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REPORT No. 48/17
PETITION 338-07
REPORT ON ADMISSIBILITY

LUIS FERNANDO LEYVA MICOLTA
COLOMBIA

Approved by the Commission at its session No. 2085 held on May 25, 2017
162nd Extraordinary Period of Sessions

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Colombia. May 25, 2017.

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PETITION 338-07
 ADMISSIBILITY REPORT
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I. INFORMATION ABOUT THE PETITION

Petitioners:	Luis Fernando Leyva Micolta, Beatriz Zuloaga de Leyva and Juan Guillermo Leyva Zuloaga
Alleged victim:	Luis Fernando Leyva Micolta
Respondent State:	Colombia
Rights invoked:	Articles 5 (right to humane treatment), 8 (right to a fair trial), 9 (right to freedom from <i>ex post facto</i> laws), 21 (right to property) and 25 (right to judicial protection) of the American Convention on Human Rights ¹

II. PROCEDURE BEFORE THE IACHR²

Date on which the petition was submitted:	March 22, 2007
Date the State was notified of the petition:	January 22, 2014
Date of the State's first response:	June 12, 2014
Additional observations from the petitioners:	July 21, 2014; July 22, 2014; November 18, 2014; and May 26, 2015
Additional observations from the State:	October 24, 2014

III. COMPETENCE

Jurisdiction <i>ratione personae</i>:	Yes
Jurisdiction <i>ratione loci</i>:	Yes
Jurisdiction <i>ratione temporis</i>:	Yes
Jurisdiction <i>ratione materiae</i>:	Yes, American Convention (instrument of ratification deposited on July 31, 1973)

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of proceedings and international <i>res judicata</i>:	No
Rights declared admissible:	Articles 8 (right to a fair trial), 9 (right to freedom from <i>ex post facto</i> laws), 21 (right to property) and 25 (right to judicial protection) of the American Convention, in accordance with Articles 1.1 and 2 of said instrument
Exhaustion of domestic remedies or appropriateness of an exception:	Yes, on November 7, 2006
Timeliness of submission:	Yes, on March 22, 2007

¹ Hereinafter, "the American Convention" or "the Convention."

² The observations presented by each party were duly forwarded to the opposing party.

V. ALLEGED FACTS

1. The petitioners claim that Luis Fernando Leyva Micolta (hereinafter “Mr. Leyva” or “the alleged victim”) was partner and president of the firm ASVALORES S.A. (hereinafter “the firm” or “ASVALORES”), which was subjected to an investigation for alleged illegal financial dealings. The petitioners note that the Public Prosecutor’s Office initiated a criminal investigation for unjust enrichment against the firm’s legal representative, the alleged victim and other people with ties to ASVALORES. They claim that, from that prosecution, the Public Prosecutor’s Office initiated a forfeiture action against the legal representative and his heirs, which was extended to Mr. Leyva for his ties to ASVALORES. The petitioners allege that, in the framework of this forfeiture procedure, the alleged victim’s right to property of his assets was declared extinguished, disregarding the evidence, due process and the principle of freedom from *ex post facto* laws.

2. The petitioners note that criminal charges were filed against the alleged victim for unjust enrichment on September 8, 1999. Given these charges, the Public Prosecutor’s Office initiated *ex officio* a forfeiture action against the legal representative of ASVALORES on July 16, 2001, which was extended to Mr. Leyva’s assets. In these proceedings, the Public Prosecutor’s Office filed on January 14, 2002, before the Second Criminal Court of the Specialized Circuit, a request to change the charges from unjust enrichment to receiving stolen property; such proceedings were ruled to have exceeded the statute of limitations on November 29, 2004.

3. The petitioners allege that, in the framework of the forfeiture proceedings, on June 4, 2002, and on September 9, 2002, the alleged victim requested that the forfeiture action be declared inadmissible, arguing that this action is only appropriate when there is unjust enrichment and that forfeiture is not applicable to receiving stolen property, in accordance with Act 333 of 1996, which was in force at the time of the events. They further note that, although Act 793 of 2002 established the origin of the action with respect to the crime of receiving stolen property, it was not applicable because it went into force after the events. On October 28, 2002, the Public Prosecutor’s Office confirmed that the action was admissible, noting that receiving stolen property is equivalent to money laundering because the criminal offense examines the origin of the assets and those assets were acquired with ill-gotten funds. On December 24, 2002, the Second Specialized Criminal Court in Cali initiated proceedings on the forfeiture action.

4. The petitioners note that, on April 9, 2003, the alleged victim repeated its request for the action to be declared inadmissible before the Second Specialized Criminal Court in Cali. On April 28, 2003, the Attorney General’s Office ruled that the forfeiture action was not admissible, since equating money laundering with receiving stolen property is against the legality principle embedded in due process. The petitioners note that, on May 19, 2003, the Second Specialized Criminal Court in Cali asked the Public Prosecutor’s Office to submit evidence about the alleged victim’s income, in order to establish whether there was an unjustified asset growth. The petitioners note that the Public Prosecutor’s Office did not submit any evidence that challenged Mr. Leyva’s income.

