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REPORT No. 51/18
PETITION 1779-12
REPORT ON ADMISSIBILITY

KAQCHIKUEL MAYA INDIGENOUS PEOPLES OF SUMPANGO, ET
AL.
GUATEMALA

Approved by the Commission at its session No. 2127 held on May 5, 2018.
168th Special Period of Sessions.

Cite as: IACHR, Report No. 51/18, Petition 1779-12. Admissibility. Kaqchikuel Maya
Indigenous Peoples of Sumpango, et al. Guatemala. May 5, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	<i>Asociación Sobrevivencia Cultural, Asociación Mujb'ab'1 yol (Encuentro de Expresiones), and Cultural Survival, Inc.</i>
Alleged victim:	Kaqchikuel Maya Indigenous People of Sumpango, Sacatepéquez; Achi Maya People of San Miguel Chicaj, Baja Verapaz; Mam Maya People of Cajola, Quetzaltenango; and Maya People Todos Santos in Cuchumatán, Huehuetenango
Respondent State:	Guatemala
Rights invoked:	Articles 1 (obligation to respect rights), 13 (freedom of thought and expression), and 24 (right to equal protection) of the American Convention on Human Rights, ¹ and Article XIII (right to the benefits of culture) of the American Declaration of the Rights and Duties of Man ²

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	September 28, 2012
Additional information received at the stage of initial review:	March 7, 2013, October 21, 2014, January 16, 2015, June 9, 2015, and May 11, 2016
Notification of the petition to the State:	April 26, 2017
State's first response:	July 27, 2017

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 (instrument deposited on May 25, 1978)

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 13 (freedom of thought and expression), 24 (right to equal protection), and 26 (economic, social, and cultural rights) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereto, and article XIII (right to the benefits of culture) of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, March 29, 2012
Timeliness of the petition:	Yes, September 28, 2012

¹ Hereinafter "Convention" or American Convention"² Hereinafter "American Declaration"³ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. This petition alleges the violation of the rights to freedom of expression, equal protection, and cultural identity of the Kaqchikuel Maya Indigenous People of Sumpango in Sacatepéquez; the Achi Maya People of San Miguel Chicaj, Baja Verapaz, the Mam Maya People of Cajola, Quetzaltenango and Maya People Todos Santos of Cuchumatán, Huehuetenango as a consequence of the failure to legally recognize the radio stations they operate in their communities and the persistence of discriminatory legal conditions that prevent access to the radio spectrum and criminalize the development of their own communications media.

2. According to the petition, the four abovementioned indigenous peoples have organized to establish community radio stations in their communities with the objective of broadcasting information to their members, as well as to promote and protect their indigenous cultures and languages. According to the information presented, for several years now the Kaqchikuel Maya People of Sumpango in Sacatepéquez have been operating the community radio station *Radio Ixchel*, the Achi Maya People of San Miguel Chicaj, Baja Verapaz operate the community radio station *Uqul Tinamit* "The Voice of the People," the Mam Maya People of Cajola, Quetzaltenango operate the community radio station *X Musical*, and the Maya community of Todos Santos in Cuchumatán, Huehuetenango operates the community radio station *Qman Txum*. The petitioners contend that these communities have not been able to access a broadcast license to operate their radio stations because of the obstacles that the current legislation imposes.

3. They explained that Guatemala's General Telecommunications Act [*Ley General de Telecomunicaciones*] has a direct impact on the ability of the alleged victims to exercise their rights. They assert that this law fails to recognize community broadcast media and other types of non-profit media outlets and prevents indigenous peoples from accessing the radio spectrum under equal conditions. In particular, they argue that Articles 1, 2, 61, and 62 of the Act establish a licensing process for the use of radio frequency bands that is based exclusively on public auctions, which favors the granting of licenses to the highest bidder. In the opinion of the petitioners, this mechanism excludes in practice the possibility of granting indigenous peoples "effective participation [...] to compete for the rights to frequencies in their linguistic areas and territories in which they reside, considering that the common denominator of their economic status is poverty." They maintain that indigenous peoples "will not be able to take part in a public bidding process because they lack the financial resources." They argue that this auction mechanism fails to provide equal opportunities for community media sectors, and fails to address the special needs of Guatemala's indigenous peoples.

