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REPORT No. 126/19
PETITION 1525-08
REPORT ON ADMISSIBILITY

EDUARDO ENRIQUE DÁVILA ARMENTA
COLOMBIA

Approved electronically by the Commission on August 2, 2019.

Cite as: IACHR, Report No. 126/19, Admissibility. Eduardo Enrique Dávila Armenta. Colombia.
August 2, 2019

I. INFORMATION ABOUT THE PETITION

Petitioner:	Eduardo Enrique Dávila Armenta, José Ernesto Rey Cantor, Verónica Dávila Dávila ¹
Alleged victim:	Eduardo Enrique Dávila Armenta
Respondent State:	Colombia ²
Rights invoked:	Articles 8 (right to a fair trial), 9 (freedom from Ex Post Facto laws) 11 (right to privacy), 21 (right to property), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention on Human Rights ³ in conjunction with its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 30, 2008
Notification of the petition to the State:	February 10, 2014
State's first response:	June 12, 2014
Additional observations from the petitioner:	July 24, 2014; July 31 and August 10, 2015; January 4, 2016 and January 16, 2017
Additional observations from the State:	May 27, 2015

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 made on July 31, 1973)

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), 9 (freedom from Ex Post Facto laws) 11 (right to privacy), 21 (right to property) and 25 (right to judicial protection) of the American Convention in conjunction with its Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, September 5, 2008
Timeliness of the petition:	Yes, December 30, 2008

¹ In a brief received on June 18, 2012, Verónica Dávila Dávila informed the Commission of the death of Eduardo Enrique Dávila Dávila, the original petitioner, and requested to be registered as a replacement petitioner.

² In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in either the discussion or decision in the present case.

³ Hereinafter "the Convention" or "the American Convention".

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

V. FACTS ALLEGED

1. The petitioners claim that on November 8, 1996, Mr. Eduardo Enrique Dávila Armenta (hereinafter "the alleged victim" or "Mr. Dávila") was convicted for the crime of illegal narcotics trafficking, and sentenced to 10 years incarceration and accessory penalties of suspension of rights, the confiscation of a boat and twelve hectares of the property "Villa Concha" where the marijuana was found. This conviction was upheld at second instance on February 21, 1997. The alleged victim filed a cassation appeal that was dismissed on June 20, 2001. The petitioners point out that, despite considering the conviction unjust, the alleged victim fully complied with custodial sentence, after which he returned to his regular business activities.

2. They allege that the State continued to persecute him, initiating an investigation into the offense of illegal enrichment. They point out that, in the context of this investigation, the Attorney General's Office undertook multiple procedural steps aimed at determining the source of the alleged victim's assets, including expert opinions from the Administrative Department of Security (DAS) and the Technical Investigatory Body of the Prosecutor's Office. They indicate that on November 22, 2004, the Prosecutor's Office declared the termination of the investigation due to a failure to find unjustified economic gains, thus confirming that the alleged victim's assets had been lawfully acquired.

3. They argue that, contrary to their previous conclusions, the same Prosecutor's Office initiated proceedings for forfeiture of the right of ownership over his property. They indicate that on August 19, 2003, the Prosecutor's Office requested the judge to forfeit ownership of a number of property items belonging to the alleged victim. They indicate that initially the case file was remitted to the Single Criminal Court of the Specialized Circuit of Santa Marta. However, the Superior Council of the Judiciary created a special and temporary decongestion jurisdiction for ownership forfeiture actions, comprised of five specialized criminal courts of decongestion in the Judicial District of Bogotá and a Criminal Decongestion Chamber in the Superior Court of Bogotá.⁵ They point out that, as a result of this, the matter was sent to the Third Criminal Court of the Specialized Circuit of Decongestion of Bogotá.

4. On October 5, 2004, the Specialized Court of Decongestion issued a judgment declaring the forfeiture of ownership of a series of assets belonging to the alleged victim, which in the court's view had been acquired illegally. The court concluded that "given his position as a drug trafficker, it is not hard to imagine that his seemingly clean assets, derive from the drug trafficking for which he was convicted." The alleged victim appealed this decision and on May 27, 2005, the Criminal Chamber of Decongestion of the Superior Court of Bogotá, after realizing that the Single Criminal Court of the Santa Marta Specialized Circuit had taken actions after the transfer of jurisdiction of the case to the courts of decongestion, on its initiative and annulled the procedural actions taken without competence and remitted the case to the decongestion court of first instance for it to continue the proceedings.

