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REPORT No. 136/18
PETITION 859-07
REPORT ON INADMISSIBILITY

MANUEL JESÚS AYBAR MARCA
PERU

Approved electronically by the Commission on November 20, 2018.

Cite as: IACHR, Report No. 136/18, Petition 859-07. Inadmissibility. Manuel Jesús Aybar Marca. Perú. November 20, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Manuel Jesús Aybar Marca
Alleged victim:	Manuel Jesús Aybar Marca
Respondent State:	Peru ¹
Rights invoked:	Articles 7 (personal liberty), 8 (judicial guarantees), 24 (equality before the law) and 25 (judicial protection) of the American Convention on Human Rights ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	June 28, 2007
Additional information received at the stage of initial review:	February 3, 2009 and August 18, 2009
Notification of the petition to the State:	August 5, 2011
State's first response:	November 14, 2013
Additional observations from the petitioner:	February 1, 2014 and June 9, 2016
Additional observations from the State:	July 15, 2014

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 of ratification 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, in the terms of Section VI
Timeliness of the petition:	Yes, June 28, 2007

V. FACTS ALLEGED

1. Mr. Manuel Jesús Aybar Marca (hereinafter "the petitioner", "the alleged victim" or "Mr. Aybar Marca"), a retired colonel of the National Police, alleges that the Peruvian State did not respect his guarantees of due process (specifically: the right of defense, effective judicial protection and the right to a competent judge) during judicial proceedings where he was convicted of the offenses of conspiracy and acting as an accessory after-the-fact.

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 in the decision 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. The petitioner indicates that on January 12, 2001, the Specialized Provincial Criminal Prosecutor's Office for Offenses of Corruption of Officials issued a complaint against him. That same day, the Thirty-second Criminal Court of Lima opened an investigation for the offenses of conspiracy, an accessory after-the-fact and attempting to obstruct the course of justice. He was accused of coordinating Mr. Vladimiro Montesinos' (hereinafter "Mr. Montesinos") departure from the country on October 29, 2000, bound for Venezuela. The petitioner denies these facts and alleges that Mr. Montesinos was not subject to any criminal proceedings at that time.

3. He submits that the criminal proceedings were unlawfully transferred to the First Special Criminal Chamber of the Superior Court of Justice of Lima (hereinafter, "the First Chamber"), since this court was created after the events in the indictment with the purpose of investigating acts of corruption and serious crimes committed during Alberto Fujimori's government. He alleges that he was tried and convicted for crimes unrelated to acts of corruption or serious crimes perpetrated by Mr. Montesinos, but rather for his alleged participation in Mr. Montesinos' exit from the country, and that, therefore, this court had no jurisdiction to hear his case.

4. On October 28, 2002, the First Specialized Superior Criminal Prosecutor's Office (hereinafter "the Prosecutor's Office") found that there were no grounds for an oral trial for the crime of conspiracy, and therefore, only charged the petitioner with being an accessory after-the-fact. However, on February 14, 2003, the First Chamber asked the Prosecutor's Office to reconsider the crime of criminal conspiracy, on the grounds that *prima facie* there were sufficient elements to establish the offense. On February 24, 2003, the Supreme Prosecutor found it appropriate to indict the petitioner with the crime of conspiracy, on the grounds that he acted in conjunction with other individuals associated with Mr. Montesinos. Mr. Aybar Marca alleges that this ruling was based on "non-existent facts" and that it failed to specify the applicable criminal offense. Subsequently, on April 14, 2003, the Superior Prosecutor extended his indictment opinion to include the offense of criminal conspiracy. On June 11, 2003, the First Chamber issued a committal order, considering sufficient grounds to proceed to an oral trial for the offenses of conspiracy and accessory after-the-fact, for having arranged Mr. Montesinos' exit from the national territory, according to the petitioner, omitting to specify the elements of the offenses.

5. The petitioner mentions that the Peruvian State failed to respect the right to a defense and to produce evidence, and that "a number of requests were denied". He states that at the hearing of October 21, 2003, during the oral trial before the First Chamber, he alleged that, in order to exercise his right to a defense, he should have been informed in advance and in detail of the charges made against him, and that he should have been questioned separately on each one of the offenses for which he was charged – two different and distinctive criminal offenses – and that his requests were denied. Similarly, in the session of August 12, 2003, he requested from this Chamber a copy of a visual recording of all the sessions that were held at the hearing, a request also denied.