4. The petitioners allege that the lack of recognition and the legal obstacles blocking access to frequencies have been accompanied by a serious criminalization of the operation of indigenous community radio stations. In particular, they indicate that the exercise of their right to freedom of expression through the radio spectrum has resulted in members of indigenous communities being criminalized by means of penal law concepts such as "frequency theft." Similarly, they state that they are subjected to frequent police searches and seizures of radio broadcasting equipment.

5. According to the petitioners, in the Agreement on the Identity and Rights of Indigenous Peoples (AIDPI) signed in 1995, Guatemala agreed to "facilitate access and use of frequencies for indigenous projects' and 'take measures to ... repeal all legal provisions which hinder the right of the indigenous peoples to use communications media for the development of their identity." They allege that, to date, these commitments have not been met. They observe that several reform proposals have been introduced in Congress (Initiative 2621 of 2002, Initiative 3142 of 2004, Initiative 3151 of 2005, and Initiative 4087 of 2009), but that the Congress of Guatemala has yet to debate or vote on any of them.

6. The petitioners state that, in view of the failure of these legal reform initiatives, *Asociación Sobrevivencia Cultural* filed a legal action in 2011 challenging the constitutionality of Articles 1, 2, 61, and 62 of Guatemala's current Telecommunications Act. The action alleged that those articles directly violate articles of the national Constitution, "because they fail to contemplate indigenous communities as rights-holders entitled to obtain the benefit of using the radio spectrum for the dissemination of their culture and spirituality, without taking account of their historic, economic, and majority status."

7. In particular, the action alleged that “the first two articles of the Telecommunications Act [...] fail to contemplate indigenous communities as rights-holders entitled to obtain the benefit of using the radio spectrum for the dissemination of their culture and spirituality, as their wording provides only for development and investment through competition, ignoring the development of the culture of indigenous people.” It further asserted that Articles 61 and 62 of the Act “complement the discriminatory action of the State toward indigenous peoples, given that [...] the Guatemalan indigenous peoples of Maya origin have always lacked financial resources; failing to consider their historical and majority status in this country, and then establishing a mechanism favoring the best and highest financial bid as the only way to obtain frequencies, is by itself specific and express evidence of the violation of Article 4 of the Constitution of the Republic.”

8. In March 2012, the Constitutional Court [*Corte de Constitucionalidad*] dismissed the unconstitutionality action, indicating that it found no violation of any article of the constitution. In particular, the Court ruled that the challenged articles “refer specifically to the general procedure to be followed in conducting the public auction and competitive bidding processes, there being no distinction, exclusion, limitation, or preference on the basis of race, color, sex, language, religion, position, origin, or other basis of a similar nature, that obstructs, restricts, or impedes access by ‘any interested person’ to participation in the procedure for awarding rights to use radio frequencies. Nor do those regulations in any way violate the recognition, respect, and promotion of the ways of life, customs, traditions, languages, and forms of social organization of the country’s ethnic groups.” The petitioners indicate that they received notice of this decision of the Constitutional Court on March 29, 2012.

9. The petitioners indicate that from the time the petition was filed with the IACHR in September 2012, until May 2016, the situation of community radio stations has not improved. They report, for instance, that in May 2012 the Achi-Maya community radio station *Uqul Tinamit*, “The Voice of the People,” was raided by the Public Ministry and the national police, and one of its volunteer workers was arrested at the time of the raid. In addition, on December 5, 2012, the President of Guatemala signed Decree 34-2012, “allowing usufructuary rights-holders to extend for a period of 20 years the usufructuary rights granted to them under the Telecommunications Act.” According to the petitioners, “Congress enacted the law with little debate and entirely without consulting the indigenous peoples of Guatemala.” The petitioners affirm that this decree hinders access to radio frequencies under equal conditions even further, particularly for indigenous peoples, since it freezes spectrum allocation for 20 years.

