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REPORT No. 57/20
PETITION 199-09
ADMISSIBILITY REPORT

JOSÉ DEL BUSTO MEDINA AND OTHERS
PERU

Approved electronically by the Commission on February 26, 2020.

Cite as: IACHR. Report No. 57/20. Petition 199-09. Admissibility. José del Busto Medina and others. Peru. February 26, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	José Felix Palomino Manchego ¹ and Carlos Blancas Bustamante ²
Alleged victim	José del Busto Medina y otros ³
Respondent state	Peru ⁴
Rights invoked	Articles 8 (judicial guarantees), 11 (honour and dignity), 23 (political rights) y 25 (judicial protection) of the American Convention on Human Rights ⁵ in relation to article 1.1 (obligation to respect rights) and articles 6 and 7 of the additional protocol of the American Convention on Economic, Social and Cultural Rights “San Salvador Protocol”. ⁶

II. PROCEEDINGS BEFORE THE IACHR⁷

Filing of the petition	January 16, 2009
Notification of the petition to the State:	November 29, 2016
State’s first response:	February 27, 2017
Additional observations of the petitioners	January 28, 2011; May 9 and December 20, 2013; July 11, 2014; August 31, 2016; September 30 and November 3, 2016; February 28, March 4, July 18 and 2, November 14, 2017; July 14 and September 27, 2018; and January 7, 2019.
Additional observations by the State	October 18, 2017 and March 20, 2019

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 8 (judicial guarantees), 11 (honour and dignity), 23 (political rights) y 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in relation to articles 1.1 (obligation to respect rights) and 2 (duty to adopt domestic measures).
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 Commission begins by taking note that in the present petition the alleged victims have been divided into two groups with separate legal representation. In this report “the petitioning party” will be used to refer to both groups together and the pertinent indication will be made in cases of allegations that come from only one of the groups.

2. The petitioners denounce alleged violations to the human rights of 17 persons who it alleges were forced to quit the positions they occupied in a State bank and did not have access to an effective judicial protection against this act; being this evidenced by the fact that even during the time in which a

¹ Leading counsel representing the first group of victims (see Annex)

² Leading counsel representing the second group of victims (see Annex)

³ The petition refers to a group of alleged victims that amounts to seventeen alleged victims whom are detailed in the annex.

⁴ Based on article 17.2.a of the Rules of procedure of the Commission, Commissioner Julissa Mantilla Falcón, a Peruvian national, did not participate in the debate or decision of this matter.

⁵ Hereinafter “American Convention” or “Convention”.

⁶ Hereinafter “The San Salvador Protocol” or “the Protocol”.

⁷ The observations submitted by each party were duly transmitted to the opposing party.

constitutional protection decision ordering their reinstatement was in force such decision was not effectively executed.

3. The petitioning party reports that on March 12, 1992, workers of the Banco Central de Reserva (hereinafter "the BCR") were informed that a voluntary resignation program with economic incentives had been approved, which extended until May 11, 1992.⁸ He alleges that on May 26, 1992, the General Manager of the BCR aggressively addressed letters to 72 workers who had not accepted the voluntary resignation, informing them that a formal process of staff reduction had begun and that the "collective termination" of all staff members was going to be requested, as well as the "opportunity" to be included in the voluntary resignation program with severance pay which had been reopened for three non-extendable days. He argues that, under these circumstances, the alleged victims⁹ were forced to resign under threat of being included in the list of dismissals by collective termination.¹⁰

4. It maintains that what happened to the alleged victims in 1992 was a "fraudulent dismissal".¹¹ He indicates that in 2002 the association of former BCR workers filed a habeas data action to request information on the voluntary resignation program, through which they were able to verify¹² the non-existence of a board agreement that approved the alleged reopening of the voluntary resignations program in May 1992,¹³ as well as the existence of a report where the external adviser of the BCR indicated that the workers should be pressured to resign. He notes that by obtaining this information, 34 former BCR workers, including the alleged victims, filed an amparo - action for protection of constitutional rights - on October 3, 2003, denouncing the fraudulent simulation committed against the former workers and requesting the return of the workers to their jobs. In opposition to this action, the BCR filed an exception claiming the action had expired.

5. It indicates that the court of first instance rejected the expiration exception concluding that the deadline for the presentation of the action began to run after the information regarding the alleged fraud was obtained through the habeas data, but the court declared the action without sufficient grounds. Then, on December 15, 2006, the Fourth Civil Chamber of Lima issued a second instance decision declaring the claim founded and ordering the reinstatement of the plaintiffs to their jobs. He alleges that this decision was hostilely received by the political forces of the government, resulting in President Alán García publicly pronouncing against it¹⁴ and that the judges who issued the sentence in their favor were fired¹⁵ (although later reinstated). They emphasize that, without ever having complied with the sentence, the BCR filed an amparo against the sentence that ruled in their favor, which was admitted by the Eighth Civil Chamber of Lima on February 14, 2007. Within this process a precautionary measure was issued on June 5, 2007, suspending the execution of the sentence which ordered the reinstatements.

