



**REPORT No. 121/09**

PETITION 1186-04

ADMISSIBILITY

OPARIO LEMONTE MORRIS *ET AL.* (MISKITU DIVERS)

HONDURAS

November 12, 2009

**I. SUMMARY**

1. On November 5, 2004, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") received a complaint submitted by the Asociación de Miskitos Hondureños de Buzos Lisiados (AMHBLI: Association of Disabled Honduran Miskitu Divers); the Asociación de Mujeres Miskitas *Miskitu Indian Mairin Asla Takanka* (MIMAT: Association of Miskitu Women); and the *Almuk Nani Asla Takanka* Council of Elders, respectively, represented by Arquímedes García López, Cendela López Kilton, and Bans López Solaisa, all in representation of the Miskitu indigenous people of the department of Gracias a Dios (hereinafter "the petitioners")<sup>[1]</sup>, against the State of Honduras (hereinafter "Honduras," "the State," or "the Honduran State"), to the detriment of the divers who are members of the Miskitu people (hereinafter the "alleged victims" or the "Miskitu divers"). The petition alleges that the State has failed to supervise the working conditions of persons who have been and are employed in underwater fishing in the department of Gracias a Dios, who are subject to labor exploitation, which has caused a situation of such proportions and gravity that it endangers the integrity of the Miskitu people, as thousands have suffered multiple and irreversible physical disabilities, and many have died.

2. In the petition, it is alleged that the State is responsible for violating the fundamental rights of the divers who are members of the Miskitu people established in Articles 4 (right to life), 5 (humane treatment), 8(1) (judicial guarantees), 17(1) (protection of the family), 19 (rights of the child), 24 (equality before the law), 25 (judicial protection), and 26 (progressive development of economic, social and cultural rights), in conjunction with Articles 1(1) and 2, all of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") and Convention 169 of the International Labor Organization "Concerning Indigenous and Tribal Peoples in Independent Countries" (hereinafter "ILO Convention 169"). As regards the admissibility requirements, they state that they have not had access to domestic remedies, either administrative or judicial, due to their condition of extreme poverty and the failure of the State to provide adequate mechanisms. They state that in those cases in which they have had access to domestic remedies, they were not expeditious or effective, leading to an unwarranted delay in resolving the actions.

3. The State indicates that it has a specific legal system of protection that regulates labor relations between employers and workers, the procedures to be followed, the institutions, and the competent personnel, so that the persons engaged in underwater fishing can demand respect for and observance of their rights. Moreover, it argues that the cases brought by the persons affected before the competent organs, both administrative and judicial, were not concluded due to omission and abandonment by the petitioners, accordingly they ask that the petition be found inadmissible due to failure to exhaust domestic remedies.

4. Without prejudging the merits, and having analyzed the information available and verified compliance with the admissibility requirements set forth at Articles 46 and 47 of the American Convention, as well as Articles 30 and 37 of its Rules of Procedure, the IACHR concludes that the petition is admissible in relation to the alleged violation of the rights established at Articles 4, 5, 8(1), 17(1), 19, 24, 25, and 26 of the American Convention, in relation to the general obligations enshrined in Articles 1(1) and 2 of the same international instrument. In addition, by application of the principle of *iura novit curia* the Commission concludes that the petition is admissible in relation to the possible violation of Article 6(2) of the Convention. The Commission decides to notify the parties of this decision, publish it, and include it in its Annual Report to the General Assembly of the Organization of American States.

**II. PROCESSING BY THE COMMISSION**

5. On November 5, 2004, the Commission received the petition and assigned it number 186-04. On December 8, 2004, it transmitted the pertinent parts to the State, asking that it submit its response within two months, in keeping with Article 30(2) of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter the "Rules of

Procedure"). The State's response was received on February 23, 2005.

6. In addition, the IACHR received information from the petitioners on the following dates: December 7, 2004; August 14 and September 18, 2006; December 18, 2007; July 7, August 4 and 13, October 9, 2008; and April 3 and May 4, 2009. Those communications were duly forwarded to the State.

7. Furthermore, the IACHR received observations from the State on the following dates: January 21, 2005, February 23, 2005; May 27, 2008, October 10 and 21, 2008; and January 28, 2009. Those communications were duly forwarded to the petitioners.

8. On October 22, 2008, a hearing was held during the 133<sup>rd</sup> regular session of the IACHR on arguments on the admissibility of the petition.

### **III. THE PARTIES' POSITIONS**

#### **A. The petitioners**

9. The petitioners argue that the Honduran State has failed to adopt an integral policy in the areas of social security, public health, and labor as required in order to supervise the working conditions in underwater fishing in the department of Gracias a Dios, which has resulted in a systematic violation of the fundamental rights of Miskitu divers, a situation which, given its extent and gravity, has affected the very integrity of the Miskitu people. They indicate that the Miskitu indigenous people constitute a binational people who live the territories on both sides of the border between Honduras and Nicaragua. Most of the Miskitu in Honduras live in the department of Gracias a Dios, a region known as the *mosquitia hondureña*, or Honduran Mosquitia, one of the most marginalized and geographically isolated areas of Honduras, where living and health conditions are worse than anywhere else in the country.<sup>[2]</sup>

10. According to the petitioners, the Miskitu divers are recognized worldwide for their innate capacity for immersion, and are considered to be among the best free divers on the planet. They indicate that underwater fishing is one of the main economic activities in the department of Gracias a Dios.<sup>[3]</sup> Given the lack of labor opportunities, the members of the Miskitu people (men, youths, and even children) are forced to work as divers for fishing companies in subhuman conditions, without the proper training or occupational health and safety guarantees, as they fall victim to labor exploitation by the boats' owners and captains.<sup>[4]</sup> They add that given the scarcity of marine resources in shallow waters, the divers are forced by their employers, under threat and in some cases at gunpoint, to descend to greater depths and to be submerged for longer times, which is at odds with basic diving rules, due to the risk of suffering decompression syndrome<sup>[5]</sup> and other occupational accidents, which has caused and continues to systematically cause, in thousands of divers, partial and permanent disability and even death.<sup>[6]</sup>

