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REPORT No. 149/17
PETITION 559-08
REPORT ON ADMISSIBILITY

SAMUEL WALTER ROMERO APARCO
PERU

Approved by the Commission at its session No. 2104 held on October, 26 2017.
165th Regular Period of Sessions.

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I. INFORMATION ABOUT THE PETITION

Petitioning party:	Samuel Walter Romero Aparco
Alleged victim:	Samuel Walter Romero Aparco
State denounced:	Peru
Rights invoked:	Articles 5 (Humane Treatment), 8 (Fair Trial), 9 (Freedom from Ex Post Facto Laws), 11 (Privacy), 23 (Right to Participate in Government), 24 (Equal Protection), 25 (Judicial Protection), 26 (Progressive Development) and 29 (Interpretation) of the American Convention on Human Rights; ² and Article 45 of the OAS Charter

II. PROCEDURE BEFORE THE IACHR³

Date on which the petition was received:	May 7, 2008
Date on which the petition was transmitted to the State:	December 17, 2012
Date of the State's first response:	February 19, 2013
Additional observations from the petitioning party:	August 12, 2013; May 5, 2014 and July 6, 2017
Additional observations from the State:	January 17, 2014 and August 4, 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 (ratification instrument deposited on July 28, 1978)

IV. ANALYSIS OF 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 8 (Fair Trial), 23 (Right to Participate in Government) and 25 (Judicial Protection) of the American Convention, in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the same treaty

¹ In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not participate in the discussion or the decision on this matter.

² Hereinafter "Convention" or "American Convention".

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

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, November 8, 2008
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

1. Mr. Samuel Walter Romero Aparco (hereinafter “Mr. Romero” or “the alleged victim”) claims that he was wrongfully removed from his job as a judge as a result of a decision issued by the National Judicial Council (hereinafter “CNM”) that violated the *non bis in idem* principle and which cannot be challenged.

2. He asserts that he served as a judge in a case settled on May 15, 2000, and that when the judgment had become final, the 34th Court of Enforcement returned the proceedings to him due to the respondent party having requested that proceedings be annulled. He indicates that on July 6, 2000, he declared himself incompetent to decide on the matter. However, he alleges that on the following day he assumed competence and nullified *ex officio* all the proceedings that took place after the case had been served on the respondent party.

3. He indicates that because of said act a complaint was filed against him before the District Judiciary Control Office of the Superior Court of Justice of Lima (hereinafter “ODICMA”), and that he was acquitted on September 20, 2000. Likewise, he indicates that on November 20, 2000, a complaint for malfeasance was lodged against him before the Office of the Supreme Prosecutor for Internal Oversight of the Attorney General’s Office. On October 26, 2001, said body found the complaint admissible on the grounds that the alleged victim had deviated from the law by reversing proceedings in the enforcement stage to the detriment of legal certainty. According to him, this body also recommended that said complaint be sent to the Judiciary Control Office of the Judicial Branch so that, in addition to the criminal aspect, potential disciplinary liabilities be investigated. On February 5, 2002, the Attorney General’s Office declared the complaint groundless on the basis that Mr. Romero’s acts did not demonstrate the commission of an offense and that his acts were based on the principle of procedural economy.

4. However, on April 19, 2002, the CNM filed a disciplinary action against Mr. Romero and on June 27, 2002 it ruled to remove him from office in view of a functional misconduct under article 31 of the CNM Organic Law, as he had committed a serious act which, despite not being a crime or constitutional offense, damages the prestige of the judicial branch, compromises the dignity of the public function and detracts from the public image. Mr. Romero claims that the CNM decided to remove him based on the same facts heard by the ODICMA and the Attorney General’s Office; and that, therefore, it violated the principles of *non bis in idem* and presumption of innocence.

5. The alleged victim submits that under the Peruvian legal framework resolutions issued by the CNM are not subject to judicial review. Nevertheless, on July 5, 2002, he lodged an appeal for review to the CNM and it was rejected on August 6, 2002. Likewise, on August 22, 2002, he filed a constitutional appeal against the CNM before the 37th Specialized Civil Court of Lima (hereinafter “37th Court”) so that this body would find the CNM’s resolution inapplicable on the basis that it violates his right to due process and the principles of the presumption of innocence and *non bis in idem*. On April 16, 2004, the 37th Court found his complaint groundless on the basis that the application of the *non bis in idem* principle requires that both the parties and the attributed acts be identical in the legal proceedings, a condition that said Court deemed inexistent in this case. In this regard, the Court considered that the complaint filed before the ODICMA referred to a purported delay on the part of the alleged victim as regards the settlement of two requests filed by the parties; that the legal action before the Prosecutor’s Office concerned the reversal of proceedings previously settled by an uncontested final judgment; and that the proceedings before the CNM concerned the act of hearing a case in which he had already declared himself incompetent after hearing only the respondent party.

6. Subsequently, he filed a remedy before the Superior Court of Justice of Lima in order that, again, the CNM’s resolution be declared inapplicable in view of the violation of the *non bis in idem* principle.

On October 18, 2005, the Court found the complaint groundless, as it deemed that the CNM had respected the alleged victim's right of defense and because the matters investigated by the Judiciary Control Office were not the same, considering that the investigation made by the Prosecutor's Office concerned an offense, a situation different from the disciplinary proceedings lodged.

