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REPORT No. 3/17
CASE 12.772
REPORT ON THE MERITS

OSCAR MUELLE FLORES
PERU

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Organization of
American States

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¹ Commissioner Francisco Eguiguren, a Peruvian national, did not participate in the deliberation or decision of this case, as provided in Article 17.2.a of the Commission's Rules of Procedure.

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I. SUMMARY

1. On April 8, 1998, the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") received a petition initially lodged on his own behalf by Oscar Muelle Flores (hereinafter "the petitioner" or "the alleged victim"). That petition alleged that the Republic of Peru (hereinafter "the State," "the Peruvian State," or "Peru") bore international responsibility for failure to comply with two judgments for enforcement of rights (*amparo*), handed down in 1993 and 1999, which recognized the petitioner's right to receive a pension as a former worker at the State-owned Tintaya mine.

2. The State acknowledged that the two "amparo" suits filed by Mr. Muelle were declared well-founded and that judicial proceedings were under way to determine the specific pension Mr. Muelle would receive. It indicated that a court would rule on the benefits to which the alleged victim was entitled. It stressed that Mr. Muelle had received all due judicial guarantees during the various proceedings that had been initiated.

3. After analyzing the information available, the Commission concluded that the Peruvian State is responsible for violation of the rights to judicial guarantees, private property, and judicial protection recognized in Articles 8 (1), 21, and 25.2.c) of the American Convention, in conjunction with the obligations contained in Articles 1 (1) and 2 thereof, to the detriment of Oscar Muelle Flores.

II. PROCEEDINGS BEFORE THE IACHR

4. The proceedings during the admissibility stage are described in Admissibility Report No. 106/10 of July 16, 2010.² The IACHR declared the petition admissible in respect of the rights recognized in Articles, 8, 21, and 25 of the American Convention. The Commission declared the argument regarding alleged violation of Article 24 of said instrument inadmissible.

5. On July 21, 2010, the Commission notified the parties of the admissibility report. The IACHR also placed itself at the disposal of the parties in order to facilitate a possible friendly settlement. Neither of the parties responded to the offer to initiate a friendly settlement procedure. The petitioner presented his additional observations on the merits on October 30, 2010. The State presented its additional observations on the merits on April 8, 2011. Subsequently, the Commission received communications from both parties,³ which were duly forwarded from one to the other.

III. POSITION OF THE PARTIES

A. Position of the petitioner

6. The petitioner alleged that the State bears international responsibility for failing to comply with two "amparo" judgments, handed down in 1993 and 1994, which recognized his pension rights as a

² IACHR, Report No. 106/10, Petition 147-98, Admissibility, Oscar Muelle Flores, Peru, July 16, 2010. Available at: <http://www.cidh.org/annualrep/2010eng/PEAD147-98EN.DOC>.

³ The petitioner's communications were sent on October 30, 2010; July 18, 2011; September 8, 2012; and June 10, 2013. For its part, the State sent communications on April 8, 2011; December 2, 2011; March 21, 2012; December 19, 2012; and January 29, 2014.

former worker at the State-owned Tintaya mine. The details of the facts and proceedings are to be found in the Proven Facts section.

7. Mr. Muelle stated that in September 1990 he retired from a state-owned mining company and was included in the pension scheme established by Decree Law 20530, which contained the scale of pensions and benefits for civil servants' services rendered to the State by workers on active duty. He maintained that he was receiving such pension until February 1991 when he received a notification from the company stating that the application of Decree Law 20530 had been suspended.

8. The petitioner maintained that he filed an "amparo" suit challenging that decision, which the Supreme Court heard in final instance. He pointed out that, in its judgment of February 1993, the Supreme Court ordered Mr. Muelle's reincorporation in the pension scheme governed by Decree Law 20530. The petitioner added that in response to the ruling the company issued a Decision (*acuerdo*) in which it attempted to annul his reincorporation into the scheme governed by that law. He maintained that, faced with that situation, he filed a second amparo appeal, which was heard in final instance by the Constitutional Court. He added that, in its judgment of December 1999, the Constitutional Court ordered the company to comply with "continued payment" of the pension money that Mr. Muelle was receiving. The petitioner stated that, despite that, those judgments have still not been executed.

9. Regarding the **right to judicial guarantees and judicial protection**, the petitioner alleged that the State had violated it by not complying with its obligation to abide by the court judgments ordering adjustment (*nivelación*) of the pension money owed to him. With regard to the **right to private property**, the petitioner argued that failure to pay his pension as ordered by the courts had impaired his net worth.

B. Position of the State

10. The State acknowledged that the facts the petitioner complained about did occur, as did the judgments handed down by the Supreme Court of Justice and the Constitutional Court, in 1993 and 1999, respectively. It maintained, nonetheless, that it is not responsible for the violations alleged by the petitioner inasmuch as judicial guarantees were respected in each of the proceedings that Mr. Muelle initiated. It added that each country addressed its debt to pensioners based on internal provisions. It maintained that, that being so, the amounts of the benefits owed the petitioner "will be determined by applying the rules in effect at the time."

11. The State pointed out that the Constitutional Court had issued a judgment in 2005 stating that "when pensioners call for a pension adjustment system to be maintained (...) all they are doing is using their entitlement to the pension to their advantage." The State maintained that, based on that judgment, Mr. Muelle's claim to a pension equivalent to the position he had held as General Manager should not be admitted.

12. In its reports of November 2012 and 2013, the Peruvian State maintained that the process of complying with the Supreme Court judgment of 1993 is at the execution of judgment stage. It reiterated that the determination of the pensions and other financial benefits "will be determined by a court."

IV. PROVEN FACTS

A. Regarding Mr. Muelle's situation up to February 1991

13. Oscar Muelle Flores worked for the State-owned Tintaya mining company⁴ from June 1, 1981 until 1990.⁵ Mr. Muelle held various different positions within the company, the last one being the position of General Manager.⁶

⁴ Based on information provided by the parties, the IACHR notes that the company was later privatized and became Xstrata Tintaya S.A.

14. On May 15, 1990, the State-owned company issued Resolution No. AD-0884/90-R.⁷ That resolution included Mr. Muelle in the pension scheme governed by Decree Law 20530 - Rules governing Pensions and Benefits for Civil Servants' Service to the State,⁸ which acknowledged that Mr. Muelle had rendered services to the State for 35 years, 10 months, and 27 days.⁹

15. The pertinent parts of Decree Law 20530 for the instant case are:

Article 4. Workers acquire the right to a pension upon completing 15 years of actual remunerated service in the case of men, and 12 1/2 years in the case of women.