5. They indicate that thereafter the Head of the National Unit for the Forfeiture of Ownership and Counter-Asset Laundering filed a *tutela* action against the Criminal Chamber of Decongestion of the Superior Court of Bogotá, on the grounds that the alleged victim's due process rights were being violated, since procedural steps were taken by the special courts in Bogotá when the assets subject to the forfeiture request were located in Santa Marta. This action was dismissed on procedural grounds on August 3, 2005. Therefore, the proceedings continued and on June 6, 2006, the First Criminal Court of the Special Circuit of Decongestion of Bogotá issued a judgment terminating the alleged victim's ownership of several of his assets. This decision was upheld in the second instance on December 13, 2007.

6. The alleged victim filed a *tutela* action against the decision of the Criminal Chamber of Decongestion, alleging, among other things, that the decision violated his rights to due process and access to justice; it contravened the principles of *res judicata* and the natural, independent, impartial and competent

⁵ Agreements 1692 of January 15, 2003, and 2467 of May 10, 2004

judge⁶ previously established by law; and admitted unlawful evidence⁷ and ignored valid evidence.⁸ The *tutela* action was declared inadmissible on May 22, 2008, in the petitioners' view, without sufficient grounds. This decision was challenged by the alleged victim, alleging, among other arguments, that the judgment for forfeiture of ownership violated the principles of *res judicata* and *ne bis in idem* and that the law of forfeiture of ownership was incompatible with the fundamental right to private property. This challenge was rejected on July 9, 2008. The proceedings were remitted to the Constitutional Court, which decided in an order of August 22, 2008, not to select it for review.

7. The petitioners allege that the forfeiture decision violated the petitioner's human rights, as, among other reasons: (1) it violated the prohibition of double jeopardy, since the alleged victim had been under investigation for illicit enrichment on a previous occasion and an order had been issued to terminate the investigation (which renders it *res judicata* in the Colombian procedural rules); (2) it violated the rights to the presumption of innocence and to honor and dignity by assigning to the alleged victim the status of a drug trafficker based on a previously served conviction, and presuming without proof that he maintained a commercial relationship with his family members linked to drug trafficking; (3) it constituted dual criminality because, as part of the sentence imposed for his conviction for illegal drug trafficking, the alleged victim had already been divested of the assets that were considered associated with that offense; (4) it violated the principle of international law requiring the payment of compensation whenever an expropriation takes place; (5) it violated due process by admitting unlawful evidence and excluding valid evidence previously gathered by state authorities; (6) it violated the principle of non-retroactivity by applying the forfeiture of ownership rule originating in the 1991 Constitution and not regulated until 1996 for goods acquired prior to those dates. The petitioners also consider that the proceedings for the forfeiture of ownership are of a criminal nature (among other reasons because the proceedings are carried out by the criminal jurisdiction authorities) and that by failing to recognize its nature, the States itself shows non-compliance with the due process guarantees established in Article 8 of the American Convention for criminal proceedings.

8. They also argue that the special jurisdiction created for the decongestion of the forfeiture of ownership actions fails to comply with the requirements of Article 8.1 of the American Convention, among other reasons because: (1) it was created by an administrative act and not by law; (2) it violates the principle of the natural judge by transferring jurisdiction to courts created after the facts under adjudication; (3) it violates the right to a defense and imposes unfair costs on the defendants by centralizing the proceedings in Bogota and removing jurisdiction from the courts where the assets in question are located; (4) The courts were conceived as provisional in nature but their competence has been periodically extended through administrative decisions, and therefore the judges lack stability of tenure as required by international standards on the independence of the judiciary; and (5) judges lack the objective appearance of independence and impartiality because their salaries are drawn from the assets of the Directorate of Narcotics into which property forfeited and the income produced therefrom are paid.