6. On December 15, 2003, the First Chamber sentenced Mr. Aybar Marca to fifteen years in prison for the crimes of accessory after-the-fact and aggravated conspiracy, on the basis that the group to which he belonged conspired to commit crimes against the security and public tranquility to the detriment of the State. The petitioner maintains that he was not able to exercise his right of defense in relation to this latter accusation, since he was never informed of the elements of the offense for which he was indicted. He also maintains that the principle of inseparability was violated, since Article 46-A of the Penal Code - a special aggravating circumstance which applies to members of the Armed Forces or National Police – was applied against him although it is not applicable whenever the aggravating circumstance is foreseen when sanctioning the criminal offense or when this is a constituent element of the offense. The petitioner argues that this Article was not applicable, by virtue of providing for the same aggravating circumstance in Article 404 of the Penal Code, for which he was convicted. On the other hand, he argues that antiterrorist laws were applied against him, in particular Legislative Decree No. 921.

7. The petitioner filed an appeal for annulment of the judgment of the First Chamber, requesting that the proceedings be declared null and void and for the issuance of a new investigation specifying the criminal offenses. Thus, on August 2, 2004, the Permanent Criminal Chamber of the Supreme

Court (hereinafter, "the Supreme Court"), heard the appeal, recognizing that the Superior Prosecutor, in his indictment and summons, referred to the crime of criminal conspiracy in its generic form or elements. Therefore, it decided to amend the decision to convict the alleged victim as co-author of the crime of conspiracy in its simple form, reducing his sentence from fifteen to eight years. The Supreme Court also held there were no grounds to declare the nullity of the trial, for the procedural defects could be corrected, without affecting the basis of the decision. In view of the above, the petitioner considers that the Supreme Court validated the irregularities when it should have declared the trial and the investigation void.

8. According to the petition, the alleged victim raised the lack of a statutory offense as to the conduct for which he was convicted for the first time in the appeal for nullity filed before the Supreme Court. He alleged therein that at the time of the events (Mr. Montesinos' illegal departure from the country) there was no arrest warrant or legal impediment to his leaving the country. The Supreme Court specified that the criminal offense refers to "criminal prosecution", which was constituted by both judicial decisions and the Police and Prosecutor's Office's investigations; and that by then it was public knowledge that Mr. Montesinos was being investigated for crimes of corruption.

9. On January 15, 2007, the alleged victim filed a writ of habeas corpus with the presiding criminal judge alleging violations of constitutional procedural rights derived from the rulings issued in the criminal proceedings (the order to open the investigation, the first instance sentence and the conviction execution order). On June 15, 2007, the Sixth Criminal Chamber of the Superior Court of Justice declared this writ of habeas corpus to be without merit. The petitioner filed a constitutional motion for review before the Constitutional Court against this decision, requesting the nullity of the sentences and of the proceedings, and a re-trial. However, on January 9, 2008, the Constitutional Court declared the claim to be without merit. This decision was published on its official website on July 31, 2008. In its decision, the Constitutional Court confirmed that the Supreme Court had already amended the inconsistency of the First Chamber's decision.

10. Regarding the applicability of the aggravating circumstance used because of the condition of member of the National Police for the commission of the offense, the Constitutional Court held that the alleged victim was fully aware that he was charged with the crime of conspiracy in its basic form, since he had access to the indictment and thus he had the opportunity to defend himself against all the elements in the offences for which he was charged; and the petitioner was convicted in connection with the basic forms of the offences investigated. However, the petitioner argues that the Supreme Court should have ordered a new trial instead of amending the judgment of the First Chamber, based on jurisprudence by the Constitutional Court⁴ in the sense of declaring the proceedings null and void, in a similar case. The petitioner argues that his right to equality before the law has been violated as a consequence of the aforementioned Court not applying the same criteria to his case. The petitioner maintains that his claim before the Commission is not untimely and that the Constitutional Court's decision is the final judgment on his case.

11. For its part, the State argues that the petition is inadmissible, since it does not state facts that characterize violations of the rights enshrined in the American Convention. In its view there is no prima facie evidence that the petitioner's due process guarantees or his rights enshrined in the Convention have been violated.

12. Regarding the allegations on the principle of the competent judge, the State argues that in International Law of Human Rights there is no prohibition to establish special courts or specialized courts, as long as they abide by judicial guarantees. It argues that the Convention only requires that the tribunal be previously established by law in order to prevent that political or ad hoc tribunals are established, but it does not prevent the establishment of a specialized court nor the alternative of a tribunal composed of magistrates or judges who already exercised these functions previously. The State maintains that the First Chamber was competent to hear the case, and that the petitioner did not question its competence either before the Supreme Court or the Constitutional Court.

⁴ The petitioner submits a judgment issued by the Constitutional Court on August 6, 2005 on a constitutional motion filed by Margarita Rosales Bermúdez Bermúdez and Irma López de Castilla.

13. With regard to the alleged violation of the right to personal liberty, the State indicates that the petitioner's deprivation of liberty resulted from a judicial decision issued in accordance with the law; and that in the present case, the authorities established specifically and in advance, the causes and conditions under which the petitioner was deprived of his liberty. In this sense, the petitioner's detention on June 8, 2001, was carried out pursuant to the order of a competent court and in accordance with the requirement of legality with the causes and conditions under which he was deprived of his liberty having been previously established. On June 24, 2008, the petitioner was released.

