



REPORT No. 76/09
PETITION 1473-06
ADMISSIBILITY
COMMUNITY OF LA OROYA
PERU
August 5, 2009

I. SUMMARY

1. On December 27, 2006, the Inter-American Human Rights Commission (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a petition from the Inter-American Association for Environmental Defense (AIDA), the Center for Human Rights and Environment (CEDHA), and Earthjustice (hereinafter "the petitioners"), on behalf of a group of persons^[1], concerning violations by the Republic of Peru (hereinafter "Peru", "the State," or "the Peruvian State ") of the rights enshrined in Articles 4 (right to life), 5 (right to humane treatment), 11 (right to privacy), 13 (freedom of thought and expression), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter "the American Convention," "the Convention," or "the CADH"), with reference to Articles 1.1 and 2 of that instrument and to Articles 10 and 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "the Protocol of San Salvador"). They also alleged violations of Article 19 of the American Convention (rights of the child) with reference to certain articles of the Convention on the Rights of the Child.

2. The petitioners alleged that environmental contamination in La Oroya, caused by the metallurgical complex operating there –run by the State until 1997, when it was purchased by the United States firm Doe Run – has caused a series of violations of the rights of the alleged victims, attributable to state actions and omissions, in particular, noncompliance with environmental and health regulations and lack of supervision and inspection of the company that operates the complex. As for admissibility, they alleged that domestic remedies had been exhausted by way of a motion to enjoin enforcement, decided in their favor but still pending execution. For its part, the State indicated that, although pollution exists in La Oroya, effective measures have been taken to mitigate it and to supervise the Doe Run Company. The State listed the actions taken and argued that this is a complicated situation requiring medium- and long-term measures. As for admissibility, the State alleged that domestic remedies have not been exhausted, since the process of execution of the judgment has not been completed, warning measures in the context of that proceeding have not been pursued, and a writ of *amparo* was not pursued.

3. After examining the parties' positions in light of the admissibility requirements established in Articles 46 and 47 of the Convention, the Commission concluded that it is competent to hear the complaint and that the petition is admissible as regards the alleged violation of the rights enshrined in Articles 4, 5, 13, 19, 8, and 25 of the Convention, with reference to Articles 1.1 and 2 of that instrument. The Commission also concluded that the petition is inadmissible as regards the right enshrined in Article 11 of the Convention. Consequently, the Commission decided to notify to parties, publish this Report on Admissibility, and include this report in its Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Processing of the petition

4. On December 27, 2006, the initial petition was received; it was registered as no. P-1473-06. On April 18, 2007, the Commission transmitted the relevant sections of the petition to the State, which presented its reply on July 19, 2007.

5. The petitioners presented additional observations on August 24, 2007, October 9, 2007, April 8, 2008, and May 15, 2009. The State presented additional observations on January 30, 2008, and on February 18, April 29, and May 15, 2009. These communications were transmitted to the parties.

6. On May 19, 2008, the *Instituto de Defensa Legal* presented an *amicus curiae* report, which was transmitted to both parties.

7. On January 22, 2009, the Commission transmitted to the State a series of attachments provided by the petitioners. On that same date, the IACHR indicated to the

parties that the information provided in connection with the precautionary measures had been incorporated, as appropriate, into the case record.

B. Processing of the precautionary measures

8. On November 21, 2005, the petitioners requested precautionary measures on behalf of 65 persons. After a number of requests for information from both parties, on August 31, 2007, the Commission granted the measures, requesting that the Peruvian State adopt appropriate measures to provide the beneficiaries with specialized medical diagnoses; provide appropriate specialized medical treatment to those persons whose diagnoses indicated danger of irreparable harm to their personal well-being or their lives; and coordinate implementation with the petitioners and the beneficiaries.

9. The petitioners and the State have submitted periodic reports and held two working meetings, during the 131st and 134th periods of sessions, respectively. The precautionary measures remain in place.

III. THE PARTIES' POSITIONS

A. Position of the petitioners

10. The petitioners described some general characteristics of La Oroya^[2]. They indicated that a metallurgical complex operates there, built in 1922 by a United States firm, then nationalized in 1974 and acquired by the *Empresa Minera del Centro del Peru* (hereinafter "CENTROMIN"). In 1997, they said, it was purchased by the United States firm the Doe Run Company, which assumed responsibility for a significant number of the requirements contained in the *Programa de Adecuación y Manejo Ambiental* (Environmental Management and Adaptation Program, hereinafter "the PAMA"). They explained that, when Doe Run acquired the complex, during the transition, the PAMA had been divided into two parts: one whose performance was the responsibility of the Company, and another whose performance would remain the responsibility of the Peruvian State.

11. The petitioners said the metallurgical complex processes mineral concentrates with high levels of lead, copper, zinc, silver, and gold, as well as other contaminants of little economic value, such as sulfur, cadmium, and arsenic. According to the petitioners, in the absence of appropriate systems to mitigate contamination, the population, especially children and expectant mothers, is exposed to high levels of lead, arsenic, sulfur dioxide, and cadmium, in amounts exceeding the parameters recommended both within Peru and by the World Health Organization (hereinafter "the WHO")^[3].

12. They emphasized that international institutions and universities have listed La Oroya as one of the 10 most polluted cities in the world and have recommended that the State reduce exposure to lead and other pollutants. They explained that in December 2005 a report had been published comparing blood and urine contamination in persons at La Oroya to that of persons in a nearby community^[4].

