

OEA/Ser.L/V/II.
Doc. 92
31 May 2019
Original: Spanish

REPORT No. 83/19
PETITION 403-08
REPORT ON ADMISSIBILITY

JUAN CARLOS TAFUR RIVERA
PERU

Approved electronically by the Commission on May 31, 2019.

Cite as: IACHR, Report No. 83/19, Petition 403-08. Admissibility. Juan Carlos Tafur Rivera.
Peru. May 31, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	<i>Instituto de Defensa Legal</i> [Legal Defense Institute] (IDL) ¹
Alleged victim:	Juan Carlos Tafur Rivera
Respondent State:	Peru ²
Rights invoked:	Articles 8 (right to a fair trial) and 13 (freedom of thought and expression) of the Inter-American Convention on Human Rights ³ in relation to Articles 1 (obligation to respect rights) and 2 (domestic legal effects) thereof.

II. PROCEEDINGS BEFORE THE IACHR ⁴

Filing of the petition:	April 4, 2008
Additional information received at the stage of initial review:	April 21, 2008
Notification of the petition to the State:	August 13, 2014
State's first response:	November 17, 2014
Additional observations from the State:	June 18, 2018
Notification of the possible archiving of the petition:	October 24, 2017
Petitioner's response to the notification regarding the possible archiving of the petition:	November 23, 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 (instrument 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	Articles 8 (right to a fair trial), 13 (freedom of thought and expression), 22 (freedom of movement and residence), and 25 (right to judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof.

¹ The State asserts that the alleged victim has not expressly delegated the petitioners to represent him. In this regard, the IACHR recalls that Article 44 of the American Convention allows any person or group of persons, or non-governmental entity legally recognized in one or more member States of the Organization, to file complaints alleging violations of the Convention without requiring them to be authorized by the alleged victims or to present a power of attorney on their behalf.

² In accordance with Rule 17.2.a of the Commission's Rules of Procedure, Commissioner Francisco José Equiguren Praeli, a Peruvian national, did not participate in the debate or in the decision of the present case.

³ Hereinafter "Convention" or "American Convention."

⁴ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on October 4, 2007
Timeliness of the petition:	Yes, on April 4, 2008

V. FACTS ALLEGED

1. The petitioner submits that the alleged victim, Juan Carlos Tafur Rivera, is a journalist with a lengthy career in Peru, whose rights to freedom of expression, due process of law, and freedom of movement were violated in connection with a criminal proceeding brought against him for the crime of aggravated defamation. It states that the journalist ran the newspaper *Correo*, a periodical that published information in 2003 about the police investigation into the escape of a suspected drug trafficker, linking him to a then sitting judge. The petitioner notes that this judge subsequently filed a lawsuit against Mr. Tafur Rivera alleging that he acted “with clear defamatory interest” against her.

2. The press articles that gave rise to the criminal proceedings were published on July 18 and 19, 2003 in the newspaper *Correo*, and were said to be related to an investigation being led by the National Counternarcotics Bureau [*Dirección Anti-Drogas*] (DIRANDRO) about the escape from the country of a known alleged drug trafficker, in whose case the then judge of the Eighth Provincial Criminal Court of the Northern Cone declined to order detention measures to ensure his appearance in the criminal proceedings against him. In particular, the petitioner notes that the July 18, 2003 article reported the escape from the country of the drug trafficker, as well as the personal assessment of a police source, who asserted that the judicial decision was irregular and that it was not within the judge’s authority to rule on the request to secure his appearance. The article also mentioned a trip that the judge took 15 days after her ruling, and stated that, according to police sources, DIRANDRO was investigating her in order to determine whether she had any responsibility in the aforementioned case. Regarding the July 19 article, the petitioner indicates that the newspaper again published information about the drug trafficker’s escape from the country, and further stated that, according to police sources, DIRANDRO was reportedly investigating the judge in order to determine whether she had traveled with him.

