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REPORT No. 112/21
PETITION 66-12
REPORT ON ADMISSIBILITY

HUMBERTO JESUS TEMPESTA HERRADA
PERU

Approved by the Commission electronically on June 3, 2021.

Cite as: IACHR, Report No. 112/21, Petition 66-12. Admissibility. Humberto Jesus Tempesta Herrada. Peru. June 3, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner	Eddie Calajeón Castilla
Alleged victim	Humberto Jesús Tempesta Herrada
Respondent state	Peru ¹
Rights invoked	Articles 16 (freedom of association), 24 (right to equal protection), 25 (judicial protection) and 26 (progressive development) of the American Convention on Human Rights ² , in relation to Article 1.1 (obligation to respect rights) and Articles 6, 7 and 8 of the additional protocol of the American Convention on Economic, Social and Cultural Rights (“Protocol of San Salvador”)

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition	January 16, 2012
Additional information received during the initial review:	January 18, 2012; May 7, 2012; January 22, 2014; May 18, 2014; June 19, 2017; December 27, 2017; January 17, 2018; and December 19, 2018
Notification of the petition to the State:	January 28, 2019
State’s first response:	May 1, 2019
Additional observations of the petitioners	February 21 2020
Additional observations by the State	July 14 2020 and February 15 2021

III. COMPETENCE

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

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

Duplication of procedures and International res judicata:	No
Rights declared admissible:	Articles 16 (freedom of association), 24 (right to equal protection), 25 (judicial protection) and 26 (progressive development) of the American Convention on Human Rights, in relation to Article 1.1 (obligation to respect rights) and Article 8.a) of the Protocol of San Salvador Protocol.
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of section VI
Timeliness of the petition:	Yes, under the terms of section VI

V. SUMMARY OF ALLEGED FACTS

1. The petitioner denounces that the State violated the rights to work, equality and freedom of association of Mr. Humberto Tempesta, when he was fired from the private company where he worked because of his status as a union leader.

2. The alleged victim worked for the company “América Móvil Perú SAC” (hereinafter, América Móvil). The petitioner specifies that on January 13, 2009, Mr. Humberto Tempesta was elected by the Workers' Assembly of said company to be a member of the union's Board of Directors, and that on January 16, 2009, they communicated such decision to the company. The petitioner denounced that, as a result of a policy of repression and anti-union discrimination, on January 17, 2009, América Móvil fired the alleged victim and the other members of the Board of Directors.

¹ Based on Article 17.2.a of the Rules of procedure of the Commission, Commissioner Francisco Julissa Mantilla Falcón, a Peruvian national, did not participate in the debate or decision of this matter.

² Hereinafter “the American Convention” or “the Convention”.

³ The observations submitted by each party were duly transmitted to the opposing party.

3. Between January 17 and 18, 2009, the company offered and deposited a settlement and compensation in the bank accounts of the dismissed persons, in order to validate the aforementioned arbitrary dismissals. In view of this, on January 19, 2009, Mr. Humberto Tempesta sent a notarized letter to America Movil, indicating his rejection to the dismissal and the compensation deposited. On February 27, 2009, the alleged victim asked the bank, by notarized letter, not to use the account where the aforementioned deposit made by the company was located. He specified that the same day the Labor Inspector of the Ministry of Labor verified such action through a certified act.

4. On March 9, 2009, Mr. Humberto Tempesta, together with the other former members of the Board of Directors, filed an action for the protection of constitutional rights (“amparo”), alleging that their dismissals were null and void as they were motivated by their condition as trade unionists and requesting their reinstatement to their positions. On December 14, 2009, the First Constitutional Court of Lima declared the lawsuit founded, arguing that the alleged victim did not consent to the receipt of compensation and that the dismissal was based on his status as a trade unionist. América Móvil appealed this decision, and, on June 11, 2010, the Second Civil Chamber of the Superior Court of Lima reversed the first instance ruling and declared the lawsuit inadmissible, arguing that the compensation awarded to the alleged victim shows that he consented to his dismissal.

