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REPORT No. 187/18
PETITION 1255-08
REPORT ON INADMISSIBILITY

WALTER ESTEBAN OJEDA
ARGENTINA

Approved electronically by the Commission on December 27, 2018

Cite as: IACHR, Report No. 187/18. Petition 1255-08. Inadmissibility. Walter Esteban Ojeda.
Argentina. December 27, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Juan Pablo Vigliero and Rodolfo Andrés Vaccarezza
Alleged victim:	Walter Esteban Ojeda
Respondent State:	Argentina
Rights invoked:	Article 8 (fair trial), Article 9 (principle of legality and retroactivity), and Article 25 (judicial protection) of the American Convention on Human Rights, ¹ in connection with its Article 1.1 (obligation to respect rights); Article XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man ² and other international treaties ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	October 24, 2008
Notification of the petition to the State:	June 11, 2012
State's first response:	April 19, 2016
Additional observations from the petitioners:	May 18, 2017
Additional observations from the State:	September 27, 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 (deposit of instrument of ratification September 5, 1984)

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:	Yes, April 25, 2008. According to the terms of Section VI.
Timeliness of the petition:	Yes, October 24, 2008

V. FACTS ALLEGED

1. The petitioners allege that Walter Esteban Ojeda (hereinafter “the alleged victim” or “Mr. Ojeda”) was criminally prosecuted for armed robbery of a butcher shop, along with two other persons. During the robbery, one of the assailants shot the brother of the shop’s owner, who attempted to follow the group of assailants, leading to his death from a gunshot to his chest. As a result of these incidents, Mr. Ojeda was tried in a criminal court of first instance, Juvenile Court No. 2 of the Federal Capital, because one of the three persons charged was a minor.⁵ Juvenile Court No. 2 of the Federal Capital charged and tried him as an accomplice for the crime of aggravated robbery including the use of a firearm, combined with homicide, in

¹ Hereinafter “the American Convention” or “the Convention.”

² Hereinafter “the American Declaration” or “the Declaration.”

³ Articles 2, 6, 8, 10, 11, and 14 of the Universal Declaration of Human Rights; and Articles 14, 15, and 16 of the International Covenant on Civil and Political Rights.

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

⁵ The minor is not an alleged victim in the present petition.

furtherance of a crime (*criminis causae*). He was unanimously acquitted for this crime on May 5, 2000, because it was deemed that the evidence was insufficient to establish a link between him and the criminal incident.⁶

2. Against this judgment, the Attorney General's Office filed an appeal, which was heard by the First Chamber of the National Court of Criminal Cassation (*Sala I de la Cámara Nacional de Casación Penal*), which with its judgment of December 1, 2000 overturned the acquittal of the alleged victim and ordered that a new trial be held. Because of that, the case was transferred to the Criminal Oral Court No. 7 of the Federal Capital (*Tribunal Oral en lo Criminal*, hereinafter "TOC No. 7"), and on April 10, 2006, it convicted the alleged victim and sentenced him to ten years' imprisonment, because it deemed that the facts classified the crime as a homicide during robbery.

3. Against this judgment, both the defense attorney, on April 21, 2006, and the Attorney General's Office filed a cassation appeal with the National Court of Criminal Cassation, in which the First Chamber of the Court (which had previously overturned the judgment of acquittal) intervened once again. This chamber ruled, on the basis of the judgment of December 19, 2006, to modify the classification of the crime concerned, again taking up the charge of homicide in furtherance of a crime and convicting Mr. Ojeda and sentencing him to life imprisonment. In view of this ruling, the petitioners filed an extraordinary appeal with the National Court of Criminal Cassation, which processed it and referred it to the Supreme Court of Justice of the Nation, which ruled it was inadmissible on April 22, 2008, on the basis of its discretionary power to review (*certiorari*).

4. The petitioners claim that the State violated the principle of presumption of innocence to the detriment of the alleged victim, who was acquitted in his first trial, and that after the cassation appeal was filed by the Attorney General's Office, he was judged by courts that had not been entirely impartial, because it was the First Chamber of the National Court of Criminal Cassation itself that intervened in all the appeals that were filed. The petitioners allege that this court had a preconceived idea of the alleged victim's guilt and, in all of its rulings, issued judgments against him without properly weighing the evidence.

5. The petitioners also pointed out that, in the regular proceedings, the defense did not have due control over the evidence submitted by the Attorney General's Office, because testimony that was read out against the alleged victim was included, without the possibility of questioning said witnesses at the hearing before TOC No. 7. In addition, they alleged that the Supreme Court of Justice of the Nation's failure to admit the extraordinary appeal denied the alleged victim access to a second hearing, because, as they alleged, the First Chamber had weighed the facts and rights involved in the case again, issuing an original judgment, as a result of which Mr. Ojeda would have been entitled to a second hearing.

