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REPORT No. 216/19

PETITION 1355-07

REPORT ON ADMISSIBILITY

RONAL ISAAC FIGUEROA ÁVILA

PERU

Electronically approved by the Commission on September 11, 2019.

Cite as: IACHR, Report No. 216/19. Petition 1355-07. Admissibility. Ronal Isaac Figueroa Ávila.
Peru. September 11, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Tomás A. Morán Ortega
Alleged victim:	Ronal Isaac Figueroa Ávila ¹
Respondent State:	Peru ²
Rights invoked:	Articles 8 (fair trial), 21 (property), 24 (equal treatment) and 25 (judicial protection) of the American Convention on Human Rights ³ in connection with its Article 1 (obligation to respect rights); XVI (social security), XVIII (fair trial) and XXIII (property) of the American Declaration of the Rights and Duties of Man; ⁴ and 6 (work), 9 (social security), 10 (health), 17 (protection of the elderly) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” ⁵

II. PROCEDURE BEFORE THE IACHR⁶

Filing of the petition:	October 18, 2007
Additional information received at the stage of initial review:	February 10, 2009; August 28, 2012
Notification of the petition to the State:	May 27, 2016
State’s first response:	August 29, 2016
Additional observations from the petitioner:	July 5, 2017
Additional observations from the State:	June 11, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of ratification instrument on July 28, 1978)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 8 (fair trial), 9 (freedom from <i>ex post facto</i> laws), 21 (property), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in connection with its Article 1.1 (obligation to respect rights)

¹ Mr. Ronal Isaac Figueroa Ávila died in September 2011; however, his surviving spouse, Mrs. Neyla Paquita Panduro Cachay (Mrs. Figueroa) requested the Commission to continue processing the petition consider her the alleged victim’s legal successor entitled to hold his pension rights as heiress.

² Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not take part in the discussion or voting on this petition.

³ Hereinafter, “Convention” or “American Convention.”

⁴ Hereinafter, “Declaration” or “American Declaration.”

⁵ Hereinafter, “Protocol of San Salvador.”

⁶ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, June 14, 2011
Timeliness of the petition:	Yes, October 18, 2007

V. ALLEGED FACTS

1. The petitioning party claims that in 1990 the State officially recognized the alleged victim's right to unemployment insurance, which has not been paid yet.

2. According to the petition, Mr. Figueroa Ávila began to work at the Bank and Insurance Superintendency (*Superintendencia de Banca y Seguros*, "SBS") on December 21, 1964, where he worked for 28 years uninterruptedly, plus 4 university years, which were accumulated under the applicable law. It indicates that on January 1, 1982, due to a reform of the pension system in Peru, employees of the above institution were transferred from the national social security fund to the National Pension System (*Sistema Nacional de Pensiones*, "SNP"), and the former was discontinued. It is alleged that in 1986, when he had an administrative career of almost 22 years, he was enrolled in the pension system governed by Decree Law 20530, under Law 24366.⁷

3. According to the petition, in 1990 the SBS recognized Mr. Figueroa Ávila's uninterrupted 30-year career as a state employee, by Administrative Resolution No. 713-90. The petition states that on December 20, 1990, he was unlawfully dismissed and, accordingly, the SBS issued Resolution No. 715-90 ruling the payment of unemployment insurance along with the bonuses earned up to his dismissal. It indicates that although he was reinstated after a successful constitutional remedy,⁸ Mr. Figueroa Ávila resigned in 1992. The petition further states that despite numerous requests, the SBS has not paid his pension and that in 1994, the alleged victim began to work at a private university, hence he was enrolled in the private pension system, as per the requirements of the law.

4. The petitioning party argues that the SBS had never challenged the validity of the resolutions issued in favor of the alleged victim. However, in 2004, the Pension Standardization Office⁹ (*Oficina de Normalización Previsional*, "ONP"), and then the SBS—ONP's legal successor—appealed the resolutions on the grounds that Mr. Figueroa's enrollment in the SBS pension system and, hence, the resolution on his entitlement to an unemployment insurance were irregular. He alleges that, in the appeal, the SBS sought that Mr. Figueroa "return the full amount received for pensions," although it had not paid him anything. The petitioner claims that the Transitional Constitutional and Social Chamber of the Supreme Court of Justice settled the appeal proceedings by declaring the alleged victim's statute of limitations exception admissible. They argue that this decision constitutes a *res judicata* ruling on the alleged nullity of the resolutions, because of which their validity can no longer be questioned.

5. According to the petition, the alleged victim filed an amparo action against the SBS for lack of payment of his unemployment insurance. The trial court admitted the remedy on considering the expiration of the period for an *ex officio* annulment of the resolutions, ruling that the above non-payment violated the alleged victim's right to social security. Later, the SBS appealed the decision. The Fourth Civil Division of the Superior

⁷ The alleged victim is said to have met the requirement established in article 1: "State officials and employees who, at the time Decree Law No. 20530 was promulgated, had seven years of service or more, are entitled to coverage by the public pension system established by the said Decree Law, provided that they have rendered services to the State uninterruptedly."