13. The petitioners said that, according to that study, in La Oroya Antigua^[5] no child under 6 has a blood lead level under 20 µg/dL, that 72.73% tested between 20 and 44 µg/dL, and that 27.27% have between 4 and 69 µg/dL. As for the rest of the city, they said only 4% of children under 6 have lead levels under 10 µg/dL, while 24% tested between 10 and 19 µg/dL and 72% had between 20 and 44 µg/dL. They called these results extremely troubling; according to the Centers for Disease Control and Prevention (hereinafter "the CDC"), the United Nations Children's Fund (hereinafter "UNICEF"), and the United Nations Environment Programme (hereinafter "UNEP"), a blood lead level of 10 µg/dL requires corrective measures. They added that the CDC: (i) considers a blood level of over 10 µg/dL in children excessive; (ii) recommends medical follow-up, research, and environmental remediation when children have a blood lead level of over 20 µg/dL; and (iii) indicates that specialized treatment may be required when levels exceed 45 µg/dL, in addition to effective emissions controls and removal of contaminated materials.

14. The petitioners said that, at the domestic level, internal tests of blood lead levels in the population of La Oroya have been performed in 1999, 2000, 2001, and 2005, and the findings on this serious public health problem and its direct connection with activities at the metallurgical complex have been similar.

15. This pollution, they said, increases the risk of illness in La Oroya's inhabitants, and/or aggravates diseases they would normally have. Although illness is part of the human condition, they said inhabitants of La Oroya present abnormal degrees and frequency of illness, which is caused or at least aggravated by environmental pollution. According to the petitioners, this causal relationship is demonstrated in patterns of illness throughout the population, correlated with the most common effects of the elements found in La Oroya. They described these most familiar effects and related them to ailments in La Oroya's inhabitants, citing some of the alleged victims as examples.

16. Lead, they said, is a highly toxic element, possibly carcinogenic, that can affect almost any human organ; the central nervous system is the most vulnerable, particularly in children, whose behavior and ability to learn are affected^[6]. The petitioners said exposure to high lead levels can damage kidneys and the reproductive system, compromise hemoglobin synthesis and vitamin D metabolism, and lead to anemia, severe brain damage, coma, and even death.

17. The petitioners said sulfur dioxide is a gaseous pollutant that damages the circulatory and respiratory systems, aggravates existing respiratory illnesses like bronchitis and asthma, and lowers the lungs' ability to expel foreign particles, such as heavy metals. They said these effects are intensified in La Oroya during frequent peak concentrations of this element.

18. The element cadmium, they said, is probably carcinogenic; accumulates in soft tissue like the kidneys; is associated with decline in lung function; can produce bronchitis, alveolitis, and emphysema; and can aggravate heart disease, anemia, and immune disorders. As for arsenic, they pointed to the worldwide consensus on its toxic, carcinogenic nature, which can cause cancer of the lungs, skin, bladder, and liver; gastrointestinal and nervous-system problems; and reduced red and white blood cell counts.

19. Among the most common ailments among inhabitants of La Oroya, they mentioned gastritis; vomiting; diarrhea; abdominal pain; weakness and bone pain; calcium deficiency; dental problems; low stature; irreversible respiratory system damage; skin problems; cancer; reproductive system damage; anemia; cardiovascular disease; and neurological problems, especially involving behavior, development, and learning in children under 10.

20. They said nearly all the alleged victims have severe respiratory problems; for example, Juan 29 has lost 61% of lung capacity. They said a significant number of alleged victims have hearing loss and hearing problems, such as the child Juan 9, deaf in both ears; Juan 26, who has lost 75% of his hearing; Juan 5, who has auditory complications; Maria 10, partially deaf; Maria 4, who has constant pain the left ear; and Juan 27, whose right ear oozes pus. They added that many of the alleged victims have skin problems attributable to arsenic, such as Maria 14, who died of skin cancer and had received no specialized emergency medical care.

21. As for the international liability of the State, the petitioners argued that Peru has been guilty by act and omission on a continual basis in La Oroya, especially in its failure to control the metallurgical complex, its lack of supervision, and its failure to adopt measures to mitigate ill effects. They emphasized that the State has been aware of this serious situation since at least 1999 through various sources, including reports from state authorities and judicial decisions.

22. They emphasized that there exist reasonable measures that could be adopted by the State to correct the situation and/or mitigate its effects without closing down the metallurgical complex, and to make its sustainable and responsible development possible^[7]. They gave as examples: ongoing emissions control; education campaigns; relocating the most exposed population; requiring the Doe Run Company to fulfill its obligations^[8]; fulfillment of the PAMA obligations that fall to the State^[9]; and requiring the use of technologies that, while they require a reasonable investment, are justified in order to protect the life and health of the affected population.

23. The petitioners said that many of these measures are present in the law but have not been properly implemented. They said that, while the Ministry of Health and other agencies have taken some measures, such as concluding agreements, little progress has been made; the Peruvian authorities have adopted a permissive attitude toward pollution. For example, they mentioned that the Government has allowed the Company to change the commitments under the original PAMA on three occasions, and that fulfillment of requirements under this program has been deferred.

24. They said that, moreover, La Oroya has only two limited-access health centers, with no special facilities or equipment for the diagnosis of lead and other sorts of poisoning and appropriate treatment.

25. As for the measures listed by the State in its pleadings, the petitioners said that the authorities' statements are sporadic and incomplete^[10], while the alleged victims, and the population of La Oroya overall, continue to be exposed to extremely high levels of pollution. The petitioners said this situation was reflected in the Peruvian Congress's report of July 18, 2007; through its Commission on Andean, Amazonian, and Afro-Peruvian Peoples, Environment, and Ecology, the Congress concluded that the State has failed to exercise its authority and implement effective environmental management to control risks to the health

of inhabitants of La Oroya, and has failed to minimize environmental hazards stemming from metallurgical activity.