Article 12.- For pension or benefits determination purposes, periods of services may be cumulative provided that they were not simultaneous.

Article 13.- When services are accumulated as per the foregoing Article, payment of the pension or benefits shall be effected by the entity at which the work was last employed.

Article 49. Pensions are adjustable when:

a) Upon retirement, the worker has completed 30 or more years of service in the case of men, or 25 or more years of service in the case of women, are 60 or 55 years old or over, respectively, and have not been rendered ineligible by a final judicial decision or dismissed as a disciplinary measure; (...)

Article 50. The adjustment of pensions shall be done based on amendments to the Remuneration Scale; be processed ex officio; be approved by order of the Chief of the Respective Budget Unit; and enter into effect from the month following that in which the aforementioned scale was amended.

16. The Eighth Transitory Provision of the Constitution of 1979 established the right to progressive adjustment of pensions of dismissed workers with more than 20 years of service, in the following terms:

EIGHTH.- The pensions of dismissed and retired public administration workers with more than 20 years of service who do not come under the Peruvian Social Security Service regime or other special regimes are progressively equalized with the wages of active public servants in the respective categories for a period of 10 fiscal years, starting from January 1, 1980, and must be included in the Budget of the Republic under the appropriate headings.¹⁰

17. Decree-Law 23495 of November 20, 1982, and its Regulations developed the above constitutional rule, introducing the right to automatic progressive adjustment in favor of the beneficiaries of Decree-Law 20530:

⁵ Brief No. 2 of the law firm Laos, Aguilar, Celi y Vinatea Abogados, September 24, 1996. Attached to the petitioner's communication of November 10, 1998.

⁶ Brief No. 2 of the law firm Laos, Aguilar, Celi y Vinatea Abogados, September 24, 1996. Attached to the petitioner's communication of November 10, 1998.

⁷ Brief No. 2 of the law firm Laos, Aguilar, Celi y Vinatea Abogados, September 24, 1996. Attached to the petitioner's communication of November 10, 1998.

⁸ Decree Law 20530. Promulgated on February 27, 1974.

⁹ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

¹⁰ Constitution of the Republic of Peru of 1979.

Any post-equalization increase awarded to active public servants in the same or a similar position to the last position held by the dismissed or retired worker shall give rise to the same pension increase to which the active public servant is entitled¹¹.

18. The decision contained in Resolution No. AD-0884/90-R was based on Board of Director Decisions No. 155/88 of December 22, 1988 and 029/90 of February 8, 1990¹². Those decisions authorized the Public Administration to include public servants in the aforementioned pension scheme and established regulatory norms to that end.¹³

19. After retiring on September 30, 1990, Mr. Muelle received his pension in accordance with Decree law 20530 until February 1991.¹⁴ On February 27, 1991, Mr. Muelle received a communication from the company informing him that application of Decree Law 20530 was being suspended.¹⁵

B. Regarding the first application for enforcement of rights (amparo) filed by Mr. Muelle

20. On April 18, 1991, Mr. Muelle filed an application for amparo seeking his reincorporation in the Decree Law 20530 pension scheme.¹⁶ On July 19, 1991, the Fifth Civil Court of Lima declared the application well-founded and ordered in favor of Mr. Muelle that the suspension of the Decree Law 20530 pension and benefits scheme be set aside.¹⁷ Regarding Mr. Muelle's inclusion in that scheme, the Court argued as follows:

(...) that inclusion established a substantive legal relationship between employee and employer, that is to say, one that gave rise to material rights and obligations that both parties must comply with (...). Therefore the plaintiff cannot unilaterally suspend that legal relationship, much less do so through a mere report of the administrative manager (...) as he does not express the decision of the legal entity against which the action was brought. Amendment or termination of said rights has to be obtained via agreement between the parties or via a decision of a competent court.¹⁸

21. The court concluded that the notification issued by the company "violated the right to social security, equality, and the right to work guaranteed [in] the Political Constitution of the State."¹⁹

22. On May 29, 1992, the Second Civil Division of the Superior Court of Lima confirmed the lower court's decision.²⁰ On February 2, 1993, the Supreme Court of Justice ratified the Superior Court's ruling.²¹ The Supreme Court has established the following:

¹¹ Ley 23.495. Promulgated on November 20, 1982.

¹² Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

¹³ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

¹⁴ Judgment of the Supreme Court, of February 2, 1993. Attached to the petitioner's communication of November 10, 1998.

¹⁵ Judgment of the Supreme Court, of February 2, 1993. Attached to the petitioner's communication of November 10, 1998.

¹⁶ Complaint by Oscar Muelle, April 18, 1991. Attached to the State's communication of February 26, 2010.

¹⁷ Judgment of the Fifth Civil Court, July 19, 1991. Attached to the State's communication of February 26, 2010.

¹⁸ Judgment of the Fifth Civil Court, July 19, 1991. Attached to the State's communication of February 26, 2010.

¹⁹ Judgment of the Fifth Civil Court, July 19, 1991. Attached to the State's communication of February 26, 2010.

²⁰ Judgment of the Supreme Court, of February 2, 1993. Attached to the petitioner's communication of November 10, 1998.

²¹ Judgment of the Supreme Court, of February 2, 1993. Attached to the petitioner's communication of November 10, 1998.

