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REPORT No. 191/18
PETITION 1405-08
REPORT ON ADMISSIBILITY

MIGUEL ÁNGEL GÓMEZ RODRÍGUEZ
PERU

Approved electronically by the Commission on December 31, 2018.

Cite as: IACHR, Report No. 191/18, Petition 1405-08. Admissibility. Miguel Ángel Gómez Rodríguez. Peru. December 31, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Miguel Ángel Gómez Rodríguez
Alleged victim:	Miguel Ángel Gómez Rodríguez
Respondent State:	Peru ¹
Rights invoked:	The petitioner does not mention specific rules from inter-American instruments or other international treaties ²

II. PROCEDURE BEFORE THE IACHR³

Filing of the petition:	December 4, 2008
Additional information received at the stage of initial review:	April 13, 2010
Notification of the petition to the State:	January 27, 2015
State's first response:	April 21, 2015
Additional observations from the petitioner:	June 6, 2017
Additional observations from the State:	September 11, 2017

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 on Human Rights ⁴ (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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 7 (Personal Liberty), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, September 14, 2009
Timeliness of the petition:	Yes, under the terms of Section VI

¹ Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not partake in the discussion or the decision on the instant matter.

² Neither the American Convention nor the IACHR Rules of Procedure require petitioners to indicate, in the matter presented to the IACHR, the specific rights allegedly violated by a State, although petitioners may do so. Based on the jurisprudence of the system, it is for the Commission to determine in its reports on admissibility what provisions of relevant inter-American instruments are applicable and could be considered to have been violated if there is substantial evidence to prove the alleged facts.

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

⁴ Hereinafter "Convention" or "American Convention."

V. ALLEGED FACTS

1. Mr. Miguel Ángel Gómez Rodríguez (hereinafter “the petitioner,” “the alleged victim” or “Mr. Gómez Rodríguez”), a retired colonel of the army, submits that the State infringed the principle of due process in a proceeding on plea bargaining taking place simultaneously with the criminal trial filed against him. He indicates that such irregularities prevented the approval of the plea bargain, which allegedly had a direct negative impact on the prison term that he was made to serve; thus affecting his enjoyment of the right to personal liberty. According to the petition, in early February 2001 the National Attorney General of Peru opened an investigation against the petitioner for unjust enrichment; later that year an investigation was filed against him for embezzlement of public funds. As a result of these investigations, on May 16, 2005 the Third Special Criminal Chamber of the Superior Court of Justice, in first instance, sentenced Mr. Gómez Rodríguez to six years in prison for embezzlement of public funds, acquitting him of unjust enrichment. This resolution was upheld by the First Temporary Criminal Chamber of the Supreme Court of Justice (“First Temporary Criminal Chamber”) in its final judgment of December 12, 2005 regarding case *Hermosa Rios et al.*

2. The petitioner alleges that on September 19, 2001, in the preliminary stage, he requested the application of Law 27378 (a law providing benefits like sentencing reduction in exchange of truthful testimony on organized crime offenses) before the Second Special Criminal Tribunal of the Superior Court of Justice in order to enter a plea agreement (also known as “preliminary agreement” under the domestic legislation). On November 28, 2001 the Second Provincial Prosecutor’s Office specializing in corruption offenses committed by officials (“the Second Provincial Anti-Corruption Prosecutor’s Office”) began a process to verify the information submitted by the petitioner as a cooperator. In view of the prosecutor’s office delay, beyond the five months’ period set forth in Law 27378, the petitioner requested in writing to expedite said proceeding in two separate occasions (on August 8, 2002 and May 14, 2003).

3. Moreover, on February 8, 2003 the Second Special Criminal Tribunal of the Superior Court of Justice granted the petitioner house arrest by way of precautionary measure, in order to preserve his life given that members of Grupo Colina, potentially affected by his testimony as a cooperator, were held in the same prison as him.