26. In their arguments of law, the petitioners stressed that the right to life includes the right to a decent life, and that health is directly linked to that right. The petitioners argued that it is the duty of States to take measures to avert risks to life and health, and that this obligation is heightened in the case of children. They said it was precisely a lack of preventive measures that caused the death from skin cancer of Maria 14, in fragile health since birth. They argued that ongoing and concurrent illnesses prevent the alleged victims from enjoying their lives—even from birth, because lead affects expectant mothers.

27. As for the right to humane treatment, they argued that, in addition to the manifest physical harm to the health of the alleged victims, their psychological and emotional well-being is also affected by continual anxiety and fear of the dangers they face every day^[11]. They gave the example of the family of Juan 5 and María 10, who have already lost two of three children prematurely to the effects of contamination. They also said the family of María 1 and Juan 11 are unable to live together because one of their children needs treatment.

28. As for the right enshrined in Article 11 of the Convention, the petitioners argued that excessive environmental contamination represents an intrusion into the personal and family life of individuals; it is present in the air they breathe, in the soil, and in the home, and affects every aspect of daily life. As for the rights of the child, the petitioners said the Peruvian State has failed to fulfill its obligation to take special measures for the protection of children affected by lead poisoning in La Oroya, even though high blood levels and the risk they pose to health and development are well known.

29. As for lack of access to information, they argued that the State has not provided the population with clear, adequate information on the city's degree of contamination, the substances that cause it, the possible impact on humans, and measures that could be taken to alleviate or reverse the damage. They added that the State has manipulated information, promoting the false belief that the situation is not serious and that no other options exist. They explained that individuals are told their symptoms or illnesses are normal, or are due to the cold, the altitude, or age. They said those who attempt to disseminate information are harassed by local officials, by persons connected with the Company, and by other residents who do not understand their concerns, precisely because they lack information.

30. As for the right to a fair trial and the right to judicial protection, they alleged that the State has failed to carry out the judgment of the Constitutional Tribunal, dated May 12, 2006; after a lengthy trial, the Tribunal ordered a series of measures to be carried out within 30 days *infra* paragraphs 69 and 71. They said it ordered the institution of an emergency health care system for the city's residents; a baseline diagnostic study for implementation of the air quality improvement plans; measures to enable states of alert to be declared; and measures to establish epidemiology and environmental monitoring programs in the area^[12].

31. As for the exhaustion of domestic remedies, the petitioners said that, on December 6, 2002, a group of residents of La Oroya lodged a motion to enjoin enforcement against the Ministry of Health and the General Directorate of Environmental Health (hereinafter "DIGESA") for protection of their right to health and right to a healthy environment, and of the same rights for the rest of La Oroya's population, in keeping with Article 200 of the Constitution. They argued that this remedy is appropriate because the violations stemmed from the State's failure to enforce applicable standards. They added that, given the general nature of the action, execution of the judgment could have corrected the situation.

32. The petitioners emphasized that, while actions for constitutional guarantees are processed on a preferential basis because their purpose is to protect essential rights, this did not happen with the motion to enjoin enforcement lodged in December 2002, copied to the petitioning agency on January 15, 2004, ruled upon in the first^[13] and second^[14] instances on April 2 and November 10, 2005, respectively, and found admissible in a definitive ruling of May 12, 2006, by the Constitutional Tribunal, which ordered a series of measures, as detailed above in paragraph 30. They argued that this ruling has not been carried out, that there are no other remedies to be exhausted under domestic law^[15], and that the decision was announced on June 27, 2006, the petition having been lodged within the six-month deadline stipulated by the Convention.

33. As for the State's argument on warning measures, the petitioners argued that these can be employed by a judge to increase pressure on a reluctant official, but are not part of the constitutional proceeding itself, nor are they binding, and they cannot be used as an excuse for failure to comply with what is mandated in the ruling. The petitioners reasoned

that conditioning the validity of a judgment on the use of coercive measures subverts the sense and very essence of the action.

34. As for the State's most recent argument on the lack of a writ of *amparo*, the petitioners said that, while such an avenue exists, in this case the motion to enjoin enforcement is the most appropriate, being broad in scope, and that the violations in question stem precisely from the failure to apply legal provisions. They emphasized that, in any case, the State did not explain why the *amparo* proceeding should take precedence, or why it would be more appropriate than the motion to enjoin enforcement.

35. Lastly, they argued that the identified group of alleged victims does not represent the entire number of persons affected. They emphasized that, unfortunately, this group does not include the most serious cases known in the city; for lack of information, and because of pressure from the Company, the residents do not know that they can appeal to the inter-American system. They argued that the group of alleged victims is only a small sample of the persons affected, and that scientific studies indicate that a large part of the population has severe health problems or is at high risk of developing them. They concluded that there probably exist "countless victims who still do not realize how their health has been affected."

B. Position of the State

36. By way of background, the State indicated that, during the administration of the state enterprise CENTROMIN, between 1974 and 1996, significant investments were made in projects to modernize the metallurgical complex, helping to improve air quality and reduce the risk of human exposure to contamination. The State said that, when the transfer to the Doe Run Company was formalized, on September 30, 1997, the PAMA projects were transferred to the Company for US\$107.6 million. It added that, in December 2003, CENTROMIN completed its part of the PAMA and assumed responsibility for the remediation of soil affected by smelting emissions through 1997^[16].

37. The State argued that the petitioners do not detail, in a clear and convincing manner, actions by the Peruvian State that would lead to the alleged violations. It said that, in keeping with its international obligations, it has been taking progressive, consistent, cross-cutting, and multisectoral measures to bring about optimal air quality levels, to counteract the health problems of the affected population, and to monitor the activities of the Doe Run Company. The State emphasized that this is an extremely complex medium- and long-term process. The State described a series of measures adopted by various authorities in that regard.