14. Regarding the alleged violation of the rights to judicial guarantees and judicial protection, the State indicates that the petitioner had the means and opportunity to exercise his right to a defense with full respect for due process and that effective remedies were provided and fulfilled. It also emphasizes that the petitioner was fully aware of the charges against him, of the prosecutor's initial indictment, including of being an accessory after-the-fact and later of criminal conspiracy. In its view, the inconsistency between the indictment and the judgment of the First Chamber was resolved by the Supreme Court's decision. In this regard, Peru submits that the Criminal Chamber of the Supreme Court amended the elements of the criminal offense to its simple form and consequently reduced the severity of the sentence, and that thus the aforementioned Court was not under the obligation to annul the proceedings, given that the claim was resolved with a reclassification of the elements of the offense.

15. Regarding the application of Legislative Decree No. 921, the State clarifies that the Criminal Chamber cited and applied the provisions relating to the general regime of penalties, and not the provisions relating to anti-terrorist laws, due to the legal vacuum then existing in the Penal Code, in light of the unconstitutionality of Legislative Decree No. 895 (Law against Aggravated Terrorism).

16. Regarding the allegations concerning the right to a defense in relation to the denial of certain requests made by the petitioner, the State submits transcripts of the oral trial leading to the First Chamber's judgment, in which the petitioner's active participation during the oral phase is recorded. In the hearing of July 22, 2003, Aybar Marca's defense counsel placed on record a number of issues relating to the presentation of certain witnesses, with some of them being declared inadmissible and others admissible. In response to this request, the Chamber indicates that testimony "*must be admitted in light of its pertinence and relevance, meaning its connection with the object of the process and the possibility of providing evidence capable of clarifying the issues at stake*". The Chamber also referred to the "admissibility requirements", while the Superior Prosecutor adds and reiterates that "*the main offense is that of being an accessory after-the-fact as contemplated in Art. 404 CP*" ... "*and obviously the witnesses offered must have a direct connection with Montesinos absconding, not with subsequent events relating to our own investigation.*"

17. Likewise, in the transcript of the hearing held on August 12, 2003, before the First Chamber, the petitioner requested a copy of audio-visual recording thereof, to which the First Chamber replied that "*the request is not being denied, and that in time the Chamber will decide whether it is pertinent or not.*" However, it does not appear from the information provided by the parties in this petition what was the final decision in this regard. With regard to the hearing on October 21, 2003, the State alleges that the right of defense was ensured and the allegation is a statement taken "*out of context, in isolation, and without references given*", that can be subject to misinterpretation.

18. Regarding the allegations of discrimination resulting from a conviction contrary to his own interests, Peru maintains that the right to equality before the law was not violated, since the petitioner's arguments were reviewed and dismissed by the Constitutional Court. In addition, it argues that the cases cited by the petitioner are based on facts different from those in his claims. The State alleges that the petitioner resorts to the IACHR only because there has been a conviction against him in the domestic courts and that he seeks that the IACHR act as a fourth instance.

19. With respect to the requirement of timeliness, the State argues that the petition was filed after the time limit established in Article 46.1.b of the Convention, because the judgment that exhausted the domestic judicial remedies was issued August 2, 2004 by the Supreme Court. In this regard, it states that the petitioner filed a writ of habeas corpus on January 15, 2007, two years and five months after the Permanent

Criminal Chamber of the Supreme Court issued the compliance order. In the State's view, this delay exceeds a reasonable time, given that the petitioner has failed to explain why he did not immediately resort to the constitutional jurisdiction.

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

20. Regarding the exhaustion of domestic remedies, the Inter-American Commission observes at the outset that although there is disagreement regarding which was the remedy that put an end to the proceeding, there is no disagreement in connection with the fact that domestic remedies were exhausted. In this regard, the State argues that the domestic remedies were exhausted with the judgment issued by the Supreme Court on August 2, 2004, which decided the appeal for nullity raised by the petitioner. This is also argued by Peru as a ground to challenge compliance with the requirement of timeliness in the presentation of the petition (Article 46.1.b of the Convention). The petitioner, for his part, states that even after the aforementioned resolution, he continued to pursue other remedies to challenge his conviction, up until the judgment issued by the Constitutional Court on January 9, 2008.