4. The petitioner indicates that on January 28, 2005 the Second Special Criminal Tribunal of the Superior Court of Justice rejected the plea agreement, which in principle gave the petitioner the benefit of a four years’ term. The tribunal deemed that “the information submitted by the cooperator cannot be considered truthful because the investigation did not produce conclusive evidence that proved or confirmed it.” In this regard, the petitioner claims that this judicial decision was delayed because of the excessively long time that the Second Provincial Anti-Corruption Prosecutor’s Office took to submit the agreement proposal to the tribunal. Additionally, he claims that the Tribunal’s unfavorable decision was due to the fact that said prosecutor’s office failed to present substantial data necessary to verify his testimony. The petitioner alleges that he submitted said information at the phase of investigation and that it was the prosecutor’s office’s duty to timely (within three months) verify the validity and relevance of such data. According to the petitioner, his statements as a “cooperator” allowed the State to dismantle the defense plan of Grupo Colina and to establish connections with General Hermoza Rios and, thus, with Alberto Fujimori.

5. On February 8, 2005 the petitioner challenged the above decision before the Third Special Criminal Chamber of the Superior Court of Justice and on June 22, 2005, he presented a written request to the Chamber for it to consider the fact that the case file on the plea agreement was incomplete. However, on July 25, 2005 the Chamber upheld the lower court’s decision. On the following day, Mr. Gómez Rodríguez presented an appeal for annulment before the same Chamber, which was ruled inadmissible on August 2 that year. The petitioner again challenged this resolution through a special complaint, which the same Chamber admitted on August 26 and transmitted, on September 19, 2005, to the First Temporary Criminal Chamber for its pursuit.

6. The petitioner claims that, in the framework of this complaint proceeding before the First Temporary Criminal Chamber, the First Supreme Prosecutor’s Office of the Supreme Court of Justice noticed that the case file was actually incomplete; that, therefore, it issued a judgment in favor of his complaint. After

receiving the information missing from the case file, the First Temporary Criminal Chamber ruled the special complaint admissible by a resolution of September 20, 2006. In this resolution, the First Temporary Criminal Chamber concluded that the decisions of the two lower courts infringed the right to due process, and it ordered the Third Special Criminal Chamber of the Superior Court of Justice to nullify the trial court's decision.

7. After the Second Special Criminal Tribunal of the Superior Court declined jurisdiction, the proceeding was referred for examination to the Fifth Special Criminal Tribunal of the Superior Court of Justice, which on September 4, 2008 annulled the resolution of January 28, 2005 and transmitted the case file to the Second Provincial Anti-Corruption Prosecutor's Office to arrange the plea agreement. However, on October 27, 2008 said prosecutor's office established that the deal terminated because a final resolution had already been issued on the main criminal proceeding. On November 11, 2008 the petitioner appealed that decision by filing a complaint before the Fourth Special Superior Prosecutor's Office, claiming that he had entered the agreement during the phase of investigation of the criminal proceeding and that he met all the requirements set forth in the Law on Effective Cooperation. On December 15, 2008 said prosecutor's office ruled in favor of the petitioner, revoking the decision of the Second Provincial Anti-Corruption Prosecutor's Office that established the termination of the plea agreement.

8. Therefore, in early 2009 the petitioner restarted the procedure of plea bargaining before the Second Provincial Anti-Corruption Prosecutor's Office in order to obtain the four years' term initially proposed to him and thus serve a shorter term in prison. Yet the Second Provincial Special Prosecutor's Office, by a resolution of November 26, 2009, terminated the plea agreement in view of the lack of consensus on the reparation method. According to the prosecutor, a cooperator could not present confiscated goods because these already belonged to the State, therefore a cooperator could not pay civil restitution by resubmitting those goods to the State. On December 3, 2009 the petitioner challenged this decision through an appeal of complaint, deemed groundless by the Fourth Special Superior Prosecutor's Office on January 12, 2010. Later, on January 27, 2010 the petitioner lodged a special complaint before the same appealing body, rejected on February 22, 2010 on the basis that it was not foreseen in the legal system. As the Fifth Special Criminal Tribunal of the Superior Court of Justice had been closed, the case file was sent to the Fourth Special Criminal Tribunal of the Superior Court of Justice for its closure.