38. As for the Ministry of Health, the State noted that activities and campaigns to promote health, hygiene, and nutrition have been instituted. It said that, in keeping with the ruling by the Constitutional Tribunal on May 12, 2006, and with the precautionary measures granted by the Commission, blood lead level analyses and specialized medical diagnostic studies are being performed so as to provide the necessary attention to recurring diseases that could be related to pollution.

39. The State noted that, as regards the cooperation agreement between the Ministry of Health, the regional government, and the Doe Run Company^[17], the Ministry has prioritized health care through a Health Care Strategy for Persons Affected by Poisoning with Heavy Metals and Other Chemical Substances. It mentioned the construction of an obstetric center and general infrastructure improvements at the health center in La Oroya, with an increase in the team of professionals, consisting of 62 individuals, to which more are to be added. It also mentioned the adoption of the Practical Clinical Guide for the Care of Lead Poisoning Patients for health professionals dealing with this problem. It said that, because the residents of La Oroya live in poverty, or extreme poverty, they have been given comprehensive health insurance at no charge.

40. The State said that, following the ruling by the Constitutional Tribunal, the General Directorate of Environmental Health performed a diagnostic study that included an emissions inventory, air quality monitoring^[18], and epidemiology studies; these served as the basis for the Air Quality Improvement Plan in the La Oroya Atmospheric Basin, which includes a Preventive Plant Stoppage Plan in the event that thresholds established under domestic law are exceeded.

41. Continuing to address the items in the judgment of the Constitutional Tribunal, the State said that, according to the Ministry of Health, the states of alert decree is impossible to accomplish within the established timeframe; domestic law requires consecutive procedures for design, institutional and public consultation, and adoption of instruments. In a more recent communication, the State said that, on August 6, 2008, the states of alert decree process has been initiated; the outcome included the inauguration on September 30, 2008, of the Company's sulfuric acid treatment plant to lower sulfur dioxide emissions. Still, the State said the measures taken by the Company have been inadequate.

42. As for the Ministry of Energy and Mines, the State said that, on May 26, 2006, a decision was issued approving in part the request for a special deferment through October 2009, submitted by Doe Run for implementation of the Sulfuric Acid Plant Project^[19] under the PAMA. According to the State, this deferment has no effect on the performance of the Company's obligations, because requirements in addition to those in the original PAMA were established. According to the State, the decree granting the deferment empowered the Ministry of Energy and Mines to request that the Company take special measures to prevent and reduce risks to the environment, to health, or to public safety, and that these measures are verifiable obligations. The State emphasized that the deferment request was considered according to the most rigorous standards, with civil society participation, and in keeping with applicable regulations, and that this included a health risk assessment performed jointly with the Ministry of Health, through its General Directorate of Environmental Health.

43. Among other measures required of the Company, the State listed: (a) increased coverage of health services to prevent, control, and address "health factors associated with inadequate environmental management and its effect on the health of persons in that city," with special emphasis on children with blood lead levels over 45 µg/dL, all of this in coordination with the Ministry of Health^[20]; (b) adjustment of the Company's activities to the states-of-alert standards, including plant stoppages or production cuts to reduce human exposure to sulfur dioxide, and implementation of an air quality and weather information transmission system^[21]; and (c) complementary mechanisms to monitor air quality and health risks and to monitor soil and particulates.

44. The State said that, in order to ensure these measures, mechanisms for monitoring, sanctions, and citizen participation were established through a Citizen Monitoring and Oversight Committee. As for sanctions, the State pointed to an official communication of June 8, 2007, in which the Energy and Mining Investment Monitoring Agency (hereinafter "OSINERGMIN")^[22] announced that sanction proceedings against Doe Run had been initiated on the basis of a report by outside inspectors.

45. As for the National Environmental Council (hereinafter "CONAM"), the State said air quality regulations are being developed; environmental quality standards for cadmium, arsenic, antimony, bismuth, and thallium are being established; and sulfur dioxide standards are being revised and/or updated; it said all of these measures are to be approved shortly. It also mentioned a feasibility study on the relocation of residents of La Oroya Antigua, in response to the permanent health risks posed by living in an area of high contamination. It added that, at CONAM's initiative, on June 27, 2007, a PAMA Control and Monitoring Committee was instituted for Doe Run.

46. As for the Regional Health Directorate of Junín, the State said it carries out inspections and takes samples to monitor water quality. According to the State, the findings show that concentrations of cadmium, chromium, copper, magnesium, and selenium at all the evaluated monitoring stations are within WHO limits. It also said most lead concentrations detected at the stations evaluated are below the threshold.

47. The State said that a draft supreme resolution to establish a temporary Multisectoral Commission that would propose urgent measures and issue a technical report on the situation in La Oroya has been submitted and is now under consideration by the President of the Council of Ministers^[23]. It added that efforts are under way to improve the situation but, unfortunately, societal reactions are hindering progress^[24].

48. In a more recent communication, the State said that, while it is true that in 2006 the Blacksmith Institute listed La Oroya among the 10 most polluted places on Earth, a new report published in 2008 shows evidence of improvement stemming from measures taken by the Company. According to the State, this report demonstrates that it has fulfilled its supervisory and monitoring function.

49. As for the exhaustion of domestic remedies, the State argued that the petition does not fulfill that requirement, since the petitioners appealed to the Commission without awaiting verification of execution of the judgment of the Constitutional Tribunal through the judgment execution process, on which action was still being taken. Here the State argued that Article 22 of the Code of Constitutional Procedure provides that, at the request of a party, coercive measures can be employed to enforce execution of judgments rendered in such proceedings. It emphasized that this mechanism has not been pursued by the petitioners in the process of execution of a judgment that is by nature complex. It stressed that the same judgment by the Constitutional Tribunal provided for the imposition of coercive admonitions, meaning that these should be requested by the petitioners before remedies under domestic law can be considered exhausted. The State said that the Code of Constitutional Procedure also provides that a judge may issue a supplemental ruling correcting an omission by an official who has failed to carry out a decision, without requiring that the petitioners themselves pursue this remedy.

