

OAS/Ser.L/V/II
Doc. 216
11 August 2022
Original: Spanish

REPORT No. 213/22

PETITION 79-15

REPORT ON ADMISSIBILITY

SAGLA ERNESTO AYALA AND OTHERS
PANAMA

Approved electronically by the Commission on August 11, 2022.

Cite as: IACHR, Report No. 213/22. Petition 79-15. Admissibility. Sagla Ernesto Ayala et al. Panama. August 11, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioner	Corporation of Indigenous Lawyers of Panama
Alleged victims:	Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez, Luis Enrique Martínez Ayala, Gilberto Vásquez, Casildo Ayala Ayala and relatives ¹
Respondent State:	Panamá ²
Rights invoked:	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 10 (compensation), 12 (freedom of conscience and religion), 17 (rights of the family), 19 (rights of the child), 24 (equality before the law), and 25 (judicial protection) of the American Convention on Human Rights ³ , in relation to its Articles 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law); and Articles I, II, V, VI, VIII, IX, XI, XVIII, XXI, XXIII and XIV of the American Declaration on the Rights and Duties of Man ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	February 12, 2015
Additional information received at the stage of initial review:	August 6, 2018
Notification of the petition to the State:	February 11, 2020
State's first response:	December 7, 2020
Notification of the possible archiving of the petition:	May 25, 2022
Petitioner's response to the notification regarding the possible archiving of the petition:	June 7, 2022

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 June 22, 1978)

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

Duplicación de procedimientos y cosa juzgada internacional:	No
--	----

¹ The petition also refers to the relatives of Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez, Luis Enrique Martínez Ayala, Gilberto Vásquez and Casildo Ayala Ayala Ayala, as alleged victims, who are individualized in the attached document.

² Pursuant to Article 17.2.a of the Commission's Rules of Procedure, Commissioner Esmeralda Arosemena de Troitiño, a Panamanian national, did not participate in the debate or in the decision of the present matter.

³ Hereinafter referred to as "the Convention" or "Convention".

⁴ Hereinafter referred to as "the Declaration" or "Declaration".

⁵ The observations of each party were duly forwarded to the opposing party.

Rights declared admissible:	Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 12 (freedom of conscience and religion), 17 (rights of the family), 19 (rights of the child), 22 (movement and residence), 24 (equality before the law), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law)
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. POSITION OF THE PARTIES

1. The petitioner claims the international responsibility of the Panamanian State in relation to the homicide of Luis Enrique Martínez Ayala, Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez and Gilberto Vásquez, as well as the injuries suffered by Casildo Ayala Ayala: all members of the Kuna indigenous communities of Paya and Púculo (also referred to as "Púculo"). The petitioner also argues that due to these events, to which they refer as "the paya massacre," the Kuna communities of Paya and Púculo were forcibly displaced, which has affected their way of life and food security. Petitioner holds that the alleged facts remain in impunity, as those responsible have not been identified and punished, despite the fact that at the time of the events there was a situation of violence in the area.

2. The petitioner narrates that on January 18, 2003, a group of members of the United Self-Defense Forces of Colombia (hereinafter "AUC") crossed the border into Panama and entered the territory of the Kuna community of Paya, while the residents were at a celebration, demanding the presence of the chiefs and the village commissioner to answer for the alleged support given to the Colombian guerrillas. Next, several members of the AUC kidnapped Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez and Gilberto Vásquez, as indigenous leaders, and during their transport, they kidnapped Luis Enrique Martínez Ayala and Casildo Ayala Ayala. When they arrived to an isolated place, they tortured, mutilated and violently wounded with bladed weapons and shot Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez, Luis Enrique Martínez Ayala and Casildo Ayala Ayala, causing the death of all except Casildo Ayala, who pretended to be dead. Subsequently, they walked to the Kuna community of Púculo and killed Gilberto Vásquez. The AUC members then planted anti-personnel mines to discourage the recovery of the bodies and the use of the traditional path between the borders, stole various goods and animals, and then set several properties on fire.

3. The petitioner explains that about six hundred inhabitants of the Kuna communities of Púculo and Paya managed to reach the town of Boca de Cupe where they took refuge in temporary camps set up by the Panamanian National Police, but many fled to other parts of the country in fear that they would be the target of further attacks by paramilitaries.