10. For its part, the State asks the IACHR to declare this petition inadmissible, “since the State has not violated any right enshrined in the American Convention.” In particular, it states that under the Guatemalan Constitution, radio frequencies are the property of the State, and therefore their use must be legally authorized. The State maintains that it has made provisions for “the use of a resource that is owned by the State to be legally accessed” through the Superintendency of Telecommunications [*Superintendencia de Telecomunicaciones*] and the Guatemalan Broadcasting Bureau [*Dirección General de Radiodifusión*]. It further notes that, as a Member State of the Convention of the International Telecommunication Union (ITU), it undertook, *inter alia*, “recognize the necessity of taking all practicable steps to prevent the operation of electrical apparatus and installations of all kinds from causing harmful interference to [duly authorized radio services or communications].”

11. The Guatemalan State adds that the criminal prosecutions pursued by the Public Ministry as the responsible agency have been for the unlawful use of a state-owned good, “consistent with the principle of objectivity,” without distinction regarding the content of the programs disseminated. In that regard, it argues that there has been no discrimination against any individual person or legal entity in relation to obtaining a radio frequency, as it has “only required compliance with the legal requirements established to that end.” It reports that the Office of the Prosecutor for Crimes Involving the Unlawful Use of Radio Frequencies [*Fiscalía de Delitos Cometidos por el Uso Ilegal de Frecuencias Radioeléctricas*] has conducted, to date, 165 raids, inspections, searches, and seizures of evidence at properties where it had determined that a radio frequency was being used, and that 65 individuals have been convicted of the offense of frequency theft.

12. With respect to the legislative initiatives introduced in Congress in relation to community broadcasting, the State indicates that the record of the Legislative Affairs Office of Congress contains Initiative 2621, which provides for the enactment of the respective Law, pending a report by the Committee on Communications, Transportation, Public Works, and Housing.

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

13. The petitioners contend that they have exhausted the applicable domestic remedies by filing an unconstitutionality action challenging various provisions of the Telecommunications Act, which in their opinion impose legal obstacles that prevent the indigenous peoples who are the alleged victims in the instant case from accessing the radio spectrum under equal conditions. The petitioners filed the action with the Constitutional Court in 2011, and received notice of its decision on March 29, 2012. The State, for its part, has neither disputed this fact nor presented observations with respect to the exhaustion of domestic judicial remedies in this matter.

14. For purposes of admissibility, the Commission finds that the constitutionally challenged legislative provisions in this case have a direct effect on the rights of the alleged victims, who contend that the law is discriminatory and prevents them from exercising their rights to freedom of expression, equal protection, and cultural identity under equal conditions. In these kinds of situations, an unconstitutionality action can be a suitable remedy for protecting the violated legal status.⁴

15. Under the domestic laws, the powers of the Constitutional Court of Guatemala include hearing and deciding constitutional challenges to laws in a single and final judgment (Articles 267 and 272(a))⁵ and issuing a determination on the rights alleged to be affected by those laws.⁶ The Court's decision on this matter is final and binding.

16. Given that a final decision has been rendered by Guatemala's highest court on the facts alleged in this case, the Commission finds that the domestic remedies have been exhausted in the terms of Article 46.1.a of the American Convention. Furthermore, considering that the petition was received on September 28, 2012, the Commission finds that it was timely filed in accordance with Article 46.1.b of the American Convention.

17. In addition, the Inter-American Commission takes note of the State's complaint that notice of the petition was not timely served. The IACHR indicates that neither the American Convention nor the Rules of Procedure of the Commission establish a deadline for serving notice of a petition on the State after it has been received, and that the deadlines established in the Rules of Procedure and in the Convention for other stages of the proceedings are not applicable by analogy.⁷

VII. ANALYSIS OF COLORABLE CLAIM

18. In view of the legal and factual elements presented by the parties and the nature of the matter brought before it, the Commission finds that, if proven, the petitioner's allegations could potentially

⁴ See IACHR, Report No. 25/04 (Admissibility), Petition 12.361, Ana Victoria Sánchez Villalobos and others v. Costa Rica. March 11, 2004. Para. 60 and 62; IACHR, Report No. 28/98 (Admissibility), Case 11.625, María Eugenia Morales de Sierra v. Guatemala. March 6, 1998. Para. 28.