7. Subsequently, on January 30, 2006, he resorted to the Constitutional Court (hereinafter "TC") by filing a constitutional remedy so that this court would annul the resolution issued by the CNM. He asserts that the TC analyzed if the disciplinary legal action had respected the basic legal safeguards applicable on all administrative proceedings aiming at the restriction of the exercise rights, and that it found the remedy inadmissible on the basis that in the disciplinary proceedings his right of defense was respected, that the resolution was well founded and that the matters investigated by the CNM were not the same as those investigated by the Prosecution.

8. In addition, he submits that he was not notified which inappropriate conduct was being attributed to him and that in his removal from office, he was subjected to unequal treatment since other judges and prosecutors with serious disciplinary sanctions on them were confirmed in their posts, whereas he was not despite having a good professional record, functional conduct and an academic career. Likewise, he indicates that the punishment imposed is contrary to a person's moral integrity, honor and dignity in view of the permanent prohibition of his reinstatement in the Judicial Branch or the Attorney General's Office.

9. For its part, the State asserts that the two legal actions in the domestic courts do not constitute a violation of the *non bis in idem* principle, since the proceedings were different in nature and source. In this regard, it submits that the purpose of the investigation in the framework of the disciplinary proceedings filed against Mr. Romero was to impose sanctions on a functional conduct considered as administrative misconduct, whereas the judicial proceedings were lodged due to the possible commission of a criminal offense. It asserts that the IACHR itself has already established that the criminal jurisdiction and the disciplinary-administrative jurisdiction are different in nature, and that although the safeguards of due process of law must be applied by both jurisdictions, the latter are independent from each other, which means that one single event or circumstance may be analyzed from the perspectives of the criminal jurisdiction and the disciplinary jurisdiction because both of these have different purposes and apply different standards in the assessment of the attributed acts.

10. Moreover, the State indicates that Mr. Romero had access to the usual periods and remedies legally established to ensure his right of defense. As to the review of the CNM's resolutions, it explains that these can be reviewed by the constitutional court in cases where no preliminary hearing of the person under investigation is carried out and the resolution lacks motivation. It also adds that Mr. Romero could have challenged the CNM's judgment of removal before the constitutional court, in which he could have filed the arguments and evidence necessary to exercise his right. It concludes by saying that it ensured Mr. Romero's access to effective legal remedies and that these were carried out pursuant to the rules of due process.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

11. The Commission notes that after his removal, Mr. Romero lodged several remedies seeking to annul the judgment of his removal from office. Both parties agree in that the last remedy filed was the constitutional appeal presented before the TC, that the TC settled this remedy on April 12, 2007 and that the decision was notified on November 8, 2007. Concerning the filing period, Mr. Romero asserts that he sent his petition by electronic mail to the Commission on May 7, 2008, within the 6 months following the last notification. For its part, the State alleges the untimely presentation of the petition given that when the processing of the petition began, the Commission informed the State that it had been received on May 9, 2007.

12. Considering the position of the parties and the information submitted by them, the Commission believes that the domestic remedies were exhausted on November 8, 2007. In addition, it notes that pursuant to the DHL Express receipt No. 6530717093, which is contained in the case file, this petition was sent to the IACHR not by electronic mail but by ordinary mail on May 7, 2008, and was received on May 9,

2008. According to the IACHR's practice in the subject, the Commission understands that the days that passed while the petition was in the post office are a reasonable period for the reception of the petition; therefore, the Commission believes that it was filed in due course.⁴

VII. COLORABLE CLAIM

13. After considering the information filed by the parties, the Commission deems necessary to analyze in the merits stage whether the reported impossibility to obtain a comprehensive review of a punitive ruling, which lead to the alleged victim's removal from office and a permanent prohibition to take office, if proved, could establish a violation of the rights enshrined in Articles 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in connection with its Articles 1.1 and 2. In this regard, it takes into account that under the law in force the CNM's decision is not subject to review: even though Mr. Romero was able to challenge certain aspects of due process, the courts indicated that the review was limited to some procedural aspects since the decision concerning his removal was not subject to review. Likewise, the IACHR will analyze in the merits stage if the permanent ban on the alleged victim to be reinstated in another post in the Judicial Branch or the Attorney General's Office, resulting from the alleged victim's removal, could constitute a violation of the right enshrined in Article 23 (Right to Participate in Government) of the Convention pursuant to Article 1.1 of the same treaty.

14. Moreover, based on the available information, the IACHR considers that the petitioner did not file sufficient evidence to *prima facie* support a possible violation of the *non bis in idem* principle. The IACHR also considers that there is insufficient evidence to support the purported violation of the rights enshrined in Articles 5, 9, 11, 24 and 26 of the Convention.

15. As to Mr. Romero's claim on the violation of rights enshrined in the OAS Charter, the Commission recalls that although it is not entitled to rule on the violation of rights established in said instrument, it is competent to resort to the standards established there, in order to interpret the rules of the Convention by virtue of Article 29 of the Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 23 and 25 of the American Convention, in relation to Articles 1.1 and 2 of said treaty;

2. To find the instant petition inadmissible in relation to Article 5, 9, 11, 24 and 26 of the American Convention;

3. To notify the parties of this decision;

4. To continue with the analysis on the merits; and

5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Montevideo, Uruguay on the 26th day of the month of October, 2017. (Signed): Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.

⁴ IACHR, Report No. 69/08. Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, par. 44-46.