3. According to the petitioner, on July 22, 2003, the judge asked Mr. Tafur Rivera to correct these publications in his capacity as editor of the newspaper *Correo*. It states that, on July 23, 2003, the information provided by the judge was published, indicating that she had traveled to Spain as part of a postgraduate course for which she was authorized to travel by the Executive Council of the Judiciary, and which was funded through a loan from the National Scholarship Institute. However, the newspaper added in the publication that the complaint filed against the judge by the Drug Prosecutor for the judicial conduct in the aforementioned case was still pending. The petitioner states that, in light of the foregoing, the judge filed a criminal complaint against Mr. Tafur Rivera, in his capacity as Director of the newspaper *Correo*, for the criminal offense of defamation.

4. The petitioner states that the judge alleged in the criminal complaint that Mr. Tafur Rivera defamed her by linking her to the alleged drug trafficker. She alleges in the complaint that the statements in the articles were “reckless” and that the information on the complaint filed by the Drug Prosecutor was false because the complaint was dismissed after being found inadmissible. On August 21, 2003, the defense filed a motion to dismiss based on the improper classification of the legal action [*excepción de naturaleza de acción*], asserting that the information published on July 18, 19, and 23 was based on statements from the authorities in charge of the investigation, as specified in the articles. It added that the alleged victim could not be the perpetrator of the alleged crimes, since the articles were signed by the journalists responsible for them, and no legal action was brought against them. It contended that “defamatory animus” was a requisite element of the offense, which was lacking in the alleged victim’s conduct, since he merely approved the articles, they were in the public interest, had been “reasonably” verified, and concerned investigations being carried out by the National Police and the Judicial Oversight Office of the Northern Cone.

5. The petitioner indicates that on February 24, 2005, the Twentieth Criminal Court of Lima granted the alleged victim's motion to dismiss, since "Juan Carlos Tafur's actions were a legitimate use of his right to inform, and therefore cannot be considered a crime, let alone the offense of defamation." The complainant appealed the decision, and on appeal the Second Criminal Chamber for non-detained defendants, overturned the judgment and found the motion to dismiss unfounded on the grounds that "The person who made the statements must prove them." In response, Mr. Tafur Rivera filed a motion to vacate. On April 25, 2006, the First Transitory Criminal Chamber of the Supreme Court ruled the motion to dismiss unfounded, and ordering the Twentieth Criminal Court of Lima to issue a judgment. According to the Chamber, "The veracity of the accusations must be objectively demonstrated, which did not occur in this case." Subsequently, on August 1, 2006, the plaintiff requested the recusal of the trial judge, who on August 17, 2006 was recused from the case. The journalist appealed this decision. According to the petitioner, with the replacement of the judge on September 5, 2006, the recusal was set aside.

6. The petitioner reports that on 16 October 2006, the judge in charge of the Twentieth Criminal Court of Lima condemned the journalist, "suspending the conviction for a term of one year and ordering the payment of civil damages in the amount of 50,000 *nuevos soles*." The judgment reportedly stated, *inter alia*, that Mr. Tafur Rivera "has failed to demonstrate in this case the existence of an investigation in DIRANDRO and in the Judicial Oversight Office of the Northern Cone." The alleged victim filed an appeal, but on January 25, 2007, the Second Criminal Chamber for non-detained defendants upheld the conviction. In view of this decision, the journalist filed a motion to vacate, "in order for the Supreme Court to rule on the matter being litigated." On September 24, 2007, the First Transitory Criminal Chamber of the Supreme Court declined to vacate the decision upholding the conviction. According to the petitioner, this decision, which was served on the journalist on October 4, 2007, was the final court of appeal, and there is no other remedy against this decision.

7. Finally, with respect to the alleged violation of Mr. Tafur's freedom of movement, the petitioner reports that pursuant to the criminal complaint, on October 7, 2003, the judge presiding over the Twentieth Criminal Court of Lima took a statement from the defendant journalist and on October 22, 2003, issued an order prohibiting him from leaving the country. According to the petitioner, the judge immediately notified the Immigration Police without informing Mr. Tafur Rivera. It states that he only learned about it on November 22, 2003, moments before he was to board a flight to Miami. His lawyers subsequently filed an appeal, as well as a complaint against the judge who issued the measure.

