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**REPORT No. 19/19**  
**PETITION 1079-07**  
REPORT ON ADMISSIBILITY

JOSÉ MANUEL MERCADO LÓPEZ  
PERU

Approved electronically by the Commission on February 26, 2019.

**Cite as:** IACHR, Report No. 19/19. Petition 1079-07. Admissibility. José Manuel Mercado López.  
Peru. February 26, 2019.



**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	José Manuel Mercado López and Luis Enrique Mercado López
<b>Alleged victim:</b>	José Manuel Mercado López
<b>Respondent State:</b>	Peru <sup>1</sup>
<b>Rights invoked:</b>	Articles 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights <sup>2</sup> , in relation to its Article 1 (obligation to respect rights) other international treaties <sup>3</sup> and Article XVIII of the American Declaration on the Rights and Duties of Man <sup>4</sup>

**II. PROCEDURE BEFORE THE IACHR<sup>5</sup>**

<b>Filing of the petition:</b>	August 22, 2007
<b>Additional information received at the stage of initial review:</b>	February 1, April 16, June 6 and July 7, 2008; April 21 and May 8, 2009; April 19, May 21, August 31 and September 17, 2010; January 31, April 25 and November 30, 2011
<b>Notification of the petition to the State:</b>	February 14, 2014
<b>State's first response:</b>	December 1, 2014
<b>Additional observations from the petitioner:</b>	February 24, 2016 and April 2, 2018
<b>Additional observations from the State:</b>	June 22, 2016

**III. COMPETENCE**

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

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 7 (personal liberty), 8 (fair trial), 23 (participation in government) and 25 (judicial protection) of the Convention, in relation to its Article 1 (obligation to respect rights)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, under the terms of Section VI
<b>Timeliness of the petition:</b>	Yes, under the terms of Section VI

**V. ALLEGED FACTS**

1. José Manuel Mercado López, the alleged victim, indicates that a complaint was filed against him on the grounds of corruption while he served as a Superior Prosecutor. Following it, an administrative proceeding was filed against him, which eventually led to a criminal trial. The petitioners allege violations of

<sup>1</sup> 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 decision in the present case.

<sup>2</sup> Hereinafter "Convention" or "American Convention."

<sup>3</sup> Articles 2, 4, 9 and 12 of the International Covenant on Civil and Political Rights.

<sup>4</sup> Hereinafter, "American Declaration."

<sup>5</sup> The observations submitted by each party were duly transmitted to the opposing party.

the rights of due process and access to simple, prompt and effective recourse, and violations of the principle of the right of appeal and the right of defense.

2. The petitioners submit that on April 14, 1997, Hierro Mar company sued the then-Superior Prosecutor for his alleged request to Victor Huarancca Medina, a company employee, of USD 10,000 in exchange for a favorable judgment on a case involving the company. They allege that, since the employee declined the offer, the alleged victim ruled against Hierro Mar, and that the company reported this situation accordingly. On May 7, 1997, the Supreme Prosecutor's Office found the administrative charge admissible. On December 30 that year, at the end of the investigation, the Assistant Supreme Prosecutor for Internal Oversight of Commission "C" issued a report, later submitted to the Supreme Prosecutor. It indicated that, while the criminal charge of corruption was not proven, because the only available piece of evidence was the claimant's complaint, the charge of malfeasance in office was to be found admissible. On April 24, 1998, the Supreme Prosecutor dismissed the criminal charge due to lack of evidence but admitted the administrative charge. As a result, the alleged victim received a 15 days suspension period and a 50 percent pay cut for 15 days.

3. The alleged victim appealed before the Judiciary's Executive Commission. Said Commission annulled Resolution 401 on considering that the right of due process had been violated, for the official submitting the report to the Supreme Prosecutor was not entitled to do so. It also ordered the Supreme Prosecutor to issue another resolution. Accordingly, on November 23, 1998, the Temporary Supreme Prosecutor for Internal Oversight issued Resolution 666-23 establishing that the abovementioned criminal charge was not conclusively proven. He dropped the criminal charge but admitted the administrative charge of malfeasance in office. He sentenced the alleged victim to a 30 days suspension period and a 50 percent pay cut.<sup>6</sup> The alleged victim appealed before the Executive Commission of the Public Prosecutor's Office. On August 2, 1999, the Executive Commission annulled the Supreme Prosecutor's decision and ordered the issue of another resolution on the grounds of inadequate analysis of the actions attributed to the denounced Prosecutor.