(...) given that this is a matter of rights recognized in favor of the employee which the company itself later unilaterally ceased to recognize, the amparo suit for restoration of the infringed right guaranteed in Article 57²² of the Political Constitution of the State is in order in accordance with law.²³

23. The Supreme Court ruled as follows:

(...) Communication GA-0131/91, providing for the suspension, ordered by the defendant, of the plaintiff's inclusion in the pension and benefits scheme envisaged in Decree Law 20530 and of payment of his pension, is inapplicable to the plaintiff, wherefore his rights shall be restored to their status prior to the violation of the Constitution (...). This resolution is final.²⁴

C. Regarding the second application for enforcement of rights (amparo) filed by Mr. Muelle

24. Not long after the ruling of the Supreme Court of Justice in favor of Mr. Muelle, on February 17, 1993 the company issued Board of Director's Decision No. 023/93, suspending decisions 155/88 and 029/90²⁵ which, as indicated above, had established company's power to include workers in the pension scheme envisaged by Decree Law 20530. Consequently, it ordered a suspension of retirement pension payments to its former workers.²⁶

25. Mr. Muelle filed a second amparo suit to block application of Decision No. 023/93.²⁷ He also requested reinstatement of his right to continue receiving his pension pursuant to Decree Law 20530 and Law 25273.²⁸

26. On February 23, 1995, the Seventeenth Civil Court of Lima declared the suit inadmissible.²⁹ The Court concluded as follows:

(...) Decision No. 023/93 (...) does not violate or threaten any constitutional right of [the plaintiff], since it does not amend or terminate his right to inclusion in the Decree Law 20530 pension and benefits scheme, which right is fully guaranteed, safeguarded, and protected by the final judgment (...) in his favor in the constitutional law proceeding he brought before the Fifth Specialized Court (...) and which is being executed and the full implementation of which must be verified before said court.³⁰

27. On July 14, 1995, the First Civil Division of the Superior Court of Justice of Lima pronounced on Mr. Muelle's appeal and confirmed the judgment of the lower court.³¹ The Division considered that the

²² Article 57 of the Peruvian Constitution in force at the time. Recognized workers' rights may not be waived. The exercise of such rights is guaranteed by the Constitution. Any agreement to the contrary shall be null and void. In the event of any interpretation or doubt as to the scope and content of any labor provision, the position most favorable to the worker shall prevail.

²³ Judgment of the Supreme Court, of February 2, 1993. Attached to the petitioner's communication of November 10, 1998.

²⁴ Judgment of the Supreme Court, of February 2, 1993. Attached to the petitioner's communication of November 10, 1998.

²⁵ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

²⁶ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

²⁷ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

²⁸ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

²⁹ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³⁰ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³¹ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

ruling of the Supreme Court of February 1993 "has res judicata status (...) so that another amparo suit against [said] act could not be brought."³²

28. On August 26, 1997, the Supreme Court of Justice pronounced on Mr. Muelle's appeal for a reversal of judgment and declared the amparo appeal inadmissible.³³ In light of that ruling, Mr. Muelle filed an extraordinary appeal with the Constitutional Court.³⁴

29. On December 10, 1999, the Constitutional Court revoked the resolution of the Supreme Court of Justice and declared the amparo suit well-founded.³⁵ The Court argued as follows:

(...) the pension rights acquired by the plaintiff under Decree Law 20530 cannot be disregarded by the defendant unilaterally and extemporaneously. The only way to determine the nullity of resolutions constituting res judicata is through regular proceedings before a competent court.³⁶

30. The Constitutional Court declared Decision No. 023/93 inapplicable and ordered the company "to comply with continued payment of the adjustable retirement pension he [the plaintiff] was receiving."³⁷

D. Regarding further appeals filed and the judgment enforcement process.

31. The IACHR notes that during the processing of the two aforementioned amparo appeals and thereafter, several courts issued resolutions regarding new applications and suits by both Mr. Muelle and the company. Following is the Commission's summary of the applications, suits, and rulings presented by the parties for the purpose of the IACHR'S analysis.

1. Suit filed by the company

32. On August 15, 1996, the company filed a suit seeking a declaration of the inadmissibility of Mr. Muelle's reincorporation into the Decree Law 20530 pension scheme.³⁸ On September 2, 1996, the Division for Actions under Administrative Law (*Sala Contencioso Administrativa*) of the Superior Court of Lima declared the suit well-founded.³⁹ Mr. Muelle filed an appeal to have that judgment annulled.⁴⁰

33. On August 22, 1997, the Constitutional and Social Division of the Supreme Court pronounced, declaring the suit filed by the company groundless.⁴¹ The Division argued the following:

³² Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³³ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³⁴ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³⁵ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³⁶ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³⁷ Judgment of the Constitutional Court of December 10, 1999. Attached to the petitioner's communication of May 31, 2004.

³⁸ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

³⁹ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

⁴⁰ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

⁴¹ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

While it is true that Article 14.b of Decree Law 20530 precludes the accumulation of periods of public service under differing labor regimes, it is also true that the reincorporation of the appellant to the Government pension scheme took place (...) in application of the Fifth Transitional Provision of the aforementioned Decree Law, following verification of compliance with that provision's requirements.⁴²

34. The Division pointed out that the application of that provision to Mr. Muelle had been ratified with the promulgation of Law No. 25273 of July 6, 1990, which established exceptions to Article 14.b of Decree Law 20530.⁴³ It added that consequently, and based on the benign retroactivity of laws principle established in Article 187 of the Constitution in force at the time, Law No. 25273 was to be applied to Mr. Muelle's situation.⁴⁴ The Division concluded by pointing out the following:

(...) while it may be true that Law No. 25273 has been repealed by the Third Final and Transitional Provision of the 1993 Constitution, that in no way impairs the appellant's acquired right.⁴⁵

2. The process for enforcement of the amparo judgment of February 2, 1993

35. On December 18, 1995, in response to a request from Mr. Muelle, the Fifth Specialized Civil Court of Lima issued a resolution stating that:

(...) the company (...) has been creating obstacles to execution of the judgment with the pretext that it is legally prevented from satisfying the claim because the services provided by the plaintiff that led to his being granted a pension pertained to different non-cumulative labor regimes; (...) Magma Copper Corporation - Tintaya is hereby required within three days of notification to proceed to comply with the final Supreme Court judgment of February 2, 1993.⁴⁶

36. On April 7, 1997, at Mr. Muelle's behest, the Fifth Civil Court of Lima issued a new resolution, which read as follows:

LET THE SPECIAL MINING CORPORATION TINTAYA S.A. (now BHP Tintaya S.A.) BE HEREBY REQUIRED FOR THE LAST TIME to fully comply within three days with the order handed down in the Supreme Court judgment of February 2, 19[93] on pain of issuance of certified copies for filing criminal suit (...).⁴⁷

37. On August 24, 2000, Mr. Muelle notified the Pension Standardization Office (*Oficina de Normalización Previsional* -ONP) that as of 1999 the company had begun paying him a monthly sum of 800 new soles.⁴⁸ He maintained that the company had not "performed the balanced-out and retroactive calculation

⁴² Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

⁴³ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

⁴⁴ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

⁴⁵ Decision of the Constitutional and Social Division of the Supreme Court, August 22, 1997. Attached to the petitioner's communication of November 10, 1998.

