

REPORT Nº 107/05
PETITION 185/02
FRIENDLY SETTLEMENT
RÓGER HERMINIO SALAS GAMBOA
PERU
December 28, 2005

I. SUMMARY

1. By petition submitted to the Inter-American Commission on Human Rights (hereinafter "the IACHR" or "the Commission "), on March 11, 2002, Mr. Róger Herminio Salas Gamboa (hereinafter "the petitioner") alleged that the Republic of Peru (hereinafter "Peru," "the State" or "the Peruvian State") violated, to his detriment, the right to a fair trial, the right to protection of honor, his political rights, the right to equality before the law, and the right to judicial protection, enshrined at Articles 8, 11, 23, 24, and 25, respectively, of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"), in keeping with Article 1(1) of the Convention. The violations alleged are related to irregularities alleged to have been committed by the National Council of the Magistracy (hereinafter the "CNM") in its decision not to ratify his appointment as a full judge of the Supreme Court of Justice of the Republic.

2. The petitioner argues before the Commission that, according to Article 142 of the Constitution of 1993 and consistent with Article 1 of Act Nº 26397 of the Organic Law of the National Council of the Magistracy, the decisions of the National Council of the Magistracy are not subject to review by a judicial body and therefore that no domestic remedy remains to be exhausted. Accordingly, the exception provided for in Article 46(2)(a) and (b) of the Convention is therefore applicable and the petition was filed within the time required by the rules of procedure in view of the time when he was notified of the decision in question.

3. The present friendly settlement report, done in conformity with the provisions of Article 49 of the Inter-American Convention on Human Rights and Article 41 (5) of the Rules of Procedure of the Commission, contains a brief summary of the facts alleged by the petitioner and the settlement reached. It also contains an agreement to publish the report.

II. PROCESSING BEFORE THE COMMISSION

4. On April 4, 2002, the Commission received the complaint lodged by Mr. Róger Herminio Salas Gamboa, and assigned it Nº 0185/2002. On September 18, 2002, it transmitted the pertinent parts of the complaint to the State of Peru and requested the State to provide information on the matter within a period of 60 days. On October 15, 2002, the State requested an extension of the time allowed for replying, and the State granted the extension in its note of October 23, 2002, which was transmitted to the State on October 26, 2002. The State submitted its reply on November 26, 2002. On January 6, 2003, the petitioner submitted additional information regarding the complaint and requested a hearing at the Commission's 117th session, which was held from February 17 to March 7, 2003. That request was denied.

5. After analyzing the parties' arguments and compliance with the admissibility requirements set forth in the Convention, the Commission decided to declare the petition admissible pursuant to Articles 46 and 47 of the American Convention in Report N° 14/03, adopted February 20, 2003. On March 10, 2003, the Report N° 14/03 was transmitted to the State and to the Petitioners, and pursuant to Article 38(1) of the Commission's Rules of Procedure, the Commission placed itself at the disposal of the parties to pursue a friendly settlement.

6. In a communication dated March 19, 2003, the petitioner accepted the IACHR's invitation to pursue a friendly settlement, and presented additional observations on the merits. The pertinent parts of that communication were transmitted to the State on March 21, 2005 and granted the State 45 days within which to submit its observations. At the requests of the State, in order to complete an evaluation of whether it would be in a position to reach a friendly settlement, this deadline was extended on two occasions, for 60 and 45 days, respectively. On July 3 and 23, 2003, the petitioner submitted additional information, which was transmitted to the State by notes of July 29 and August 1, 2003, respectively. On August 27, 2003, a work meeting was held chaired by Commissioner Martha Altolaquirre, IACHR Rapporteur for Peru, in which both parties agreed to pursue a friendly settlement. At the meeting, the petitioner provided abundant additional information that was forwarded to the State in a timely fashion. In addition, on March 5, 2004, during the 119th session of the IACHR, a hearing was held in which the groundwork was laid down for negotiating friendly settlements in several petitions relating to judges and prosecutors not ratified by the National Council of the Magistracy.

7. On August 20, 2004, the State informed the IACHR that on March 19, 2004, the Mechanism of Dialogue for the cases of Judges and Prosecutors not ratified by the CNM had been instituted; it is made up of representatives of the Judicial Branch, the Public Ministry, the Ministry of Foreign Affairs, the Office of the Human Rights Ombudsman, and the CSM, as well as a group of petitioners, representatives, and the petitioners' attorneys. On November 5, 2004, the State reported that by Supreme Resolution No. 207-2004-JUS of September 3, 2004, a "High-level Commission in charge of drawing up a proposed friendly settlement agreement regarding the cases of judges not ratified by the CNM who have filed complaints before the IACHR" was formed; and that among the cases included in this Supreme Resolution is the case of Mr. Róger Herminio Salas Gamboa.