6. As for the Argentine State, it alleges that, at TOC No. 7, the alleged victim enjoyed the full exercise of his right to a defense and could have challenged the evidence submitted by the prosecution and freely provided any evidence he deemed relevant to undermine it. It underscores that Mr. Ojeda received two judgments of conviction issued by courts authorized to conduct a comprehensive and integral examination of all the issues of fact and law. It claims that the alleged victim had the opportunity to file an appeal of recusal, which was the suitable and effective measure to challenge the composition of the First Chamber of the National Court of Criminal Cassation. In fact, the party proposed this remedy, but he did not support or substantiate it,⁷ although the intervening court had requested him to do so, and therefore, as a result, it turned down said appeal on September 14, 2006. This decision rejecting the appeal was not challenged by the petitioners, although the extraordinary federal remedy was available and was authorized for challenging said ruling; and could have even ruled the unconstitutionality of the applicable procedural law. The state indicates that these considerations are relevant when considering that it was this appeal of recusal that was the suitable way to remedy a basic situation set forth in the petition before the IACHR, namely challenging the impartiality of the judges of the First Chamber. The state substantiates these allegations in the jurisprudence

⁶ The petitionary party did not file any allegations about prolonged pretrial prison.

⁷ The case file indicates that this remedy was filed by a private attorney.

of the Inter-American Court, which indicates that when relevant grievances are not submitted adequately in the jurisdiction under domestic law, then they are prevented from being introduced subsequently in an international court, tending to establish an assumption of improper exhaustion of remedies under domestic law. This would make the present petition inadmissible.

7. As for the right to a second hearing for Mr. Ojeda, Argentina claims that, with the ruling of the Court of Cassation, subsequent to the judgment of conviction from TOC No. 7, this guarantee to the right to a second hearing by a higher legal body was effectively fulfilled. Therefore, the alleged victim was given two judgments of conviction issued by courts authorized to conduct a comprehensive and integral examination of all matters argued in the case. In that regard, the inadmissibility of the extraordinary federal appeal ruled by the Supreme Court of Justice of the Nation had not undermined the alleged victim's right, nor was the ruling upheld because of his failure to substantiate the appeal, but rather it was the absence of elements that highlighted the alleged arbitrariness that was claimed. The state pointed out that the petitioners base their argument on a false premise when they consider that the judgment of the First Chamber constituted a first judgment of conviction that merited further review on the basis of the change in legal classification decided by the latter.

8. Regarding this, the state reiterates that recusal was the suitable remedy to claim that the right to an impartial court had been violated and to request a second hearing, which the petitioners voluntarily refused to engage in. Therefore, the state understands that these remedies cannot be deemed to have met the requirement of admissibility, according to Article 46(1)(a) of the American Convention.

9. As for the matter of the evidence submitted, the state indicates that, in the oral trial conducted in TOC No. 7, the judges initially turned down the request of the Attorney General's Office to incorporate it "by reading" the testimony of a witness absent from the hearing, which the petitioners claim is a "key element" for the accusations made against the alleged victim. As a result, said court ordered the urgent delivery of official letters to various authorities so as to order the witness to appear. After it was observed that said witness was outside the country because he was a foreign national, the court decided to accept the Attorney General Office's request to incorporate said testimony by reading it, in accordance with Article 391, subparagraph 3, of the Criminal Proceedings Code of the Nation, also underscoring in its judgment that, in the case, there was an effective monitoring of said statements by the defense. It points out that, although the defense verbally opposed the incorporation of said testimonial evidence by reading, invoking the appeal for reversal, it neglected to substantiate the latter at a suitable time in the proceedings, thus neglecting to reserve for himself the corresponding right to appeal the decision in the cassation and the federal case.⁸ The state points out that the above-mentioned testimonial evidence, although it was relevant, did not constitute the only complete evidence, as claimed by the petitioner. In fact, it was taken into consideration even in the trial of the juvenile court that acquitted Mr. Ojeda. It also refers to the judgment of the First Chamber of December 19, 2006, which stipulates that the grievance referring to the alleged violation of the defense in a trial because of the incorporation of the reading of the testimony being challenged is not admissible because, as a result of its origins, the damage caused must be proven; and in this case the plaintiff did not prove that, if these statements had been omitted from the set of evidence, the outcome of the trial would have been different.

10. Finally, regarding the violation of the principle of presumption of innocence, the state claims that, regarding the rebuttable presumption (*iuris tantum*), it was discredited during the proceedings, because in both the first and second instances, the existence of contrary evidence had been assessed and it was also added to the shortage of arguments put forward by the defense throughout the trial. It indicates that the damaging facts alleged by the petitioners highlight their intention of seeking a judgment in an international court because of their dissatisfaction with the unfavorable outcome of the judgments issued in the proceedings under domestic law, thus challenging the justice that was administered. It contends that, if a ruling stemming from a valid trial under domestic law is challenged, then the Commission would be acting as a fourth instance.

⁸ It allegedly involved a private attorney.

11. Furthermore, the state also challenges the admissibility of the petition on the basis of the argument that it was forwarded by the IACHR almost four years after it had been filed.

