Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 90/03; Petition 0581/99
Session:	Hundred and Eighteenth Regular Session (7 – 24 October 2003)
Title/Style of Cause:	Gustavo Trujillo Gonzales v. Peru
Doc. Type:	Decision
Decided by:	President: Jose Zalaquett; First Vice-President: Clare K. Roberts; Commissioners: Robert K. Goldman, Julio Prado Vallejo. In accordance with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Susana Villaran, a Peruvian national, did not participate in the discussions or in the decision on this case.
Dated:	22 October 2003
Citation:	Trujillo Gonzales v. Peru, Petition 0581/99, Inter-Am. C.H.R., Report No. 90/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)

I. SUMMARY

1. By a petition submitted to the Inter-American Commission on Human Rights ("IACHR" or "the Commission") on December 30, 1999, Gustavo Trujillo Gonzáles (hereinafter "the petitioner") reported that the Republic of Peru (hereinafter "Peru", "the State" or "the Peruvian State") violated, to his detriment, the right to judicial guarantees, to equality before the law and to judicial protection, enshrined in Articles 8, 24, and 25, respectively, of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), consonant with Article 1(1) of that international instrument. The reported violations involve alleged irregularities in the implementation of Decree Law 25.636 of July 23, 1992, which authorized the Peruvian Social Security Institute (hereinafter "the Institute" or "the IPSS") to subject its employees to an examination and use this as a criterion for termination of employment. The petitioner affirms that, despite the fact that he did not receive adequate notification, he was dismissed on November 30, 1992 for not having taken the said examination.

2. Regarding the admissibility of the petition, the petitioner submits to the Commission that the pertinent remedies within the domestic jurisdiction had been exhausted and that the petition had been filed within the regulatory time frame, respecting the Commission's deadlines.

3. The State in turn claims that there has been no violation of the rights established in the American Convention and that the petitioner did not exhaust all available domestic remedies.

4. In this report, the Commission analyzes the information available in light of the American Convention and concludes that the petitioner did not exhaust the domestic remedies

available under Article 46(1)(a). It therefore determines that the petition is inadmissible under Article 47(a) of the American Convention, sends the report to the parties, and arranges for its publication in the Commission's Annual Report.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The Commission received the report on December 30, 1999 and assigned it the number 0581/1999, forwarding the pertinent parts to the Peruvian State on July 30, 2001 so that it could submit its comments within two months. By communications dated September 28, 2001 and October 12, 2001, the State submitted its written response to the complaint. On October 31, 2001, the Commission transmitted the pertinent parts of that response to the petitioner, who in turn made comments on the State's answer on August 27, 2002. The Commission also received communications with additional information from the petitioner on July 5, 2002, September 9. 2002, and July 28, 2003.

III. POSITIONS OF THE PARTIES REGARDING ADMISSIBILITY

A. The Petitioner

6. The petitioner related that Decree Law 25.636 of July 23, 1992 authorized the Peruvian Social Security Institute to implement a staff downsizing process by applying selection tests and a program of incentives for voluntary separation. Said Decree Law was regulated by Executive Board Resolution 1761-DE-IPSS-92 of October 30, 1922 through Directive 039-DE-IPSS-92, which provided that employees would be notified personally of the holding of the examination.

7. The petitioner points out that even though he was not notified, he was terminated by Central Management Resolution 750-GCDP-ISS-92 of November 30, 1992 for not having taken the selection examination. According to him, "After I was fired and as I was a union leader, I was not allowed to enter any of the office buildings, nor did I receive any documentation, so I had to resort to the various judicial channels." [FN2]

[FN2] Communication from the petitioner dated July 28, 2003.