8. During the course of the friendly settlement proceeding, a hearing was held on October 25, 2004, to discuss the petitions and cases of the judges and prosecutors not ratified. In addition, work meetings were held to address the matter during the 122nd and 123rd sessions of the IACHR.

III. THE FACTS

9. Mr. Róger Herminio Salas Gamboa alleges that, based on the results of a public competitive examination, he was appointed a member of the Supreme Court of Justice of Peru in Supreme Decision N° 105-90-JUS of May 25, 1990. His appointment was confirmed in Senate Decision N° 1093-90, published on September 21, 1990, and the title of Judge conferred on him on September 19, 1990. He was sworn in to the post on September 27, 1990. All of these acts took place while the Constitution of 1990 was still in force. That Constitution did not provide for the periodic reconfirmation of judges in their posts and guaranteed continuation in service up to the age of 60 years, provided that the incumbent was of good conduct and remained suitable for the post.

10. According to the petitioner, following the accession to office of the Government of Emergency and National Reconstruction, headed by Mr. Alberto Fujimori Fujimori, on April 5, 1992, himself and twelve other judges of the Supreme Constitutional Court were dismissed by Decree Law N° 25423, published in the *Diario Oficial El Peruano* on April 8, 1992, without any statement of cause being given. As a result of this action, he filed for protection and the Constitutional Court finally ruled on September 27, 1997 that he should be reinstated as a full judge of the Supreme Court of Justice of the Republic and that the period during which he did not serve by reason of his suspension without cause should be recognized for pension purposes.

11. Petitioner further notes that notwithstanding the aforementioned decision of the Constitutional Court, the Government of President Fujimori promulgated a series of decree laws and acts designed to avoid compliance but that he was finally reinstated on May 14, 2001 together with other judges who also had not served on the bench during the period between January 1994 and December 2000. Upon resumption of his judicial activities, it fell to him by reason of his seniority to head the Provisional Criminal Chamber of the Supreme Court of Justice of the Republic.

12. He alleged that the process of reconfirmation based on Article 150 of the Constitution of 1993 and on Article 1 of Act N° 26934 is the responsibility of the National Council of the Magistracy, which performs this function as the sole authority and whose decisions are not subject to review by any other judicial body. The National Council of the Magistracy reviews every seven years the performance and abilities of judges and prosecutors at all levels through an evaluation of their conduct and suitability for the performance of their duties, taking into consideration the completed workloads of their courts, the merits and reports of the Colleges and Associations of Attorneys, and the results of an obligatory personal interview with the judge under evaluation. Should a decision be taken to remove him from his post, this "does not constitute a penalty nor does it deprive him of the rights acquired under the law, although it does prevent him from returning to the judicial branch or to the Department of Public Prosecution".

13. He founded his complaint on the fact that the decisions of the National Council of the Magistracy are arbitrary. They are not based on legal grounds, nor are the judges being evaluated informed of the factors that were taken into account in reaching the decision. There is no possibility of appealing the decisions or of any judicial review. The decision makes it impossible thereafter to be reinstated as a member of the Court and, in his specific case, he had been evaluated under equal conditions with other judges without having completed seven years on the bench,

precisely because he had been unjustly removed from his post by the State since 1992 and reinstated after May 2001, following the ruling of the Constitutional Court.

14. Initially, the Peruvian State maintained that, since the petitioner had not been reconfirmed in his post by the National Council of the Magistracy, none of his rights had been violated, since the process of evaluation and reconfirmation had been conducted in accordance with the provisions of Article 154(2) of the Constitution and that such decisions are not subject to review by a judicial forum.

15. The State also indicated that the petitioner was subject to an evaluation process for his reconfirmation in the post under the same rules as applied to the other judges and the results were different, since they were individual proceedings designed to evaluate conduct and suitability in a report on the final decision. Therefore, the right to equality was not violated.

IV. FRIENDLY SETTLEMENT

16. The State and the petitioners signed the friendly settlement agreement, the text of which provides as follows:

FIRST: BACKGROUND

The Inter-American Commission on Human Rights, by unnumbered Note CIDH of August 15, 2002, informed the Peruvian State that a complaint had been filed by Mr. Dr. Róger Herminio Salas Gamboa.

