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REPORT No. 141/18
PETITION 350-08
REPORT ON INADMISSIBILITY

MAXIMILIANO TORRES QUISPE
PERU

Approved electronically by the Commission on November 27, 2018.

Cite as: IACHR, Report No. 141/18. Petition 350-08. Inadmissibility. Maximiliano Torres Quispe. Peru. November 27, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Andrés Acero Cárdenas and Maximiliano Torres Quispe
Alleged victim:	Maximiliano Torres Quispe
Respondent State:	Peru ¹
Rights invoked:	Articles 8 (judicial guarantees), 9 (principle of legality and retroactivity), 24 (equality before the law) and 26 (economic, social and cultural rights) of the American Convention on Human Rights ² in relation to its Article 1.1 (obligation of respect the rights)

II. PROCEDURE BEFORE THE IACHR³

Filing of the petition:	March 24, 2008
Additional information received at the stage of initial review:	October 15, 2012
Notification of the petition to the State:	January 22, 2015
State's first response:	April 23, 2015
Additional observations from the petitioner:	February 12, 2016
Additional observations from the State:	June 3, 2016

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument made 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 <i>res judicata</i>:	No
Rights declared admissible	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, September 12, 2007
Timeliness of the petition:	Yes, within the terms of Section VI

V. ALLEGED FACTS

1. The petitioners states that Maximiliano Torres Quispe (hereinafter "Mr. Torres" or "the alleged victim"), was arbitrarily dismissed from his job as a gardener in the Barranco Municipality of Lima on September 18, 2001. They indicate that he had joined the Municipality in 1974 and that in the year 2000 he was elected Under-Secretary General of the Unified Workers Union of the Municipality of Barranco.

¹ In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, of Peruvian nationality, did not participate in either the discussion or debate in the present case.

² Hereinafter the "Convention" or the "American Convention".

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

2. They allege that, at the beginning of 2001, the union assembly agreed to claim three months wages owed from the Municipality and better working conditions. During several days of protests between February and June 2001 various municipal officials were attacked, including the Municipal Director. The accompanying documentation shows that, on June 28, 2001, the Commission on Administrative Disciplinary Proceedings (hereinafter "the Commission") suggested opening a disciplinary hearing against the alleged victim and another six municipal employees, in accordance with a Resolution of the Mayor's Office of August 3, 2001. The petitioners maintain that although the Commission's records include a decision that the Municipal Director should abstain from participating therein, in practice he was involved in the drafting of one of the seven reports examined by the said Commission in its recommendation to initiate an investigation against him.

3. The petitioners submit that, after conducting the administrative investigation, the Commission accused Mr. Torres of participating in violent conduct, recommend his dismissal. From the documents in the file, it appears that he was accused of having participated in various acts, such as the violent incursion inside the Municipality, the destruction of municipal material, the dumping of garbage in the Central Park to the detriment of the community, as well as participate personally and directly in the physical aggression, threats and insults of municipal servants, noting also the existence of an extensive list of disciplinary offenses not sanctioned. Following the Commission recommendation, on September 18, 2001, the Mayor's Office issued a resolution removing him from his post. The alleged victim appealed against this resolution to the District Council of Barranco, alleging a failure to observe the rules of administrative procedure, as well as a violation of the principles of equality before the law, legality, due process, and of his right to work. Specifically, he argued that he had been punished without specific criminal record; that the decision was based on reports issued by officials involved such as the Municipal Director; that there had been bias in gathering and evaluating the evidence; and that of the seven defendants, only he and the Secretary General of the union had been punished. He states that on January 10, 2002, the District Council rejected the appeal, indicating that Mr. Torres' participation in the events leading to his dismissal was corroborated by more than a dozen memoranda and reports issued by various units of the Municipality, the Police Station and a Notary, and considered that the administrative route had been exhausted.

