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Inter-American Commission on Human Rights

REPORT No. 202/20
PETITION 109-12

REPORT ON ADMISSIBILITY

WAYÚU INDIGENOUS PEOPLE
COLOMBIA

Approved by the Commission electronically on August 4, 2020.

Cite as: IACHR, Report No. 202/20, Petition 109-12. Admissibility. Wayúu Indigenous People. Colombia. August 4, 2020.

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I. INFORMATION ABOUT THE PETITION

Petitioner:	José Manuel Abuchaibe Escolar
Alleged victim:	Wayúu Indigenous People
Respondent State:	Colombia
Rights invoked:	Articles 8 (fair trial), 21 (property) and 25 (judicial protection) of the American Convention on Human Rights[1] in relation to its Article 1.1

II. PROCEEDINGS BEFORE THE IACHR[2]

Filing of the petition:	January 25, 2012
Additional information received at the stage of initial review:	August 7 and 16; and September 3, 2012; and May 17 and 24, 2013
Notification of the petition to the State:	November 12, 2013
State's first response:	March 12, 2014
Additional observations from the petitioner:	May 27, 2014, and January 13, 2017
Additional observations from the State:	November 18, 2014

III. COMPETENCE

Competence *Ratione personae:*	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, American Convention (deposit of the 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 *res judicata*:	No
Rights declared admissible	Articles 8 (fair trial), 21 (property), 23 (political rights), 24 (equality before the law) and 25 (judicial protection) of the American Convention in relation to its Articles 1.1 and 2
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of section VI
Timeliness of the petition:	Yes, in the terms of section VI

V. FACTS ALLEGED

1. The present petition refers to the international responsibility of the State of Colombia for the alleged violation of Article 21 of the Convention as a result of the omission of prior consultation with the Wayúu indigenous people in the approval of the reform of the royalty regime derived from the exploitation of natural resources, inasmuch as it directly affects the Wayúu communities located in la Guajira region. The petitioner also claims a violation of the rights guaranteed by Articles 8 and 25 with respect to irregularities occurred in judicial proceedings regarding the constitutional complaints on the legislative acts of reform.

[1] Hereinafter "the American Convention".
[2] The observations submitted by each party were duly transmitted to the opposing party.

2. The petitioner affirms that in Colombia the Wayúu people represent 20.5% of the indigenous population and are located in the department of La Guajira where they occupy an area of 1,080,336 hectares located in the reservation of la Alta y Media Guajira and several other reservations placed south of the department and the reservation of Carraipía. In this sense, the petitioner indicates that they comprise 48% of the population of the Peninsula of la Guajira which although abundant in natural resources such as gas, coal and salt, is still one of the poorest regions in the country. The petitioner describes the Wayúu as indigenous people, who suffer the consequences of historic injustice, namely, colonization, dispossession of their lands, territories and resources, oppression and discrimination, as well as lack of control over their own way of life. The petitioner points out that the Wayúu are especially affected by poverty and consequentially cannot satisfy their basic needs, such as access to education, drinking water or health, being also disproportionally affected by malnutrition and child mortality.

3. Under such circumstances, the petitioner claims violation of human rights of the Wayúu People due to the omission of prior consultation in the process of reforming the royalty regime under Legislative Act 05 of 2011 and Law 1530 of 2012[3]. On this matter, the petitioner explains that royalties were initially minted as a compensation to the production areas to mitigate the economic, social and environmental effects resulted from mining. Nonetheless, the petitioner indicates that the new General Royalty System, created by Legislative Act 05 of 2011 and developed by Law 1530 of 2012, modified the income distribution to favor all departments or municipalities, and not primarily those where natural resources are extracted. Consequently, royalties for the Department of La Guajira and its municipalities were considerably reduced, directly affecting the Wayúu community and their health, education and food programs.

4. The petitioner recalls that the State, according to Law 21 of 1991 which approved Convention 169 of the International Labor Organization, has the obligation to "consult the peoples, through their representative institutions and following an appropriate procedure, when legislative or administrative measures directly affecting them are envisaged, in order to reach an agreement or obtain their consent". Therefore, the petitioner holds that the omission of such consultation constitutes a violation of Article 21 of the Convention, which includes an obligation by the States of consulting indigenous peoples and to guarantee their participation in decisions concerning any measure affecting their lands, considering the special relationship between the indigenous and tribal peoples, land and natural resources.

5. The petitioner claims that he filed an action for protection against the Ministry of Interior and Justice for the omission of prior consultation which was dismissed by the Administrative Court of Cundinamarca in a ruling of March 11, 2011 and then, challenged by the petitioner, was confirmed by the Council of the State ("Consejo de Estado") on May 5, 2011. The petitioner points out that on December 22, 2011 was notified on behalf of the Administrative Tribunal of Cundinamarca that such action did not qualify for revision by the Constitutional Court.

