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REPORT No. 158/20
PETITION 1654-10
REPORT ON INADMISSIBILITY

LUIS ESTEBAN GALLARDO MARTÍNEZ
PERÚ

Approved electronically by the Commission on June 17, 2020.

Cite as: IACHR, Report No. 158/20, Petition 1654-10. Inadmissibility. Luis Esteban Gallardo Martinez. Peru. June 17, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Nélida Teresa Gallardo and Martínez
Alleged victim:	Luis Esteban Gallardo Martínez
Respondent State:	Perú ¹
Rights invoked:	Articles 4, (life), 5 (humane treatment), 6 (freedom from slavery), 7 (personal liberty), 8 (right to a fair trial), 9 (freedom from ex post facto laws), 10 (compensation), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights ² , in conjunction with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	November 17, 2010
Additional information received at the stage of initial review:	June 15, 2011, August 6, 2011, February 25, 2014, and January 26, 2016
Notification of the petition to the State:	February 8, 2016
State's first response:	May 23, 2016
Additional observations from the petitioner:	June 6, 2017
Additional observations from the State:	January 19, 2018

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 (instrument of ratification deposited 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:	No, in the terms of section VI
Timeliness of the petition:	Yes

¹ Pursuant to Article 17.2.a of the Commission's Regulations, Commissioner Julissa Mantilla Falcón, a Peruvian national, did not participate in the debate or decision on this matter.

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

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

V. FACTS ALLEGED

1. The petitioner claims that Mr. Luis Esteban Gallardo Martínez (hereinafter “the alleged victim” or “Mr. Gallardo Martínez”) suffered the violation of his right to a fair trial, when he was convicted of the crime of money laundering in an allegedly arbitrary manner, and for having been prosecuted for the crime of tax fraud for more than ten years.

2. The petitioner indicates that in 1998 the alleged victim acted as figurehead by accepting the position of general manager of the companies “Andino Marketing S.A.” and “Comercial Atahualpa S.A.”, which were part of a network of companies in charge of transferring fine gold owned by Vladimiro Montesinos and others to the United States. It specifies that, as a result of this, the Prosecutor’s Office initiated a criminal proceeding against him for money laundering and, at the same time, two criminal proceedings for tax fraud.

3. In relation to the first process, the petitioner explains that on January 5, 2000, the Thirtieth Specialized Criminal Court of Lima, at the request of the Prosecutor’s Office, issued an order to open an investigation for the crime of money laundering and issued an arrest warrant against Mr. Gallardo Martínez. The petitioner indicates that on December 12, 2002, without the alleged victim’s request, said detention was varied by a summons to appear. However, it argues that despite Mr. Gallardo Martínez complying with such precautionary measure, on January 19, 2005, the Fourth Criminal Court of Lima imposed a preventive prison term of thirty-six months.

4. The petitioner maintains that on January 14, 2008, the First Criminal Chamber for Trials with Released Inmates sentenced the alleged victim for the crime of money laundering to eight years of custodial sentence. Given this, Mr. Gallardo Martínez filed an appeal for annulment, alleging that the body of evidence was not properly assessed and that there was no evidence to prove the commission of said crime. However, the petitioner specifies that later the representation of the alleged victim withdrew the aforementioned appeal since he was informed that the challenge was going to take time to resolve and that it was better to avail himself of the prison benefits.

5. The petitioner explains that, after the cancellation of the appeal for annulment, on March 21, 2012, the alleged victim filed a habeas corpus action questioning his conviction. However, on March 26, 2012, the Fifty-second Specialized Criminal Court of Lima declared the lawsuit inadmissible, considering that Mr. Gallardo Martínez abandoned the ordinary appeal to question the aforementioned conviction. On May 2, 2013, the Fourth Special Criminal Chamber for Prosecution of Inmates in the Lima Superior Court Prison, upon review, confirmed the inadmissibility of the appeal. Given this, the alleged victim filed a constitutional complaint and on September 4, 2013, the Constitutional Court confirmed the inadmissibility of the lawsuit, reiterating that the controversial sentence was consented by withdrawing the appeal for annulment.

6. Regarding the second process, the petitioner indicates that the alleged victim was prosecuted along with 224 people for the crime of tax fraud. The investigation of the case was initiated on July 11, 2000 by the Special Court on Tax and Customs Crimes, but at the end of that year this court was deactivated and the file of Mr. Gallardo Martínez transferred to the Fourth Criminal Court of Lima, and subsequently, on April 24, 2005, to the First Criminal Chamber with Inmates in Prison. Petitioner complains that on September 26, 2006 the Executive Council of the Judiciary irregularly ordered a new transfer of the aforementioned file to the National Criminal Chamber of the Supreme Court, and that only on August 12, 2009, was it ordered the start of the trial for October 27, 2009.

7. The petitioner alleges that on various occasions, the alleged victim sought the early conclusion of the process and greater speed on the part of the justice organs, but the requests were not met. The petitioner adds that on September 8, 2009 and May 5, 2009, respectively, it filed complaints with the National Office of the Magistracy, and a complaint before the Attorney General’s Office for denial and delay of justice. However, the first complaints were declared inadmissible and the complaint was not answered.

8. The petitioner indicates that, in view of the delay of the National Criminal Chamber in resolving this second process, on December 12, 2011, the alleged victim filed a writ of habeas corpus, alleging

the violation of his rights to reasonable period, *non bis in idem* and his right of defense. Petitioner maintains that both the Fifty-Seventh Criminal Court for Free Prisoners of Lima and the Superior Review Chamber rejected the claim *in limine*, considering that there was no specific and manifest violation of the right to personal liberty. In response, Mr. Gallardo Martínez filed a constitutional complaint and on June 11, 2013, the Constitutional Court reversed the decision of inadmissibility and ordered the habeas corpus petition to be processed. The petitioner argues that on May 16, 2014, the Fifty-Seventh Criminal Court of Inmates Free of Lima admitted the aforementioned appeal, but after that, the alleged victim has not been aware of said habeas corpus action, and to date, the authorities have already decreed the prescription of the criminal process for tax fraud.