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

12. In the present case, the Commission observes, on the basis of the information provided by the parties, that the allegations presented in the petition have to do entirely with matters of due process of law relative to the criminal case filed against Mr. Walter Esteban Ojeda. In that respect, it is accepted by the parties that said proceeding was definitively finalized with the ruling issued by the Supreme Court of Justice on April 22, 2008, notified to the petitioners on April 25, 2008. Thus, taking into account that the petition was received in the IACHR on October 24 of that same year, it was submitted within the six-month time-limit set by the American Convention. These are the general considerations regarding the criminal proceeding as a whole, which appear as a framework for the review of admissibility in the present petition.

13. On the basis of the above, taking into consideration the position of the petitioners more carefully, the Commission observes that they are making three basic allegations: (a) the absence of impartiality in the First Chamber of the National Court of Criminal Cassation, because that was the court overturning the judgment of acquittal by Juvenile Court No. 2 of the Federal Capital; (b) the defense's impossibility of challenging one of the pieces of evidence (statement made by a witness incorporated by "reading it") taken into consideration by TOC No. 7; and (c) the violation of the right to a second hearing in another instance, because it is deemed that the extraordinary federal appeal not admitted by the Supreme Court does not constitute a guarantee of this right.

14. Regarding this, the Commission considers that, with respect to the first allegation (a), the alleged victim had the possibility of requesting a recusal of the judges comprising the First Chamber, a remedy he did not adequately exhaust. Likewise, with respect to the second argument (b), relative to the matter of the evidence, the Commission considers as well that the defense of the alleged victim had the possibility of opposing the incorporation of the above-mentioned testimony by its reading, which did not take place because of his own failure to support the challenging mechanism. This cannot be imputed to the state; therefore, regarding this issue the suitable remedy regarding the concrete situation submitted by the petitioner was not duly exhausted either.

15. Finally, regarding the claim about the alleged violation of the right to benefit from a second hearing in another criminal court to review the judgment of conviction, the Commission believes that, in conformity with its constant jurisprudential line, this is a matter that could be resolved by means of the usual remedies of instance pertaining to criminal proceedings, an assumption that was formally fulfilled when the extraordinary federal appeal filed with the Supreme Court of Justice was exhausted. Therefore, regarding this appeal, the Commission deems that remedies under domestic law have been exhausted according to the terms of Article 46(1)(a) of the American Convention. As already indicated in the first paragraph of this section, the present petition complies with Article 46(1)(b) of the Convention.

16. Furthermore, the Inter-American Commission takes note of the claim made by the state about the untimeliness of the petition's forwarding. The IACHR points out that, regarding this, neither the American Convention nor the Commission's Rules of Procedure set a time-limit for forwarding the petition to the state after its reception and that the time-limits set in the Rules of Procedure and in the Convention for other stages of the processing are not applicable by analogy.

VII. COLORABLE CLAIM ANALYSIS OF THE ALLEGED FACTS

17. The petitioners claim that the Supreme Court of Justice of the Nation's refusal to admit the extraordinary federal appeal filed against the judgment of the First Chamber of the National Court of Criminal Cassation of December 19, 2006, would be violating the alleged victim's right to a second hearing, by upholding a conviction ruled by a court that was obviously arbitrary and which had assumed he was guilty. As for the state, it alleges first of all that the judgment of the National Court of Criminal Cassation constituted a

true second instance regarding the judgment of TOC No. 7, even when the second instance issued an adverse ruling for the petitioner. It also considers that the petitioner had the opportunity to request the recusal of the judges sitting in the First Chamber, although he did not do so when it was requested of him as part of the procedure.

18. Regarding this, taking into account its standards regarding the contents and scope of Article 8(2)(h) of the American Convention, the Commission deems, first of all, that the fact that the judgment issued by the second criminal instance, reviewing a first ruling of conviction, is also a conviction of the alleged victim, does not imply in itself a violation of the right to a second hearing. In this concrete case, the Commission does not observe *prima facie* that the judgment of conviction of the National Court of Criminal Cassation has been arbitrary or groundless. In fact, it took up again the initial criminal classification used in the original trial in a juvenile court. Regarding this, the Commission reiterates that the purpose of the guarantee to a second hearing is to “to avoid a miscarriage of justice from becoming final.”⁹ This is a situation that, *prima facie*, without taking into consideration the merits of the present case, does not derive from the information provided by the parties.

19. Therefore, on the basis of the above-mentioned considerations, the Commission understands that the present petition does not meet the requirement set forth in Article(1)(b) of the American Convention, because it is evident *prima facie* that it is a case without a colorable claim.

20. Regarding the allegation of the violation of Article XXVI of the American Declaration, the IACHR has previously established that, when the Convention comes into force with respect to a state, it is that instrument and not the Declaration that becomes the specific source of law that the Inter-American Commission shall apply, whenever a petition alleges violations of rights substantially identical enshrined in the two instruments. In the present petition, the Commission has examined the rights of the American Declaration invoked by the petitioner in the light of the American Convention.

VIII. DECISION

1. To declare the present petition inadmissible;
2. To notify the parties of the present decision; to continue examining the merits of the case; 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 27th day of the month of December, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President (dissenting opinion); Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.

⁹ Manfred Amhrein et al., Costa Rica, para. 188. (Edited in the final version of the report.)