4. The petitioners indicate that, on September 23, 2003, the alleged victim filed a complaint challenging the administrative decisions with the Third Labor Chamber of the Lima Superior Court of Justice, alleging that his dismissal had been carried out in retaliation for the claims made by the union, and in violations of his freedom of association and equality due to a biased resolution. On December 12, 2003 his appeal was successful on the ground of a due process violation since the Municipal Director had issued two memoranda and a report that the Commission considered in its determination of the events leading to the recommendation to dismiss Mr. Torres. Therefore, the Chamber annulled the administrative resolution and ordered the initiation of new proceedings. However, the Municipality appealed this decision to the Second Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic. On November 8, 2005, this Court declared the claim unfounded, contrary to the recommendations of the Office of the Supreme Prosecutor in Contentious Administrative matters. This Chamber established that the Municipal Director had not participated in the investigations of the disciplinary process, nor in the assessment of evidence, nor in the decision recommending the sanctioning of Mr. Torres and that therefore the Resolution of the Mayor's Office was issued with impartiality and in accordance with due process.

5. From the documents in the file, it appears that the alleged victim filed a writ of *amparo* with the First Civil Chamber of the Lima Superior Court of Justice, alleging a violation of the right to due process, effective judicial protection, and a violation of his right to freedom of association and equality. He reiterated his allegations regarding the production and evaluation of evidence by a biased organ. On June 26, 2006, the writ was declared inadmissible on the grounds that it sought the review of an unfavorable decision by the Supreme Court, which was impossible under the *amparo* proceedings. The alleged victim filed an appeal against this decision. It was declared inadmissible by the Supreme Court of Justice on December 6, 2006, based on similar arguments. Finally, it is clear from the file that on January 22, 2007, the alleged victim filed a constitutional complaint with the Constitutional Court, which was declared inadmissible on March 14, 2007, stating that the review of the resolution by the contentious administrative proceedings was unconnected with the right to due process. He was notified of this decision on September 12, 2007.

6. The State, for its part, argues that the petition was filed extemporaneously, because the petitioners did not justify the application of the exceptions to the six-month time limit provided for in the Convention. It also notes that the petition does not contain facts that characterize violations of the rights of the alleged victim recognized in the Convention. It states that the dismissal was resolved by the Mayor and that no public official participated as in the process as a "judge and party" and that the decision was based on multiple sources that accredited the participation of the alleged victim in acts constituting a serious offense punishable by dismissal. Additionally, the State states that the alleged victim resorted to three internal remedies to demand the protection of his fundamental rights, namely, disciplinary administrative proceedings, administrative litigation and writ of *amparo*, and that due process guarantees were observed in all of them. It argues that the petitioner's claim would lead the IACHR to act as a fourth instance, thus exceeding its competence, and that therefore the petition must be declared inadmissible.

7. With respect to the alleged violation of the rights to freedom of association, equality and the principle of legality, the State contends that these were not proven, and that domestic remedies were not exhausted. In its view, the alleged breach of these rights was not invoked in the writ of *amparo*. In turn, regarding the invocation of Article 26 of the Convention, it maintains that it is necessary to prove that the State did not comply with the commitment to progressivity through legislative means or other means with respect to rights in favor of the population in general, situation that in this case has not been alleged or proved.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

8. The petitioner states that, once the administrative proceeding was completed, the alleged victim went to court through a contentious administrative action that ended with a ruling by the Supreme Court declaring his claim unfounded. Subsequently, the alleged victim filed a writ of *amparo* that was declared inadmissible. They add that the alleged victim filed a constitutional complaint before the Constitutional Court that was resolved on March 14, 2007 and the ruling was notified on September 12, 2007. The State alleges that the petition was filed in an untimely manner. In connection with the principle of legality and the right to work, the State alleges the lack of exhaustion of domestic remedies due to not having been invoked in the writ of *amparo*.