⁸ No information about this constitutional remedy or its outcome appear on the case file.

⁹ The institution responsible for the settlement of pensions concerning Decree Law No. 20530. It oversees the National Pension System (SNP) in the Republic of Peru.

Court of Justice of Lima revoked the lower court's decision.¹⁰ Therefore, Mr. Figueroa Ávila presented a constitutional remedy, but the court dismissed it.¹¹

6. The petition further states that, later and with base on the favorable ruling which rejected the SBS appeal against the resolutions recognizing his rights, Mr. Figueroa lodged a mandamus petition against the SBS officer in contempt. However, it indicates that the two courts of justice that heard the case dismissed the petition. Then, he filed another constitutional remedy for the violation of the *res judicata* principle, but the Constitutional Court dismissed it on the grounds that it had already ruled on that matter. Finally, the alleged victim appealed the Constitutional Court's resolution, yet the remedy was found inadmissible on the grounds that decisions by the Constitutional Court may not be challenged. According to the petition, he insisted by submitting a written petition seeking the court's annulment of the judgment; but it replied with a warning that sanctions would apply unless he stopped filing remedies aiming at the same goal.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

7. In the initial petition, the petitioner states that he considered that domestic remedies were exhausted with the Constitutional Court's dismissal of the alleged victim's first constitutional remedy, a decision notified on April 18, 2007. Later, he informed of subsequent remedies, all of which were decided contrary to his interests—the last decision was the Constitutional Court's resolution of June 14, 2011, regarding the alleged victim's appeal for annulment.

8. The State contends that there is nothing to indicate that the alleged victim filed a claim for compensation. It argues that the domestic legal system foresees that remedy and that it would have allowed him to claim compensation for the damages alleged in the complaint filed with the Inter-American system. Therefore, the State deems that, considering the non-exhaustion of a claim for compensation at the national level, the Commission should dismiss this petition, for it does not fulfill the requirement established in Article 46.1(a) of the American Convention.

9. The Commission believes that there is nothing to indicate that a claim for compensation for damages is an appropriate and effective remedy to settle the matter of this petition, for the Constitutional Court has already dismissed the claim and warned to apply sanctions if similar claims were filed. As a result, the Commission deems that domestic remedies were exhausted with the dismissal of the alleged victim's appeal before the Constitutional Court. Considering that the resolution was issued on June 14, 2011, and the petition was filed on October 18, 2007, domestic remedies were exhausted while the petition was under study at the Commission. According to the doctrine of the IACHR, the analysis of the requirements set forth in Article 46.1(b) of the Convention should be done in light of the situation as of the moment the decision is issued regarding the admissibility of the claim.¹²

VII. ANALYSIS OF COLORABLE CLAIM

10. According to the petition, the alleged victim's rights were violated given the State's failure to enforce his pension right, legally recognized in resolutions that are still valid and in force. Additionality, because the judicial authorities have violated *res judicata* and deviated from the jurisdiction established in the law by invoking a supposed nullity of the resolutions as ground for dismissing his remedies, even though the competent domestic tribunals had already ruled at the *res judicata* level that the nullity appeal was barred by the statute of limitations. It points out that the ruling from the Constitutional Court which rejected the alleged

¹⁰ The Chamber considered that in 1994 the alleged victim was enrolled in the private pension system and rejected the alleged victim's claim by stating that workers may not be under two different pension systems.

¹¹ The Constitutional Court ruled that, although the alleged victim met the requirements of Law No. 24366, "...he does not meet the additional requirement of being under the Public Sector Employment regime on the effective date of the legal exception, for this law is subsequent to his employment regime change. A different interpretation would allow for the retroactive application of the legal exception or the accumulation of services rendered under the Law on Public Sector Employment and the Law on Private Sector Employment (...)."

¹² IACHR, Report No. 10/16, Petition 387-02, Admissibility. Carlos Andrés Fraticelli, Argentina, April 14, 2016, para. 46.

victim's constitutional remedy did not revoke the resolutions nor the Supreme Court's ruling that had been favorable to the alleged victim; highlighting that it was not within the Constitutional Court's powers to revoke an administrative act while deciding on said constitutional remedy.