6. The representatives of the first group point out that, after the interposition of multiple remedies, they managed to lift the aforementioned precautionary measure on June 15, 2011, so these alleged victims were reinstated to the BCR. They argue that, despite this reinstatement, the BCR did not fully comply with the sentence, isolating the reinstated workers in a discriminatory manner in an office of 20 m², located outside the bank's facilities, with a single bathroom and a single computer. In addition, they note that reintegrated workers were not granted specific responsibilities according to their professional levels; they were all paid the same minimum wage instead of the one corresponding to them by scale; and they were excluded from benefits such as bonuses granted to other bank workers. The representatives of

⁸ He affirms that the programme was part of a more general policy of "reorganization" of all public agencies driven by the government that was in place at that time.

⁹ With the exception of the alleged victim José del Busto Medina who alleges that he never signed the dismissal but was prevented from entering his place of work and later on was communicated through a notary letter that "his money was deposited in the National Bank". He contends that in the case of this alleged victim the labour relationship was never dissolved as he never resigned or cashed the mentioned payment.

¹⁰ He contends that on June 5, 1992 the few workers that hadn't accepted the voluntary resignation were dismissed.

¹¹ He indicates that the existence of defect of contractual consent in the resignations of the former BCR workers was proven by the report of the Ombudsman of Peru on August 28, 2003.

¹² After the BCR was forced to provide the information under threat of criminal action on July 30, 2003.

¹³ He considers that this evinces that the general CEO acted in a unilateral and arbitrary manner to get the "resignation" of those workers that he did not want to remain working for the bank.

¹⁴ Among other statements, they indicate that the president expressed "They left with high resignation packages and now they come back with amparos" and "why would society have to pay in such a way? That is not justice. That is taking advantage of legal loopholes".

¹⁵ They contend that after the statements the President made, the chief of control of the Magistrate Council commenced an investigation against the judges that favoured them with a suspicious expediency and the President publicly affirmed agreeing with the destitution.

the second group, on the other hand, indicate that their representees were never re-incorporated into the BCR.

7. The petitioning party reports that on November 22, 2011, the Third Civil Chamber of Lima declared the “amparo against the amparo” filed by the BCR founded and annulled the sentence previously issued in their favor, arguing that it lacked due motivation.¹⁶ This decision was then confirmed in second instance by the Permanent Constitutional and Social Law Chamber on October 30, 2012.¹⁷ For this reason, the Fourth Civil Chamber of Lima issued a new judgment of second instance, in which the exception of the expiration of the action filed by the BCR in 2003 was declared founded. The representatives of the first group allege that, despite the fact that this new judgment was not notified until September 3, 2013, on June 18, 2013,¹⁸ the BCR dismissed all workers who had been reinstated.¹⁹ The petitioner indicates that a constitutional remedy was filed against the new judgment of the Fourth Chamber. However, on July 20, 2016, the Constitutional Court confirmed the expiration exception because it considered that the deadline should be counted from 1992 when the alleged damage occurred.²⁰

8. The representatives of the second group point out that in the specific case of Mr. José Augusto del Busto Medina he was included in 2017 in the National Registry of Irregularly Ceased Workers (RNTCI), which implies an acknowledgment by the State that his termination of employment was illegitimately carried out.²¹ He alleges that based on this recognition he has unsuccessfully requested his reinstatement to the BCR based on the benefit that Law No. 27803 grants him. For their part, the representative of the first group alleges that the alleged victims were initially included in the RNTCI but then removed from the list as a result of having filed their habeas data and amparo actions in 2002 and 2003.

9. The petitioning party maintains that the State is responsible for the violation of the human rights of the alleged victims, noting that their right to a simple and effective remedy was not respected, although their amparo action resulted in a favorable decision with a degree of *res judicata*, it was not complied with, its execution being suspended for years based on subsequent judicial processes, in which mediated the political intervention of the executive branch.²² It considers that the respect for the right to work requires that workers be reintegrated while deciding any challenge to the sentence ordering their reinstatement.²³ Likewise, he considers that the expiration exception should not be granted in favor of the BCR, since this entity fraudulently concealed information from them, preventing them from presenting their amparo action at an earlier date. The representative of the first group, in addition, denounces that the workers who were temporarily reintegrated were treated in a discriminatory manner and that the lack of compliance with the sentence affected the personal integrity of several of the workers, preventing them from accessing the medical treatments they required, endangering their lives. For his part, the representative of the second group indicates that the State has already acknowledged that the dismissals were irregular by including José del Busto Medina in the RNTCI, but has not repaired the damage caused.