11. Based on the information provided by the petitioners, it appears that the Ministry of Health indicates that "there are nearly 9,000 divers in the Mosquitia.... Of the 9,000 divers, 47% (4,200) have been disabled as a result of decompression syndrome."<sup>[7]</sup> They add that an aggravating consideration in this situation is that the disabled divers don't have any opportunity to engage in any subsistence labor activity, putting them in acute extreme poverty, which affects their families, and on occasion they are abandoned by their wives and family members. In the face of this situation, there have even been cases in which divers try to commit suicide but are unable to succeed due to their condition.<sup>[8]</sup>

12. The petitioners note that the Labor Code does not provide for the special situation of workers in the fishing industry. The Occupational Health and Safety Regulation for 2001 establishes the obligations of employers and workers in relation to the occupational risks associated with fishing, guarantees occupational safety and accident prevention, and sets different safety standards for vessels and for the various activities.<sup>[9]</sup> They indicate that Honduran legislation provides for the resolution of labor conflicts between employers and workers, administrative actions before the General Labor Bureau (Dirección General del Trabajo)<sup>[10]</sup>, and judicial actions before the corresponding Labor Courts (Juzgados de Trabajo)<sup>[11]</sup>, and must exhaust administrative remedies before availing themselves of judicial remedies. They argue that in practice these mechanisms are not effective or adequate due to the ineffectiveness of the actions of the judicial and administrative authorities.

13. With respect to the exhaustion of domestic remedies, the petitioners indicate that at least 30 persons turned to the administrative mechanisms, in some cases, and others to judicial mechanisms, without any results whatsoever; the matters all got bogged down at one or another stage of the procedure. They indicate that only Mr. Flaviano Martínez obtained a judgment in his favor, on October 22, 1996, which has yet to be enforced. In all these

cases, they argue that the State breached its duty to give impetus to administrative and judicial proceedings on its own initiative. They argue that the ineffectiveness of the actions of the administrative authorities has been determinant in the divers' claims not having got past the phase prior to the judicial phase<sup>[12]</sup> and in the judicial phase the judicial authorities have maintained a passive attitude and have not taken any initiative to effectively conclude the proceedings<sup>[13]</sup>, which together with the concealment, failure to appear in court, and filing of dilatory motions by the respondents, has contributed to not a single judicial judgment in favor of the divers being enforced<sup>[14]</sup>, as a result of which they become victims of delays in the justice system. They add that during the proceedings they do not have interpretation into their mother tongue.

14. Furthermore, the petitioners allege that most of the divers or their family members have been impeded from acceding to domestic remedies, whether administrative or judicial, due to the conditions of extreme poverty in which they live, low levels of education, lack of information, the geographic location of the Mosquitia, and the high costs of the proceeding, which requires travelling to where the administrative or judicial mechanisms are based<sup>[15]</sup>, the requirement of having legal representation<sup>[16]</sup>, and the lack of interpretation in the domestic administrative and judicial proceedings, as well as the disability of the divers in most cases.

15. In view of the foregoing, the petitioners indicate that the State is responsible for violating the fundamental rights to life and humane treatment of the following persons<sup>[17]</sup>:

a. The right to life, because they died: (1) Opario Lemonth Morris (2001); (2) Timoteo Lemus Pizzati (2002); (3) Saipón Richard Toledo (2004); (4) Licar Méndez G., 16 years of age (2003)<sup>[18]</sup>; (5) Eran Herrera Paulisto (2002); (6) José Martínez López (2004); (7) Alfredo Francisco Brown (2004); (8) Rómulo Flores Enríquez; (9) José Trino Pérez Nacril; (10) Bernardo Julián Trino; (11) Lorenzo Lemon Bonaparte; (12) Andrés Miranda Clemente; (13) Hildo Ambrocio Trino; (14) Amilton Bonaparte Clemente; (15) Bernardo Blakaus Emos; (16) Alí Herrera Ayanco; (17) Mármol Williams García; (18) José Martínez López; (19) Alfredo Francisco Brown Manister; (20) Ramón Allen Ferman; (21) Róger Gómez Alfred; (22) Saipon Richard Toledo; (23) Ramon Allen Felman; (24) Especel Bradle Valeriano; (25) Próspero Bendles Marcelino; and (26) Timoteo Salazar Zelaya (2002).

b. The right to humane treatment because they suffered decompression syndrome resulting in different levels of disability: (1) Flaviano Martínez López (1992); (2) Carcoth Padmoe Millar (1993); (3) Cooper Cresencio (1999); (4) Willy Gómez Pastor (2003); (5) Roberto Flores Esteban (2000); (6) Efraín Rosales Kirington (2003); (7) Daniel Dereck (2000); (8) Evecleto Londres Yumidal (2001); (9) David Esteban Bradley (2003); (10) Amisterio Bans Valeriano (2000); (11) Ex Dereck Claro (1995); (12) Ralph Valderramos Álvarez (1996); (13) Leonel Saty Méndez (2001); (14) Arpin Robles Tatayon (2002); (15) Fredy Federico Salazar (2003); (16) Félix Osorio Presby (1995); (17) Onasis Cooper Brown (2001); (18) Melecio Pamistan Maick (2003); (19) Rolando Monico Thomas (1999); (20) Daniel Flores Reyes (2002); (21) Efraín Rosales Kirington (2003); and (22) Carlos Castellón Cárdenas (2000).

16. The petitioners indicate that the victims and their next-of-kin have not received justice or compensation. For this reason, they argue that the State is responsible for violating the following rights:

a. The right to judicial guarantees (Article 8) with respect to the alleged victims, because they brought administrative and judicial actions without any result, and suffered an unwarranted delay in the processing of their actions.

b. The right to protection of the family (Article 17(1)) of the alleged victims due to the human tragedy that affects the disabled divers, who receive no fair compensation, no social security, without any possibility of rehabilitation, and without any prospects of leading a dignified life, as it is the family must bear the burden of the human drama that has affected their disappeared or disabled loved ones.

c. Rights of the child (Article 19), with respect to Licar Méndez Gutiérrez, who was subjected to extenuating working conditions contrary to his condition as a minor, and who, having disappeared, is presumed dead.<sup>[19]</sup>

d. The rights to equality before the law, judicial protection, and economic, social and cultural rights (Articles 24, 25 and 26), with respect to the Miskitu people and their members dedicated to underwater fishing, as they do not have the protection of the law and public policies on labor supervision in compliance with statutory and regulatory provisions so as to prevent workplace accidents. They invoke Article 26 of the Convention in relation to Article 45 of the Charter of the Organization of American States, at sections (a), (h), and (i), which make reference to the protection of work, the development of an efficient social

security policy, and adequate provision for all persons to have due legal aid in order to secure their rights. All the rights indicated above are alleged to have been violated in conjunction with Articles 1(1) and 2 of the American Convention.