5. Given this, the legal representation of Mr. Humberto Tempesta filed a constitutional complaint against said judgment. However, on June 27, 2011, the Constitutional Court confirmed the inadmissibility of the claim. Such resolution was notified on July 20, 2011. It details that the alleged victim requested the “clarification, nullity, and cancellation” of such decision, but on August 17, 2011, the Constitutional Court rejected such request. The petitioner specifies that such resolution was notified on September 14, 2011.

6. The petitioner denounces that the State did not grant effective judicial protection to Mr. Humberto Tempesta in the face of his dismissal. He complains that the Constitutional Court committed an act of discrimination by maintaining that the alleged victim accepted the amount of compensation deposited by the company. He details that Mr. Humberto Tempesta expressly rejected such an attempt to justify his invalid dismissal, so it was appropriate for said court to grant another treatment to the case. He indicates that such absence of guardianship had effects on the psychological health and professional development of the alleged victim.

7. He also argues that the ruling of the Constitutional Court applied domestic legislation unequally. He indicates that Article 29 subsections a) and b) of the Single Ordered Text of the Employment Promotion Law provides that “dismissal for reasons of (...) a) membership in a union or participation in union activities is void” and for “b) being a candidate to represent the workers or act or have acted in that capacity.” Despite this, he denounced that the Constitutional Court did not apply this norm and its own jurisprudence equally, causing the alleged victim's reinstatement to be arbitrarily rejected.

8. Additionally, the petitioner maintains that Mr. Humberto Tempesta exhausted domestic remedies with the decision of the Constitutional Court of June 27, 2011, and that he meets the deadline established in Article 46.1.b) of the American Convention since such resolution was notified on July 20, 2011. In this sense, he considers that the response issued by said court on August 17, 2011 to the request for “clarification, nullity and impeachment” of the alleged victim is irrelevant, and that it was only a legitimate attempt to dispute in an extraordinary manner some of the grounds of the ruling.

9. The State, for its part, alleges that the petition was filed untimely. That, although the alleged victim presented a request for “clarification, nullity and cancellation of the resolution”, such appeal had no capacity to change the content of the judgment issued by said court. It argues that Article 202 of the Political Constitution of Peru⁴ expressly states that there is no challenge whatsoever against the judgments issued by the Constitutional Court, therefore the presentation of said brief was a reckless maneuver designed to allow additional time limits to improperly appeal to the IACHR. Because of this, it argues that

⁴ 1993 Political Constitution of Peru. Mandate of the Constitutional Court. Article 202. It is within the power of the Constitutional Tribunal: (...) To entertain, as a last and definitive instance, the negative decisions of habeas corpus, actions for the protection of constitutional rights (“amparo”), habeas data and enforcement of judgement actions.

the six-month period provided by Article 46.1.b) of the American Convention and Article 32 of the Rules of the IACHR must be counted from the notification of the first decision of the Constitutional Court and not from the aforementioned order rejecting the objection of the latter. Thus, if the Constitutional Court ruling was notified on July 12, 2011 and the petition was presented to the IACHR on January 16, 2012, the alleged victim was four days out of date.

10. Additionally, it argues that the alleged victim did not exhaust the adequate remedies of the domestic jurisdiction. It indicates that Mr. Humberto Tempesta did not use the ordinary labor process, which has an evidentiary stage, in order to demonstrate that he suffered a dismissal based on his status as a union leader. It also maintains that the alleged victim also had civil remedies at his disposal, in order to obtain compensation for any psychological damage suffered. Given that Mr. Humberto Tempesta did not use any of these processes, the State considers that the requirement established in Article 4.1.a of the American Convention is not met.

11. Finally, it argues that the facts denounced do not constitute a violation of human rights. It indicates that the alleged victim had an effective judicial recourse to present his claims, and that they were resolved in a process that had due judicial guarantees. For this reason, it requests that the petition be declared inadmissible based on Article 47 (b) of the American Convention, since it considers that the petitioner's claim is for the Commission to act as a "court of appeal," in contradiction to its complementary nature. Furthermore, it highlights that the IACHR does not have material competence to analyze the alleged violation of Article 26 of the American Convention, since it can only examine the economic, social, and cultural rights expressly indicated in Article 19.6 of the Protocol of San Salvador.