⁴⁶ Resolution of the Fifth Specialized Civil Court of Lima of December 18, 1995. Attached to the petitioner's communication of November 10, 1998.

⁴⁷ Resolution of the Fifth Civil Court of Lima of April 7, 1997. Attached to the petitioner's communication of May 31, 2004.

⁴⁸ Communication of the ONP of August 24, 2000. Attached to the petitioner's communication of May 31, 2004.

of the pension he was legally entitled to."⁴⁹ The ONP answered, stating it was "not competent to pronounce on his request and that [he] should (...) file his complaint with the company paying his pension."⁵⁰

38. The State pointed out that on January 5 and March 23, 2009, the 38th Civil Court of Lima, which had become competent to enforce the February 1993 judgment, issued two resolutions.⁵¹ In those resolutions, the Court ordered the company to comply with the aforementioned judgment within three days.⁵²

39. On April 26, 2010, the Thirty-Eighth Civil Court of Lima issued a new resolution.⁵³ The Court stated the following:

(...) despite the reiterated instructions to the defendant company to comply with the provisions of the Supreme Court judgment, said company is not complying (...).

Subsequently, in 2007, the file was case was reopened at the request of the plaintiff, who also asked this court to obtain compliance with the Supreme Court judgment. The defendant party was notified of this request and stated, in its response, that after the Supreme Court ruling had been issued, privatization of the Tintaya mining company had begun, so that (...) the party required to make the payment pursuant to the Supreme Court judgment had long since ceased to exist (...).⁵⁴

40. In light of the above, the Court concluded as follows:

(...) the plaintiff's claim before this court has become no longer viable (...), given that the current owner is a different private enterprise, as indicated above (...); the appellant retains his right to have appropriate legal recourse to assert his claim resolved in his favor by the 1993 Supreme Court judgment.⁵⁵

41. On May 17, 2010, Mr. Muelle filed an appeal against the resolution of the 38th Civil Court of Lima.⁵⁶ Two days later said Court forwarded the appeal to the Civil Division.⁵⁷ The petitioner reported that the judge presiding over the 38th Civil Court of Lima was replaced, as a result of which his appeal was only submitted for processing to the Second Civil Division of the Superior Court of Lima in October 2010.⁵⁸ The petitioner added that that Division recused itself from hearing the appeal "because the case was supposedly old" and returned the file to the 28th Civil Court of Lima.⁵⁹

42. On April 13, 2011, the Second Civil Division of the Superior Court of Lima annulled the resolution of the 38th Civil Court of Lima of April 2010.⁶⁰ The Division stated the following:

⁴⁹ Communication of the ONP of August 24, 2000. Attached to the petitioner's communication of May 31, 2004.

⁵⁰ Communication of the ONP of October 26, 2000. Attached to the petitioner's communication of May 31, 2004.

⁵¹ State's communication of February 26, 2010.

⁵² State's communication of Friday, February 26, 2010.

⁵³ Resolution of the Fifth Civil Court of Lima of April 26, 2010. Annex 8 to the petitioner's communication of May 29, 2010.

⁵⁴ Resolution of the 38th Civil Court of Lima of April 26, 2010. Annex 8 to the petitioner's communication of May 29, 2010.

⁵⁵ Resolution of the 38th Civil Court of Lima of April 26, 2010. Annex 8 to the petitioner's communication of May 29, 2010.

⁵⁶ Appeal by Oscar Muelle of May 17, 2010. Attached to the petitioner's communication of May 29, 2010.

⁵⁷ Resolution of the 38th Civil Court of Lima of May 19, 2010. Attached to the petitioner's communication of October 30, 2010.

⁵⁸ Petitioner's communication of October 30, 2010.

⁵⁹ Petitioner's communication of October 30, 2010.

⁶⁰ Resolution No. 6 of the Second Civil Division of the Superior Court of Lima of April 13, 2011. Attached to the petitioner's communication of July 18, 2011.

(...) the (court) pronounces on the request filed by the plaintiff (...) assuming that the statements by the defendant required to pay the pensions are completely true; and (...) without first determining whether the Magma Copper company did or did not take over the assets and liabilities of the initial defendant party, Empresa Minera Especial Tintaya, during the privatization process; without taking into account that if it had taken on said assets and liabilities, (...) it transfers said assets and liabilities to the buyers.⁶¹

43. The Division also maintained that the Court issued its resolution "without specifying the facts and corresponding legal provisions supporting that determination."⁶² The Division added that the Court had violated the right to due substantiation of judicial resolutions and stressed that Mr. Muelle's retirement pension was at the judgment enforcement stage.⁶³

44. The petitioner stated that on May 17, 2012 the 33rd Civil Court of Lima issued a resolution requiring the company to comply with the order given in the Supreme Court judgment of February 1993.⁶⁴ The company filed an appeal against said resolution.⁶⁵

45. On October 30, 2012, the 33rd Civil Court of Lima resolved to suspend enforcement of judgment pending a decision on the appeal filed by the company.⁶⁶ On November 20, 2012, Mr. Muelle appealed against that resolution with respect to its suspension of the judgment enforcement process.⁶⁷ Mr. Muelle argued that said decision impaired the res adjudicata status of the previous judgments granting him his pension rights, so that there could be no delaying of their enforcement.⁶⁸

46. On October 10, 2013, the Second Civil Division of the Superior Court of Justice issued a resolution annulling the resolution of May 17, 2012 of the 33rd Civil Court of Lima.⁶⁹ The Division stated the following:

(...) it has not been accredited that the appellant company has the obligation to pay the pension rights claimed, because since its privatization the original purchaser did not take on that obligation (...).
9...) in addition (...), the pension rules [of Decree Law 20530] regulated State pensions and benefits financed with State resources (...). Accordingly, given that the appellant is now a private enterprise, it is not possible for it to take on a pension obligation because it does not administer pension funds and because, moreover, it did not take on the obligation. Rather the plaintiff's relations were with the State (...).⁷⁰

⁶¹ Resolution No. 6 of the Second Civil Division of the Superior Court of Lima of April 13, 2011. Attached to the petitioner's communication of July 18, 2011.

⁶² Resolution No. 6 of the Second Civil Division of the Superior Court of Lima of April 13, 2011. Attached to the petitioner's communication of July 18, 2011.

⁶³ Resolution No. 6 of the Second Civil Division of the Superior Court of Lima of April 13, 2011. Attached to the petitioner's communication of July 18, 2011.