## **B. The State**

17. The State indicates that the situation raised in the petition as grave and systematic violations, characterized by the petitioners as a "human tragedy," is not unknown to the State, and is a matter of concern. In this respect, it indicates that it has social security, health, and labor policies for the population engaged in underwater fishing, which are established in the Constitution of the Republic, the Labor Code, and the Regulation on Occupational Health and Safety for Underwater Fishing.<sup>[20]</sup> Nonetheless, it affirms that the nature of the activity performed by the Miskitu divers "as well as the cultural aspects particular to their people, have made more complex the effective application of the provisions that regulate the occupational safety and health conditions of those who work in fishing so as to prevent accidents."<sup>[21]</sup>

18. The State notes the administrative and judicial procedures that the petitioners must follow to pursue their claims, according to what is established in the Labor Code. It states that in the administrative forum one must go before the Secretariat for Labor and Social Security (Secretaría del Trabajo y Previsión Social) and that in the judicial forum, a labor action must be filed before the respective Labor Court (Juzgado de Trabajo). In the event that the workers do not have resources for hiring the services of an attorney they may be represented by the labor public defender's office (Procuraduría del Trabajo), which operates in the regional offices of the Secretariat of Labor located in La Ceiba and Puerto Lempira.

19. The State asserts that most of the judicial public employees of the department of Gracias a Dios speak the Miskitu language. While the procedures are all written in Spanish, which is the official language of Honduras, interpreters are provided where required. With respect to the requirement of having legal counsel, the State indicates that the Labor Code establishes that the parties may act on their own, without the participation of counsel, in non-appealable proceedings and in conciliation hearings.

20. With respect to the petitioners' arguments on the geographic difficulties or high transport costs for the petitioners to gain access to administrative and judicial proceedings, it argues that it is a generalized and very subjective assessment on their part, it recognizes that there may have been transportation difficulties, but in no way does it accept that it maintains a factual or legal obstacle in place.<sup>[22]</sup> The State asserts that to keep the Miskitu from moving to the cities of Tegucigalpa and San Pedro Sula, the Secretariat for Labor and Social Security, through the Social Security Bureau, has appointed qualified staff in the regional offices in La Ceiba and Gracias a Dios, where administrative claims may be filed. It adds that to keep the persons affected from having to go to Tegucigalpa to establish the compensation, they are evaluated at the Hospital of Puerto Lempira, department of Gracias a Dios; if the company's domicile is in the Bay Islands or La Ceiba, the evaluation will be done in the cities closest to its jurisdiction.<sup>[23]</sup>

21. The State asserts that the persons affected and individually identified by the petitioners had access to the administration of justice, in both the administrative and judicial forums, yet the proceedings did not conclude due to omission and abandonment of them. To this end, the State submits information to show that the alleged victims and their next-of-kin had recourse to the offices of the Secretariat of Labor in Puerto Lempira, La Ceiba, and Roatán, but did not follow up on the proceedings they themselves initiated. It states that it has carried out its duties indicated in the legal proceeding and cites specific cases<sup>[24]</sup> of compensation paid for fatal accident.<sup>[25]</sup> In addition, it notes that the Secretariat for Labor has a record of 57 cases on which conciliation was reached from 1997 to 2001.<sup>[26]</sup>

22. It adds that the Miskitu divers were provided services correctly, they were referred in timely fashion to the Medical Evaluation Unit of the Secretariat for Labor, the labor compensation due was calculated, the employers were summonsed, a record was made of the conciliatory agreements between the parties when they were reached, and, if the employers did not appear, they were given the certifications needed to file a judicial action.<sup>[27]</sup> The State further argues that the Secretariat of Labor demands that an individual contract be entered into between employers and workers, as an indispensable requirement for authorizing the fishing boats to weigh anchor, before which it performs on-site inspections of them and, during the off-season, it is seen to it that the workers receive the material, equipment, and training necessary and that repeat diving be planned.

23. The State argues that to reduce the incidence of accidents due to decompression syndrome in the population of divers, and to propose productive alternatives for the development of the Mosquitia region, in 2004 it created the "Inter-institutional



Commission for Reorganizing Commercial Fishing by Diving.” In this regard, it describes the activities carried out by this commission to control and improve the conditions for underwater fishing.<sup>[28]</sup> It also argues that it guarantees health promotion through training on safe diving and that through its hospital network it ensures disability prevention and complete reparations for the divers affected by their underwater fishing activity. In addition, it indicates that support has been given to the organizations for protecting divers, with a L.200,000.00 subsidy allocated by the Secretariat of Government and Justice to the Asociación de Misquitos Hondureños de Buzos Lisiados (Association of Disabled Honduran Miskitu divers) through the Coordinadora de Instituciones y Asociaciones de Rehabilitación de Honduras (Coordinating Body of Rehabilitation Institutions and Associations of Honduras) in 2004 and 2005.

24. In conclusion, the Honduran State indicates that it has social security, health, and labor policies aimed at the population engaged in underwater fishing, who have a legal body that regulates labor relations between employers and workers, the procedures to be followed, the institutions, and the competent personnel to whom the persons affected can turn to demand respect for and observance of their rights. Finally, it asks that the petition be found inadmissible on grounds of failure to exhaust domestic remedies.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. Competence *ratione personae*, *ratione temporis*, *ratione loci* and *ratione materiae* of the Inter-American Commission**

25. The petitioners are authorized by Article 44 of the American Convention to file petitions with the IACHR.

26. The petitioners present as the alleged victims 48 Miskitu divers who were individually identified in paragraph 15 of this report, and the members of the Miskitu people who were and are engaged in underwater fishing in the department of Gracias a Dios<sup>[29]</sup>, who can be individually identified and with respect to whom the Honduran State undertook to respect and ensure the rights enshrined in the American Convention.