9. The petitioner claims that the irregularities in the effective cooperation agreement, though judicially recognized, permanently damaged his possibilities to obtain the benefits of the legal scheme because the procedure for repairing such irregularities had been prolonged in such a way that it became useless, for in the end he served the imprisonment term sentenced in the criminal proceeding.

10. Moreover, the petitioner reports an infringement of article 10 of the Rules of Procedure of Chapter III of Law No. 27378, on protective measures, because the information that he submitted as well as his name and his cooperator code number—which is confidential and is meant to guarantee his anonymity—were given to the press. He alleges that this situation put at risk both his and his family's physical integrity. He argues that the judicial authorities responsible for such information did not preserve the confidentiality of the case; thus not only was it known to the public, but also to the members of Grupo Colina.

11. Likewise, the petitioner claims that, in the calculation of the term in prison that he was made to serve, the time he was under house arrest was not considered; that, therefore, his right to personal liberty was infringed. He submits that his house arrest lasted 27 months, which were not considered in the calculation of the imprisonment term imposed on May 16, 2005. The petitioner indicates that in its judgment of March 10, 2008 on the case of Wolfenson, the Constitutional Court considered a period of house arrest when it calculated an imprisonment term at the rate of two days of house arrest per each day in prison, taking into account despite obvious differences: "this does` not mean that house arrest is considered as a simple form of appearance in court that does not affect personal liberty at all. On the contrary, this is the most serious form of restricted appearance in court established by criminal law, because the degree of severity of personal coercion that it involves is immediately lower than that of pretrial detention. [...] Among the several forms of restricted appearance in court under our rules of criminal procedure, this constitutes the most serious one."

12. The petitioner claims that such case is significantly similar to his and that there is a legal loophole on the calculation of house arrest as part of sentence calculation. He submits that on March 28, 2008 he filed a request for release from prison on the basis of the above judgment but that it was never settled. In view of this situation, on October 20, 2008 he presented a habeas corpus petition before the Sixth Criminal Court of Lima, ruled upon only on August 31, 2009, which he believes was nugatory because he was released from prison on May 6, 2009.

13. For its part, the State claims that the instant petition is inadmissible because it does not present facts that may establish violations of the rights recognized on the American Convention. In its view, there is nothing that prima facie indicates that the petitioner's guarantees of due process or his rights under the American Convention have been violated. It argues that the petitioning party failed to exhaust appropriate and effective domestic remedies because the issue of a final resolution on the effective cooperation agreement was pending when the instant petition was filed. As for its purported violation of personal liberty, the State claims that the petitioner, not having challenged the trial court's resolution that dismissed his habeas corpus petition, agreed to the judgment. It also indicates that no appeals were lodged on that situation. It alleges that the reason that the approval of the plea agreement was "delayed" was that the petitioner did not meet the requirements set forth in the law.

14. The State moreover considers that the guarantees of due process were at all times respected; however, it emphasizes the petitioner's behavior in the phase of investigation because he allegedly tried to cripple investigations aimed at clarifying the offenses for which he was accused, prosecuted and sentenced. Furthermore, it submits that when he decided to enter a plea agreement, Mr. Gómez Rodríguez ignored that two other people had already provided the same information that he believed had contributed with to the investigation; that, therefore, it was impossible to approve such an agreement. It claims that the alleged victim exhausted the appropriate legal remedies provided for in the domestic system and that the courts settled each of these remedies. Consequently, the State deems that the petitioner seeks to have the Commission work as a court of fourth instance because he is not satisfied with the result of the resolutions made by the domestic courts.