9. For its part, the State indicates that all the proceedings involving the alleged victim were carried out in accordance with the applicable legal and constitutional framework, and in full respect of the judicial guarantees and due process. It requests that the petition be declared inadmissible on the basis of Article 47 (b) of the American Convention, as it considers that the petitioner intends for the Commission to act as a fourth instance tribunal, in contradiction to its subsidiary nature. It argues that the decisions taken in the forfeiture of ownership proceedings and subsequent *tutela* actions do not suffer from procedural defects and cannot be disqualified as jurisdictional acts. It emphasizes: (1) that the merits decisions were duly reasoned vis-a-vis all remedies filed by the alleged victim; (2) that the decisions were not based on fictitious grounds or evidentiary standards incompatible with those of the Inter-American system; and (3) that there is no practice attributable to the State that may have prevented the exhaustion of domestic legal remedies.

⁶ In his *tutela* action, he alleged that the judge failed to decide on the claims regarding a clash.

⁷ Such as "investigations of journalists" and the book "Cocaine Riders"

⁸ Such as the official experts report during the investigation into unlawful enrichment.

10. The State also requests that the petition be declared inadmissible on the basis of Article 47 (b) and (c) because the facts described by the petitioner do not characterize possible violations of human rights. The State considers that it has discharged its obligations under the Convention regarding access to justice, and that the petitioners' complaint only seeks that the Commission remedy their dissatisfaction with the duly reasoned and substantiated decision issued under domestic law.

11. It also points out that the forfeiture of ownership proceedings are based on Article 34 of the Constitution, a provision that reflects the need for effective means to combat drug trafficking and corruption, which are among the greatest scourges afflicting its society. It indicates that this action is a non-punitive instrument, intended to prevent profiteering through activities against the interests of the State. It adds that these proceedings are separate and independent from criminal proceedings, as established by the framers of the Constitution and pursuant to the domestic case law. Thus forfeiture is applicable even when the conduct has not been set out as an offense, and has not been punishable by the deprivation of liberty or other measures. It alleges that forfeiture of ownership is aimed at determining the source of assets and not the imposition of criminal responsibility on an individual, and therefore the concept of illegality governing forfeiture proceedings is much broader than the one applied to criminal actions. Therefore, the fact that criminal proceedings and forfeiture actions have different results does not entail any irregularity whatsoever.

12. In addition, it rejects the petitioners' argument that the official expert opinions in the context of the proceedings for illicit enrichment were not considered. It points out that these were duly examined by the judges who then made properly reasoned judgments. It also states that the alleged victim was granted every opportunity to demonstrate the legality in the increase of his assets and that, despite this, the documentation provided by the victim was insufficient.

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

13. The Commission observes that the petitioner exhausted the appeal against the judgment forfeiting ownership over his property and later the attempted *tutela* action which was considered inadmissible both at first and second instance, and finally not selected for review by the ruling of the Constitutional Court on August 22, 2008. The State has not contested the exhaustion of domestic remedies nor has it indicated that there are additional remedies that the petitioner should have exhausted in order for his claim to be heard at the domestic level. Therefore, the Commission considers that the present petition fulfills the requirements of Article 46 (1) (a) of the American Convention.

14. On the other hand, the Commission observes that the decision exhausting domestic remedies was the order of August 22, 2008, which was served on the petitioner on September 5, 2008, and that the present petition was filed on December 30, 2008. Therefore, the Commission concludes that the petition fulfills the six-month time limit established in Article 46 (1) (b) of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

15. The Commission observes that the petitioners have explained the reasons why the proceedings resulting in the forfeiture of the alleged victim's assets was incompatible with the guarantees of the American Convention. The Commission considers that the arguments presented by the petitioners are not manifestly groundless and justify a merits review, as that which have been argued could characterize violations of Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 21 (right to property) and 25 (right to judicial protection) of the American Convention in relation to its Articles 1.1. (obligation to respect rights) and 2 (domestic legal effects).

16. Regarding the claim about a possible violation of Article 24 (right to equal protection) of the American Convention, the Commission observes that the petitioners have failed to offer allegations or sufficient support to allow prima facie consideration of its possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 9, 11, 21, and 25 of the American Convention in relation to its Articles 1.1 and 2;
2. To find the instant petition inadmissible in relation to Article 24 of the American Convention;
and
3. 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 2nd day of the month of August, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President (dissenting opinion); Antonia Urrejola, Second Vice President (dissenting opinion); Margarette May Macaulay, Francisco José Eguiguren Praeli (dissenting opinion) and Flávia Piovesan, Commissioners.