4. Given that a final resolution from the trial court was pending, the alleged victim filed petitions in writing before the Supreme Prosecutor's Office on August 23, 1999, January 17, 2000, and February 1, 2001. In all of these, he sought the applicability of the exception of the statute of limitation of action regarding the complaint lodged against him; for it was more than two years since the filing of the complaint. In the petitions, he requested the applicability of the statute of limitation of action, the dismissal of the complaint against him on the grounds of the statute of limitation and the ex officio termination of the administrative proceeding. In the petition of January 17, 2000, he moreover alleged the applicability of the exception of the claimant's lack of competence by submitting that Francisco García Ríos, who filed the criminal complaint on behalf of Hierro Mar, was not entitled to do so. On January 29, 2001, the Commission of the Supreme Prosecutor's Office issued Judgment 006-2001. It established the inadmissibility of the exceptions filed by the alleged victim<sup>7</sup> and recommended that the denounced Prosecutor be removed from office, and criminally prosecuted on the grounds of corruption. On August 13, 2001, the Attorney General's Office issued Resolution 764-2001 by which it declared the charge of corruption admissible and the charge of accessory after the fact inadmissible due to insufficient evidence. In view of the foregoing, it informed that the proposed disciplinary sanction consisted in the denounced Prosecutor's removal from office. This resolution led to a criminal proceeding on the grounds of corruption. The petitioners argue that the resolution infringed the right of defense because the authorities failed to rule on the exception of the statute of limitation in relation to the administrative proceeding. Therefore, the petitioners claim ineffective judicial protection. Moreover, they allege a violation of the right to due process and the principle of equal protection in that the authorities favored the opposing party.

5. Concerning Resolution 764-2001, on August 23, 2001, the alleged victim lodged an appeal for review before the Attorney General's Office, claiming that Víctor Huarancca, not being an official or an employee

<sup>6</sup> The alleged victim claims the violation of the double jeopardy principle because on serving the punishment imposed under Resolution 666-23, he was removed from office through another resolution considering the same facts.

<sup>7</sup> The Commission of the Prosecutor's Office found the exception of the statute of limitation inadmissible because the period established by the law had not elapsed yet, given that the denounced Prosecutor did not refrain from hearing the matter and that, by August 16, 1999, he persisted in serious misconduct. It dismissed the exception of the complainant's lack of competence because Francisco García Ríos filed the complaint as the company manager and, according to the General Corporations Law, managers possess the general and special powers of procedural representation established in the Civil Code of Procedure.

at Hierro Mar, could not be a party to the proceeding. He also argued that the resolution violated the Constitution because it established the admissibility of the criminal charge despite the lack of evidence. He also argued that the disciplinary action should have been terminated *ex officio*. On October 22, 2001, the Attorney General's Office dismissed the appeal for review on noting that there was nothing to invalidate its decision, and found administrative remedies exhausted. The alleged victim presented an appeal, and on November 20, 2001, authorities rejected it on considering that administrative remedies had been exhausted.

6. Subsequently, the alleged victim filed an appeal seeking the annulment of the abovementioned resolutions. In the appeal, he argued that there were no pronouncement on his petitions seeking the applicability of the exceptions of the statute of limitation and, that authorities violated the right of due process because they processed the administrative and the criminal charges together even when these are different from one another and thus require different investigation procedures. On May 16, 2003, the Superior Court of Justice of Lima ruled his appeal admissible, on considering that the resolutions violated due process, the right of defense and the right to appeal because they did not refer to the alleged exceptions and precluded review by a higher body. It found the resolutions inapplicable and ordered the Attorney General's Office to issue a new resolution, ruling on the exceptions. The Civil Superior Prosecutor's Office appealed the amparo judgment by arguing that, because the denounced Prosecutor had already been removed from office, his case concerned irreparable harm and, consequently, the alleged victim's appeal was inadmissible. On August 2, 2004, through a judgment notified on January 28, 2005, the Superior Court of Justice of Lima decided to review and dismiss its previous decision. The Court considered that the admissibility of the alleged victim's appeal would not resolve the violation of his rights because his situation involved irreparable harm, as he no longer held the office of Superior Prosecutor. The petitioners submit that this decision disregarded the nature of the remedy because it failed to rule on the merits of the case. They moreover allege that the irreparability of the harm was due to the courts' performance as he was still in office when he filed the amparo action—he was removed from office on January 9, 2003, by the Judiciary Council.<sup>8</sup> In view of this, the alleged victim filed a constitutional complaint before the Constitutional Court in which he presented the same arguments regarding the lack of resolution of the exceptions that he filed. On September 22, 2005, through a judgment notified on February 23, 2007, the Constitutional Court upheld the resolution, by adhering to the same considerations of the Superior Court of Justice of Lima. The petitioners claim the violation of the alleged victim's rights in that it was due to a delay in the issue of the amparo resolution that an irreparable damage was created, and that his violated rights were not restored in the proceedings against him.