4. On January 22, 2003, "indigenous leaders from other comarcas" filed a criminal complaint before the Attorney General's Office against the members of the Autodefensas Campesinas of Córdoba and Urabá for crimes of terrorism, homicide, kidnapping, robbery and illicit association to commit crimes, requesting a rigorous investigation and the extradition of those responsible. To that effect, the petitioner highlights that the Special Superior Prosecutor's Office took lead of the investigation the following day, however, within this context, it limited itself to investigating the connection and possible responsibility of Mr. V.M.A., who at the time of the facts was a guide hired by three Americans for an expedition, all of whom had also been ambushed and kidnapped by the same group of AUC, and to taking more than forty statements; without requesting any assistance from the Colombian authorities to find the whereabouts of those responsible.

5. Accordingly, the petitioner explains that the Special Superior Prosecutor's Office issued Prosecutorial Order No. 23 on October 20, 2003, requesting the provisional dismissal of the investigation against V.M.A. for the crimes committed against the alleged victims, which was granted by the Second Superior

Court of the First Judicial District of Panama on November 21, 2003, through Order No. 195; and later confirmed by the Second Criminal Chamber of the Supreme Court of Justice on September 3, 2004, and notified by edict on October 1, 2004. The petitioner highlights that by judicial decision No. 195 of November 21, 2003, the Second Superior Court considered it proven that the crimes were committed in the border zone between the States of Colombia and Panama by the Autodefensas Campesinas of Córdoba and Urabá.

6. The petitioner argues that the State did not comply with its obligations to effectively and diligently investigate the violent events that occurred, since it has not clarified the facts or identified those responsible, despite the existence of international instruments on extraterritorial criminal investigation and mutual assistance agreements. On the contrary, they hold that the prosecutor's office only requested support from the Colombian State to take the sworn statements of the U.S. citizens who had been kidnapped and released by members of the AUC in the context of the alleged facts.

7. The petitioner holds, without providing further details, that the members of the Kuna communities became aware of the text of this last decision in 2012, after having located the physical file and requesting copies from the court since 2010. Thus, petitioner argues that there is no remedy against the decision to archive the case file, other than the presentation of new evidence which would not be available to the relatives of the alleged victims or the indigenous communities due to their geographic isolation. Nevertheless, it holds that every year the Kuna communities of Paya and Púculo demand justice from the Panamanian State so that these events do not go unpunished. In particular, the petitioner explains that in 2011, members of the Kuna indigenous communities of Paya and Púculo filed a request with the Ministry of Foreign Affairs of Panama to demand compensation from the Republic of Colombia for the violent acts of January 18, 2003, under Law 1448 of June 2011, without any result to date, or any other proceedings carried out by the State of Panama.

8. Accordingly, petitioner stresses not having found any effective legal mechanism in Panama to enforce the State's obligations in light of the results of the investigations. Since there is no remedy against the decision of the Second Chamber of the Supreme Court of Justice to dismiss the investigation, the alleged victims cannot seek redress through human rights protection mechanisms, since all remedies presuppose the decision of an administrative or judicial body in charge. Petitioner argues that the exceptions to the exhaustion of domestic remedies should be applied to this petition, since at the time of the events, the Kuna indigenous communities of Paya and Púculo were in a situation of vulnerability and were unable to travel due to a well-founded fear of being victims of the paramilitaries and the guerrillas.

9. With respect to the timeline for filing the petition, the petitioner emphasizes that during the criminal proceedings, the relatives of the alleged victims were not duly represented so that they could have been notified of the closure of the investigation. Petitioner underscores that it was indigenous authorities from other parts of the country who made the claim in solidarity with the two affected communities, this being a criminal complaint and not a lawsuit, in accordance with Panamanian law. Petitioner holds - without giving further details - that since 2003 and up to the filing of the petition, the Kuna communities of Paya and Púculo have demanded justice from the State for the alleged facts by means of resolutions without having received any response. The petitioner also considers that although there is an Ombudsman's Office, the State, through the competent agencies, did not inform the indigenous authorities or the relatives of the alleged victims, despite the dozens of complaints, of the possibility of going to this office or that there are bilingual lawyers in the indigenous languages in said office.