Mr. Róger Herminio Salas Gamboa was appointed full judge (Vocal Titular) of the Supreme Court of Justice of the Republic by Supreme Resolution No. 105-90-JUS of May 25, 1990; his appointment was ratified by Senate Resolution No. 1093-90, of September 19, 1990, and his judge's certificate had been issued, with number 413 on that same date.

The complaint submitted to the Inter-American Commission on Human Rights is based on the fact that, while serving as a full member of the Supreme Court of Justice of the Republic, he was dismissed by mandate of the unconstitutional Decree-Law 25,423, published April 8, 1992. Subsequently, his reinstatement was ordered by the Transitory Council of the Judicial Branch by Administrative Resolution No. 017-2000-CT-P, of December 26, 2000, pursuant to the judgment of the Constitutional Court dated September 27, 1997. He resumed his duties as a justice of the Supreme Court on May 14, 2001. He was called to the First Process of Evaluation and Ratification of the National Council of the Judiciary on June 19, 2001, without having served seven years in the position, as established in the 1993 Constitution. By Resolution No. 218-2001-CNM, of September 18, 2001, the petitioner was informed of the decision of the National Council of the Judiciary not to ratify him in the position.

The Permanent Commission on Evaluation and Ratification of Judges, by Report No. 021-2003-CPER-CNM, of March 26, 2003, signed by the current President of the National Council on the Judiciary, Mr. Daniel Caballero Cisneros, in his capacity, at the time, as Counselor, and also

signed by Judges Fermín Chunga Chávez and Jorge Lozada Stanbury, respectively, has held that it is not admissible in the instant case to subject the petitioner to said process of evaluation and ratification; in this way, the National Council of the Judiciary itself considers its previous resolution to be incompatible with our legal order. The Permanent Commission bases its position on the case-law of the Constitutional Court handed down in the cases regarding Messrs. Diodoro González Ríos (File No. 2409-2002-AA.TC) and Juan Carlos Vidal Morales (File No. 0116-2003-AA.TC), respectively. This case-law holds that, between the dismissals that occurred pursuant to the unconstitutional Decree-Law No. 25,446 (1992) and the reinstatement, one cannot compute the seven-year period required for ratification. And this is because: ***"one cannot presume conduct where there has been none, and merits or demerits where they have not existed either."*** For these reasons the Permanent Commission concludes in its report that: ***"The Peruvian State may reach a friendly settlement with Mr. Róger Herminio Salas Gamboa and reinstate him in the position of full member of the Supreme Court of Justice of the Republic."***

The plenary of the National Council of the Judiciary (CNM) adopted Decision No. 317-2003, on March 27, 2003, as appears in the minutes of the Regular Plenary Session, ***"... opining favorably [to the effect] that the Peruvian State may reach a friendly settlement agreement with Mr. Róger Salas Gamboa."***

The then-President of the National Council of the Judiciary (CNM), Mr. Teófilo Idrogo Delgado, by Official Note No. 648-2003-P-CNM, of March 31, 2003, communicated to this Executive Secretariat that: ***"the Plenary of the National Council of the Judiciary, which I am honored to chair, in its session of March 27, agreed to issue a response with a favorable opinion [to the effect] that the State may reach a friendly settlement agreement with the above-mentioned former justice."***

The Manager of Personnel and Judicial Salary Scale of the General Management of the Judicial Branch, on October 2, 2003, sent the petitioner letter No. 310-2003-SRB-GPEJ-GG/PJ, attaching to it the amount of the remuneration not received from April 1992 until September 2003 (S/. 819,026.58, i.e., eight hundred nineteen thousand twenty-six new sols and 58 cents). In addition, by letter No. 322-2003-SRB-GPEJ-GG/PJ, the amount for operating expenses that correspond to the petitioner, pursuant to D.U 114-2001 is sent (S/. 329,520.00, i.e. three hundred twenty-nine thousand five hundred twenty new sols).

The Human Rights Ombudsman, by Official Note DP-2004-247, of May 11, 2004, signed by the Human Rights Ombudsman, reiterates what was stated by the Office of the Human Rights Ombudsman (Defensor del Pueblo) in Ombudsman's Resolution No. 038-2002-DP of November 28, 2002, in which it is considered that: ***"... the possibility that the CNM may initiate ratification proceedings without considering the actual time in office of each judge would***

introduce a major factor of arbitrariness into the judicial system, contrary to the very logic by which the system is designed". (Fourth whereas clause, *in fine*).