50. The State emphasized that Article 24 of the Code of Constitutional Procedure, which provides that a decision on the merits by the Constitutional Tribunal exhausts domestic remedies, refers to a dispute on the merits and not to the execution of a judgment issued in favor of the complainant, in which case it must be determined whether remedies available under domestic law to bring about the execution of judgments have been exhausted.

51. In later pleadings, the State argued that there exists another suitable and effective avenue for demanding protection of the rights in question; this is the process of *amparo*, a petition for constitutional guarantees which, in a simple and expeditious proceeding, can protect fundamental rights such as health and the enjoyment of a balanced and livable environment. The State argued that the petitioners did not indicate whether they had pursued *amparo*, nor did they indicate the reasons for which they had not done so, and therefore had failed to discharge the burden of proof that falls to them according to the practice of the Commission.

IV. EXAMINATION OF ADMISSIBILITY

A. Competence

1. Competence of the Commission *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*

52. The petitioners are empowered by Article 44 of the Convention to submit complaints on behalf of the alleged victims. The alleged victims in this case were under the jurisdiction of the Peruvian State from the point at which the alleged acts began to be carried out. For its part, the Peruvian State ratified the American Convention on July 28, 1978. Consequently, the Commission is competent *ratione personae* to hear the petition.

53. The Commission is competent *ratione loci* to hear the petition, since the petition alleges violations of rights protected under the American Convention that are alleged to have taken place within the territory of a state party to that treaty. In addition, the Commission is competent *ratione temporis*, because the obligation to respect and guarantee the rights protected under the American Convention was already in effect for the State on the date on which the actions alleged in the petition are said to have occurred.

54. Lastly, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights protected under the American Convention. The Commission notes that the petitioners cited Articles 10 and 11 of the Protocol of San Salvador and Articles 2, 3, 6, 16, and 24 of the Convention on the Rights of the Child. While under Article 29 of the American Convention these provisions can be taken into account in interpreting the scope and intent of the American Convention, the Commission reiterates that it is not competent to render decisions on instruments adopted outside the regional purview of the inter-American system^[25]. As for the Protocol of San Salvador, the Commission reiterates that Article 19.6 of that treaty provides a limited competence clause allowing organs of the inter-American system to render judgments on individual petitions related to the rights enshrined in Articles 8.a and 13^[26].

B. Exhaustion of domestic remedies

55. Article 46.1(a) of the American Convention provides that, in order for a complaint lodged with the inter-American Commission to be admissible under Article 44 of the Convention, all domestic remedies must have been pursued and exhausted, in keeping with generally recognized principles of international law. This requirement is intended to allow national authorities to consider an alleged violation of a protected right and, when applicable, to give them the opportunity to correct it before it may be considered by an international body.

56. The Peruvian State submitted, in due course and in proper form, its challenge to the exhaustion of domestic remedies, basing it on three arguments: (i) that the process of verification of execution of the judgment remains open and therefore has not been exhausted; (ii) that warning measures, as provided by Article 22 of the Code of Constitutional Procedure, have not been pursued; and (iii) that *amparo* has not been pursued.

57. For their part, the petitioners argued that the motion to enjoin enforcement is the appropriate means of pursuing a solution to the problem reported and that, although the petition was decided in favor of the alleged victims, to date the final decision in that proceeding remains unfulfilled. The position of the petitioners is that the aforementioned motion and the decision thereon have been ineffective in resolving the situation in question and that there is no need to await execution indefinitely. They also argued that the warning measures mentioned by the State can be applied at the discretion of judges and requiring their exhaustion would be tantamount to subverting the immediate nature of constitutional proceedings.

58. In order to evaluate the arguments of the parties and determine whether the requirement of exhaustion of domestic remedies has been met, the Commission must determine, first of all, whether the motion to enjoin enforcement was in order and whether a writ of *amparo* must be lodged; and, secondly, whether, once that action was found in favor of the alleged victims, it was necessary to exhaust the judgment execution process, including warning measures.

1. Exhaustion of the motion to enjoin enforcement and lack of a writ of *amparo*

59. The events described by the petitioners refer to the alleged harm to human life and well-being stemming from a series of alleged omissions by the Peruvian State in connection with environmental pollution generated by the metallurgical complex in La Oroya. According to the petitioners, these omissions are a result of the failure of Peruvian authorities to carry out applicable domestic law.

60. Information from both parties indicates that the petitioners lodged a constitutional motion to enjoin enforcement, as provided in Article 200 of the Constitution and in Article 66 of the Code of Constitutional Procedure. The former governs the petition for enforcement as a constitutional guarantee "applicable in the case of any authority or official who resists complying with a legal provision or performing an administrative action, without prejudice to legal liability." The latter article provides that the aim of the enforcement procedure is "to order the resistant public official or authority: (1) to comply with a legal provision or to carry out a specific administrative action; or (2) to issue an express ruling when applicable law mandates that it render an administrative decision or issue a regulation."

61. The motion to enjoin enforcement was lodged by the petitioners to counteract noncompliance, by the appropriate authorities, with Articles 96, 97, 98, 99, 103, 104, 105, 106, and 123 of Act 26842 (General Health Act), as well as with Articles 15, 23, and 25 of Supreme Decree 074-2001-PCM (Regulations Governing National Environmental Air Quality Standards)^[27], and to remedy harm by these omissions to the health of the inhabitants and their right to live in a healthy environment. A definitive ruling on this motion was issued by the Constitutional Tribunal on May 12, 2006.