10. In response to the State's argument, the petitioner explains that although the indigenous communities of Paya and Púculo could be covered by the rights of victims set forth in Law 31 of 1998 on Victims, it does not provide evidence of how this was implemented in order to provide legal or psychological assistance to the family members and the community who were displaced for fear of another military incursion.

11. On its part, the State holds that it complied with its duty to investigate the facts and that the instant petition does not constitute a case of impunity. It argues that the prosecutorial authority complied with its obligations and that it was the court in the case that decided to provisionally dismiss the investigation

against V.M.A. due to the lack of evidence to link him to the facts. However, it clarifies that this measure makes it possible to reopen the investigation if new evidentiary elements arise.

12. The State argues that the exceptions to the exhaustion of domestic remedies have not been met, since Order No. 195 issued on December 21, 2003 by the Second Superior Court proves that there was no delay in the investigation or in the decision of the case. It also adds that the petitioner made use of the remedies allowed by law, as well as its right to defense. In relation to the poverty exception, it argues that it is not clear why the petitioner claims that its rights were not protected under Law 31 of May 28, 1998 on the protection of victims of crime, since it is clear from the procedural documents that the indigenous communities of Paya and Púcuro were duly represented by their attorneys, and that it was not necessary to request free legal representation.

13. In this regard, Panama also notes that there is no record in the casefile or in the petition that the petitioner requested protection because of a well-founded fear of not going to court. It clarifies that in January 2003 the Presidency of the Republic visited the towns of Paya and Púcuro, and later in February of the same year met with the then President of Colombia where they discussed the issue of border security. The State explains that in April 2003 Panama and Colombia signed an agreement on the occasion of the reactivation of the binational security committee; by virtue of which border posts of the Colombian military and police force were located to prevent the entry of illegal groups into Panamanian territory. On the other hand, the State argues that the persistence of fear is understandable, but it is not admissible considering that eleven years have elapsed since the petitioner exhausted the domestic remedies to file the petition before the Commission.

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

14. The petitioner holds that the facts remain unpunished to date. They explain that the Second Superior Court of the First Judicial District of Panama ordered the provisional dismissal of the criminal investigation by Order No. 95 of November 21, 2003, which was later confirmed by the Second Criminal Chamber of the Supreme Court of Justice on September 3, 2004, and notified by edict on October 1, 2004. Consequently, the petitioner argues that no remedy is allowed against the decision to close the file, except for the presentation of new evidence. Finally, it argues that the members of the Kuna communities were informed of the text of this last decision in 2012. In turn, the State asserts that this petition is not a case of impunity. It explains that the provisional dismissal of the investigation against V.M.A. allows for the reopening of the case if new evidence emerges. It also emphasizes that the exceptions to the exhaustion of domestic remedies do not apply, and that, although it recognizes the well-founded fear experienced by the indigenous communities of Paya and Púcuro, eleven years have passed since the petitioner exhausted domestic remedies to file the petition before the Commission.

15. Given the characteristics of this case, the Commission reiterates that in situations such as the one in the instant matter, which involve alleged crimes against life and integrity, criminal proceedings are the appropriate remedy for clarifying this type of facts, prosecuting those responsible and establishing the corresponding criminal punishments, in addition to making possible other forms of reparation for the next of kin⁶. In this sense, the Commission stresses that, as a general rule, a criminal investigation must be conducted promptly in order to protect the interests of victims, preserve evidence and even safeguard the rights of any person who in the context of the investigation is considered a suspect.

16. The Commission notes that, according to the documentation submitted to the casefile, on January 22, 2003, indigenous leaders of the Madungandi, Wargandi, Embera, Ngobe Bugle, among others, filed a criminal complaint with the Attorney General's Office for the alleged acts committed against the alleged victims, as a result of which a prosecutorial investigation was initiated under the command of the Special Superior Prosecutor's Office. In this regard, the Commission notes that this concluded with an order of provisional dismissal on November 21, 2003 by the Second Superior Court of the First Judicial District of

⁶ IACHR, Report No. 71/12. Petition 1073-05. Admissibility. Inhabitants of the "Barão de Mauá" housing complex, Brazil, July 7, 2012, para. 22.

Panama, which was later confirmed by the Second Criminal Chamber of the Supreme Court of Justice on September 3, 2004.