27. Honduras ratified the American Convention on September 8, 1977, the date on which it deposited its respective instrument of ratification, and it accepted the jurisdiction of the Inter-American Court of Human Rights on September 9, 1981; therefore the Commission is competent *ratione personae* to examine the petition. The Commission is competent *ratione materiae* since the petition refers to alleged violations of human rights protected by the American Convention. The Commission is also competent *ratione temporis* insofar as the facts alleged occurred once the obligation to respect and ensure the rights established by the Convention was already in force for the Honduran State, which ratified it September 8, 1977. The Commission is competent *ratione loci* because the facts alleged occurred in the territory of Honduras, a country that ratified the American Convention.

28. With respect to what petitioners raise in the complaint to the effect that it should be found that the State repudiated ILO Convention 169, the Commission is not competent to apply Convention 169 directly, although it can and should use it as a guideline for interpreting obligations under the Convention, in light of Article 29 of the American Convention.

##### **B. Other admissibility requirements of a petition**

###### **1. Exhaustion of domestic remedies**

29. Article 46(1)(a) of the American Convention provides that for a petition submitted to the Inter-American Commission to be admissible under Article 44 of the Convention, one must first have pursued and exhausted domestic remedies, in keeping with generally recognized principles of international law. Article 46(2) of the Convention establishes that the requirement of prior exhaustion will not be applied when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

30. As the Inter-American Court has established, whenever a State alleges that a petitioner has failed to exhaust domestic remedies, it bears the burden of showing that the remedies that have not been exhausted are “adequate” to cure the violation alleged, that is, that the function of those remedies within the domestic law system is suitable to protect the legal situation infringed.<sup>[30]</sup>

31. In the instant case, the State alleges that the petition does not meet the requirement of prior exhaustion of domestic remedies, provided for at Article 46 of the American Convention, since the labor-related administrative and judicial procedures were not

duly exhausted, by omission and abandonment by the alleged victims.<sup>[31]</sup> It argues that Honduras has a legal system that protects the rights of the persons engaged in fishing, and provides free legal assistance.

32. As regards the exhaustion of domestic remedies, the petitioners argue different situations:

(a) Legal actions filed by the alleged victims in the administrative and judicial forums, from 1994 to 2004, for workplace accidents and death of divers; these are at different procedural stages without any response<sup>[32]</sup>, which constitutes an unwarranted delay in resolving the complaints.

(b) The situation of Mr. Flaviano Martínez López, who filed a labor claim with the Secretariat of Labor in La Ceiba on April 13, 1993, and obtained a favorable judgment on October 22, 1996. Nonetheless, to date it has yet to be enforced.

(c) The impossibility of acceding to domestic remedies due to the alleged situation of vulnerability of the alleged victims and their next-of-kin (disability and extreme poverty); lack of adequate public services; the costs of administrative and judicial procedures; and geographic isolation.

33. The Court has established that the effectiveness of remedies is gauged based on their capacity to produce the result for which they were established<sup>[33]</sup>; in this regard, the Court has also mentioned that domestic remedies must be adequate.<sup>[34]</sup>

34. The Commission observes that the facts alleged in the instant case are related to the effective protection of the rights to life, humane treatment, judicial protection, and access to justice of the divers from the Miskitu indigenous people who live in the department of Gracias a Dios. In this regard, the Inter-American Court has established that the judge has the duty to move the proceeding along<sup>[35]</sup>, such that he must consider the facts alleged and their context so as to conduct it in the most diligent possible manner, determine what has happened, and, if relevant, establish the responsibilities and reparations in the case.<sup>[36]</sup> In addition, the case-law of the inter-American human rights system has determined that as regards the indigenous peoples, the States must grant effective protection that takes into account their own particularities, their economic and social characteristics, as well as their special situation of vulnerability, customary law, values, and uses and customs.<sup>[37]</sup>

35. In addition, the Commission observes that in the area of labor justice, Article 669 of the Labor Code of Honduras<sup>[38]</sup> establishes that when they are called on to intervene by legal means, the labor courts must act on their own initiative to give impetus to the normal course of matter submitted to them.

36. In view of the foregoing, the Commission considers that with respect to the alleged victims who had claims before the administrative and judicial mechanisms, it has not been possible to establish the responsibilities and reparations of the situations presented to the authorities, nor guarantee the rights of the alleged victims, thereby causing an unwarranted delay in the processing of their claims.

37. With respect to the situation of the alleged victims who were unable to gain access to domestic remedies, the Commission observes that while Honduran legislation provides for procedures to allege violations of the right to life and humane treatment, as well as procedures for upholding labor rights, including, according to the State, the possibility of free legal assistance, in practice these mechanisms would not be adequate or effective in the department of Gracias a Dios. This is because the procedures do not take into account the particularities of the Miskitu people. In particular, in the instant case the Commission observes that the remedies available to the alleged victims do not consider the special situation of vulnerability of the Miskitu divers and their families, in view of their situation of poverty, disability, geographic isolation, and lack of interpretation into their mother tongue in the various procedures, all of which is alleged to have made it impossible for them to gain access to said remedies.

38. As regards the State's arguments on this matter (see paragraphs 19 and 20 *supra*), the Commission observes that the department of Gracias a Dios can only be reached by air or by sea, meaning one must go to La Ceiba or Tegucigalpa, where the high courts are, which entails costly travel, yet travel is only by small aircraft, which don't have the conditions for carrying the disabled Miskitu divers. In addition, the Commission observes that the measures reported by the State for reducing the incidence of accidents due to decompression syndrome among the population of divers, and those aimed at endowing the department of Gracias a Dios with state employees who can address the labor-related complaints of the Miskitu divers, were allegedly begun in 2004.