The Ad Interim President of the National Council of the Judiciary (CNM), Mr. Fermín Chunga Chávez, refers the Executive Secretariat, in view of Official Note No. 562-2004-JUS/CNDH, to Official Note No. 1183-2004-P-CNM, signed on June 11, 2004. In that document, the National Council on Human Rights is called upon: ***"In keeping with the agreement of the Plenary of the National Council of the Judiciary, which I am honored to chair, so as to inform this Council, whether a friendly settlement agreement has been reached between the Peruvian State and the petitioner, Mr. Róger Herminio Salas Gamboa, with the corresponding formalities, in the event that a commitment has been made to reinstate the petitioner; if so, please attach the supporting documentation."***

The provision of the Transitory Council of the Judicial Branch, by Administrative Resolution No. 014-2000-CT-PJ, of December 26, 2000, which ordered the reinstatement of Mr. Oscar Alfaro Álvarez in the position of full member (Vocal Titular) of the Supreme Court of Justice of the Republic, applies in the instant case, as the petitioner, as of this date, is 72 years old. That resolution indicates, among its whereas paragraphs, that, ***"... the second final provision of Law No. 27,367 establishes that the full members are definitely dismissed"***. Nonetheless, that collegial organ then states: ***"... while Mr. Oscar Víctor Alfaro Álvarez is now over 70 years of age, he is not included in the provisions of the recently-cited law [No. 27,367], because that provision is for the judges who are entering the Judicial Branch."*** For this reason, the first article resolves: ***"To reinstate Mr. Oscar Alfaro Álvarez in the position of full member (Vocal Titular) of the Supreme Court of Justice of the Republic, preserving the seniority he had at the time he was dismissed."***

The Transitory Council of the Judicial Branch reiterated the foregoing line of argument in Administrative Resolution No. 016-2002-CT-PJ, of December 26, 2000, by which Guillermo Cabala Rosand was reinstated in his position as full member of the Supreme Court of Justice of the Republic after he had turned 70. And so it is noted in that resolution that ***"... while Mr. Guillermo Cabala Rosand is at this time over 70 years of age, he is not included in the provisions of the above-cited law [No. 27,367], because that provision is for the judges who are entering the Judicial Branch."*** For this reason, the first article resolves: ***"Reinstate Mr. Guillermo Cabala Rosand in the position of full member of the Supreme Court of Justice of the Republic, preserving the seniority he had when he was dismissed."***

SECOND: INADMISSIBILITY OF THE EVALUATION AND RATIFICATION IN THE CASE OF MR. RÓGER HERMINIO SALAS GAMBOA

The Peruvian State, aware that the unrestricted protection of and respect for human rights is the basis of a just, dignified, and democratic society, strictly complying with its obligations acquired by signing and ratifying the American Convention on Human Rights and all the other international human rights instruments to which Peru is a party, considering the particular circumstances of the process of evaluation and ratification of the petitioner in which one notes the performance of constitutional functions delegated to the National Council of the Judiciary, which were determined in relation to its procedural guidelines subsequently by the Constitutional Court, recognizes its responsibility in relation to Articles 1, 8(1), 11, 23(1), 24, and 25 of the American Convention on Human Rights, to the detriment of Mr. Róger Herminio Salas Gamboa.

THIRD: REINSTATEMENT OF THE TITLE OF JUSTICE OF THE SUPREME COURT BY THE NATIONAL COUNCIL OF THE JUDICIARY

The Representative of the Peruvian State, in keeping with the First Clause of this Friendly Settlement Agreement, considers that it is lawful, and an obligation of the State, for the National Council of the Judiciary to reinstate the title of full member of the Supreme Court of Justice of the Republic for Mr. Róger Herminio Salas Gamboa, so that he may resume his duties.

In addition, it is lawful for the Peruvian State to undertake to recognize the time not worked, counted from September 19, 2001, to the date of his actual resumption of duties, for the purposes of the calculating the time of service, retirement, and all other labor benefits that he stopped receiving.