10. In its initial brief, the petitioning party stated that the requirement of exhaustion of domestic remedies should not apply to his petition because there was, no due process for their case in Peru due to the obvious interference of the maximum representative of the executive power. Subsequently, the representative of the first group has argued that the exception contained in article 46.2 (c) of the Convention should be applied to his petition because there was an excessive delay in the judicial proceedings in which they participated, highlighting that, at the time of submitting his petition, his appeal

¹⁶ Because the second instance tribunal had failed to do an individual evaluation of the specific case of each worker.

¹⁷ The representative of the second group indicates that they presented an amparo against said resolution invoking that the binding precedent issued by the Constitutional Court on November 25, 2009, that established that amparo actions against decision that order reinstatement to the workplace require the reinstatement to have been executed before they can be admitted, was not being complied with. However, this amparo action was declared without merits by the Third Civil Chamber on January 10, 2014 in a decision that was later on confirmed by the Constitutional Tribunal on March 3, 2016.

¹⁸ They contend that beforehand on January 2013, the BCR had attempted to dismissed them but were reincorporated by judicial order.

¹⁹ In the case of the alleged victim Roberto Joaquín Barreto Jimeno they contend that he was notified of his dismissal on his home despite the BCR knowing he was recovering from a surgery after suffering a heart attack in the premises of the BCR.

²⁰ The tribunal considered that not having the information that was obtained through habeas data in 2003 did not prevent the claimants to present the amparo in due time.

²¹ It considers that the effects of such acknowledgement can be extended to Carlos Alfredo Guillén Mendoza and Norma Capuñay González as the dismissals were conducted under the same circumstances as the ones surrounding Mr. Del Busto.

²² He also contends in a broad manner that the excessive delay in the resolution of the different judicial actions in which they were involved.

²³ They highlight that this was recognized domestically in a binding precedent issued by the Constitutional Court on November 25, 2009.

against the precautionary measure that suspended the execution of the decision in his favor had not been resolved. Similarly, the representative of the second group has argued that the violation of judicial protection was carried out by not complying with the amparo decision in favour of the alleged victims, with respect to which the alleged victims exhausted all remedies, being the failure to comply with the ruling and the filing of actions against it circumstances that only aggravated the violation already consummated.

11. The State, on the other hand, emphasizes that the resolution that the petitioning party claims as breached did not acquire the degree of *res judicata* because its execution was suspended by means of a precautionary measure legally issued in an amparo process against judicial resolution; this is a process permitted by the Peruvian constitutional legal system and within which the alleged victims had all the opportunities to exercise their defense and challenge the decisions that did not favour them. It also points out that there are contradictions in the facts alleged by the representatives of the different groups of alleged victims.

12. It affirms that the alleged facts do not amount to human rights violations because the decision whose compliance the petitioners demand did not have the degree of *res judicata*, as it was being contested and suspended through mechanisms provided by law.²⁴ It highlights that the aforementioned judgment was finally declared void by domestic courts following due process. It considers that the non-execution of a sentence that was proved void cannot be considered a violation of the Convention. It claims that the petitioning party improperly pretends that the Commission acts as a fourth instance to review domestic judgments with which it disagrees. It also notes that the Commission lacks *ratione materiae* competence to refer to violations regarding the right to work.

13. It also points out that at the time of filing the petition, the domestic remedies were not exhausted, this being evinced by the fact that there are judicial decisions recorded in the file dated after the filing of the petition. It also points out that the petitioners have filed and have been provided with resolutions in governments subsequent to that of President García, distorting the argument regarding an alleged lack of due process due to political intervention.

VI. EXHAUSTION OF LOCAL REMEDIES AND TIMELINESS OF THE PETITION

14. The Commission observes that the petitioning party has alleged that it must be exempted from the exhaustion of domestic remedies requirement because it has not had access to due process and also that the representative of the first group of alleged victims has alleged that there has been an unjustified delay in the resolution of their judicial actions which warrants the application of the exception to the exhaustion requirement provided for by article 46.2(c) of the American Convention. Likewise, it takes note that the State has highlighted that domestic remedies had not been exhausted at the time the petition was filed.