⁶⁴ Petitioner's communication of September 8, 2012.

⁶⁵ Petitioner's communication of June 10, 2013. State's communication of November 12, 2012.

⁶⁶ Resolution of the 38th Civil Court of Lima of October 30, 2012. Attached to the State's communication of November 20, 2013.

⁶⁷ Complaint by Oscar Muelle, November 20, 2012. Attached to the State's communication of November 20, 2013.

⁶⁸ Complaint by Oscar Muelle, November 20, 2012. Attached to the State's communication of November 20, 2013.

⁶⁹ Resolution No. 8 of the Second Civil Division of the Superior Court of Justice of October 10, 2013. Attached to the State's communication of November 20, 2013.

⁷⁰ Resolution No. 8 of the Second Civil Division of the Superior Court of Justice of October 10, 2013. Attached to the State's communication of November 20, 2013.

47. The Division ordered that "a new resolution be issued taking these considerations into account."⁷¹ The Commission has no information regarding subsequent proceedings. Notwithstanding, the IACHR observes that there is no dispute between the parties that, to date, the judgment of the Supreme Court of Justice of February 2, 1993 has not been executed.

48. According to the information available, Mr. Muelle is now 80 years old.

V. ANALYSIS OF MERITS

A. Prior consideration

49. The Commission observes that in its arguments the Peruvian State made reference to the decision issued by the Constitutional Court on June 3, 2005. In that regard the Commission deems it pertinent to undertake this prior consideration with a view to determining the scope of the case under review and the purpose of the analysis to follow.

50. The IACHR understands that the judgment of the Constitutional Court referred to by the State has to do with the constitutionality of the reform undertaken since 2004 to eliminate the rules for adjusting/updating pensions (*régimen de nivelación de pensiones*) established in Decree Law 20530. While the Inter-American Commission already pronounced on that reform and determined that it did not violate the American Convention,⁷² the legal issue posed in the instant case has to do with the alleged failure to comply with two amparo judgments that recognized that Mr. Muelle was entitled to certain pension rights under Decree Law 20530. The Commission wishes to make clear that the scope of said Decree, and the reforms amending the rules it contains, lie outside the issue at hand.

B. Right to judicial guarantees, private property, and judicial protection (Articles 8.1,⁷³ 21.1⁷⁴, and 25.2. c)⁷⁵ of the American Convention in conjunction with Article 1.1 thereof)

1. General considerations regarding effective judicial protection and compliance with internal judgments

51. The Inter-American Court has pointed out that one of the components of the right to judicial protection established in Article 25 of the American Convention is that States "[have an obligation to establish by law, and] ensure the application of effective remedies and guarantees of due process before the competent authorities."⁷⁶ This is to effectively protect declared or recognized rights from acts that violate fundamental

⁷¹ Resolution No. 8 of the Second Civil Division of the Superior Court of Justice of October 10, 2013. Attached to the State's communication of November 20, 2013.

⁷² IACHR, Report No. 38/09, Case 12.670, Admissibility and Merits, "National Association of Ex-Employees of the Peruvian Social Security Institute et al.," Peru, March 27, 2009.

⁷³ Article 8.1: Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

⁷⁴ Article 21.1: Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interests of society.

⁷⁵ Article 25.2.c: c. [The States Parties undertake] to ensure that the competent authorities shall enforce such remedies when granted.

⁷⁶ I/A Court HR. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, par. 65; and *Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, par. 166.

rights.⁷⁷ For its part, the IACHR has maintained that "if the judicial branch is to serve effectively as an organ for the control, guarantee, and protection of human rights, it must not only be constituted formally, but it also has to be independent and impartial, and its rulings must be carried out."⁷⁸

52. In that sense, the effectiveness of judgments depends on their execution.⁷⁹ If judgment is not enforced, the right involved is denied.⁸⁰ The IACHR has maintained that judicial decisions must be complied with, be it voluntarily or, if necessary, coercively.⁸¹ Likewise, the Court has underscored that execution of judgments must be governed by those specific standards that allow for effective application of the principles of, inter alia, judicial protection, due process, legal certainty, judicial independence, and the rule of law.⁸² Accordingly, the principle of effective judicial protection requires that the parties have access to enforcement procedures, without hindrance or unwarranted delays, in order for them to achieve their objective in a swift, straightforward, and comprehensive manner.⁸³

53. For its part, the European Court of Human Rights has maintained that for a judgment to be fully effective, its execution must be complete, perfect, comprehensive,⁸⁴ and prompt.⁸⁵ For that reason, the provisions governing the independence of the judiciary must be appropriately formulated in order to ensure prompt enforcement of judgments without interference from other branches of government and they must guarantee the binding and mandatory nature of final instance decisions.⁸⁶

54. The Inter-American Court has maintained that in a political system based on the principle of the rule of law, all public authorities, within their spheres of competence, must heed judicial decisions, and support and enforce them without thwarting the meaning or scope of the decision or unduly delaying its execution.⁸⁷ Accordingly, the IACHR has stressed that "ensuring the execution of judicial judgments thus constitutes a fundamental aspect that is the very essence of the rule of law."⁸⁸

2. Information regarding the issue of failure to comply with internal judgments in Peru

⁷⁷ I/A Court HR. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 5, 2011. Series C No. 228, par. 104.

⁷⁸ IACHR, Case 12.357, Application to the I/A Court H.R., Members of the National Association of Discharged and Retired Staff of the Office of the Comptroller General of the Republic of Peru, April 1, 2008, par. 52.

⁷⁹ I/A Court HR. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 5, 2011. Series C No. 228, par. 104.

⁸⁰ I/A Court H.R., Case of Acevedo Jaramillo v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of February 7, 2006, par. 220.

⁸¹ IACHR, Case 12.357, Application to the I/A Court H.R., Members of the National Association of Discharged and Retired Staff of the Office of the Comptroller General of the Republic of Peru, April 1, 2008, par. 53.

⁸² I/A Court HR. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of Tuesday, July 05, 2011. Series C No. 228, par. 105.

⁸³ I/A Court HR. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of Tuesday, July 05, 2011. Series C No. 228, par. 106.

⁸⁴ ECHR, Case of Matheus v. France, No. 62740/01, Judgment of March 31, 2005, par. 58; and ECHR, Case of Sabin Popescu v. Romania, n° 48102/99, Judgment of March 2, paragraphs 68ff.