39. The Commission also takes into account the information submitted by the petitioners indicating that the presence of the judicial branch in the specific zone where the alleged victims live is scant, and that presenting actions that have to do with the fishing companies may require doing where those companies are registered – normally Roatán or La Ceiba. The petitioners have indicated that the authorities have not succeeded in implementing measures to make these forums accessible for persons with disabilities<sup>[39]</sup>, and that they do not have the resources necessary for travelling (by air or by sea being the only possibilities). The information indicates, moreover, that the State presence in the specific area is scant and that the public employees don't have resources to make the remedies available in the legal system effective.

40. Based on the foregoing, the Commission observes that the exceptions to the requirement of prior exhaustion of domestic remedies, provided for at Article 46(2)(c) and (b) of the American Convention, apply in the instant case, because according to the facts alleged, there has been an unwarranted delay in the decision on the remedies pursued by some of the alleged victims, or because in practice they have not had access to domestic remedies because of the lack of adequate conditions for the disabled Miskitu divers to be able to have access to justice.

41. It only remains to indicate that invoking exceptions to the rule of exhaustion of domestic remedies, provided for at Article 46(2) of the Convention, is closely associated with the determination of possible violations of certain rights set forth therein, such as the guarantees of access to justice. Nonetheless, Article 46(2), given its nature and purpose, is a norm with autonomous content vis-à-vis the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule of prior exhaustion of domestic remedies provided for therein apply to the case in question should be made prior to and separate from the analysis of the merits, as it depends on a different standard of appreciation from that used to determine whether there have been violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that have impeded the exhaustion of domestic remedies in the instant case will be analyzed, as pertinent, in the Report the Commission adopts on the merits, so as to determine whether in effect there are violations of the American Convention.

## **2. Deadline for lodging a petition**

42. The American Convention provides that for a petition to be admissible by the Commission, it must be submitted within six months from the date on which the person whose rights have allegedly been violated has been notified of the final decision. In the claim under analysis, the IACHR has determined that the exceptions to the exhaustion of domestic remedies apply as per Article 46(2)(c) and (b) of the American Convention. In that respect, Article 32 of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the prior exhaustion rule apply, the petition must be lodged within a time which, in the Commission's view, is reasonable. To that end, the Commission should consider the date on which the violation of rights is alleged to have taken place and the circumstances of each case.

43. Considering the specific circumstances of the facts alleged in the petition, the lack of effectiveness of domestic remedies, the extreme poverty and disabilities of the alleged victims, the shortcomings of the administrative and judicial system in the State of Honduras, the actions of the alleged victims and their next-of-kin to seek justice, the situation and context in which the violations have allegedly occurred, and the fact that several judicial investigations and proceedings are still pending, the Commission considers that the petition was lodged within a reasonable time, and that the admissibility requirement on deadline for lodging a petition should be considered satisfied.

## **3. Duplication of procedures and international *res judicata***

44. It does not appear from the record that the subject matter of the petition is pending before any other international procedure, or that it reproduces a petition already examined by this or any other international organization. Accordingly, the requirements established in articles 46(1)(c) and 47(d) of the Convention should be deemed to have been satisfied.

## **4. Characterization of the facts alleged**

45. As the Commission has already stated in other cases, this stage of the procedure is not for determining whether there has been a violation of the American Convention. For the purposes of admissibility, the IACHR must simply decide whether the arguments state facts that could tend to establish a violation of the American Convention, in keeping with Article 47(b), and whether the petition is "manifestly groundless" or "obviously out of order," under Article 47(c). The standard of appreciation of these rules is different from that required to decide on the merits of the claim. In the present stage, the IACHR must make a summary *prima facie* evaluation that does not entail any prejudgment or anticipation of an

opinion on the merits. Its own Rules of Procedure reflect this distinction between the evaluation it must perform for the purposes of finding a petition admissible and that required to determine whether in effect there is State responsibility, on establishing clearly differentiated stages for examining admissibility and the merits.

46. In the instant case, the petitioners allege violation, by the State, of Articles 4, 5, 8(1), 17(1), 19, 24, 25, and 26, in conjunction with Articles 1(1) and 2 of the American Convention.

47. Having reviewed the information submitted by both parties, the Commission finds that the petitioners have made allegations that are not "manifestly groundless" or "obviously out of order" and that, if confirmed as true, could constitute violations of Articles 4, 5, 8(1), 17(1), 19, 24, 25, and 26 of the American Convention, in relation to Articles 1(1) and 2 of the same international instrument.

48. In particular, the Commission considers that it should note that the facts of the instant petition are related fundamentally to the alleged responsibility of the State of Honduras for the lack of social security, health, and labor measures to guarantee the working conditions of the Miskitu divers in the department of Gracias a Dios. This omission, according to the facts alleged, meant that the Miskitu divers – a substantial part of the Miskitu indigenous people who live in the department of Gracias a Dios – have suffered decompression syndrome, causing partial or permanent disability, and even death, on a large scale and to a critical extent, jeopardizing the very integrity of the Miskitu people in Honduras. In the instant case, the facts alleged tend to establish a violation of the rights set forth at Articles 4 and 5 of the American Convention, in addition to Article 19 with respect to the child Licar Méndez Gutiérrez.

49. The facts of the case tend to establish a violation of Articles 8, 25, and 24 of the American Convention, in relation to the arguments on denial of justice. Moreover, the facts alleged tend to establish a violation of Article 17(1) of the American Convention considering the consequences for the family and the community of the disability and death of its members, together with the lack of medical care and rehabilitation services, denial of justice, lack of reparation, and consequent impossibility of leading a dignified life.

50. In addition, the IACHR observes that the facts described by the petitioners could tend to establish a violation of Article 26 of the American Convention, due to the alleged omission on the part of the State to adopt measures to ensure labor and social security conditions for the workers engaged in underwater fishing, especially the Miskitu divers in the department of Gracias a Dios. The Commission observes that the actions or omissions of various state organs could have had an aggravated effect on the Miskitu divers of Gracias a Dios, considering that not only would their labor and social security rights have been curtailed, but moreover the survival of the lion's share of the Miskitu people could have been put at risk. Accordingly, and without prejudging on the merits, the IACHR considers it relevant to incorporate Article 26 of the American Convention in the analysis on the merits in the instant case.