6. Likewise, the petitioner states that on July 19, 2011 filed an unconstitutionality complaint before the Constitutional Court to challenge Legislative Act 05 of 2011 "By which the General System of Royalties is constituted, Articles 360 and 361 of the Political Constitution are modified and other provisions on the Royalty Regime are issued". On this matter the petitioner argued that the Act of law establishes the main regulations of the new royalty regime and does not delegate them upon the development law because, among others, the Act defines the main bodies of the System, delimits the specific allocation of resources, sets at a constitutional level the percentage of distribution to each allocation and indicates the rate of increase of direct allocations and resources of funds. Nevertheless, the petitioner informs that on May 3, 2012, by decision C-317/12, the Constitutional Court of Colombia declared the Legislative Act enforceable, on the grounds of lack of previous consultation with the ethnic groups of the country. The petitioner affirms that the Court concluded that Legislative Act 05 of 2011 was not a legislative measure that in itself holds a direct impact because of its general nature and referred to the Act's implementing legislation for such obligation to consult indigenous peoples.

[3] The petitioner indicates that royalties are understood as a monetary compensation received by the State for the exploitation of non-renewable natural resources.

7. The petitioner claims that judgment C-317/12 contains irregularities that infringe the due process. On one hand, the petitioner affirms that the decision ultimately creates a new jurisprudential line which does not require the obligation to consult "when a norm affects all Colombians", disregarding the established precedents according to which "the general wording of the measure does not matter, if it has a disproportionate impact on ethnic communities, it must be consulted". The petitioner argues that the due process implies that an explanation should be given to support such a change in jurisprudence. The petitioner affirms having filed a request for nullity of the decision, for violation of the due process, that was rejected on August 13, 2014.

8. The petitioner states that, by means of Order 247/12 of October 24, 2012, the Constitutional Court deleted the fragment of decision C-317/12 that conditioned the constitutionality of the act to the compliance of requirements for consultation in the development law concerning the general royalty system. The petitioner holds that this correction in the reasoning of the decision does not correspond to a correction but to an arbitrary suppression of a text fragment without any reasoning, thereby infringing the right to due process. Likewise, the petitioner points that he filed a request for nullification of Order 247/12 which the Constitutional Court also rejected.

9. The petitioner also argues that filed an unconstitutionally complaint against Law 1530 of 2012 "Which regulates the organization and operation of the General Royalty System". In his complaint, he denounced the inexistence of a statutory law on the procedure for previous consultation, because Decree 1320 of 1998 which regulates prior consultation, has been considered as incompatible with Convention 169 of 1989 by both the ILO and the Constitutional Court. On this matter, the petitioner claims that the Constitutional Court by means of sentence C-068 of 2013, also declared the law to be enforceable with regard to the obligation to carry out prior consultation with indigenous communities. Likewise, concerning Law 1530, the petitioner informs that a Permanent Consultation Table was summoned with the Indigenous Peoples and Organizations to get acquainted with the bill, but the State has not allowed their participation since the consultation process has not been initiated.

10. The State, for its part, holds that the competent domestic bodies have determined that the obligations on prior consultation contained in the Convention have not been violated. On the one hand, it argues that the adoption of Legislative Act 05 of 2011 did not require prior consultation since, according to its case law, prior consultation of indigenous peoples and tribes is required when there is a "direct affectation" of the of the measure upon them. In this case, the Court concluded that Legislative Act 05 of 2011 was not a legislative measure which in itself holds a direct effect due to its level of generality and refers to the implementing law of the Act for such obligation to consult indigenous peoples. The State holds that, there still is "a presumption of direct and deep affectation over all matters concerning ancestral territory", however, the mere reference to these matter is not sufficient in itself to establish a direct effect and it is necessary to analyze the specific scope and content of the measure as such in each case in order to establish its impact and level of effect on the relevant rights on each particular case.

11. On the other hand, the State adds that Law 1530 of 2012 which establishes the royalty system, was submitted for consultation but that the indigenous peoples refused to participate in the process. The State of Colombia deems it was diligent in carrying out the consultation and that the Constitutional Court declared that neither the Constitution nor the American Convention were breached by approving this norm. The State reiterates the position of the Constitutional Court which, in its ruling C-068 of 2013, stated that, should the consultation not reach an agreement or should the latter be frustrated by an autonomous decision of the indigenous peoples, there is no reason to halt the legislative process in matters of general interest because the right to a prior consultation is not absolute nor does it imply a right to veto. In fact, the State specifies that this refusal to be consulted cannot be understood as a power to veto the approval of the bill, insofar as it "does not fundamentally compromise the physical or cultural condition of the groups affected by the measure".

12. Thus, the State argues that both cases were duly heard and decided by the Constitutional Court of Colombia which found it to be fully respectful of the standards established by Inter-American jurisprudence

on the matter. In this sense, the State alleges that the judgement from bodies of the Inter-American System would imply that they were acting as a fourth instance body.

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

13. The petitioner states in the initial petition that domestic remedies applicable were exhausted by exercising an action for protection on the grounds of failure to do a prior consultation, which was denied by the Administrative Court of Cundinamarca whose decision was confirmed by the Council of State on May 5, 2011 and was notified on the non-revision of the action by the Constitutional Court on December 22, 2011. For its part, the State does not present arguments regarding the exhaustion of domestic remedies or the time limit for submitting the petition.