17. The Commission notes that by judicial decision No. 195 of November 21, 2003, the Second Superior Court considered it proven that the crimes were committed in the border area between the States of Colombia and Panama by the Peasant Self-Defense Forces of Córdoba and Urabá. However, according to the information received, to date the State has not provided detailed information on the steps taken to exhaust the lines of investigation to identify and punish all those materially and intellectually responsible for the alleged facts⁷.

18. The Commission reaffirms that a decision of acquittal does not exhaust the State's obligation to clarify the crime and establish the criminal responsibility of the perpetrators; nor does it allow the families of the alleged victims to know the truth of the facts. In these circumstances, the next of kin of the alleged victims have the right to expect the authorities to take other actions aimed at clarifying what happened; the State, for its part, has the obligation to continue, *ex officio*, all the investigations necessary to satisfy the demand for justice presented by the alleged victims⁸. In addition, the Commission observes that in the instant case, the alleged victims have continued over time to demand that the Panamanian State duly investigate these events, with the added difficulty implied by the fact that the perpetrators are part of an illegal armed group operating from Colombia. In a context in which the Panamanian State has not proven to have taken relevant steps with the Colombian State aimed at effectively ensuring the guarantee of the rights of its nationals, resulting in a situation that *prima facie* can be described as impunity. In short, the State has not provided concrete elements which provide evidence of the existence of an effective investigation of the facts, nor of the adoption of other effective measures to protect the communities who were victims of this massacre.

19. With respect to the possibility of requesting the de-archiving with new evidentiary material, the Commission also recalls that, in cases such as the present one, namely violations of human rights which can be prosecuted *ex officio*, the obligation to investigate them must be assumed by the State as its own legal duty, and not as a management of private interests or depending on the initiative of the latter or on their provision of evidence⁹.

20. Based on the foregoing, the Inter-American Commission concludes that the exception to the exhaustion of domestic remedies provided for in Article 46.2.c) of the American Convention is applicable.

21. As for the timeliness for filing, the Commission notes that the facts that are the subject of the complaint took place on January 18, 2003; that indigenous leaders from different districts informed of the facts on January 22 of the same year; that the petition was received at the IACHR on February 12, 2015; and that the effects of the violations, in terms of the alleged impunity would extend to the present. Thus, the Commission concludes that the present petition was filed within a reasonable period of time in accordance with Article 32.2 of the IACHR Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

22. The Commission notes that the petition includes allegations concerning the kidnapping, murder, and injuries to the detriment of Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez, Luis Enrique Martínez Ayala, Gilberto Vásquez, and Casildo Ayala Ayala, all members of the Kuna indigenous communities of Paya and Púculo, at the hands of members of the AUC on January 18, 2003; the lack of access to justice and effective judicial protection, investigation of such acts and punishment of those responsible, and lack of compensation, as well as the forced displacement of the Kuna indigenous communities of Paya and Púculo, the

⁷ IACHR, Report No. 309/20. Petition 151-10. Admissibility. Nancy del Carmen Apraez Coral, Carlos Alberto Apraez and family. Colombia. October 16, 2020, para. 20; and IACHR, Report No. 81/18. Petition 190-07. Admissibility. Edgar José Sánchez Duarte. Colombia. July 7, 2018, para. 13.

⁸ IACHR, Report No.74/14, Petition 1294-05. Admissibility. Mário de Almeida Coelho Filho and his family members. Brazil. August 15, 2014, para. 38.

⁹ IACHR, Report No. 159/17, Petition 712-08. Admissibility. Sebastián Larroza Velázquez and family. Paraguay. November 30, 2017, para. 14.

destruction and theft of goods and crops, and the lack of effective protection for the members of these communities.

23. In view of these considerations and after examining the elements of fact and law provided by the parties, the Commission considers that the allegations of the petitioner are not manifestly unfounded and require a study of the merits, since the alleged facts, if proven to be true, could characterize in the first place violations of the rights set forth in Articles 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention in view of the fundamental fact of the lack of an effective investigation of the facts denounced; in connection with the State's duty to guarantee the following rights that were also violated to the communities that were victims of the actions of the AUC, set forth in Articles 4 (life), 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 12 (freedom of religion), 17 (rights of the family), 19 (rights of the child), 24 (equality before the law), 25 (judicial protection) and 26 (progressive development) of the American Convention in connection with its Articles 1. 1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law) thereof, to the detriment of Sagla Ernesto Ayala, San Pascual Ayala Gutiérrez, Luis Enrique Martínez Ayala, Gilberto Vásquez, Casildo Ayala Ayala and family members identified in the processing of this petition.