51. In addition, by application of the principle of *iura novit curia* the Commission observes that the facts alleged tend to establish a violation of Article 6(2) of the American Convention because the State's failure to guarantee the Miskitu divers' working conditions would mean that they were subject to labor exploitation and forced labor on being compelled to work more hours than permissible, descend to greater depths, and be submerged for longer times at the risk of suffering decompression syndrome or death.

52. In view of the foregoing, in the merits stage the Commission will analyze whether there is a possible violation of Articles 4, 5, 8, 17(1), 19, 24, 25, and 26, in relation to Articles 1(1) and 2 of the American Convention, to the detriment of the alleged victims. In addition, in application of the principle of *iura novit curia* the Commission will analyze whether there is a possible violation of Article 6(2) of the American Convention.

53. Accordingly, the Commission considers that the requirements set forth at Article 47(c) of the American Convention have been met.

## **V. CONCLUSION**

54. The Commission concludes that it is competent to take cognizance of the complaint submitted by the petitioners, that the petition is admissible pursuant to Articles 46 and 47 of the Convention in relation to the alleged violation of Articles 4, 5, 8, 17(1), 19, 24, 25, and 26 of the American Convention in connection with Articles 1(1) and 2 of the same Convention. In addition, by application of the principle of *iura novit curia* during the merits stage the Commission will analyze the possible application of Article 6(2) of the American Convention.

55. In consideration of the arguments of fact and law set forth above, and without prejudging on the merits,



## THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

### DECIDES:

1. To find the petition in this matter admissible with respect to Articles 4, 5, 8, 17(1), 19, 24, 25, and 26 of the American Convention, in connection with Articles 1(1) and 2 of the same Convention.
2. In addition, by application of the principle of *iura novit curia* during the merits stage the Commission will analyze the possible application of Article 6(2) of the American Convention.
3. To transmit this report to the petitioners and the State.
4. To continue with its analysis of the merits.
5. To public this report and include it in the Commission's Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 12<sup>th</sup> day of the month of November, 2009. (Signed): Víctor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Sir Clare K. Roberts, Florentín Melendez, and Paolo G. Carozza, members of the Commission.

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[1] In a note of December 18, 2007 the Center for Justice and International Law (CEJIL) was accredited by the petitioners as a co-petitioner.

[2] According to the petition, the department of Gracias a Dios is part of rural Honduras and is the second largest department in area in Honduras, extending over 16,998 square kilometers. It has a population of 71,740, 83.1% Miskitu and the rest Garifuna, Lenca, and Tawahkas. The department is subdivided into the municipalities of Puerto Lempira, Juan Francisco Bulnes, Brus Laguna, Villeda Morales, Ahuas, and Wampusirpe. Access to the region is only by air, by sea, or by river, which makes commerce difficult and drives up the cost of living. Petitioners' brief of December 18, 2007, p. 1.

[3] Underwater fishing generates more than US\$ 35 million annually for Honduras. The Human Development Report of the United Nations Development Program for 2002 reported that 71.1% of the population of the department of Gracias a Dios is engaged in agriculture and fishing. Petitioners' brief of November 5, 2004, Annex No. 80.

[4] According to the petitioners, the divers are forced to work on average from 12 to 17 days, with more than five hours daily of diving sessions, on the high seas, where even the most basic labor standards are not observed, for it is the captain of the vessel who imposes the rules and controls the divers' schedules, as well as the supply of food, alcoholic beverages, and even drugs. They add that such practices do not even comply with the minimum standards established by the Regulation on Occupational Health and Safety for Underwater Fishing. Petitioners' brief of December 18, 2007, p. 4.

[5] Decompression syndrome occurs when the diver submerges and there is more air in the body; this air becomes diluted in the blood. When the diver surfaces, he can expel it through the respiratory system, but respecting certain levels of decompression, otherwise the nitrogen bubbles in the body may damage the spinal column, obstructing veins and arteries, and at that moment the diver can suffer paralysis. The disease manifests in different ways: rashes on the skin, pain in the joints or tendons, headaches or nausea, and it can only be treated effectively by immediate re-compression in a hyperbaric chamber before the harm becomes irreversible.

[6] As regards the divers who have died, AMHBLI maintains a registry with 400 victims. In those cases of death in which compensation has been obtained, it has not been greater than US\$ 2,000; in many cases the compensation payment is for US\$ 500 or US\$ 100. They add that a large part of the accidents occur "due to lack of supervision of the diving equipment, especially its quality and maintenance; there have been accidents caused by the use of scuba cylinders and due to obstruction of the system, which forces them to come quickly to the surface." Petition of November 5, 2004, pp. 4 and 5.

[7] Human Development Report, United Nations Development Program, 2002, p. 106. Petitioners' brief of November 5, 2004, Annex No. 74.

[8] Testimony of Mr. Vismar Oracio, 29 years of age. He suffered decompression syndrome when he was 20 years old in 1994; he was disabled, as he is unable to move his legs, and he suffers from decubitus ulcer. "...mahka pruhan sinra lukisna...wan help ka apusna bara mahka sin pruah aidokisa" "I think about suicide ... not being able to fend for myself, I prefer to die." Petitioners' brief of November 5, 2004.

[9] Some of these obligations indicated in Article 7 of the Regulation are: To provide their workers, free of charge, necessary and adequate diving equipment and equipment for personal protection in keeping with the risks to which they are exposed, perform periodic maintenance on the diving equipment, which should be replaced when completing its useful life, as per the indications provided by the manufacturer; to immediately and adequately transfer the workers from the fishing vessel to the closest hospital or medical center in case of occupational hazard or other situation that affects the workers' health; to adequately instruct the workers before and during the performance of any work activity as to the risks and hazards they may face, as well as the method for preventing them; to enter into an individual labor contract with each of the workers, approved by the Ministry of Labor and Social Security; to see to it that the workers do not perform their work under the influence of narcotic drugs or alcohol. Petitioners' brief of December 18, 2007, p. 5.