15. It submits that, considering the facts in the instant petition, the only alleged victim is the petitioner and that his next of kin have not been affected. The State indicates that the goods seized from former colonel Gómez Rodríguez were bought with public funds obtained through the acts of corruption for which he was sentenced to six years' imprisonment. Lastly, the State alleges that it did not infringe the petitioner's right to physical integrity because the State cannot be held liable for the dissemination of information by private news media.

16. The State moreover questions the admissibility of the instant petition because this was notified six years after its filing to the IACHR.

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

17. In the instant case, the Inter-American Commission observes that the petitioner's allegations essentially concern alleged irregularities taking place in the context of a proceeding on an agreement of effective cooperation with justice, under Law No. 27378, and in the enforcement of a sentence awarded after a criminal trial for embezzlement of public funds. In this regard, the Commission observes that the proceeding on the plea agreement started on September 19, 2001 and concluded on February 22, 2010 by means of a resolution from the Fourth Special Criminal Prosecutor's Office, whose judgment was sent to the Fourth Special Criminal Tribunal of the Superior Court of Justice for closure of the case. Likewise, the main criminal trial began in early 2001 and the last judicial resolution concerning the enforcement of his sentence was the dismissal of the habeas corpus petition by the Sixth Criminal Tribunal of Lima of August 31, 2009, notified on September 14 that year, after the petitioner's release from prison on May 6, 2009.

18. In this regard, the Commission observes that the State does not controvert that the abovementioned judicial proceedings were settled through the decisions mentioned but that it does observe the fact that when the instant petition was filed (on December 4, 2008) there was not yet a final decision on the effective cooperation agreement, terminated in 2010. With respect to this, the Commission reiterates that the situation that must be considered to determine whether domestic remedies have been exhausted is that existing at the time that the admissibility of a petition is ruled upon, because the time when a petition is filed is different than the time when a decision on admissibility is made.

19. Moreover, the State claims that the petitioner did not challenge the decision on the habeas corpus petition that he lodged with a view to claiming what he believed was his right to access a sentence reduction. In relation to this, the Commission believes that, regardless of the merit of the petitioner's claim, an appeal against it is not required given that said remedy on personal liberty was resolved after the petitioner had served a term in prison.

20. In view of the foregoing, the Commission concludes that the instant petition fulfills the requirements established in Article 46.1 subparagraphs (a) and (b) of the American Convention. As for the State's claim on the time elapsed from the filing of the petition to its notification to the State, the Commission reiterates that neither the American Convention nor the IACHR Rules of Procedure establish a deadline for the notification of a petition to the State from the time the petition is received, and that deadlines established in the Convention and the Rules of Procedure for other stages of the admissibility procedure are not applicable here.⁵

VII. ANALYSIS OF COLORABLE CLAIM

21. In light of the factual and legal elements presented by the parties and considering the nature of the matter brought to its attention, the alleged violations of the principle of due process in relation to the agreement of effective cooperation, the lack of recognition of the period under house arrest, and the alleged lack of judicial protection, if proven, all could prima facie establish violations of the rights enshrined in Articles 7 (Personal Liberty), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of Mr. Miguel Ángel Gómez Rodríguez.

22. In regard to the State's observations on the "establishment of a court of fourth instance," the Commission recognizes that it is not competent to review resolutions issued by domestic courts acting within the scope of their jurisdiction in conformity with due process and judicial guarantees. Nevertheless, under its mandate the Commission is competent to declare a petition admissible and, if applicable, to rule on the merits when said petition concerns domestic proceedings that may have violated rights protected by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 7, 8 and 25 of the American Convention, in connection with Articles 1.1 and 2 thereof; 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 by the Inter-American Commission on Human Rights on the 31st day of the month of December, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño,

⁵ IACHR, Report No. 1/18. Admissibility. Mirtha Elizabeth Canelo Castaño and Carla Paola Canelo. Argentina. February 24, 2018, par. 12.

First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Joel Hernández García (en disidencia), Antonia Urrejola, and Flávia Piovesan, Commissioners.