9. Finally, with regard to the third case, it alleges that despite the fact that there was a judgment order issued on December 21, 2005 by the Fourth Criminal Chamber for Inmates in Prison, only on October 22, 2010 was it notified of the Resolution No. 786 of the National Criminal Chamber of the Supreme Court that provides for the oral trial to begin on January 6, 2011. It maintains that the authorities arbitrarily delayed the process and that they only recently decreed its prescription. Along these lines, it denounces that on January 9, 2017, Mr. Gallardo Martínez requested the National Criminal Chamber of the Supreme Court to issue a statute of limitations for his two processes of tax fraud, but that to date such body has not complied with issuing such a document.

10. Based on these events, the petitioner argues that the sentence imposed on the alleged victim for the crime of money laundering was arbitrary and violated his right to a fair trial. It specifies that Article 296-B of the Criminal Code in force in 1998 only criminalized the crime of money laundering from illicit drug trafficking and / or terrorism. It indicates that it was not until June 27, 2002 that the provision was expanded to cover cases of corruption, so that his criminal conviction violated the rule of law. Likewise, it argues that the main perpetrators were not sanctioned and that there was insufficient evidence to convict him. The petitioner adds that to date the Prosecutor's Office has initiated a new process for money laundering, which violates his right to *non bis in idem*.

11. In addition, it states that the two processes for tax fraud instituted against the alleged victim violated his right of defense and reasonable time, since both cases had been deliberately delayed by the authorities. Furthermore, it argues that the guarantee of the judge predetermined by law was violated, since the proceedings against Mr. Gallardo Martínez had been unduly diverted to the National Criminal Chamber of the Supreme Court. Lastly, it alleges that there was cruel determination against the alleged victim, because the authorities had given a better treatment to the other 224 prosecuted for the same events.

12. The State, for its part, maintains that the petition is inadmissible because it considers that domestic remedies have not been exhausted. It further alleges that the alleged victim did not exhaust the appeal for annulment to question the ruling that condemned him for the crime of money laundering, as the constitutional jurisdiction found. Likewise, it argues that Mr. Gallardo Martínez did not exhaust the habeas corpus action filed to question the alleged delay in his criminal proceedings for the crime of tax fraud and that he does not explain with sufficient precision the reasons or circumstances for which he no longer had knowledge of this. Along these lines, the State points out that the complaints filed before the National Office of the Magistracy and the Office of the Attorney General of the Nation were not intended to accelerate the development of the criminal process, but to denounce an alleged functional misconduct.

13. On the other hand, the State argues that the criminal process in which the alleged victim was involved was carried out in accordance with the applicable legal framework, and in full respect of judicial guarantees and due process. The State specifies that Mr. Gallardo Martínez is currently at liberty, after serving his criminal sentence for the crime of money laundering. Because of this, the State requests that the petition be declared inadmissible based on Article 47 (b) of the American Convention, since it considers that the petitioner's intent is that the Commission acts as a court of appeal, in contradiction of its complementary nature.

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

14. The petitioner indicates that the domestic remedies were exhausted on September 4, 2013 with the decision of the Constitutional Court that declared the habeas corpus action filed to question the conviction for the crime of money laundering to be inadmissible. Additionally, regarding the processes for tax fraud, requests the IACHR to apply one of the exceptions provided for in Article 46.2 of the American Convention, but without specifying which one. The State, for its part, considers that the national jurisdiction has not been exhausted, since an appeal for annulment was not filed in due course against the conviction and the habeas corpus action filed to accelerate the processes for tax fraud was not exhausted.

15. In this regard, the Commission recalls that, as a general rule, the petitioner must previously exhaust domestic remedies in accordance with domestic procedural legislation, so that such requirement cannot be considered duly fulfilled if the claims filed were declared inadmissible based on reasonable and non-arbitrary procedural grounds.⁴ In the present case, the IACHR confirms that the courts that heard the habeas corpus action filed by the alleged victim to question his conviction for the crime of money laundering declared the lawsuit inadmissible, arguing that Mr. Gallardo Martínez consented to the controversial sentence by withdrawing the appeal for annulment. In this regard, the petitioner has not provided evidence or arguments to infer that such decisions were made arbitrarily or unreasonably. Based on the information provided, the IACHR concludes that there was an undue exhaustion of domestic remedies, so it cannot consider as proven the admissibility requirement set forth in Article 46.1.a of the Convention regarding these allegations.

16. Likewise, the IACHR observes that the petitioner has not explained the reasons why he did not exhaust the habeas corpus petition filed to question the delay in criminal proceedings for the crime of tax fraud. Additionally, it considers that the petitioner has also not provided sufficient information to allow the application of any of the exceptions provided for in Article 46.2 of the Convention. In this line, it is verified that, although the contested criminal process lasted several years, it had great complexity due to the number of people involved and that, according to the account of the petitioner, the guarantee of the statute of limitations was applied in favor of the alleged victim. For this reason, the Commission concludes that the requirement of exhaustion of domestic jurisdiction has not been established, and therefore cannot fulfill the requirement set forth in Article 46.1.a of the Convention on this point.

VIII. DECISION

1. Declare this petition inadmissible; and
2. Notify the parties of this decision; and publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 17th day of the month of June, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.

⁴ IACHR, Report No. 90/03, Petition 0581/1999. Inadmissibility. Gustavo Trujillo González. Peru. October 22, 2003, para 32