[10] The Labor Code does not establish a clear procedure for administrative conciliation procedures. In practice, the worker affected goes before the offices of the General Labor Bureau located in Tegucigalpa, Puerto Lempira, La Ceiba, and Roatán. Once he presents the labor claim, if it arises from an occupational hazard the worker is referred to the Medical Evaluation Unit, where the calculation of the corresponding compensation is done. The employer is called to a hearing to make the corresponding payment; if the employer does not appear, a certificate is issued to the worker so he can pursue the matter judicially. Petitioners' brief of December 18, 2007, p. 6.

[11] There is no Labor Court in the department of Gracias a Dios. Honduras has a total of 83 courts known as *juzgados de Letras* for the 18 departments into which the country is divided; only one of these is in Gracias a Dios, in Puerto Lempira. Petitioners' brief of December 18, 2007, p. 9.

See United Nations Development Program, *Segundo Informe sobre Desarrollo Humano en Centroamérica y*

[12] In the administrative proceeding at the offices of the Ministry of Labor, the various victims have suffered different situations. In some cases, for example, the grievance is merely received; in other cases the employers are convened to no avail; and in another case, although a preliminary agreement was reached, it was not enforced. In none of these cases was a decision issued that expressly exhausted administrative remedies, allowing the victims to have recourse to judicial remedies.

[13] As an example they cite the case of Mr. Amisterio Vans Valeriano, who filed a labor grievance in 2001, before the Juzgado de Letras (Court) of La Ceiba. Although the respondent answered the complaint, the Court did not convene the conciliation hearing or the hearing for receiving evidence; more than seven years have elapsed without the Court taking any steps to conclude the proceeding. They also cite the case of Mr. Ex Dereck Claros, who filed a labor grievance in 1997; his claim was admitted seven months later, and the respondent was ordered to appear, with no results to date. Mr. Ralph Valderramos filed a claim in 1997 before the Juzgado de Letras of Puerto Lempira; it was admitted, and the respondent was summonsed but did not appear, and the Court did not continue the proceeding. Mr. Lemus filed his claim in 2004, seeking attachment of accounts. There has been no judicial response to any of these initiatives. They note that more than 10 years have elapsed in the first case, and four years in the second example, without the courts having responded to the victims' requests. In the cases of victims José Martínez López and Opario Lemoth Morris, who died as a result of an occupational accident, though their deaths were reported to the Justice of the Peace of Brus Laguna and to the Juzgado de Letras of Puerto Lempira, respectively, neither of these courts initiated any investigation into their deaths. To date the truth of what happened is not known, nor have those responsible been sanctioned or made reparation for the harm caused. Petitioners' brief of July 7, 2008, p.19.

[14] According to the Pan American Health Organization, there are 4,000 to 6,000 disabled divers, 99% of them have not received fair compensation. This figure increases by 350 to 400 new cases each fishing season. Brief attached to the petitioners' brief of November 5, 2004, Annex No. 40.

[15] They indicate that during the conciliation proceeding, which lasts approximately six months, they must go to Puerto Lempira, La Ceiba, or Tegucigalpa several times, both for the medical evaluation by the Secretariat of Labor and Social Security and to establish the amount of compensation and the successive steps, which is extremely costly and burdensome for them, given their situation of extreme poverty. For the divers who have suffered an accident or their family members, it is almost impossible to go to the places where the administrative and judicial offices are located.

[16] In judicial and non-judicial settings, the workers need the representation of counsel; otherwise they are to be represented by the labor public defender (Procuraduría de Trabajo). The public defender may desist from providing legal counsel to the workers in the following situations: when he considers that the business to which a request refers is legally unsustainable, when the workers attempt to get the public defenders' office (Procuraduría) to go to trial with private defense counsel, and when the opinion of the Medical Section of the Secretariat of Labor, with respect to occupational risks, is contrary to the claim of the person making the request. Labor Code of Honduras, Articles 637,638, 641, and 643.

[17] The petitioners individually identified alleged victims in the petition and subsequent observations. See briefs and documents submitted by the petitioners, December 7, 2004; August 14 and September 18, 2006; December 18, 2007; July 7, August 4 and 12, 2008.

[18] At the time of his disappearance on December 12, 2003, he was 16 years old. They note that the captain of the vessel punished him by leaving him at high sea for having lost the diver that he was backing up, telling him he would pick him up in the afternoon, but on returning he was no longer there; they add that there was bad weather that day. Petitioners' brief of November 5 2004, p. 12.

[19] See paragraph 15.a and footnote, p. 18.

[20] State's brief of observations, February 23, 2005, p. 8.

[21] State's brief of observations, February 23, 2005, p. 9.

[22] State's brief of observations, May 29, 2008, p. 14.

[24] Roger Alfred Gómez, Paulino Blakaus Emos, Alí Herrera Ayanco, Mármol Williams García, José Martínez López, Alfredo Brown Manister, Ramón Allen Felman, and Alfredo Francisco Brown. State's brief of observations, February 23, 2005, p. 22.

[25] The calculations of compensation prepared by the Occupational Health and Safety Inspectors at the regional offices at La Ceiba, Puerto Lempira, and the departments of Atlántida and Gracias a Dios are done at the beginning of the administrative proceeding only with the data provided by the workers prior to a medical evaluation. The calculation of compensation is based on the table established by the Labor Code, taking into account the harm suffered by the worker. State's brief of observations, February 23, 2005, p. 21.

[26] State's brief of observations submitted to the IACHR, February 23, 2005, p. 22.

[27] State's brief of observations submitted to the IACHR, February 23, 2005, p. 8.

[28] The Honduran State indicates that the Inter-institutional Commission on Diving held a training session in the city of La Ceiba June 15 to 18, 2004 and a Course on Safe Diving in Guanaja June 10 to 12, 2004, as a result of which 180 persons were trained, including captains and intermediaries who hire divers; in addition, the General Bureau of Merchant Marine trained 94 divers from June 7 to 12, 2004, through a Course on Safe Diving Techniques. It notes that the efforts to provide training fostered by the State have trained 1,225 divers as of February 2005. In addition, the Secretariat of Labor and Social Security has performed inspections on the boats through the Occupational Safety and Health Inspector, which in 2004 performed 31 inspections of lobster boats. It indicates that the Honduran Navy performed inspections of 23 boats in the city of La Ceiba, 23 vessels on the island of Guanaja, and 10 vessels on the Island of Roatán from June to August 2004.