⁸⁵ ECHR, Case of Cocchiarella v. Italy. Judgment of March 29, 2006, par. 89.

⁸⁶ ECHR, Matheus v. France. Judgment of June 31, 2005 [Tr. sic.: March 31, 2005?], par. 58.

⁸⁷ I/A Court HR. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 5, 2011. Series C No. 228, par. 106.

⁸⁸ IACHR, Case 12.357, Application to the I/A Court H.R., Members of the National Association of Discharged and Retired Staff of the Office of the Comptroller General of the Republic of Peru, April 1, 2008, par. 54.

55. The IACHR notes that noncompliance by the Peruvian State with judgments handed down against State entities since the 1990s extends beyond just the case of Mr. Muelle and forms part of a broader context.

56. Thus, the Inter-American Court already pronounced on two cases in the 1990s of failure to comply with judgments in Peru regarding the adjustment of pensions for former public servants pursuant to Decree Law 20530.⁸⁹ Both judgments handed down by the Court point out that court rulings restoring certain labor and pension rights to the victims were not executed.

57. For its part, in connection with one of those cases, the IACHR maintained that the Peruvian State's failure to comply with judgments "distorts the practice and meaning of administration of justice and diminishes the trust felt by members of the Association in the pronouncements of judges."⁹⁰ The Commission has also admitted several cases alleging the same problem,⁹¹ which are currently awaiting a decision on the merits.

58. Along the same lines, the Commission observes that in October 1998, the Ombudsperson's Office issued a report entitled "Failure by the State Administration to Comply with Judgments."⁹² The Ombudsperson's Office singled out as one issue in the Judiciary the failure to execute judgments against a State entity.⁹³ It stated that since the Office had been established in 1993, it had processed some 101 complaints filed against a number of State entities for failure to comply with final judgments against them.⁹⁴ It pointed out that over half the complaints referred to "court mandates on labor matters that are then ignored."⁹⁵ The Office of the Ombudsperson explained that the vast majority of cases refer to judicial mandates that "involve complying with a financial obligation [such as] the adjustment of pensions."⁹⁶

59. The IACHR takes note that the Ombudsperson's Office pronounced expressly on cases of judgments admitting amparo actions brought by former workers seeking payment of their pensions pursuant to Decree Law 20530.⁹⁷ In its report, the Ombudsperson's Office concluded that:

(...) failure to execute a judgment against a State entity would amount to evasion of the State's responsibility to comply with its obligations (...).

⁸⁹ I/A Court HR. *Case of the "Five Pensioners" v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C. No. 98; and *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller) v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2009. Series C No. 198.

⁹⁰ IACHR, Case 12.357, Application to the I/A Court H.R., Members of the National Association of Discharged and Retired Staff of the Office of the Comptroller General of the Republic of Peru, April 1, 2008, par. 63.

⁹¹ See, for example, IACHR. Report No. 21/09. Petitions 965.-98, 638.-03, and 1044.-04. Joined. Admissibility. National Association of Discharged and Retired Staff of the Tax Authority (SUNAT). Peru. March 19, 2009; IACHR. Report No. 4/09. Petition 914-98. Admissibility. Members of the ECASA Workers' Trade Union. Peru. February 11, 2009; and IACHR. Report No. 86/01 Case 12.319. National Federation of Maritime and Port Workers of Peru (FEMAPOR). Félix Campos Caipo, Sergio Valdivia Ayala, Asiscló Chinapro Fernández, Víctor Briceño Miranda et al. 4.101 Maritime and Riverine Workers. Peru. October 10, 2001.

⁹² Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

⁹³ Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

⁹⁴ Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

⁹⁵ Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

⁹⁶ Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

⁹⁷ Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

The judge enforcing the judgment must render criminal liability effective by filing the corresponding complaint against public servants who fail to comply with judicial mandates either through a flat refusal, or by unreasonably delaying compliance with some administrative prerequisite, or by arguing a legal impossibility to comply based on an incorrect interpretation of provisions.⁹⁸

3. Analysis of the instant case

60. As evidenced by the proven facts, there is no dispute about the fact that Mr. Muelle was included in the Decree Law 20530 pension scheme by a resolution issued by what was then the State-owned mining company, Tintaya. A couple of months later, the same company sent him a communication notifying him that application of the scheme had been suspended. Faced with that situation, Mr. Muelle filed a first action to protect his rights (*amparo*). After going through several levels of the justice system, this *amparo* procedure culminated on February 2, 1993, when the Supreme Court of Justice handed down a judgment ordering Mr. Muelle's reincorporation into the Decree Law 20530 pension scheme.

61. Barely a few days after that judgment, the then State-owned mining enterprise issued a Decision suspending payment of pensions in a manner that went against the rights that had been recognized in favor of Mr. Muelle. This led the petitioner to file a second *amparo* action that was resolved in final instance by the Constitutional Court in 1999, which ordered payment of his adjustable pension as he had been receiving it the first months.

62. While that judgment was still pending, another judicial ruling in Mr. Muelle's favor had been issued in connection with an action filed by the company. On that occasion, the judicial authorities declared the legality of Mr. Muelle's reincorporation into the Decree Law 20530 pension scheme.

63. In addition, in connection with the process of execution of the Supreme Court's judgment of February 1993, there were multiple judicial pronouncements determining that said judgment had not been complied with. Thus, on December 18, 1995, the company was found to be blocking compliance with the judgment and it was ordered to execute it within three days. That order was reiterated at least three times: on April 7, 1997; January 5, 2009; and March 23, 2009. The Commission stresses that, even though noncompliance with the judgment was evident, none of the judicial authorities hearing the execution of judgment proceedings established any coercive mechanism to ensure that Mr. Muelle's recognized right would actually be exercised.

64. In addition, the IACHR notes that one of the arguments adduced by the company for not complying with that judgment was that the company had been privatized after the ruling had been issued. Here, the Commission notes that the United Nations Committee on Economic, Social and Cultural Rights has maintained that States must guarantee that State-owned company privatization measures do not "undermine workers' rights."⁹⁹

65. In the same sense, the European Court analyzed a case similar to the present one. In *Arras et al. V. Italy* a group of former employees of a public bank, which was subsequently privatized, suffered a reduction in their pensions. These people sued the bank and, after several instances, the Court of Cassation considered that the former workers should not have been affected by the decrease of their pensions. Despite this ruling, their pensions were not modified. The European Court considered that the privatization of the

⁹⁸ Report of the Ombudsperson's Office No. 19, Ombudsperson's Office, The State Administration's Failure to Comply with Judgments. October 1998.