FOURTH: COMPENSATION

- a. The Peruvian State recognizes the petitioner's right to the payment of comprehensive compensation that includes lost earnings, actual damages, and moral injury, in the form of monetary reparation. This is in light of the responsibility to which reference is made in the second clause of this document.**
- b. The Peruvian State recognizes the sum of US\$ 20,000.00 U.S. dollars (twenty thousand U.S. dollars) for moral injury, in view of the special circumstance of his non-ratification and other facts set forth in the first clause of this document. Mr. Róger Herminio Salas Gamboa undertakes not to pursue any claim for moral injury, directly or indirectly. In addition, he agrees not to sue the Peruvian State for joint-and-several liability and/or a third party with civil liability, or on any other grounds.**

FIFTH: ANOTHER TYPE OF MONETARY REPARATIONS

For the purposes of monetary reparations, consisting of remuneration not received, operating expenses pending payment up until his actual restitution, and the amount of compensation, the parties, by mutual agreement, defer their payment pending the results of the initiatives being taken to that end vis-à-vis the Judicial Branch. The Inter-American Commission on Human Rights shall be informed of Its form of payment within six month.

This agreement does not imply that Mr. Róger Herminio Salas Gamboa is waiving the ability to uphold his rights, as he deems advisable, directly before the Executive Council of the Judicial Branch, or other national and international human rights mechanisms.

SIXTH: CEREMONY TO RESTORE HIS REPUTATION

The Representative of the Peruvian State undertakes to hold a Ceremony to Restore Reputation for Mr. Róger Herminio Salas Gamboa within three months of the signing of this Agreement.

SEVENTH: CASE BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IS CONCLUDED

The Peruvian State and Mr. Róger Herminio Salas Gamboa, by mutual agreement, as part of the Friendly Settlement Agreement, ask the IACHR to consider the case before it in this matter to be concluded. The monetary reparations specified in the FOURTH and FIFTH clauses above remain pending.

EIGHTH: LEGAL BASIS

This Agreement is signed in keeping with the provisions of Articles 2, 3, 44, 55, and 205, and the Fourth Final and Transitory Provision of the Constitution of Peru; Articles 1, 2, and 48(1)(f) of the American Convention on Human Rights and Article 41 of the Rules of Procedure of the Inter-American Commission on Human Rights.

NINTH: INTERPRETATION

The meaning and scope of this Agreement shall be interpreted in keeping with Articles 29 and 30 of the American Convention on Human Rights, as pertinent, and in keeping with the principle of good faith. In case of doubt or disagreement between the parties as to the content of this Agreement, the Inter-American Commission on Human Rights shall decide on its interpretation. It shall also verify its implementation, the parties being obligated to report every three months on its status and implementation.

TENTH: APPROVAL

The intervening parties undertake to inform the Inter-American Commission on Human Rights of this Friendly Settlement Agreement for the purpose of that organ approving it in its entirety.

ELEVENTH: ASSIMILATION

The parties that sign this Agreement express their free and voluntary conformity with and acceptance of the content of each and every one of its clauses, stating expressly that it puts an end to the dispute in the terms agreed upon, and to any claim regarding the liability or responsibility of the Peruvian State for the violation of the human rights of Mr. Róger Herminio Salas Gamboa.

Signed in four copies, in the city of Lima, the 16 day of December, two thousand five. It includes the annexes mentioned in the First Clause.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

17. The Commission reiterates that in conformity with Articles 48(1)(f) and 49 of the Convention, this mechanism is used "with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention." The State's consent to pursue this avenue is evidence of its good faith in fulfilling the purposes and objectives of the Convention based on the principle of *pacta sunt servanda*, according to which States must discharge in good faith the obligations assumed in treaties. It also wishes to reiterate that the friendly settlement procedure provided for in the Convention permits individual cases to be settled in a non-contentious manner and in cases involving various countries has proven to be a useful vehicle that both parties can use for the settlement of disputes.

18. The Inter-American Commission has closely monitored the development of the friendly settlement reached in the instant case. The Commission highly appreciates the efforts made by both parties to reach this settlement agreement, which is compatible with the object and purpose of the Convention.

VI. CONCLUSIONS

19. Based on the foregoing considerations, and by virtue of the procedure provided for in Articles 48(1)(f) and 49 of the American Convention, the Commission wishes to reiterate its profound appreciation for the efforts made by the parties and its satisfaction with the attainment of the friendly settlement agreement in this case based on the object and purpose of the American Convention.

By virtue of the considerations and conclusions set forth in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the friendly settlement agreement signed by the parties on December 16, 2005.
2. To continue to monitor and supervise each and every one of the points of the friendly settlement agreement, and, in this context, to remind the parties of

their commitment to report to the IACHR every three months on the implementation of this friendly settlement.

3. To make public this report and include it in its annual report to the General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights, December 28, 2005: Clare K. Roberts, President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, and Florentín Meléndez, Members of the Commission.