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REPORT No. 87/19
PETITION 212-11

REPORT ON ADMISSIBILITY

ELENA NUQUES VILLACÍS ET AL.
ECUADOR

Approved electronically by the Commission on June 1, 2019.

Cite as: IACHR, Report No. 87/17, Petition 212-11. Admissibility. Elena Nuques Villacís et al. Ecuador. June 1, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Elena Nuques Villacís and others[1]
Alleged victim:	Elena Nuques Villacís and others
Respondent State:	Ecuador
Rights invoked:	Articles 7 (personal liberty), 8 (fair trial), 21 (property) and 25 (judicial protection) of the American Convention on Human Rights[2] in relation to its Articles 1.1 and 2

II. PROCEEDINGS BEFORE THE IACHR[3]

Filing of the petition:	February 24, 2011
Notification of the petition to the State:	November 18, 2014
State's first response:	May 27, 2015
Additional observations from the petitioner:	July 6, 2015, July 8, 2016, January 6, July 17, 2017, May 22, 2018
Additional observations from the State:	May 2, 2016, February 15 and August 7, 2017, June 26, 2018

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes, American Convention on Human Rights (deposit of instrument made on December 28, 1977)
Competence *Ratione materiae*:	Yes

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

Duplication of procedures and International *res judicata*:	No
Rights declared admissible	Articles 8 (fair trial), 21 (property) and 25 (judicial protection) of the American Convention on Human Rights, in relation to its Article 1.1
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, September 15, 2010
Timeliness of the petition:	Yes, February 24, 2011

V. ALLEGED FACTS

1. The petitioners indicate that Mr. Anselmo Nuques Benítez (hereinafter "Mr. Nuques") was the owner of a sugar mill and the La Virginia, Chorrera, San Miguel and Colorado farms located in the province of Los Ríos, as well as the Esperanza farms, located in the province of Guayas. They point out that

[1] Elena Nuques Villacís, José Nuques Villacís, Julio César Nuques Salvador, Julio César Nuques Robayo, Jorge Mauricio Nuques Robayo, María Antonieta Nuques Robayo, María del Pilar Nuques Robayo and Violeta del Pilar Robayo Ramírez, in their capacity as heirs of Mr. Anselmo Nuques Benítez, and Wilson Yupangui Carrillo (family attorney). This group of individuals appear in the petition as victims and petitioners.

[2] Hereinafter "the American Convention" or "the Convention".

[3] The observations submitted by each party were duly transmitted to the opposing party.

after his death, all his assets passed to his heirs. They indicate that in 1967 the Provincial Head of Revenue and Income Collection of Los Ríos (hereinafter "Head of Revenue"), issued recovery orders on the sugar mill for tax on sugar production and income tax. They claim that despite the fact that they were never notified, the Head of Revenue initiated a coercive procedure which led to the seizure of the sugar mill.

2. They refer that as a consequence of this coercive collection process, intervenors were assigned to take care of the administration of the sugar mill and the payment of the debt. However, for a period of thirty years, from 1967 to 1997, they did not make a single payment on the initial debt, even though the sugar mill was in operation. The alleged victims pointed out that they had repeatedly requested accounts concerning the activities and that the auditors had told them that "the files had been lost". The petitioners specify that they only carried out activities for their benefit, to the point of causing the mill's bankruptcy, the dismantling of its infrastructure and the seizure of the haciendas by squatters. On the other hand, they reported that the Tax Administration continued to demand the payment of tax obligations.

3. They state that on August 5, 1997, Julio César Salvador, José Humberto and Elena Nuques, represented by the attorney Wilson Yupangui Carrillo (hereinafter "Mr. Yupangui") sued before District Court No. 2 of the Prosecutor's Office (hereinafter the "District Court"), seeking the nullity of the enforcement proceedings that led to the seizure of the sugar mill and the farms. They point out that on September 10, 1998, the Court declared that the taxes initially demanded by the administration at the end of the 60s had become time-barred, but did not order a nullity of the proceedings and the seizure. Thus, on September 17, 1998, they filed a *cassation* appeal, on the ground that the court had not decided the essential point of the claim in order to avoid liability attributable to the State if the coercive procedure were declared null and void.

4. The alleged victims indicate that on March 4, 1999, the Special Taxation Chamber of the Supreme Court of Justice (hereinafter "the Taxation Chamber") accepted the suit claiming the nullity of the enforcement proceedings. On November 13, 2000, as a consequence of this decision, they requested the District Court to set a date and time for the delivery of the mill and the haciendas, according to Article 1704 of the Civil Code, "the effects of nullity involve leaving matters in *status quo ante*". This request was notified on the Head of Revenue, which on February 13, 2001, stated that it was impossible to comply with the requirement, because after a tour of the area it was established that there were only vestiges of the sugar mill remaining and the farms had been divided, and were now in the hands of third parties.