5. The petitioners note that, on February 23, 2004, the forfeiture proceedings were reassigned to the First Relief Court in Bogota, which changed the judge in violation of the alleged victim’s right to a fair trial. On December 30, 2004, the First Relief Court in Bogota ruled in favor of forfeiture for Mr. Leyva, on the grounds that the alleged victim’s ties to the firm ASVALORES would have enabled him to be aware of irregularities in its financial dealings. The petitioners note that Mr. Leyva appealed that decision before the Higher Court for the Bogota Judicial District, which confirmed the lower court’s ruling on February 24, 2006, and said there was concurrence with several accounts of illicit origin. The petitioners claim that the evidence submitted in the proceedings was not adequately assessed, that due process was not respected and that Act 793 of 2002 was applied *ex post facto*.

6. They note that the alleged victim submitted an action for *tutela* (protection) before the Supreme Court of Justice on March 17, 2006, which was declared inadmissible on April 4, 2006, because the Court deemed that an action for *tutela* is not appropriate against court decisions. On November 7, 2006, the Constitutional Court decided, based on its attributions for discretionary selection, not to choose this case for review.

7. The State deems that, in forfeiture proceedings, the illicit origin of the resources used to acquire the assets subjected to forfeiture was adequately proved, as were the alleged victim's ties to ASVALORES and its legal representative. The State further argues that the forfeiture action is autonomous and independent from criminal responsibility proceedings, and that such independence enabled forfeiture proceedings to continue even after the statute of limitations was declared to have been exceeded. The State further claims that the legal basis for the forfeiture action does not arise from the charges in criminal proceedings, and therefore that the principles of criminal proceedings are not applicable to this action: it is a constitutional action rather than one that seeks by nature to impose penalties.

8. With regard to the alleged *ex post facto* application of the law, the State claims that the right to freedom from *ex post facto* laws has not been violated, since this action is by its very nature not associated with criminal justice. The State cites jurisprudence from the Constitutional Court based on sentence C-374/97, which was issued in a case that is separate from this petition. According to that sentence, applying Act 793 of 2002 "does not violate the principle of freedom from *ex post facto* laws of criminal law, firstly because, as was said before, it does not deal with the imposition of penalties, and secondly because the legal term it refers to does not correspond to the concept of retroactivity in its genuine sense but rather to the concept of retrospectivity." In this respect, the State concludes that the application of Act 793 of 2002 in this case complies with constitutional and conventional standards and that the events mentioned in this petition do not tend to prove violations of the rights enshrined in the American Convention, since the State has a judicial and constitutional duty to secure forfeiture, through a court ruling, when it has been proved that the origin of the assets in question was illicit.

9. The State further alleges that this petition establishes a "court of fourth instance," since domestic decisions were adopted in full compliance with due process and with the rights enshrined in the American Convention. The State also notes that the petitioners seek a review of decisions that were contrary to their expectations, knowing that the decisions regarding the alleged victim were duly justified and were based on the evidence that was submitted and on the analysis of the elements of fact and law.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

10. Given the positions of the parties and taking into account the information available in the case file, the Inter-American Commission considers that domestic remedies were definitively exhausted with the Constitutional Court ruling of November 7, 2006, with which that supreme court decided not to examine the appeal on constitutional grounds (*tutela*) file in the alleged victim's case. In this sense, the Commission notes that the case could have been selected for review by the constitutional jurisdiction, since this was in principle an appropriate judicial way to protect the judicial situation that had been violated within the domestic legal system. Further, given that the Commission received the petition on March 22, 2007, within the six months that followed the aforementioned court decision, the petition satisfies the admissibility requirements set forth in Articles 46.1(a) and 46.1(b) of the American Convention.

VII. COLORABLE CLAIM

11. In light of the factual and legal arguments provided by the petitioners and the nature of the matter being heard, the Commission deems that the allegations related to forfeiture in violation of the principles of due process and the alleged *ex post facto* application of Act 793 of 2002³ in order to extend the admissibility of the forfeiture action to the case of the alleged victim could *prima facie* characterize violations of Articles 8 (right to a fair trial), 9 (right to freedom from *ex post facto* laws), 21 (right to property) and 25 (right to judicial protection) of the American Convention, in accordance with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of said treaty, to the detriment of Mr. Luis Fernando Leyva Micolta.

³ In previous cases, the Inter-American Commission has established the admissibility of petitions that alleged that Act 793 of 2002 had been applied *ex post facto* in forfeiture proceedings in Colombia. In this respect, see IACHR, Report No. 55/12, Petition 179-05, Jesús Amado Sarria Agredo and children, Colombia, March 20, 2012, paragraphs 43 and 44.

12. Regarding the claim over the alleged violation of Article 5 (right to humane treatment) of the American Convention, the Commission notes that the petitioners have not filed allegations or submitted sufficient supporting elements to warrant *prima facie* consideration of a possible violation of that article.

13. Regarding the allegations of the State as to the “court of fourth instance formula,” the Commission states that it has no jurisdiction to review sentences issued by domestic courts acting within their own jurisdiction, applying due process and proper judicial guarantees. However, in the framework of its own mandate, the Commission does have jurisdiction to declare a petition admissible and, should its merits be established, to rule on the matter when the petition refers to domestic proceedings that might violate rights enshrined in the American Convention.

VIII. DECISION

1. To declare this petition admissible with regard to Articles 8, 9, 21 and 25 of the American Convention, in accordance with Articles 1.1 and 2 of said instrument;

2. to declare this petition inadmissible with respect to Article 5 of the American Convention;

3. to notify the parties of the present decision;

4. to continue examining the merits of the case; and

5. 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 in the city of Buenos Aires, Argentina, on the 25 day of the month of May, 2017. (Signed): Francisco José Eguiguren, President; Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, and James L. Cavallaro, Commissioners.