7. As for the criminal action, the alleged victim was sentenced by a resolution, dated July 20, 2004, of the Special Criminal Chamber of the Supreme Court, to six years in prison on the charge of corruption. The petitioners allege the violation of the right of due process and effective judicial protection because the chairman did not allow the defense counsel to continue the cross-examination. Also, he submits that the assessment of the evidence was incorrect. The petitioners indicate that the only eyewitnesses of the alleged act of corruption contradicted themselves during their statement; that, therefore, it was necessary to cross-examine them given the lack of incriminatory material evidence. They allege that the other witnesses were not present and thus could only testify on issues that eyewitnesses had told them about.<sup>9</sup>

8. The alleged victim filed a habeas corpus petition on September 7, 2007, requesting the annulment of the judgment and the confirming resolution. On March 31, 2008, the alleged victim presented a petition against the Supreme Members of the Judiciary because more than six months had elapsed without the issue of a resolution on the habeas corpus. On April 4, 2008, he was notified of the judgment of February 14 that year. Under this judgment, the Third Criminal Court found the habeas corpus petition inadmissible because a chairman has the power to determine whether the questions made are, or are not, directed at clarifying the facts, a power which does not entail the violation of the right of defense. The Second Special Criminal Chamber of the Superior Court of Justice upheld that decision and notified its judgment on August 5, 2008. In view of this, the petitioner filed a constitutional complaint which the Constitutional Court resolved on August 21, 2009.

<sup>8</sup> The petitioner refers to several cases, and criteria of the Inter-American Court of Human Rights, concerning unwarranted delay during the amparo action, which he considers apply to his case.

<sup>9</sup> The judgment was issued based on different types of evidence: statements given by eyewitnesses and other witnesses; photographs that show him at the place where the facts took place; telephone bills proving that, contrary to the defendant's claims, he had talked with Hierro Mar's employee; and an audio recording.

Under that resolution, notified on October 28 that year, the complaint was declared unfounded on the same grounds raised by the Third Criminal Court and the Second Special Chamber. The Constitutional Court indicated that the appealed judgments were reasonable and consistent and that constitutional courts cannot assess evidence submitted in criminal proceedings as that function pertains to ordinary courts.

9. For its part, the State alleges that the petitioners intend to have the Commission work as a court of appeals. It indicates that the inter-American system is a subsidiary, contributing and complementary venue; that, therefore, the Inter-American Commission cannot decide on or interpret Peruvian rules. Likewise, it contends that the alleged victim did not exhaust domestic remedies because he failed to report to the national authorities some of the aspects presented to an international body. It claims that, consequently, the State was not given the opportunity to analyze and decide on these allegations; that, accordingly, the alleged victim did not exhaust domestic remedies. The State contends that, contrary to the claims in his petition, in the amparo action, the alleged victim did not allege a violation of the right to appeal in connection with the dismissal of the action for review and the appeal. According to the State, the petitioner's allegations about the principle of the right to appeal were aimed at questioning the lack of a resolution on the exceptions that he alleged. Moreover, it submits that the alleged victim refers to the purported violation of said principle because the decision was unfavorable to his interests. As for the claim regarding the alleged violation of the principle of double jeopardy, the State argues that the petitioner did not file any recourse before the national courts. It moreover affirms that such alleged violation was not included in the first petition to the Inter-American Commission but only in the petition of April 22, 2008. The State argues that all the alleged violations should have been included in the initial petition. It also submits that the admissibility of new allegations causes uncertainty about the facts and negatively affects the defense of the State.