24. Additionally, taking into account the multiple, complex and continuous nature of the displacement of persons, in particular that related to the direct effects that it has on the rights to freedom of movement and residence, housing and humane treatment, as well as the uprooting that can occur in social and cultural terms, the Commission considers that the allegations related to this phenomenon could characterize possible violations of Articles 5, 22 and 26 of the American Convention in a joint and interconnected manner¹⁰.

25. Regarding the alleged violation of Article 10 (compensation) of the American Convention, the Commission notes that the petitioner does not offer any allegations or support to establish, *prima facie*, its possible violation. As for the alleged violations of the American Declaration, the Commission has already determined that once the American Convention enters into force in relation to a State, it is the latter and not the Declaration which becomes the primary source of law applicable by the Commission, provided that the petition refers to the alleged violation of identical rights in both instruments and is not a situation of continuing violation. In the instant case, the Commission considers that the alleged violations of these articles do not fall outside the scope of protection of the American Convention, and therefore the Commission will examine the petition in the light of the American Convention.

VIII. DECISION

1. To declare the present petition admissible with regard to Articles 4, 5, 7, 8, 12, 17, 19, 22, 24, 25 and 26 of the American Convention in light of Articles 1.1 and 2 thereof; and

2. 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 11th day of the month of August, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarette May Macaulay, Second Vice President; Joel Hernández, and Roberta Clarke, Commissioners.

¹⁰ IACHR, Report No. 7/19. Petition 18-07. Admissibility. Bocas de Aracataca Massacre. Colombia. February 3, 2019, para. 19.

Annex: List of victims and their relatives

1. Sagla Ernesto Ayala Castillo
 - Ambrocía Ayala Gutiérrez, cónyuge
 - Casildo Ayala Ayala, hijo
 - Genaro Ayala Ayala, hijo
 - Eusebia Ayala Ayala, hija
 - Bernardo Ayala Ayala, hijo
 - Isidro Ayala Ayala, hijo
 - Victoriano Ayala Ayala, hijo
 - Abelina Ayala Ayala, hija
 - Ernestina Ayala Ayala, hija
 - Jorge Ayala Ayala, hijo
 - Narcisa Ayala Ayala, hija
 - Omilda Ayala Ayala, hija
 - Eladio Ayala Ayala, hijo
 - Hernán Ayala Ayala, hijo
 - Dora Ayala Castillo, hermana

2. San Pascual Ayala Gutiérrez
 - Inés Bolívar Peres, cónyuge
 - Evelia Ayala Bolívar, hija
 - Nikikiña Ayala Bolívar, hijo
 - Edikintili Ayala Bolívar, hija
 - Emejildo Ayala Gutiérrez, hermano
 - Francisco Ayala Gutiérrez, hermano
 - Pieta Ayala Gutiérrez, hermano
 - María Ayala Gutiérrez, hermana
 - Juan Pablo Ayala Gutiérrez, hermano

3. Luis Enrique Martínez Ayala
 - Felicidad Villalaz Ayala, cónyuge
 - Luis Enrique Martínez Villalaz, hijo
 - Militza Martínez Villalaz, hija
 - Ludibeth Martínez, hija
 - Enrique Martínez Ayala, padre
 - Beyanida Ayala Castillo, madre
 - Beyanida Regina Martínez Ayala, hermana
 - Enriquido Martínez Ayala, hermano
 - Lucía Martínez Ayala, hermana
 - Valeria Martínez Ayala, hermana

4. Gilberto Vásquez
 - María de la Cruz Díaz, cónyuge
 - Jorge Luiz Vásquez Gomez, hijo
 - Gilberta Vásquez Gomez, hija
 - Julio Vásquez Gomez, hijo

- Marcos Javier Vásquez Díaz, hijo
 - Gilberto Junior Vásquez Díaz, hijo
 - Debora Elena Vásquez Díaz, hija
5. Casildo Ayala Ayala