8. In light of the foregoing, the petitioner concludes that: (i) the requirement of proving the veracity of what is stated in the articles and the presumption that the alleged victim acted with malice (bad intent) violates the right to freedom of expression; (ii) the judges disregarded the fact that a public official is subject to a higher standard of scrutiny, thereby violating the right to freedom of expression; (iii) the criminal laws on libel, slander, and defamation in Peru do not take account of the fact that the conduct of public officials and individuals with a public profile is subject to a higher standard of scrutiny; and (iv) applying the presumption of guilt to Juan Carlos Tafur violates Article 8.2 of the ACHR.

9. The State, in turn, contends that the initial petition does not contain any specific claims for the protection or reparation of the rights alleged to have been violated, and that Mr. Tafur Rivera did not expressly authorize the petitioner to represent him. It also asks the IACHR to find the petition inadmissible, arguing that it does not meet the requirements of Articles 46.1.a) and 47.b) of the American Convention. In relation to the exhaustion of domestic remedies, the Peruvian State alleges that the petitioner has failed to prove the filing and exhaustion of judicial remedies to protect all the rights invoked in the petition. In particular, it points out that the criminal process initiated against the journalist for the crime of aggravated defamation is a special criminal process known as a lawsuit, between two individuals, "without the participation of any State entity as a plaintiff or defendant." It further notes that the purpose of this case was not to protect the rights that the petitioner alleged to have been violated, that is, his rights to a fair trial and to freedom of expression. Thus, according to the State, the ideal mechanism for this would be a writ of *amparo*, "because it is a constitutional proceeding for the protection of fundamental rights," which could have been filed against the Supreme Court's final judgment. As to the extraordinary nature of that remedy, the State

maintains that it may be an appropriate remedy “if warranted in the particular situation, as in the case under analysis.”

10. The State also submits that this petition does not fall within the exceptions to the exhaustion of domestic remedies provided for in Article 46.2 of the American Convention, as the country’s laws provide for due process of law for the protection of rights alleged to have been violated: “The alleged victim has the right to access domestic remedies, and was not prevented from exhausting them, and finally, there was no improper delay in the decision on the aforementioned remedy, insofar as it was not effectively activated by the alleged victim.” In addition, the State alleges that the petition did not meet the deadline established in Article 32 of the IACHR’s Rules of Procedure, since the petitioners’ reference to the six-month period does not refer to a mechanism for protecting the rights alleged to have been violated, but rather to the end of a criminal case against the alleged victim.

11. The State further alleges that the petition does not include any fact that would constitute a violation of the rights invoked before the IACHR. On the alleged violation of the right to freedom of expression, it indicates that Peru respects and guarantees this right, and that “this State conduct has been reiterated in practice in recent decades.” It emphasizes that, in the opinion of the courts, the statements published in the press reports fell within the scope of freedom of information, since they were factual data supplied by certain sources. The courts then focused on examining whether the published information was truthful, referring to “the level of diligence to corroborate the information.” The State affirms that “Mr. Tafur’s conduct did not reflect this minimum diligence requirement.” For example, it says that the investigation of the judge was declared inadmissible and closed on February 28, 2003, four months before she was mentioned in the press reports. It also observes that the complainant was able to prove with evidence that the published information was false, while the journalist could not prove that the alleged investigation of the judge by DIRANDRO was true. The State considers that “in light of the aforementioned evidence presented by the judge, the published information was manifestly false, thus demonstrating a breach of the duty of due diligence.” In view of the foregoing, the State affirms, among other things, that there was no reversal of the burden of proof, given the fact that the complainant was able to prove the journalist’s criminal responsibility, which meant that there was no presumption of the falsity of the information. It also indicates that the actions of the courts did not contravene the doctrine of actual malice; nor did they deny that public officials are subject to the highest level of scrutiny.