62. In that judgment, the Constitutional Tribunal referred to the suitability of the motion to counteract omissions in the enforcement of the law, including cases in which noncompliance with the law generates a violation of constitutional rights. The Constitutional Tribunal ruled as follows:

The motion by the complainants for enforcement of the orders contained in the legal and regulatory provisions cited does not pertain solely to control of administrative inaction; specifically, because such inaction violates the rights to health and a balanced and appropriate environment, it is necessary to examine those rights beforehand, given that underlying the issue of administrative inaction is the denunciation of violations of those fundamental rights.

As will be shown later, this is to suppose that, while the right to health and the right to a balanced and suitable environment could not be protected "directly" through the motion to enjoin enforcement, they can be protected "indirectly" as long as there exists a clear, specific, and valid mandate, provided in a law or an administrative act, that is inseparably linked to the protection of those fundamental rights^[28].

63. The Commission notes also that the State did not challenge the applicability of the motion to enjoin enforcement. On the contrary, starting with its initial pleadings the Peruvian State has indicated that the petitioners should await completion of the process of execution of the judgment rendered in that action. This point will be examined in the following paragraph, but the Commission notes that the argument supposes that the motion to enjoin enforcement is in order. In any case, considering the nature of the alleged facts and the rights cited; the description of the motion to enjoin enforcement according the aforementioned provisions; and the interpretation by the Constitutional Tribunal, the Commission finds that this motion constitutes an appropriate means of resolving the situation reported in the complaint.

64. That said, the Commission must examine whether, although the petitioners pursued an appropriate remedy, a motion of *amparo* could also be required. In this respect, the Commission has established that the requirement to exhaust domestic remedies does not mean that the alleged victims are obliged to exhaust every remedy available to them^[29]. Consequently, if the alleged victim raised the issue by way of any of the valid and suitable options under domestic law, and the State had the opportunity to correct the situation under its jurisdiction, the purpose of the international provision must be considered to have been accomplished^[30].

65. In this sense, the Commission finds that, although the *amparo* remedy could

be a suitable mechanism, its pursuit was not required, given that the motion to enjoin enforcement, which also constitutes an appropriate avenue, had already been pursued.

2. The proceeding for execution of the ruling on the motion to enjoin enforcement and the warning measures

66. The Commission notes the dispute between the parties as to the need to await completion of the process of execution of the ruling issued by the Constitutional Tribunal on the motion to enjoin enforcement. According to the State, the petitioners should have awaited verification of the decision's fulfillment, while the petitioners argued that their complaint to the IACHR pertains not only to the failure to comply with the judgment but also to substantive violations stemming from omissions by the State. In this sense, they argued that, under Article 24 of the Code of Constitutional Procedure, the decision by the Constitutional Tribunal on the motion to enjoin enforcement exhausted domestic remedies.

67. This case is noteworthy in that the remedy exhausted by the petitioners was decided in their favor. Concerning the requirement that domestic remedies be exhausted, this fact can have implications for a similar case in which the judicial authority has defined a procedure and has set specific timeframes for execution of the judgment. In that sense, the Commission finds that, in this case, the State must have had a reasonable opportunity to carry out that decision and resolve the situation at the national level. For their part, the petitioners also had the legitimate expectation that the appropriate authorities would enforce the mandates of the Constitutional Tribunal within the time period established by the Tribunal.

68. However, the information available as of the date of adoption of this report—over three years having elapsed since the decision by the Constitutional Tribunal—the judgment execution process remains open and compliance with the decision has not been verified, even though the situation is particularly grave and urgent as verified by the Commission the the precautionary measures process. Also, the Commission notes that taking into account the particular threat to the population of La Oroya, the Constitutional Tribunal set a one month deadline for the judgment compliance. On this regard, following the criteria established in prior cases^[31], the Commission finds that the State is liable for an unjustifiable delay and, therefore, the petitioners are exempted from awaiting completion of the judgment execution process, under Article 46.2(c) of the American Convention.

69. Lastly, the Commission finds that in this case the petitioners employed the appropriate remedy to counteract the failure to comply with laws and decrees and, once they obtained a result, they waited for a reasonable period for the State to carry out the judgment rendered in their favor. The Commission emphasizes that the amount of time granted by the Constitutional Tribunal for execution of the judgment was one month and finds that there was no need for the petitioners to pursue additional remedies—such as the request for application of warning measures—as regards the judgment execution process. In any case, the judicial authorities charged with verifying compliance with the judgment were empowered to employ warning measures, but there is no indication that they did so.

C. Deadline for presentation of the petition

70. Article 46.1(b) of the Convention provides that, in order for the petition to be declared admissible, it must have been presented within six months from the date on which the party in question was notified of the final decision which exhausted domestic remedies. This rule does not apply when the Commission finds, with respect to the requirement of exhaustion of domestic remedies, that any of the exceptions provided in Article 46.2 of the Convention applies. In such cases, the Commission must determine whether the petition was submitted within a reasonable amount of time, in keeping with Article 32 of its Rules of Procedure.

71. As indicated above in paragraph 69, an unjustified delay in execution of the judgment of the Constitutional Tribunal has taken place in this case. The petitioners presented a complaint to the Commission on December 27, 2006, i.e., six months after notice of the final decision. Considering that the Constitutional Tribunal gave the appropriate authorities a period of one month to carry out the judgment; considering that the process of execution remains open; and considering the continuing nature of the alleged violations, the Commission finds that the petition was submitted within a reasonable period of time.

D. Duplication of procedures and international *res judicata*

72. Article 46.1(c) of the Convention provides that the admissibility of a petition is subject to the requirement that the matter "is not pending in another international proceeding for settlement"; and Article 47(d) of the Convention stipulates that the Commission shall not admit a petition that is substantially similar to a petition or prior communication already examined by the Commission or by another international organization. In this case, the parties have not claimed that either of these two circumstances of inadmissibility exists; nor does the record indicate that they do.