15. The IACHR reiterates its constant position according to which the situation that must be taken into account to establish whether the remedies of the domestic jurisdiction have been exhausted is the one existing when deciding on admissibility, since the moment of filing the complaint and that of the decision on admissibility are different. For this reason, it is not necessary, in this case, to decide on whether domestic remedies were exhausted at the time the petition was filed. The Committee notes that the State has not indicated that, at the time of deciding this admissibility, there are suitable resources that are not exhausted so that the claims of the petitioner are addressed at the domestic level. For this reason, it concludes that the present petition complies with the requirements of exhaustion of domestic remedies and presentation within the term established in Article 46.1 (a) and (b) of the American Convention.

VII. COLORABLE CLAIM²⁵

16. The Commission observes that the instant petition includes allegations regarding the alleged victims having been favoured by a judicial decision which ordered their reinstatement in 2006, and that this decision was later challenged resulting in the legal situation of the workers not being definitively decided until 2016, almost 10 years later; that the execution of the sentence was suspended for more than four years even though the rights of workers demanded for them to be reinstated until their legal situation was fully decided; the decision not being complied with during the times it was in force but not suspended;

²⁴ It contends that the time between the issuing of the decision and the issuing of the precautionary measure that suspended it was short and hence the lack of execution of the decision during this period does not imply a violation to the Convention.

²⁵ The Commission takes note that the State has objected the existence of possible contradictions in the allegations of the representatives of each group of victims. Notwithstanding, for the admissibility evaluation, the analysis of the Commission will be limited to determining if the allegations are manifestly unfounded and if they could, if verified, amount to violations of the Convention. The analysis of the truthfulness of the different allegations will be done in the merits stage.

the alleged victims having been denigrated through public declarations of high State authorities; that the first groups of alleged victims receive a discriminatory treatment while they were reinstated to the BCR; and that Mr. José del Busto Medina has not received compensation even though there is a formal acknowledgement that his termination was irregular.

17. Attending to these considerations and having examined the elements of law and fact brought forward by the parties the Commission considers that the allegations of the petitioning party are not manifestly groundless and require a study on the merits as the alleged facts, if proven, could amount to violations of articles 8 (judicial guarantees), 11 (privacy), 23 (political rights), 25 (judicial protection), and 26 (economic, social and cultural rights) of the American Convention in relation to its articles 1.1 (obligation to respect rights), 2 (duty to adopt provisions of domestic law) and 26 (economic, social and cultural rights) to the detriment of all of the alleged victims. Additionally, the Commission considers that the alleged facts could amount to violations of article 24 (equal protection) of the American convention in detriment of the alleged victims belonging to the first group.

18. Regarding the allegations of violations of articles 6 and 7 of the Protocol of San Salvador, the IACHR notes that the competence provided in the terms of article 19.6 of said treaty to establish violations in the context of an individual case is limited to articles 8 and 13. Regarding the other articles, in accordance with Article 29 of the American Convention, the Commission may take them into account to interpret and apply the American Convention and other applicable instruments.

19. Finally, with respect to the State's fourth instance allegation, the Commission observes that in admitting this petition it does not intend to substitute the competence of domestic judicial authorities. But it will analyze at the merits stage of the present petition, if the domestic judicial processes complied with the guarantees of due process and judicial protection, and offered the due guarantees of access to justice for the alleged victims under the terms of the American Convention.

VIII. DECISION

20. To find the instant petition admissible in relation to Articles 8, 11, 23, 24, 25 and 26 of the American Convention, in accordance with articles 1.1 and 2.

21. 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 26th day of the month of February, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Edgar Stuardo Ralón Orellana, Commissioners.

**Annex
(Alleged victims)²⁶**

First Group

1. Roberto Joaquín Barreto Jimeno
2. Zoila María Jannett Figueroa Ramírez
3. Edwin Tulio Cruces Arana
4. Luis Enrique del Busto Durand
5. Gaby María Osorio Osorio
6. Martha Patricia Jiménez Delgado
7. Salcedo Ayres Gloria Concepción
8. Benjamina Lucía Herrera Rodríguez
9. Ana María Ruales Patrón
10. Luis Eduardo Larrañaga Espejo
11. Julio César Canales Giribaldi
12. Carlos Fortunato Morales Vélez
13. Viviana Teresa Velezmoro Bavestrello
14. Pedro Humberto Chávez Rea

Second group

1. José Augusto del Busto Medina
2. Carlos Alfredo Guillén Mendoza
3. Norma Capuñay González

²⁶ The Commission takes note that the State has objected the incorporation by the petitioners during the admissibility proceedings, of alleged victims that were not included in the initial filling of the petition. However, the Commission considers that in the admissibility stage the petitioners can provide additional information regarding other alleged victims if it is related to the original petition.