5. Faced with this situation, the petitioners allege that on May 20, 2001, they requested the payment of damages before the District Court, which was denied on June 14, 2001. Subsequently, they filed a motion for reconsideration, which was dismissed on June 29, 2001, and a *cassation* appeal that was also rejected on July 9, 2001. As a result, they filed a motion before the Taxation Chamber, which declared the District Court's proceedings null and void, on the ground that the dismissals of the appeals had not been signed by the three judges of the court.

6. They point out that on May 14, 2002, the District Court, with the signature of the three judges, again declined to award damages, arguing a lack of jurisdiction, on the ground that the task was under the competence of the Tax Authority. Therefore, they again filed a *cassation* appeal before the Taxation Chamber for a ruling: i) whether the District Court was competent to hear lawsuits for damages compensation; and ii) whether a lawsuit for damages could be heard in the fiscal jurisdiction, given the impossibility of restoring property that was illegal. On January 9, 2003, the Supreme Court ruled that there could be damages compensation and that the District Court had jurisdiction over such proceedings.

7. With this second decision, the alleged victims sued the District Court for recovery of the damages. Thus, on July 3, 2003, the expert appointed in the case established that the compensation amounted to USD $43,300,236.62. They indicate that this report was challenged by the Tax Authority. On June 11, 2004, the District Court issued a resolution, with the vote of two out of three members, finding that: i) There was not evidence that the payment of damages had been ordered by the Taxation Chamber's; ii) there was only jurisdiction to adopt the legal measures to comply with the execution of the sentences; and iii) the nullity of the decision designating the expert witness. However, the dissenting judge's opinion agreed with the granting of payment in the amount established by the expert. They filed a cassation appeal against the majority ruling

before the Taxation Chamber. On June 7, 2006, despite dismissing the appeal, the Chamber determined that the District Court must comply with its judgment of January 9, 2003. The petitioners argue that they have repeatedly requested the Court to annul the order of June 11, 2004 and grant payment of the sum of damages. Despite this, they allege that the District Court "has failed to comply with the court order and paralyzed the proceedings ."

8. The alleged victims indicate that they subsequently requested that the Internal Revenue Service (hereinafter "SRI"), comply with of the order given in the judgment of January 9, 2003 and the payment of compensation for the damages established in the expert witness report. They indicate that the SRI invited them to a mediation process in the Mediation and Arbitration Center of the State Procurator General's Office (hereinafter "Procurator General's Office"). Thus, on January 9, 2007, the parties agreed that: i) the petitioners would receive only USD $ 23,000,000 from the SRI as part of the compensation for the five farms and the sugar mill; ii) they would receive the equivalent amount in credit notes (negotiable bonds); and iii) they should renounce to the lawsuit regarding the execution of judgment pending before the Court. They indicate that after signing the final mediation agreement, the petitioners filed their motion to discontinue their lawsuit. They allege that due to the government change, the SRI refused to comply with the agreement.

9. Faced with the lack of payment, they indicate that on January 26, 2007, they demanded the compulsory fulfillment of the mediation agreement through a lawsuit filed with the Twelfth Civil Court of Pichincha (hereinafter "Civil Court"). They specify that on January 31, 2007, the Civil Court ordered the immediate payment of the credit notes. However, they allege that due to the pressure exerted by state authorities, the Civil Court revoked this decision on May 21, 2007, and declared the nullity of all proceedings, including the civil claim. The petitioners filed an appeal that was rejected on October 13, 2008, by the First Civil and Commercial Chamber of the Superior Court of Justice of Quito. Later, they filed a cassation appeal that was dismissed by the Civil and Commercial Chamber of the National Court of Justice on September 15, 2010.

10. They state that on March 19, 2007, the General Prosecutor requested the Court to annul the mediation agreement on the grounds that it lacked real cause and lawful object, despite the fact that it had the character of res judicata. On December 30, 2010, the Civil Court rejected the revocation of the agreement as inadmissible.

11. On February 11, 2008, a criminal procedure was initiated against Mr. Yupangui, before the First Criminal Chamber of the National Court of Justice (hereinafter "First Chamber"), for the offenses of forging public and private documents and attempted fraud on account of his signing of the mediation agreement. On October 20, 2014, the First Chamber decided on his final acquittal and revoked the precautionary measures ordered against him. However, the SRI appealed this decision before the National Court. On January 11, 2016, this Court decided to reverse the acquittal, on the ground that "with his signature on the mediation agreement, he became the direct perpetrator of the offense of forgery, in the manner of the invention of obligations". Consequently, it issued an indictment and ordered the seizure of his property for the amount of five thousand dollars. The petitioners consider that this is an act of retaliation by the State.

12. The State asserts that the event allegedly affecting the right to property took place between 1967 and 1973. Therefore, should there be any violation of rights arising from the conduct of the tax authorities, such events would fall outside the scope obligations established in the American Convention, which entered into force for Ecuador on December 28, 1977. Consequently, it maintains that it is not possible for the Commission to analyze this petition because it lacks of competence *ratione temporis*. It also argues that the petitioners sought redress in connection with fiscal obligations dating between 1967 and 1969 only thirty years after their consolidated unresolved obligation.