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8. The petitioner and other parties entered an amparo action, which was dismissed by judgment of October 3, 1995, handed down by the 26th Court Specializing in Civil Matters of Lima, as it was adjudged that Decree Law 25.636 did not violate the rights of IPSS workers and that the complainants decided not to sit the examination without giving any reasons. The ruling of the Fifth Civil Division of the High Court of Justice of Lima on June 18, 1996 upheld the judgment on appeal. On October 15, 1996, the Constitutional Rights Division of the Supreme Court of the Republic declared null and void the judgment of June 18, 1996 and dismissed the amparo action because the petitioners had not exhausted prior remedies, as required under the Habeas Corpus and Amparo Law.[FN3]

[FN3] Article 27 of Law 23.506.
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9. On December 6, 1996, the petitioner filed an appeal for reconsideration with the Peruvian Social Security Institute against Central Management Resolution 750-GCDP-ISS-92, ordering his dismissal. He stated that the IPSS had dismissed him despite not having notified him to take the selection and rating test, in violation of legal provisions. By Resolution 443-GCDP-IPSS-96, the Institute dismissed the petition because the protested resolution was adopted on November 30, 1992 and the appeal for reconsideration was filed on December 6, 1996, thereby exceeding the time limit of 15 days for appeal. On January 16, 1997, the petitioner filed an appeal, but the Institute failed to respond.

10. The petitioner then lodged a new complaint with the courts claiming that Central Management Resolution 443-GGDP-IPSS-96 of the Peruvian Social Security Institute dismissing his administrative appeal was invalid. In the matter, the Institute objected on grounds that the statutory limits had expired, which objection was affirmed in the judgment of the First Labor Division of the High Court of Lima on March 30, 1998, upon considering that the petitioner had accepted Resolution 750-GCDP-IPSS-92 by not protesting it and consequently rendered "ineffective the appeal for reconsideration that the complainant filed on December 6, 1996, that is, four years after the statutory time limits had expired. Thus, a proceeding may not be reopened merely by filing an appeal contesting a decision that has become final with the passage of time ".[FN4] Upon appeal by the petitioner, this judgment was upheld by the Constitutional and Social Rights Division of the Supreme Court of the Republic in a judgment of July 20, 1999.

[FN4] Judgment handed down by the First Labor Division of the High Court of Lima on March 30, 1998.
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11. On November 17, 1994, through General Management Resolution 1058-GC-ISSP-94, the Peruvian Social Security Institute held new selection and rating examinations, including the petitioner in the list of persons eligible to sit. However, on November 28, 1994, a new Institute resolution referring to the new examinations amended the previous resolution, omitting to include the petitioner’s name.[FN5] That resolution was not appealed by the petitioner.

[FN5] General Management Resolution 1089-GC-IPSS-94
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12. Finally, the petitioner adduces that the right to equality was violated because the IPSS, through resolutions 091-PE-IPSS-92 of October 28, 1992 and 094-PE-IPSS-92 of November 9, 1992, waived the examination requirement for persons with disabilities, widowed workers, and mothers acting as their families’ sole breadwinners.

13. The petitioner reported that the judiciary had dismissed his amparo action while admitting other actions "identical to his own."[FN6] According to the petitioner, the fact that the judiciary handed down different judgments in "identical" cases is also a violation of the right to equality.

[FN6] Judgment of the Constitutional and Social Law Division on March 28, 1995 in an action for amparo brought by Cesar Antonio Yafae Velásquez et al.

B. The State

13. According to the State, the petitioner was liable under Decree Law 25.636 and failed to attend the evaluation without justification, hence the grounds for his dismissal. Regarding the reported irregularities in the application of the Decree Law by the Institute, it adduced that "the Resolution terminating the petitioner's employment was accepted given that the corresponding measures to contest it were not taken in a timely manner "[FN7].

[FN7] Report 79 JUS/CNDH-SE, attached to the State's communications dated September 28, 2001 and October 12, 2001.

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14. The State affirms that the petitioner filed a suit for amparo to contest the decision to dismiss him without having fulfilled the requirement to exhaust all prior remedies established in the Habeas Corpus and Amparo Law. On those grounds, it requested that the suit be dismissed.[FN8]

[FN8] Article 27 of Law nº 23.506, Habeas Corpus and Amparo Law.