VI. EXHAUSTION OF LOCAL REMEDIES AND TIMELINESS OF THE PETITION

12. The petitioner maintains that he exhausted domestic remedies with the decision of the Constitutional Court of June 27, 2011, notified on July 20, 2011. For its part, the State replies that it unduly exhausted domestic remedies, since it filed a request for "clarification, nullity, and approval of the resolution" in order to allow additional time limits to improperly appeal to the IACHR. It adds, in addition, that there is a lack of exhaustion of the domestic jurisdiction, since the alleged victim did not use the ordinary labor procedure to question his dismissal and neither the civil procedure to request compensation for the alleged psychological damage.

13. In this regard, the Commission has established that the requisite of having exhausted domestic remedies does not mean that the alleged victims have necessarily the obligation to exhaust all domestic remedies. Consequentially, if the alleged victim approached the matter through any of the appropriate alternatives, as in the case of this petition, and the State had the chance to solve the situation, the purpose of the norm is fulfilled⁵. In such sense, observes that the judicial instances that knew of the claim, although disregarded some core points by the alleged victim affirmed their competence to analyze the raised controversy and rejected the demand for reasons of material law. Likewise, the IACHR considers that the main claim of the alleged victim is related to the lack of protection against discriminatory dismissal due to his status as a union leader, so it is not necessary to exhaust an additional civil process for the aforementioned controversy be analyzed at the international level.

14. On this base, the Commission concludes that the alleged victim exhausted the proper remedies to uphold his right to protection against discriminatory dismissal by filing the constitutional writ of amparo, which was finally resolved by the Constitutional Court, filed on July 20, 2011, which is why the petition complies with requirements set forth in Article 46.1.a of the Convention. Also, the petition was filed on July 18th, 2016, therefore, within the span of six months for submittal as stated in Article 46.1.b of the Convention.

VII. COLORABLE CLAIM

15. After examining the factual and legal elements presented by the parties, the Commission considers that the allegations of the petitioner, regarding the lack of protection against the dismissal of the alleged victim for his condition as union leader, are not manifestly unfounded and require a substantive study, since the alleged facts, if corroborated as true, could characterize violations of Articles 16 (freedom of association), 24 (right to equal protection), 25 (judicial protection) and 26 (progressive development) of the American Convention, in relation to its Article 1.1. (obligation to respect rights); Article 8.a) of the Protocol of San Salvador to the detriment of Mr. Humberto Tempesta Herrada. The IACHR recalls that it is

⁵ IACHR, Report No. 70/04, Petition 667/01, Admissibility, Jesús Manuel Naranjo Cárdenas and others, retirees from the Venezuelan Aviation Company VIASA. Venezuela, October 15th 2004, par. 52.

competent to declare a petition admissible and rule on its basis when the contested judgment may, materially, affect any right guaranteed by the American Convention.⁶

16. The IACHR recalls that pursuant to Article 19.6 of the Protocol of San Salvador, it only has competence to analyze, through its system of petitions and cases, violations of Articles 8 and 13 of said instrument. Consequently, in this petition, it cannot examine the alleged violations of Articles 6 and 7 of the aforementioned treaty.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 16, 24, 25 and 26 of the American Convention, in accordance with Articles 1.1; and Article 8.a) of the Protocol of San Salvador; and

2. To notify the parties of the decision; to continue with the analysis on the merits and to publish this decision and to include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 3rd day of the month of June, 2021. (Signed:) Antonia Urrejola, President; Flávia Piovesan, Second Vice-President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Stuardo Ralón Orellana, Commissioners.

⁶ IACHR, Report N. 72/11, Case 1164-05. Admissibility. William Gómez Vargas. Costa Rica. March 31, 2011, par. 52.