⁹⁹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18, The Right to Work, 2005, par. 25.

company was not an element to be taken into account when analyzing the right to effective judicial protection of the pensioners¹⁰⁰.

66. The IACHR agrees with the Committee's and the European Court of Human Rights' comments and considers that the right to effective judicial protection required the State to ensure that privatization of the State-owned company did not strip Mr. Muelle of his judicially recognized pension rights. The Commission has no information regarding any measure adopted by the State to ensure that privatization of the company would not deprive the petitioner of his right to effective judicial protection.

67. The Commission also points out that the resolutions issued during the execution stage of the Supreme Court judgment did not examine that situation in detail or its implications for Mr. Muelle's rights. That was another factor that delayed the compliance procedure and, ultimately, made it impossible for the rulings in favor of the petitioner to be effectively executed by the company or another State authority. In fact, no steps were taken to verify whether the privatized company had or had not taken on the State-owned company's liabilities. and, if it had not, to determine which State authority was responsible with complying with the Supreme Court's decision. On the contrary, the judicial authorities responsible for overseeing execution of judgment limited themselves to the conclusion that it had not been proven whether the privatized company had taken over the State-owned company's liabilities. Consequently, in addition to the company's failure to comply and the failure to adopt measures to avoid its privatization violating Mr. Muelle's rights, the judgment execution process also failed to comply with its essential purpose and therefore turned out to be ineffective.

68. In light of the above, the Commission considered that, 24 years after the first judicial ruling in Mr. Muelle's favor, the State continues to violate his right to effective judicial protection, given the failure to execute final judgments handed down in his favor and the ineffectiveness of judicial mechanisms subsequently activated to achieve said compliance. This situation left Mr. Muelle defenseless and in a still ongoing state of legal uncertainty that, to this day, has prevented him from duly re-establishing rights recognized by the competent authorities.

69. The Commission has therefore concluded that the Peruvian State is responsible for violation of rights established in Articles 25.1, and 25.2.c) of the American Convention, in conjunction with the obligations contained in Article 1(1) thereof, to the detriment of Mr. Muelle Flores.

70. In addition, and bearing in mind the above considerations, the Commission consider that Mr. Muelle's case is another example of a far-reaching structural issue of failure to comply with court judgments, exacerbated by a practice on the part of the judicial authorities responsible for enforcing said judgments of failing to put in place coercive mechanisms to ensure compliance and hence the material realization of the right to effective judicial protection. The Commission underscores the fact that, despite being aware of this issue, the Peruvian State has not adopted the general measures required to correct this state of affairs and prevent it from happening again. The Commission considers, therefore, that the State is also responsible for violation of Article 2 of the American Convention.

4. Reasonable time for executing internal judgments

71. Article 8(1) of the American Convention establishes as one of the elements of a fair trial that courts reach a decision on cases submitted for their consideration within a reasonable time. Therefore, a long delay may per se constitute a violation of judicial guarantees.¹⁰¹ While the IACHR and the Court have

¹⁰⁰ ECHR, *Arras et al. v. Italy*, Judgment of February 14, 2002.

¹⁰¹ I/A Court HR. *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, par. 166; *Case of Gómez Palomino v. Peru*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136, par. 85; and *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C No. 124, par. 160.

pronounced extensively on the question of what constitutes a reasonable period of time in criminal proceedings, this provision may also apply to execution of a final court judgment.

72. It has been reiterated in the jurisprudence of the European Court, when it has stated that unwarranted delay in executing a court judgment may constitute a violation of the right to be tried within a reasonable period of time.¹⁰² The European Court stressed that in no case may a delay in executing a court judgment "impair the essence of the right upheld by the right [to due process]."¹⁰³

73. Pursuant to Article 8.1 of the American Convention, the Commission will take into consideration, in light of the specific circumstances of the instant case, four elements to analyze a reasonable period of time: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the general effects on the legal situation of the person involved in the proceeding.¹⁰⁴

74. As regards complexity, the IACHR notes that there was no complexity given that a final judicial decision had been handed down that was to be executed. In addition, the Peruvian State never argued that executing it was complex. As for the interested party's involvement, the Commission observes that Mr. Muelle kept track of progress with execution of the judgment and complained on numerous occasions of the delays with regard to its enforcement. For its part, the company filed various appeals questioning Mr. Muelle's reincorporation in the Decree Law 20530 pension scheme and arguing that since it had been privatized it was not responsible for complying with the Supreme Court judgment: a matter that was not duly resolved by internal judicial authorities. With respect to the conduct of the judicial authorities, the Commission reiterates what it stated in the foregoing section regarding the way in which judicial resolutions issued during the judgment execution phase were ineffective in bringing about compliance with the judgment. Also worth stressing here are the lengthy periods in which nothing happened in the aforementioned execution of judgment stage and the unwarranted delays by the State in resolving several appeals filed by both parties.

75. Regarding the fourth element, the Court has said that, in determining what constitutes a reasonable period of time, consideration should be given to the adverse effect of the duration of the proceedings on the judicial situation of the person involved as well as to the interests at stake.¹⁰⁵ The Commission notes that Mr. Muelle is now an older adult of 80 years of age and that, 26 years after his retirement in 1990, he has still not been able to enjoy his pension on the terms to which he was entitled according to the Supreme Court. The State has not disputed the fact that the victim is in a precarious situation, both financially and in respect of his health. Accordingly, the Commission considers that this factor is relevant to the instant case and constitutes an additional consideration with respect to determining "reasonable" deadlines.

76. In short, the Commission considers that the lapse of almost 27 years without execution of the Supreme Court judgment of February 1993 exceeds any period of time that could be deemed reasonable. Consequently, the IACHR concludes that the Peruvian State is also responsible for violating the right to a reasonable time [for a hearing] established in Article 8.1 of the American Convention in conjunction with the obligations contained in Article 1(1) thereof, to the detriment of Mr. Muelle Flores.

¹⁰² ECHR, *Hornsby v. Greece*. Judgment of March 19, 1997, par. 40.

¹⁰³ ECHR, *Di Piede v. Italy*. Judgment of September 26, 1996, par. 16.

¹⁰⁴ I/A Court HR. *Case of the Massacre of Santo Domingo v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259, par. 164.