21. In this regard, the Commission considers that although in principle, in a case such as the present one, it may be sufficient for the alleged victim to exhaust remedies in the criminal jurisdiction, whenever he or she pursues extraordinary remedies - or those protecting constitutional guarantees connected to the object of the main proceedings, as in the present case -, with the reasonable expectation of obtaining a favorable result, then such remedies may be taken into account as validly exhausted to the effect of compliance with the admissibility requirements of the petition. In addition, from the text of the Constitutional Court's judgment, it is evident that the remedy was admitted and that it was considered on the merits, without being rejected *in limine* as inadmissible. In this regard, the Commission considers the judgment of the Constitutional Court as part of the conviction's review, without considering unreasonable the time elapsed between the decision of the Supreme Court and the subsequent filing of the habeas corpus, and the subsequent filing of the constitutional motion.

22. On the other hand, the Inter-American Commission observes that one of the fundamental arguments raised by Mr. Aybar Marca in his petition refers to the alleged breach of the principle of the competent judge, due to the fact that his case was referred to the First Special Criminal Chamber of the Superior Court of Justice of Lima, which in his view was established after the facts of the case. The State, for its part, argues that the petitioner failed to submit this argument at the domestic level. In this regard, after analyzing the information available in the case file, the Commission notes that the petitioner failed to exhaust domestic remedies, in connection with the competence of the First Chamber to hear his case, nor did he indicate why he failed to do so. Therefore, the Inter-American Commission concludes that this petition satisfies the requirement established in Article 46.1.a of the Convention with respect to the allegations made by the petitioner regarding the criminal prosecution, with the exception of the claim regarding the alleged lack of competence of the First Chamber.

23. In accordance with the foregoing, and with regard to the requirement timeliness of the petition, the Commission observes that it was received on July 28, 2007, and the domestic criminal proceedings definitively concluded with the aforementioned judgment of the Constitutional Court published on its own website on July 31, 2008. Therefore, it concludes that it complies with the time limit established in Article 46.1.b of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

24. Regarding the allegations and the information provided by both parties in the processing of this petition, the Inter-American Commission observes that the alleged lack of express indication of the elements of the offenses charged against the petitioner was remedied by the Supreme Court of Justice, that reduced his sentence from fifteen to eight years in prison. Therefore, in the terms of this analysis of admissibility, this claim was addressed through the remedies available for this purpose, as established by the corresponding decision of the Constitutional Court.

25. Regarding the alleged violation of Article 24 of the Convention, the petitioner submits a judgment of the Constitutional Court in a case that he considers to be of a similar nature, but whose reasoning was not applied in his own case. In this regard, the Inter-American Commission has indicated that although the obligations derived from Articles 8 and 25 of the American Convention demand from the States a degree of certainty in the administration of justice,⁵ this does not prevent the existence of divergent judicial decisions. In that sense, the legal certainty inherent to effective judicial protection must be compatible with the principle of judicial autonomy, in a manner that does not hinder the free interpretation of the law by members of the judiciary in the cases that are duly submitted before them. Even though the application of divergent interpretations by the same judicial or administrative authority in situations sharing similar substantive and procedural features could lead to a situation of uncertainty incompatible with Article 25.1 of the Convention,⁶ the IACHR considers that in the present case the petitioner's claims that the Supreme Court should have ordered a new trial instead of amending the First Chamber's conviction, does not constitute *prima facie* a situation of this nature. In other words, the Commission observes that the petitioner has failed to submit arguments or other specific elements demonstrating a previous jurisprudential line, and that in his particular case there has been an application of a different criterion from that consistently held.

26. With regard to the allegation made by the petitioner regarding the denial of his request for a copy of the video recordings of the hearing held on August 12, 2003, the Commission observes that, according to the transcript of the hearing, the First Chamber received the petitioner's request and indicated that it would rule upon it at a later date. The petitioner has failed to provide information on the result of his request nor on whether such request was denied and how, if denied, access to these video recordings could have affected his right to due process.

27. Therefore, based on the aforementioned considerations, this Commission concludes that the petition does not comply with the requirement established in Article 47.b of the American Convention, since *prima facie* there are no facts that could characterize violations of the rights invoked by the petitioner.

VIII. DECISION

1. To find the instant petition inadmissible in relation to Article 47.b of the American Convention;
2. To notify the parties of this decision; and to publish it 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 20 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 IACHR. Report No. 26/16. Petition 923-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru, April 15, 2016, para. 36; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru*. Judgment of November 24, 2006. Series C No. 158, para. 129.

⁶ IACHR. Report No. 26/16. Petition 932-03. Inadmissibility. Rómulo Jonás Ponce Santamaría. Peru, April 15, 2016, para. 36; IACHR. Report No. 26/12. Petition 736-03. Inadmissibility. Hernan Alberto Chumpitaz Vasquez. Peru, March 16, 2010, para. 34. In the same sense, the European Court has established that diverging decisions from courts of different jurisdictions and even from the same court do not imply, in themselves, a breach of the guarantees of due process. European Court of Human Rights, Case Nejdett Sahin and Perihan Sahin v. Turkey, Petition 13279/05, judgment of October 20, 2011, paras. 51 and 67.