10. Furthermore, it deems that the decision to join the administrative and criminal proceedings was well-founded because the facts were interconnected, in addition to the fact that the law does not prohibit this. It maintains that, by joining the proceedings, it applied the principles of procedural unity, speed and economy. As for the alleged lack of resolution on the invoked exceptions, the State argues that, although it is true that they were not resolved through Resolution 764-2001, they were resolved through Reports 006-2001 and 53-2001, cited in that resolution. Likewise, it claims that the National Council of the Judiciary has the power to remove judges and prosecutors and that, once the disciplinary proceeding initiated in view of Report 764-2001 was closed, the Council found the exceptions inadmissible and unfounded by Resolution 101-2002. Regarding the irreparable harm mentioned by the domestic courts, the State holds that the concept of irreparable harm was applicable because the alleged victim had already been removed from office. It further explains that when the amparo action was ruled upon, the alleged victim had already been sentenced on July 20, 2004, and that when the amparo action was brought to the Constitutional Court, that sentence was already final.

11. In relation to the habeas corpus, the State cites the same arguments given by the Third Criminal Court about the chairman's interruption of the cross-examination procedure and the assessment of the evidence that the alleged victim requested in the constitutional trial. It adds that the alleged victim filed the habeas corpus and the instant petition simultaneously because he speculated about the duration of the constitutional action.

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

12. Regarding the administrative proceeding, the petitioners indicate that on September 22, 2005, the Constitutional Court dismissed the extraordinary recourse filed by the victim, a decision notified on February 23, 2007. According to the petitioners, in the amparo action, they requested the annulment of Resolution 764-2001 in view of the disregard, by the higher court, for the invoked exceptions. Concerning the criminal action, the final resolution on the habeas corpus was that of February 14, 2008, upheld in the judgment of August 21, 2009, which dismissed the constitutional complaint. For its part, the State claims that domestic remedies were not exhausted because the alleged victim failed to bring before the domestic courts the purported violations presented before the Inter-American Commission, that is, the violation of the right to

appeal and the double jeopardy principle, and because the habeas corpus was filed simultaneously with the instant petition.

13. As for the administrative trial, the Commission concludes that, given the allegations and the available information, domestic remedies were exhausted by the notification of February 23, 2007; that, consequently, the instant petition meets the requirement established in Article 46.1.a of the Convention. Since the instant petition was received on August 22, 2007, and the notification from the Constitutional Court is dated February 23, 2007, the Commission finds that the petition was filed within the six months established in Article 46.1.b of the Convention.

14. Regarding the criminal action, domestic remedies were exhausted by the notification of the decision of October 28, 2009, when the instant petition was under the admissibility study. The Inter-American Commission reiterates its criteria what should be taken into account in determining whether domestic remedies have been exhausted is the situation at the time of the ruling on admissibility, because the time of presentation of the complaint differs from the time of the ruling on admissibility. As a result, the Commission finds that remedies were indeed exhausted through the notification of October 2009; and that the petition, therefore, meets the requirement in Article 46.1.a of the Convention.

## **VII. ANALYSIS OF COLORABLE CLAIM**

15. In view of the factual and legal elements presented by the parties and considering the nature of the matter brought to its attention, the Commission believes that the lack of a well-founded and reasonable resolution on the exceptions filed by the petitioners, allegedly leading to the alleged victim's removal from office and a criminal proceeding which caused his deprivation of liberty; and the claims about the restrictions imposed on the defense counsel during a cross-examination, if proven, all could establish violations regarding Articles 7 (personal liberty), 8 (fair trial), 23 (participation in government) and 25 (judicial protection) of the Convention, in accordance with its Article 1.1 (obligation to respect rights). Moreover, the Commission has established that once a State has ratified the American Convention, it is this and not the American Declaration that becomes the main source of obligations concerning human rights whenever both may be applicable.

16. Regarding the abovementioned articles from the International Covenant on Civil and Political Rights, the Commission may consider it to interpret norms during the report on the merits of the instant case under Article 29 of the Convention.

17. Regarding the State's pleadings on the fourth instance, the Commission recognizes that it lacks competence to review judgments handed down by domestic courts acting in the realm of their own competence, in observance of the rights to due process and judicial guarantees. However, it reiterates that within the framework of its mandate, it is competent to declare a petition admissible and rule on its merits when the petition addresses domestic proceedings that could violate rights protected by the American Convention.

## **VIII. DECISION**

1. To find the instant petition admissible in connection with Articles 7, 8, 23 and 25 of the American Convention, in relation to its Article 1.1; and

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

Approved on the 26th day of the month of February, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.