[29] According to information from international organizations such as the Pan American Health Organization, in the department of Gracias a Dios there are approximately 9,000 divers, most of them members of the Miskitu people, 4,200 of whom have suffered some degree of disability as a result of the inadequate conditions in which they perform their activities as divers. See Case of the Mayagna (Sumo) Community of Awas Tingni. Judgment of the Inter-American Court of Human Rights, August 31, 2001. Series C No. 79, para. 149.

[30] I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4.

[31] State's brief of observations, February 23, 2005, p. 1.

[32] The following persons filed administrative and judicial claims: (1) Carcoth Padmoe Miller; on August 8, 1994, he filed a claim for compensation with the Office of Occupational Health and Safety of the Municipality of the Distrito Central. (2) Crescencio Cooper Jems; on November 8, 2003, he filed an administrative claim in Puerto Lempira with the Secretariat of State in the offices of Labor and Social Security. (3) Willy Gómez Pastor; on

October 1, 2003, he filed a claim with the Secretariat of Labor in Puerto Lempira. (4) Roberto Flores Esteban; on November 17, 2003, he filed a claim for compensation. (5) Saipon Richard Toledo; on March 29, 2004, the record of the hearing was drawn up attesting to the appearance of Mr. Anastacio Richard Bais, father of the deceased, who filed the claim for fatal occupational accident with the Secretariat of Labor in Puerto Lempira. (6) Efraín Rosales Kirrinton; on February 12, 2004, he went before the Secretariat of Labor in Puerto Lempira to file a claim for compensation due to occupational accident. (7) Daniel Dereck Thomas; on April 28, 2004, he appeared before the Secretariat of Labor in Puerto Lempira to file a claim for compensation for occupational accident. (8) Eran Herrera Paulisto; on November 5, 2002, Sofía Flores Paulisto filed a labor claim for the death of Mr. Herrera Paulisto. (9) Evecleto Londres Yumida; on October 14, 2004, he signed a certificate of agreement (*acta de compromiso*) with diver intermediary Erbacio Martínez in Puerto Lempira, who undertook to pay, in two parts, the sum of 2,000.00 lempiras under the labor law to Mr. Londres Yumida. The record does not reflect that said agreement was carried out. (10) David Esteban Bradley; he went before the Secretariat of Labor in Puerto Lempira, at a date uncertain, to request the payment of compensation for permanent disability due to an occupational accident. (11) Amisterio Bans Valeriano; on December 13, 2000, he filed a claim with the Secretariat of Labor in La Ceiba. (12) José Martínez López; Mr. José Marín (diver intermediary) reported the facts of the accident to the Justice of the Peace of Brus Laguna on November 28, 2003, yet it has not been investigated. (13) Opario Lemoth Morris; on May 2, 2001, the employer, through the Juzgado de Letras of Puerto Lempira, paid 2,000 lempiras in funeral costs. (14) Ex Dereck Claros; on October 22, 1997, he filed a labor action before the Juzgado de Letras Departamental of Puerto Lempira for payment of compensation for an occupational accident with permanent partial disability and temporary disability. (15) Ralph Valderramos Álvarez; on June 10, 1996, he filed a labor claim before the General Bureau of Social Security of the Ministry of Labor in Roatán, Islas de Bahía; it did not take up the matter because the respondent filed a dilatory objection of lack of jurisdiction of the court, which was upheld. On March 23, 1997, Mr. Valderramos once again filed the action for the payment of compensation in the Juzgado de Letras Departamental of Puerto Lempira. Nothing was done to notify the respondent and continue with the proceeding. (16) Timoteo Lemus Pissaty; on March 8, 2003, he appeared before the Secretariat of Labor in Puerto Lempira to lodge a formal claim. On November 18, 2004, Mr. Lemus's next-of-kin filed a labor action before the Juzgado de Letras Departamental of Roatán. Similarly, the next-of-kin of Messrs. (17) Andrés Miranda Clemente, (18) Lorenzo Lemon Bonaparte, (19) Bernardo Julián Trino, (20) José Trino Pérez, (21) Rómulo Flores Henríquez, (22) Amilton Clemente Bonaparte and (23) Hildo Ambrosio filed administrative claims on November 20, 2000, before the Secretariat of Labor of La Ceiba. On March 4, 2002, the family members filed a judicial action before the Juzgado de Letras of Puerto Lempira, which was not taken up until two years later.

[33] I/A Court H.R., *Case of Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 66. *Case of Durand and Ugarte. Preliminary exceptions*. Judgment of May 28, 1999. Series C No. 50, para. 34 *in fine*. See also, *inter alia*, IACHR. Case 10,956. Luis Felipe Bravo Mena (Mexico). Report No. 14/93, of October 7, 1993, s/p; Case 11,142. Arturo Ribón Avila (Colombia). Report No. 26/97, of September 30, 1997, para. 57 *in fine*; Case 10,970. Raquel Martín de Mejía (Peru). Report No. 5/96, of March 1, 1996.

[34] "Adequate domestic remedies are those which are suitable to address an infringement of a legal right...." I/A Court H.R., *Case of Velásquez Rodríguez*, *supra* note 57, para. 64. *Case of Caballero Delgado and Santana*. Judgment of January 21, 1994. Series C No. 17, para. 63; Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights). Advisory Opinion OC-11/90. para. 36

[35] I/A Court H.R., *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 107.

[36] I/A Court H.R., *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120., para. 88.

[37] I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, para. 63.

[38] Article 669 of the Labor Code of Honduras: The labor courts, once their first intervention is sought legally, shall act on their own initiative and shall seek to abbreviate to the extent possible the normal course of the matters submitted to them for their cognizance. Their firm judgments shall have the authority of *res judicata*.

[39] The petitioners stated that the persons who were able to reach an arrangement with the owner of the boat were at a disadvantage, did so out of necessity, and that this did not represent exhaustion of effective remedies.