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15. The State also stressed that the petitioner only made an attempt to exhaust prior remedies four years after his dismissal by filing an appeal against the dismissal decision with the Peruvian Social Security Institute on December 6, 1996. The Institute rejected the appeal on grounds that it was time-barred, given that it was not filed within the 15 days provided in the Law on Administrative Procedure.[FN9]

[FN9] Article 98 of Supreme Decree nº 02-94-JUS, Law on Administrative Procedure.

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16. After that decision, the petitioner reintroduced the matter before the courts alleging that he had exhausted all prior remedies, but "both the First Labor Division of the High Court of Justice of Lima and the Constitutional and Social Law Division of the Supreme Court of Justice

of the Republic have dismissed the appeal of the administrative resolution as the complainant had accepted his termination."[FN10]

[FN10] Report 79 JUS/CNDH-SE, attached to the State's communications of September 28, 2001 and October 12, 2001.

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17. The State finds that the petitioner "did not adequately exhaust the remedies within the domestic jurisdiction before resorting to supranational forums, thereby attempting to supersede mandatory due process." [FN11]

[FN11] Communication from the State dated September 28, 2001.

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18. Finally, the State emphasized that "currently, under Law 27.487 of May 25, 2001, the State has established a process for reviewing layoffs by taking steps to create a committee comprising former civil servants, which will provide a solution to claims such as those voiced by the petitioner." That law is part of the process of reviewing the possible arbitrary implementation of the policy of downsizing under the administration of Alberto Fujimori Fujimori.

IV. ANALYSIS

A. Competence ratione materiae, ratione personae, and ratione temporis of the Commission

19. In accordance with Article 44 of the American Convention, the petitioner has standing to preset a petition before the IACHR. The petition presents as an alleged victim an individual, in whose regard Peru has a duty to respect and guarantee the rights established in the American Convention. Concerning the State, the Commission points out that Peru has been a party to the American Convention since September 5, 1984, on which date it deposited its instrument of ratification. Therefore, the Commission has competence ratione personae to examine the petition.

20. The Commission has competence ratione loci to hear the petition as it alleges that violations of the rights protected under the American Convention occurred within the territory of a State party to the treaty. The IACHR also has competence ratione temporis, therefore the obligation to respect and guarantee the rights protected in the American Convention was already in effect for the State on the date on which the events alleged in the petition occurred. Finally, the Commission is competent ratione materiae, given that the petition reports violations of the human rights protected by the American Convention.

B. Requirements for admissibility of the petition

21. In the matter before the IACHR, compliance with the admissibility requirement provided in Article 46(1)(a) of the American Convention is disputed.

C. Exhaustion of domestic remedies

22. Article 46 of the American Convention prescribes that the admissibility of a case is subject to the following: “remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law”. According to the Inter-American Court of Human Rights decision:

Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2).[FN12]

[FN12] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988paragraphs 63
and 64.

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23. Therefore, it must first be determined whether a remedy was available in this case under domestic jurisdiction, and also whether said remedy was adequate and effective.

24. The information presented by the petitioner indicates that the remedy of amparo was available at the time of the events and had been used successfully by persons in situations similar to the petitioner’s. On March 28, 1995, for example, the Constitutional and Social Law Division ruled on the petition by César Antonio Yafae Velásquez et al., alleging that they had not been notified about the evaluation examination by the Peruvian Social Security Institute. The ruling was in favor of the amparo action and established that the institution had to reinstate the petitioners in their former positions. It is therefore found that there was an available and effective remedy for the irregular dismissal alleged by the petitioner.

25. The Inter-American Court has established that

if a State which alleges non-exhaustion proves the existence of specific remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2).[FN13]

[FN13] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, paragraph 60.

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26. In this case, the petitioner failed to demonstrate proper exhaustion of the remedies or that the situation came under the exceptions mentioned. The petitioner alleges that he could not file and appeal with the IPSS and therefore was unable to exhaust prior remedies as required in the amparo action. However, he provides the IACHR with absolutely no evidence in that regard, neither did he present proof to the local office to support his argument for a time-barred appeal for reconsideration by the IPSS.