14. For purposes of admissibility, the IACHR notes that, upon the filing of the petition before the IACHR on January 25, 2012, the Constitutional Court issued sentence C-317/12 regarding Legislative Act 05 of 2011 which was notified on May 3, 2012. Likewise, on February 13, 2013, the Constitutional Court ruled on the constitutionality of Law 1530 of 2012 by means of ruling C-068/13.

15. The Inter-American Commission recalls that, although in principle the exhaustion of extraordinary remedies is not necessary in all cases, if the petitioner considers that these may have a favorable outcome in mending the allegedly infringed judicial situation and decides to pursue this avenue, they are to be exhausted in accordance with procedural norms in force[4]. On the instant case, the Commission considers that the legal norms constitutionally challenged in the present case have a direct effect on the rights of the alleged victims and these actions qualify as suitable remedies to protect the infringed juridical situation of the alleged victims[5]. Given that in the present case there is a definitive decision of the highest judicial instance of Colombia on constitutional matters, the Commission considers that domestic remedies have been exhausted under the terms of Article 46.1.a of the American Convention[6]. In regard to the timeliness of the filing, the Commission observes that the final decision was issued on February 13, 2013 and the petition was received on January 25, 2012. Consequently, the petition meets the requirement set forth in Article 46.1.b of the Convention.

VII. ANALYSIS OF COLORABLE CLAIM

16. The Commission observes that, according to repeated statements made by the bodies of the Inter-American System, the right to consultation is one of the core elements for the protection of the rights to property of the indigenous peoples[7] and includes the positive duty of the States to provide appropriate and effective mechanisms to obtain free, prior, and informed consent in accordance with the customs and traditions of indigenous peoples before undertaking activities that impact their interests or may affect their rights to their lands, territories, or natural resources[8]. In addition, the Inter American Court has established that "matters relating to the consultation process, as well as those concerning the beneficiaries of the 'fair compensation' to be shared, are to be determined and decided by the people in accordance to their traditional customs and norms"[9].

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[4] IACHR, Report No. 135/18, Petition 1045-07. Inadmissibility. Enrique Alberto Elías Waiman. Argentina. November 20, 2018, par. 9 and 10.

[5] IACHR, Report No. 51/18. Petition 1779-12, Admissibility, Maya Kaqchikuel Indigenous People of Sumpango and others. Guatemala. May 5, 2018, par. 14.

[6] IACHR, Report No. 51/18, Petition 1779-12. Admissibility. Maya Kaqchikuel Indigenous People of Sumpango and others. Guatemala. May 5, 2018, par. 13, 14 y 16.

[7] IACHR. Rights of Indigenous and Tribal Peoples over their ancestral lands and natural resources. Norms and jurisprudence of the Inter American System on Human Rights. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, par. 275.

[8] See inter alia IACHR, Report of Ecuador 1997 Conclusions of Chapter IX and Chapter VIII; IACHR, Report on the situation of human rights in Colombia, Chapter X, 1999. Recommendation No. 4.; IACHR, Report on merits No. 75/02, Case 11.140, Mary and Carrie Dann (United States), IACHR Annual Report of 2002, par. 140; IACHR, Rights of Indigenous People and tribes over their ancestral lands and natural resources. Norms and jurisprudence of the Inter American System of Human rights. OAS/Ser.L/V/II.Doc.56/09, December 30, 2009, Chapter IX.

[9] IA Court. Case of Saramaka People Vs. Surinam. Interpretation of the Sentence of Preliminary Exceptions, Merits, Reparations and Costs. Sentence of August 12, 2008 Series C No. 185, par. 27.

17. The Commission observes that the present petition includes allegations regarding he adoption without previous, free and informed consultation to the Wayúu People on the change in the royalty regime that has presumably had an impact in their territory and development as a community, as well as alleged irregularities in the judicial process due to claims of unconstitutionality of the legislative acts of the reform. In light of the above and upon examining the elements of fact and law exposed by the parties, the Commission considers that the claims by the petitioner are not manifestly unfounded, and require a merits study, since the alleged facts, if corroborated, may characterize violations to Articles 8 (fair trial), 21 (property), 23 (political rights), 24 (equality before the law) and 25 (judicial protection) of the American Convention in relation to its Articles 1.1 and 2.

18. With respect to the State's allegations regarding the so-called "fourth instance" formula, the Commission reiterates that, for the purposes of admissibility, it must decide whether the alleged facts may characterize a violation of rights, as stipulated in Article 47 (b) of the American Convention, or if the petition is "manifestly unfounded" or "its total inadmissibility is evident", pursuant to subsection (c) of said article. The criteria for evaluating these requirements differs from that used to rule on the merits of a petition. Likewise, within the framework of its mandate, it is competent to declare a petition admissible when it refers to internal processes that could violate rights guaranteed by the American Convention. In other words, in light of the aforementioned conventional standards, in accordance with Article 34 of its Rules of Procedure, the admissibility analysis focuses on the verification of such requirements, which refer to the existence of elements that, if true, could constitute *prima facie* violation of the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 21, 23, 24 and 25 on the American Convention in relation to its Articles 1.1 and 2;

2. To notify the parties of this decision; to proceed 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 4th day of the month of August, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.