13. The State emphasizes that the petitioners effectively exhausted domestic remedies in the civil jurisdiction as from 1997, by means of the nullity claim of the enforcement proceedings and subsequently the compensation claim for damages. However, it maintains that the petition is inadmissible because it was filed once the time limits established by the Convention had expired. Thus, it argues that the claim seeking nullity of the enforcement proceedings and the application for the assessment of damages was

discontinued by the petitioners on January 11, 2007. On the other hand, it argues that the enforcement proceedings of the mediation agreement were finally resolved by the Supreme Court in its judgment on October 13, 2008. The State argues that the petition is untimely due to the fact that the alleged victims resorted to the Commission on February 24, 2011, more than 27 months after the last decision.

14. Likewise, regarding the conciliation proceedings, it argues that according to the reports issued by the State General Comptroller's Office and the Commission for Civic Oversight against Corruption, the proceedings were flawed and therefore the mediation agreement was inadmissible. Additionally, it points out that the criminal process against Mr. Yupangui concluded under the figure of prescription and was later filed. It points out that these proceedings were unrelated to the claims advanced by the Nuques family.

15. Finally, the State argues that the petitioners before the IACHR are not the only heirs of Mr. Nuques, and as a result of any outcome of these proceedings could affect the rights of the remaining heirs. This situation might undermine the principle of legal certainty vis-a-vis the State, as the non-participating heirs might bring other claims to seek for their alleged rights.

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

16. The petitioners argue that domestic remedies were exhausted before the civil jurisdiction. They indicated that the judgment issued by the Supreme Court on March 4, 1999, ordered the nullity of the enforcement proceedings. Subsequently they demanded compensation for damages in proceedings resolved by the Supreme Court on June 7, 2006. They refer that on January 11, 2007, they reached a conciliation agreement with the SRI within the context of that judgment's execution. However, they were forced to seek judicial enforcement of this mediation agreement. These proceedings concluded on September 15, 2010, with the judgment of the Civil and Commercial Chamber of the National Court of Justice. For its part, the State indicates that the domestic remedies were exhausted on January 11, 2007, with the discontinuance of the compensation claim filed by the petitioners, and that therefore the petition is untimely.

17. The rule on the exhaustion of domestic remedies provided for in Article 46.1.a of the American Convention establishes that the remedies available and effective in the domestic legal system must be pursued first. Such remedies must be sufficiently reliable, both in formal and material terms; that is, they must be accessible and effective to redress the situation. In this regard, the IACHR has established that the requirement of exhaustion of domestic remedies does not mean that the alleged victims necessarily have an obligation to exhaust all available remedies. Accordingly, if the alleged victim pursued the issue through one of the valid and adequate avenues provided by the domestic legal order and the State had the opportunity to remedy the situation in its jurisdiction, the purpose of the international provision is fulfilled.[4]

18. The Commission observes that the present petition seeks to redress non-compliance with judgment rendered by the Supreme Court on June 7, 2006, ordering payment of the damages, which became the object of a number of subsequent motions in order to secure its enforcement. According to the information provided by the parties, the Commission observes that the alleged victims filed the available remedies at the domestic level to ensure compliance with the judgment, and that remedies were ineffective. Consequently, the IACHR considers that domestic remedies have been sufficiently exhausted for the purposes of admissibility, thus complying with the provisions of Article 46.1.a of the Convention.

19. On the other hand, the decision of the Civil and Commercial Chamber of the National Court was notified to the alleged victims on September 15, 2010 and the petition before the IACHR was filed on February 24, 2011. Therefore, the Commission concludes that this petition abides by the requirement established in Article 46.1.b of the American Convention.

[4] IACHR, Report Nº 67/12 (Admissibility), Petition 728-04, Rogelio Morales Martínez, Mexico, July 17, 2012, para.34.

VII. ANALYSIS OF COLORABLE CLAIM

20. Regarding the facts and law claims presented by the petitioner and the nature of the matter brought to its attention, the IACHR considers that, should the alleged non-compliance of the judgments on damages and the ongoing denial of justice be proved, this could characterize possible violations of Articles 8 (right to a fair trial), 21 (right to property) and 25 (right to judicial protection) of the American Convention, in relation to its Article 1.1 (obligation to respect rights), to the detriment of the alleged victims.

21. With respect to the alleged violation of Article 7 (right to personal liberty) of the American Convention, to the detriment of Mr. Yupangui, the Commission observes that the petitioners have failed to provide sufficient grounds on a prima facie violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 21 and 25 of the Convention, to the detriment of the alleged victims;

2. To find the instant petition inadmissible in relation to Article 7 of the American Convention;

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 1st day of the month of June, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarette May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.