27. The Commission notes that, the petitioner argued the illegality of his dismissal based on the fact that he had not been notified to sit the exam, as established in the law. That notwithstanding, in the amparo action filed by the petitioner and others, the failure to notify was not put forward.[FN14] The petitioner cannot allege the ineffectiveness of the remedies if he did not attempt to use them appropriately.

[FN14] According to the judgment of the 26th Court Specializing in Civil Matters of Lima, handed down on October 3, 1995, "that, in the end, it must be established that although there are indeed final judgments at the highest level in civil proceedings that protect amparo actions in the court of final instance, these are not applicable to the parties given that at no time did they allege in their petition the failure to provide notification of the date, time and place where the examinations would be taken". ----------

28. Only on December 6, 1996, four years after his dismissal, did the petitioner lodge an appeal for reconsideration with the IPSS against the decision to terminate his employment, alleging that he had not been notified.[FN15] That appeal was dismissed by Central Management Resolution nº 443-GCDP-IPSS-96 as being time-barred, based on the Law on Administrative Procedure, which sets a time limit of 15 days for filing appeals for reconsideration.[FN16]

[FN15] Resolution 750-GCDP-IPSS-92
[FN16] Op cit 9.

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29. When the administrative appeal was denied, the petitioner filed an administrative dispute requesting that Central Management Resolutions 750-GCDP-IPSS-92 and 443-GCDP-IPSS-96 be invalidated. The IPSS argued for an exception based on the expiration of the statutory time limits because the action was filed after the three-month limit provided by law.[FN17] The First Labor Division ruled in favor of the exception and its decision was upheld by the Constitutional and Social Division of the Supreme Court of the Republic on July 20, 1999.

[FN17] Article 81 of the Procedural Labor Law 26.636

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30. In 1994, the Peruvian Social Security Institute gave new selection and rating examinations, including the petitioner in the list of persons eligible to take them. However, a new General Management Resolution on November 28, 1994, no. 1089-GC-IPSS-94, amended the previous resolution and did not include the petitioner’s name. Despite the fact that that this presented a new opportunity to sit the tests, which was later denied him when he was excluded from the list, and presented another possibility of administrative appeal of that resolution and, consequently, judicial review of the decision, the petitioner failed to take advantage of the opportunity.

31. The Commission is aware, as are other international agencies, that the petitioner must exhaust domestic remedies in accordance with domestic procedural legislation. The Commission cannot regard the petitioner as having duly complied with the requirement of prior exhaustion of domestic remedies if said recourse has been rejected on reasonable, not arbitrary, procedural grounds, such as filing an appeal for amparo without previously exhausting the pertinent channels and lodging an administrative dispute with the local courts after the corresponding time limits have lapsed.[FN18]

[FN18] Human Rights Committee, Communication 26/1978, N.S. v. Canada, July 28, 1978; European Court of Human Rights, Cardot v. France, February 19, 1991, paragraph 34; European Commission of Human Rights, Cunningham v. The United Kingdom, 1 July 1985, 43DR 171.

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32. The Commission finds that the amparo action was an available and effective remedy, which was not properly used by the petitioner for reasons for which the State bears no responsibility. Thus the petitioner did not make timely and adequate use of the available domestic remedies, thereby failing to meet the requirements for the Commission to admit this petition pursuant to Article 46(1)(a) of the American Convention.

V. CONCLUSIONS

33. The IACHR has established in this report that domestic remedies were not exhausted. When the Inter-American Commission finds the case to be inadmissible for failure to comply with one of the requirements established in the Convention, it is not required to make a statement on the others.

34. The Commission finds the petition to be inadmissible, under Article 47(a) of the American Convention, based on the arguments in fact and in law articulated above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition inadmissible.
2. To inform the petitioners and the State of this decision.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 22nd day of the month of October, 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.