11. It also alleges that, in any case, the alleged nullity of the resolutions is groundless. It indicates that the alleged victim fulfilled the requirements of Law 24366 when the resolution by which he was enrolled in the Pension System under Decree Law 20530 was passed (to be a state employee with seven years or more of uninterrupted work in the public sector). Likewise, it states that the SBS and the Constitutional Court have deprived him of his right on the grounds of an extra requirement, "to be under the Law on Public Sector Employment on the effective date of the legal exception," mentioned only in subsequent laws that do not apply to his case. The petition further indicates that, regardless of the pension reform, the alleged victim remained a state employee throughout his years of work at the SBS because this institution has always been a state body. The petitioner highlights that, after the discontinuance of the national social security fund, the National Pension System became the only pension system; that as a result, the alleged victim's admission to the latter did not affect his being a state employee.¹³

12. According to the petition, only after two years of being dismissed from the SBS without receiving insurance was the alleged victim enrolled in the private pension system, as per the requirements of the law, when he began working at a private university. It is alleged that this is not incompatible with the alleged victim's entitlement to a previously recognized insurance.

13. The petitioner also claims that the State has violated the alleged victim's right to equality because its denial to recognize Mr. Figueroa's right to pension contradicts the previous criterion of the Constitutional Court and the judgment by the Inter-American Court of Human Rights on the "Five Pensioners" case.¹⁴ He moreover alleges the violation of the alleged victim's right to due process and judicial protection for two reasons. First, when the court revoked the amparo resolution favorable to Mr. Figueroa, it did not state the purported legal or factual errors by the trial court. Secondly, the mandamus petition was dismissed based on the Constitutional Court's decision on the first constitutional remedy, although this decision had not revoke the *res judicata* level ruling referred to in the mandamus petition. Thirdly, the Constitutional Court decided on the second constitutional remedy without ruling on the claims at issue, including the alleged violation of the *res judicata* principle.

14. For its part, the State believes that this petition should be declared inadmissible under Article 47 of the American Convention, as the facts alleged do not establish human rights violations. It claims that Mr. Figueroa Ávila's enrollment in the pension system under Decree Law No. 20530 was a mistake, for he did not meet the requirement of uninterrupted services in the public sector. The State indicates that, after the pension reform of 1982, the alleged victim worked in the private sector; thus, it stresses that services rendered under different laws on employment may not accumulate. It contends that the resolutions recognizing Mr. Figueroa's pension coverage and his entitlement to an unemployment insurance are legally void under the applicable law. The State claims that since he worked at a private university and was enrolled in the private pension system, the alleged victim lost his former beneficiary status, as now he may not receive a pension from both systems.

15. It indicates that the petitioner invokes rights from the Protocol of San Salvador and the American Declaration regarding which the Commission is not competent to rule upon—in the case of the latter, because the State has ratified the Convention. It argues that the pension right the alleged victim claims is not recognized; that, consequently, it may not be considered within the right to property established in Article 21 of the American Convention. It repudiates the allegation that the decision on the alleged victim's case differs from previous decisions on similar cases; therefore, it claims that it did not violate his right to equality before the law.

¹³ The petitioner further claims that the Constitutional Court and the State have wrongfully applied a provision of the Constitution of 1993 that bans the accumulation of services rendered in the public sector and the private sector, although the alleged victim's enrollment in the pension system of Decree Law 20530 was in 1986.

¹⁴ I/A Court H.R., Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs. Judgment of February 28, 2003.

16. It affirms that Mr. Figueroa Ávila had the opportunity to pursue all the remedies he deemed adequate and that all the decisions adopted regarding his pension rights were made pursuant to due process and his right of defense. It alleges that the petitioning party seeks that the Commission work as a court of appeal and review the decision by the Constitutional Court, out of sheer disagreement with the resolution.

17. The Commission considers that the facts alleged by the petitioner concerning a pension right recognized in favor of the alleged victim, which has not been enforced through domestic mechanisms, and the fact that state authorities have wrongfully and retroactively applied damaging norms, if proven, could *prima facie* establish violations of Articles 8 (fair trial), 9 (freedom from ex post facto laws), 21 (property), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in connection with its Article 1.1 (obligation to respect rights).

18. As to the claim about a possible violation of Article 24 (equal protection) of the American Convention, the Commission notes that the petitioner has not provided enough allegations or evidence to *prima facie* establish a possible violation.

19. In regard to the alleged violations of articles of the American Declaration, the Commission has previously established that once the American Convention becomes effective in relation to a State, it is this and not the Declaration that becomes the primary source of law applicable by the Commission, provided that the petition concerns a violation of similar rights set forth in both instruments and that the matter is not an ongoing situation. In this case, the purported violations of the American Declaration fall within Articles 8, 21, 25, and 26 of the American Convention. Therefore, the Commission will analyze these allegations in light of the American Convention.

20. As for the purported violations of articles 6 (work), 9 (social security), 10 (health) and 17 (protection of the elderly) of the Protocol of San Salvador, the Commission notes that the competence to determine violations in an individual petition is limited to articles 8 and 13, under its article 19.6. Regarding the other articles, the Commission may consider them to interpret or apply the Convention or other applicable instruments, under Article 29 of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 9, 21, 25 and 26 of the American Convention in accordance with its Article 1.1;
2. To find the instant petition inadmissible in relation to Article 24 of the Convention; and
3. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 11th day of the month of September, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.