E. Characterization of the facts alleged

73. For purposes of admissibility, the Commission must decide whether the petition describes events that could represent a violation, as provided in Article 47.b of the American Convention; and whether the petition is "manifestly groundless or obviously out of order," according to subparagraph (c) of that same article. The standard for deciding these points differs from the standard for a decision on the merits of a complaint. The Commission must make a *prima facie* assessment to determine whether the complaint shows valid evidence of an apparent or potential violation of a right guaranteed by the Convention--not to establish whether a violation exists. This is a summary analysis that does not constitute prejudgment of, or an opinion on, the merits.

74. The Commission finds that the alleged deaths and/or health problems of alleged victims resulting from actions and omissions by the State in the face of environmental pollution generated by the metallurgical complex operating at La Oroya, if proven, could represent violations of the rights enshrined in Articles 4 and 5 of the American Convention, with reference to the obligations established in Articles 1.1 and 2 of that instrument. In the case of children^[32], the Commission finds that these events could also constitute violations of Article 19 of the American Convention.

75. The Commission finds that the alleged delay of over three years in the decision on the constitutional motion, as well as the alleged failure to comply with the final decision in that proceeding, could represent violations of the rights enshrined in Articles 8 and 25 of the Convention, with reference to the obligations established in Articles 1.1 and 2 of that instrument. The Commission also finds that the alleged lack and/or manipulation of information on the environmental pollution pervasive in La Oroya, and on its effects on the health of its residents, along with the alleged acts of harassment toward persons who attempt to disseminate information in that regard, could represent violations of the right enshrined in Article 13 of the American Convention, with reference to the obligations established in Article 1.1 of that instrument.

76. Lastly, the Commission finds that the events described would not represent a violation of Article 11 of the American Convention.

V. CONCLUSIONS

77. On the basis of the considerations of fact and of law set forth, and without prejudging the merits, the Inter-American Commission concludes that this case meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention. Therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. To declare the petition admissible with respect to the rights enshrined in Articles 4, 5, 13, 19, 8, and 25 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of that instrument.
2. To declare the petition inadmissible with respect to the right enshrined in Article 11 of the American Convention.
3. To convey this decision to the State and to the petitioners.
4. To initiate proceedings on the merits.
5. To publish this decision and include it in the Annual Report it will present to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 5th day of the month of August 2009. (Signed): Luz Patricia Mejía, President; Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Paolo G. Carozza, members of the Commission.

[1] The State knows the names of the alleged victims; however, at the express request of the petitioners, their names are treated as confidential and throughout the proceedings they will be identified as follows: María 1; María 2; María 3; María 4; María 5; María 6; María 7; María 8; María 9; María 10; María 11; María 12; María 13; María 14; María 15; María 16; María 17; María 18; María 19; María 20; María 21; María 22; María 23; María 24; María 25; María 26; María 27; María 28; Juan 1; Juan 2; Juan 3; Juan 4; Juan 5; Juan 6; Juan 7; Juan 8; Juan 9; Juan 10; Juan 11; Juan 12; Juan 13; Juan 14; Juan 15; Juan 16; Juan 17; Juan 18; Juan 19; Juan 20; Juan 21; Juan 22; Juan 23; Juan 24; Juan 25; Juan 26; Juan 27; Juan 28; Juan 29; Juan 30; Juan 31; Juan 32; Juan 33; Juan 34; Juan 35; Juan 36; Juan 37; and Juan 38. Among these persons, 30 are children.

[2] Population of approximately 30,533. The city is located 175 km from Lima. According to the petitioners, basic services are scarce and 43% of the population lacks cost-free access to health care.

[3] By way of example, they said that in 2004 the levels of lead, arsenic, and cadmium in the air were approximately 5, 7, and 20 times internationally recommended limits. They also said the concentration of sulfur dioxide, for 2006, exceeded by approximately 4 times the level considered harmful to human health.

[4] The petitioners cited the following section of that report: "Lead test results confirm trends observed in prior monitoring, i.e., high blood lead levels throughout the population of La Oroya and, what is worse, levels exceeding 45 µg/dL in a large part of the population; these levels are cause not only for concern but for emergency medical treatment, according to the CDC [Centers for Disease Control and Prevention]. Cadmium, arsenic, and antimony level test results provide additional scientific evidence, alongside the negative impact of environmental lead contamination in La Oroya." The petitioners cite their source as "Environmental Contamination in the Homes of La Oroya and Concepción and Its Effects in the Health of Community Residents," Fernando Serrano, School of Public Health, Saint Louis University, Missouri. December, 6, 2005, p. 42.

[5] The petitioners say this is the most polluted area of the city.

[6] The petitioners said that, because children are undergoing physical and cognitive development, they are more sensitive than adults to the adverse neurological effects of lead poisoning. They said that loss of cognitive and academic aptitude from lead exposure in children has been demonstrated even at blood levels below 5 µg/dL. According to the petitioners, each 10 µg/dL increase in lead in the blood is associated with a 4.6 drop in the intellectual coefficient. They added that the danger is higher in the case of infants and the unborn, and can cause premature birth, low-weight babies, loss of mental capacity in the infant, and other problems.

[7] They emphasized that, for this type of situation, international environmental law provides two essential principles: (i) prevention, in that, when the environmental impact of an activity is known, all measures to prevent and mitigate such harmful effects must be implemented; and (ii) precautions, in that, when the danger of serious and irreversible harm exists, a lack of absolute scientific certainty should not be used as a reason to postpone the adoption of cost-effective measures to prevent environmental degradation.

[8] In this respect, they mentioned that, although recent sanctions had been imposed, there was no guarantee that they would be enforced; in 2003 and 2004, sanctions had been imposed on the Company but not enforced. The petitioners considered this to be evidence that the inspection and control system is ineffective.