¹⁰⁵ I/A Court HR. *Case of Garibaldi v. Brazil*, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, par. 138; *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, par. 155; and *Case of Kawas Fernández v. Honduras*. Merits, Reparations, and Costs. Judgment of April 3, 2009, Series C No. 196, par. 115.

5. The right to private property in relation to failure to execute internal judgments relating to pensions

77. In their jurisprudence, both the Commission and the Court have developed a broad concept of property, which comprises, among other aspects, the use and enjoyment of "property," defined as those material objects susceptible of being appropriated, as well as any rights which may be part of a person's assets.¹⁰⁶ In addition, the Court has protected acquired rights, understood as rights that have been incorporated into personal net worth.¹⁰⁷ The Commission recalls that the right to property is not absolute and, accordingly, may be subject to restrictions and limitations, provided that the latter are imposed through appropriate legal channels and in accordance with the parameters established in Article 21 of the American Convention.¹⁰⁸

78. In the Case of the "*Five Pensioners*" v. Peru, the Inter-American Court declared that there had been violation of the right to property due to the financial impairment caused by failure to comply with judgments seeking to protect the right to a pension acquired by the victims in accordance with domestic regulations. In that judgment, the Court pointed out that from the time a pensioner pays his or her contributions to a pension fund and ceases to serve in the institution concerned with a view to acceding to a retirement scheme provided for by law, he or she acquires the right for the pension to be governed by the terms and conditions of that law. It also declared that the pension rights acquired by that person have "property implications" (*efectos patrimoniales*) protected under Article 21 of the American Convention.¹⁰⁹ Consequently, in that case the Court declared that since the State had changed the amount of the pensions being received by the alleged victims and had not complied with court judgments issued following the filing of amparo suits, the State had violated the right to property recognized in Article 21 of the American Convention.¹¹⁰

79. Subsequently in the judgment in the case of *Discharged and Retired Employees of the Office of the Comptroller* v. Peru, the Inter-American Court analyzed a similar case of failure to comply with judgments ordering that the victims be incorporated in the Decree Law 20530 pension scheme. The Court considered that those victims met the requirements established by that Decree and that the pension entitlement that they had acquired had an impact on the property of those who received the monthly payments¹¹¹. The Court took into account the fact that the Constitutional Court had issued judgments ordering the State to pay the victims the pension amounts that had been withheld. Based on that, the Court considered that the victims had been harmed inasmuch as they "could not effectively exercise their right to property over the patrimonial effects of their legally recognized adjustable pension; those effects would refer to the amounts the victims stopped receiving."¹¹²

¹⁰⁶ IACHR, Case 12.357, Application to the I/A Court H.R., Members of the National Association of Discharged and Retired Staff of the Office of the Comptroller General of the Republic of Peru, April 1, 2008, par. 72. I/A Court HR. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 174.

¹⁰⁷ I/A Court HR. *Case of the "Five Pensioners" v. Peru*. Merits, Reparations, and Costs. Judgment of February 28, 2003. Series C No. 98, par. 102.

¹⁰⁸ I/A Court HR. *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objections and Merits. Judgment of May 6, 2008. Series C No. 179, par. 54.

¹⁰⁹ I/A Court HR. *Case of the "Five Pensioners" v. Peru*. Merits, Reparations, and Costs. Judgment of February 28, 2003. Series C No. 98, par. 103.

¹¹⁰ I/A Court HR. *Case of the "Five Pensioners" v. Peru*. Merits, Reparations, and Costs. Judgment of Friday, February 28, 2003. Series C No. 98, paragraphs 115 and 121.

¹¹¹ I/A Court HR. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2009. Series C No. 198, par. 88.

¹¹² I/A Court HR. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2009. Series C No. 198, par. 88.

80. The Commission considers that those precedents are fully applicable to the instant case. The reason is that Mr. Muelle, just like the victims in the two cases referred to above: 1) was lawfully included in the Decree Law 20530 pension scheme, as ratified by the courts in both amparo actions and in the ruling on the suit filed by the company itself; ii) was prevented from continuing to receive the benefits that went with that pension scheme; iii) filed judicial appeals seeking his reincorporation in that scheme; iv) received final court judgments supporting his claim and v) has still not seen those judgments executed. All those factors have impaired Mr. Muelle Flores' net worth.

81. Consequently, the IACHR concludes that the Peruvian State is responsible for violating the right to private property established in Article 21 of the American Convention in conjunction with the obligations contained in Article 1(1) thereof, to the detriment of Mr. Muelle Flores.

VI. CONCLUSIONS

82. Based on the considerations of fact and law presented throughout this report on the merits, the Commission concludes that the Peruvian State is responsible for violation of the rights to judicial guarantees, private property, and judicial protection recognized in Articles 8.1, 21, and 25.2. c) of the American Convention, in conjunction with the obligations contained in Articles 1.1 thereof, to the detriment of Oscar Muelle Flores. The Commission likewise concludes that the State failed to meet its obligations under Article 2 of the same instrument.

VII. RECOMMENDATIONS

83. In light of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RECOMMENDS THAT THE STATE OF PERU:

1. Comply as soon as possible with the judgments of the Supreme Court of Justice of February 2, 1993 and the Constitutional Court of December 10, 1999. This means that the Peruvian State must immediately take the steps needed to pay Mr. Muelle Flores' pension on the terms recognized by the courts, that is to say, those of the Decree Law 20530 pension scheme. This includes paying him the pensions he did not receive from his retirement through to the date payment is effected. Bearing in mind the standards set forth in this report on the obligations of the State in connection with the privatization of State-owned enterprises, Peru may not cite privatization as an excuse not to comply with this recommendation.
2. Make full reparation for the violations declared in this report, including due compensation for material (property) and immaterial damages.
3. Adopt legislative and other measures needed to avoid a recurrence of the violations substantiated in this report. In that regard, the State takes such steps as are needed to: i) Ensure that State-owned enterprises comply with the judicial rulings recognizing former workers' pension rights; ii) Ensure that in privatization processes proper safeguards are in place to prevent the compliance with judicial decisions in favor of retirees; iii) Ensure that judgment execution processes meet conventional standards of straightforwardness and promptness; and iv) Ensure that the judicial authorities hearing such processes are legally empowered to apply, and do in practice apply, the coercive mechanisms needed to guarantee compliance with judicial rulings.