12. With regard to the alleged violation of the right to a fair trial, the State indicates that the alleged victim had a defense attorney throughout the criminal proceedings against him, the opportunity to present evidence and file appeals to challenge decisions that allegedly violated his rights, and other means of defense. It reiterates that he was never required to prove the veracity of the public information, but that he was required to comply with the duty of due diligence; and that his disagreement with judicial decisions cannot constitute an infringement of his rights. The State further asserts that, by filing his petition with the IACHR, the petitioner is tacitly requesting that the IACHR act as a fourth instance.

13. Finally, with respect to domestic legal effects, the State points out that it is not necessary for the differences between private individuals, public officials, and individuals with a public profile to be expressly regulated “in order for them to be applied by judges in settling disputes that arise in this regard.” In addition, it states that “In any case, [...] the petitioner’s allegations would have been considered by the State with the adoption of Plenary Order No. 3-2006/CJ-116 of October 13, 200[6]” which is “doctrine that is binding on all the country’s judges and in which the criteria for resolving any potential conflict between the crime against honor [...] and the constitutional right to freedom of expression have been developed.”

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

14. The petitioner states that domestic remedies were exhausted with the September 24, 2007 judgment of the First Transitory Criminal Chamber of the Supreme Court, which was served on Mr. Tafur on October 4, 2007. It notes that this decision, which upheld the journalist’s conviction, was issued by the court of last resort, and cannot be appealed. For its part, the State contends that the alleged victim did not comply

with the requirement to exhaust domestic remedies, since the case was not brought by the journalist, “but rather was brought against Mr. Tafur for the crime of defamation against a judge.” It argues that the most suitable remedy is an *amparo* proceeding, as it is a constitutional process for the protection of fundamental rights such as freedom of expression and due process. It further argues that The petition fails to comply with the deadline established in Article 32 of the IACHR’s Rules of Procedure, since the petitioner’s reference to the six-month period does not refer to a mechanism for the protection of the rights invoked as allegedly violated; rather, it refers to the end of criminal proceedings against the alleged victim.

15. The Commission reiterates that the exhaustion of domestic remedies requirement does not mean that alleged victims are under an obligation to exhaust all available remedies. In this regard, the IACHR has maintained that “if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled.”⁵ In the present case, the Commission observes, for purposes of the admissibility analysis, that the alleged victim exhausted the ordinary remedies provided for in the criminal proceedings brought against him in order to assert his allegedly violated rights and, therefore, the petition meets the requirement set forth in Article 46.1.a of the Convention. In addition, considering that the petition was received on April 4, 2008, and that the ordinary remedies were exhausted on September 24, 2007, with notice being served on the alleged victim on October 4, 2007, the Commission finds that the filing deadline established in Article 46.1.b of the American Convention has been met.

VII. ANALYSIS OF COLORABLE CLAIM

16. Based on the legal and factual elements presented by the parties and the nature of the matter brought before it, the Commission finds that, if proven, the petitioner’s allegations regarding the use of a criminal offense to punish the dissemination of information purportedly in the public interest, the effects of that penalty on the petitioner, and the alleged irregularities in the criminal proceedings could amount to a possible violation of the rights enshrined in Articles 8 (right to a fair trial), 13 (freedom of thought and expression), 22 (freedom of movement and residence), and 25 (right to judicial protection) of the American Convention, in relation to the obligations established in Articles 1.1 and 2 thereof.

17. With regard to the State’s arguments relating to the fourth instance formula, the Commission acknowledges that it is not competent to review judgments handed down by national courts acting within the scope of their jurisdiction and applying due process and the right to a fair trial. However, it reiterates that pursuant to its mandate it is competent to find a petition admissible and decide on the merits when it concerns domestic proceedings that may violate rights guaranteed by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 13, 22, 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 May, 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.

⁵ IACHR, Report No. 70/04, Petition 667/01, Admissibility, Jesús Manuel Naranjo Cárdenas *et al.*, Pensioners of the Venezuelan Aviation Company VIASA. Venezuela, October 15, 2004, para. 52.