[9] Here they said that the State has failed to fulfill its obligations under the PAMA, specifically the recovery of soil and sedimentary particles; without soil remediation, home hygiene and cleanliness campaigns are of little value.

[10] By way of example, they said that, while under the agreement between the Ministry of Health and the Doe Run Company, some children are moved to Casaracra from Monday to Friday, this measure benefits only children under 6 with very high blood lead levels.

[11] The petitioners reported on certain cases of harassment of alleged victims who have attempted to report their illnesses publicly, attributing them to the pollution problem. For example, Juan 25 was fired by the Doe Run Company for claiming his health benefits. In some cases, such as those of the children Juan 9 and 10, they pointed to psychological abuse by the environmental delegates under the MINSAs-Doe Run agreement, stemming from their mother's involvement in environmental defense.

[12] As for the order to establish an emergency health care system for persons with lead poisoning, with priority on specialized care for children and expectant mothers, they said the information provided by the State is non-specific and does not refer to concrete measures to deal with the emergency and provide the specialized attention the situation requires. They said it also fails to list any measures to mitigate the health effects of contaminants other than lead, such as cadmium, arsenic, and sulfur dioxide. As for the performance of a baseline diagnostic study for implementation of air quality improvement measures, the petitioners said that, while monitoring has been performed, its locations and methods have changed over time, making data

comparison difficult. They added that a 2009 report, pending publication and based on data provided by the Company, concluded that the control measures have not led to improvements in air quality, which is the main problem in La Oroya. As for the order regarding declarations of states of alert, the petitioners said that these had been instituted only in August 2008—more than two years after that ruling. They said the states of alert have not been properly implemented and that the protective measures they involve have not been duly reported to residents. On the mandate to establish epidemiological and environmental monitoring programs, the petitioners said these have not been implemented, and that the measures under the agreement between the Ministry of Health, the Company, and the regional government are inadequate and do not cover all of the population that needs assistance.

[13] On April 2, 2005, the 22nd Civil Court of Lima found the motion to enjoin enforcement admissible, ruling that pollution in La Oroya exceeds allowable levels, and ordering a series of measures.

[14] Following an appeal lodged by the Ministry of Health and DIGESA, on November 10, 2005, the First Civil Division of the Superior Court of Lima reversed the ruling of the court of first instance, reasoning that “the order whose execution is requested by the petitioner does not meet the minimum requirements for enforceability.”

[15] They cited Article 24 of the Code of Constitutional Procedure, which provides that domestic remedies are exhausted with the ruling of the Constitutional Tribunal on the merits.

[16] The State said that in 2006 CENTROMIN began measures to study and analyze soil in the areas affected by emissions, in order to establish remediation priorities.

[17] The State reported that the components of this agreement are: Health Promotion; Epidemiology Monitoring, Health Services, and Individual Care; and Sectoral and Multisectoral Management.

[18] In this respect, the State indicated that a total of nine monitoring plans are being carried out, including those on sulfur dioxide, in addition to the analysis of lead countersamples in particulate filters under 10 microns, which is used to assess compliance with national standards. In a later communication, the State reported that, for 2009, two monitoring studies were planned, for March and September.

[19] According to the State, this project includes implementation of three sulfuric acid plants for the copper, lead, and zinc cycles, which will result in a significant and progressive reduction in sulfur dioxide emissions.

[20] The State said that no children in 2007 were found to have blood lead levels over 45 µg/dL.

[21] The State said this measure requires authorization from the General Directorate of Environmental Health of the Ministry of Health and from the Ministry of Energy and Mines.

[22] The State explained that this agency is empowered to oversee and monitor mining at the national level by mid-size and large mining enterprises, its purview being mine safety, mine hygiene, and environmental protection.

[23] In connection with this proposal, the State quoted a report by the Ministry of Health: “in response to this scenario, the Ministry of Health and the Regional Government of Junín are deploying efforts to monitor health and the quality of air, soil, and water resources; however, it has not been possible to meet the environmental quality standards; moreover, episodes of severe contamination by sulfur dioxide and particulates under 10 microns, especially in La Oroya Antigua, continue to date.”

[24] The State cited as an example a consultation carried out on the implementation of a contingency plan to protect the population in the event of acute contamination, which was violently resisted by the provincial mayor, workers, and groups with economic ties to the metallurgical complex.

[25] IACHR, Report N° 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, paragraph 70.

[26] IACHR, Report N° 21/09, petitions 965/98, 638/09, and 1044/04, joined. Admissibility. National Association of Discharged and Retired Employees of SUNAT. Peru, March 19, 2009, paragraph 56; and IACHR, Report N° 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, paragraph 69.

[27] Constitutional Tribunal. Record no. 2002-2006-PC/TC. Judgment of May 12, 2006.

[28] Constitutional Tribunal. Record no. 2002-2006-PC/TC. Judgment of May 12, 2006, paragraphs 2 and 3.

[29] IACHR, Report N° 40/08, petition 270/07. Admissibility. *I.V.* Bolivia, July 23, 2008, paragraph 70.

[30] IACHR, Report N° 57/03, case 12.337, *Marcela Andrea Valdés Díaz*. Chile, October 10, 2003, paragraph 40; and IACHR, Report N° 40/08, petition 270/07. Admissibility. *I.V.* Bolivia, July 23, 2008, paragraph 70.

[31] In a similar vein, see: IACHR, Report N° 21/09, petitions 965/98, 638/03, and 1044/04, joined. Admissibility. *Asociación Nacional de Cesantes y Jubilados de la SUNAT*. Peru, March 19, 2009, paragraph 66.

[32] Understood as boys, girls, and adolescents under 18.