9. In relation to the domestic judicial remedies pursued by the alleged victim, the Commission notes that, with respect to the alleged grievances reported related to rights contained in articles 8 (judicial guarantees), 9 (principle of legality and retroactivity), 24 (equality before the law), and 26 (economic, social and cultural rights) of the Convention, Mr. Torres exhausted all available domestic courts, and therefore, the petition meets the requirement established in Article 46.1.a of Convention. In addition, the IACHR notes that various judicial instances of the State had the opportunity to hear the arguments of the alleged victim both in terms of his claim for recognition of the violation of his rights to equality, legality and freedom of association, as well as the rest of the alleged violations of due process

10. In response to the information available in the case file, the IACHR considers that the domestic remedies were definitively exhausted by the decision of the Constitutional Court of March 14, 2007, notified to the alleged victim on September 12, 2007. As for the time limit for the submission of the petition, the Commission observes that the document is dated March 10, 2008; that it was sent by post; and that it was received by the IACHR on March 24, 2008. In view of the number of days taken by the postal service to deliver it, the IACHR considers that the petition was presented in a timely manner.⁴

VII. ANALYSIS OF COLORABLE CLAIM

11. The petitioner alleges that Mr. Torres was arbitrarily dismissed from his job in retaliation for the days of protests convened by the union to which he belonged, in a process in which the Commission that carried out the investigation, assessed the evidence submitted by its own members, thus acting as both the judge and a party. The State argues that the dismissal was decided on the basis of the information collected

⁴ IACHR, Report No. 69/08. Admissibility. Guillermo Patricio Lynn. Mexico. Argentina, October 16, 2008, paras. 44-6.

from multiple sources that proved the participation of the alleged victim in the perpetration of serious offenses punishable by dismissal, for which reason the alleged facts do not characterize a violation of the rights recognized in the American Convention.

12. From the documentation provided by the parties, the IACHR observes that the dismissal decision issued by the Mayor's Office was based on at least 16 memoranda and reports from the Municipality, one of which is a testimony on the attacks suffered by the Municipal Director. Likewise, from the available documentation it appears that the Second Chamber of the Supreme Court of Justice established that "it has been demonstrated that the Municipal Director has not participated in the investigations that have been the subject of the administrative process." It also concluded that the offenses committed by Mr. Torres were substantiated and proved, and that the dismissal decision had been issued impartially and in accordance with due process. Therefore, from the information available in the file before the IACHR, there are no indications that could establish *prima facie* the possible violation of the principles of legality and impartiality.

13. Regarding the allegation that the dismissal decision was issued in retaliation to claims made by the union to which Mr. Torres belonged, the Commission observes that the decision of the Mayor's Office of September 18, 2001 ordering the dismissal of Mr. Torres established his participation in acts constituting serious offenses punishable by dismissal, outside the realm of trade union activities.⁵ In this regard it established, *inter alia*, that the alleged victim had engaged in various acts of violence such as violently forcing his way into the premises of the Municipality, the destruction of municipal property and assets, and the insults, threats and physical attacks against officials, municipal servants and authorities. In addition, the IACHR notes that these occurrence of these events was not expressly contested by Mr. Torres in his arguments.

14. In view of the information provided by the parties and the nature of the present case, it is evident that the petitioner seeks that the IACHR act as a fourth instance thus substituting the domestic courts in the assessment of the evidence in connection with issues already examined and resolved on the merits by the competent judicial authorities. In this regard, the IACHR recalls that it is not entitled to review the judicial decisions issued by the national courts acting within their competence and applying due process guarantees, unless it finds that there has been a violation of any of the rights protected in the American Convention, which is not the case in the present claim. Therefore, based on the aforementioned considerations, the IACHR concludes that the petition fails to satisfy the requirements established in Article 47.b of the American Convention, given that *prima facie* no facts that could characterize violations of the rights invoked by the petitioner have been alleged.⁶

VIII. DECISION

1. To find the instant petition inadmissible; and
2. To notify the parties of this decision and to publish this decision and 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 27th day of the month of November, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁵ OIT, Libertad Sindical: Recopilación de decisiones y principios del Comité de Libertad Sindical del Consejo de Administración de la OIT, Ginebra. Quinta edición (revisada), 2006, para. 804.

⁶ IACHR, Report No. 14/18. Admissibility. Thelmo Reyes Palacio. Mexico. February 24, 2018, para. 12.