⁵ Political Constitution of the Republic of Guatemala. Chapter IV: The Court of Constitutionality. Article 272. Functions of the Court of Constitutionality. "The Court of Constitutionality has the following functions: a. To receive and judge, acting as sole instance, the charges raised against laws or general provisions, challenged either in part or in their entirety as being unconstitutional (...)". Available (in Spanish) at: https://www.oas.org/juridico/mla/sp/gtm/sp_gtm-int-text-const.pdf

⁶ See IACHR, Report No. 25/04 (Admissibility), Petition 12.361, Ana Victoria Sánchez Villalobos and others v. Costa Rica. March 11, 2004. Para. 60 and 62; IACHR, Report No. 28/98 (Admissibility), Case 11.625, María Eugenia Morales de Sierra v. Guatemala. March 6, 1998. Para. 28.

⁷ See, for instance, IACHR, Report No. 56/16. Petition 666-03. Admissibility. Luis Alberto Leiva. Argentina. December 6, 2016. See also IACHR, *Case Mémoli v. Argentina*. Preliminary Objections, Merit, Reparations and Costs. Judgment of August 22, 2013. Series C, No. 295, para. 30-33.

constitute violations of Articles 13 (freedom of thought and expression) and 24 (right to equal protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights), and 2 (domestic legal effects) thereto.

19. On several occasions, the IACHR and the Office of the Special Rapporteur have acknowledged that community media outlets perform an essential function in our hemisphere for different sectors of society to exercise their rights to freedom of expression and access to information. In those decisions, they have established that it is necessary for States to legally recognize community media, for spectrum to be reserved for these types of media, and for there to be equal access to licenses that recognize the distinct nature of private non-commercial media.⁸ The IACHR has also indicated that, “the issuance or renewal of broadcast licenses must be subject to a clear, fair and objective procedure that takes into consideration the importance of the media so that all sectors of society [...] may participate in an informed manner in the democratic process [...]”⁹

20. With respect to the alleged violation of article XIII (right to the benefits of culture) of the American Declaration, the IACHR has previously established that once the American Convention enters into force with respect to a State, it is that instrument, and not the Declaration, that becomes the specific source of law to be applied by the Inter-American Commission, provided that the petition alleges violations of rights of identical substance upheld by both instruments. Thus, considering that Article 26 of the American Convention refers broadly to the economic, social and cultural rights, and that these rights should be analyzed in relation to the OAS Chart and other relevant legal instruments, the IACHR deems that in cases where violations of the American Declaration are alleged, the analysis of the applicability and scope of Article 26 of the Convention should be made at the merits stage.

21. Finally, based on the information presented, the IACHR finds that the petition refers to four indigenous communities, which are asserting the collective exercise of their right to freedom of expression and their cultural rights. On this point, the Inter-American Court has held that, “international standards on indigenous or tribal peoples and communities recognize the rights of peoples, and not just their members, as collective rights-holders under international law; indigenous or tribal peoples and communities, united by their particular ways of life and identity, exercise some rights recognized by the Convention in their collective dimension.”¹⁰ Similarly, the Rules of Procedure and the decisions of the IACHR acknowledge situations in which it is not possible to identify each victim by his or her name. The Commission recognizes that certain human rights violations, due to their nature or circumstances, may affect a particular individual or a group of individuals who can be identified by specific criteria—a situation that would be evident in this case.¹¹

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 13, 24 and 26 of the American Convention in connection with Articles 1.1 and 2 thereto, and article XIII of the American Declaration.

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.

⁸ IACHR. Office of the Special Rapporteur for Freedom of Expression. [Freedom of expression standards for free and inclusive broadcasting](#). OEA/Ser.L/V/II CIDH/RELE/INF. 3/09. December 30, 2009. Para. 96-97.

⁹ IACHR. Office of the Special Rapporteur for Freedom of Expression. [Freedom of expression standards for free and inclusive broadcasting](#). OEA/Ser.L/V/II CIDH/RELE/INF. 3/09. December 30, 2009. Para. 111-112.

¹⁰ IACHR. Advisory Opinion OC-22/16 of February 26, 2016. “Rights holdership of legal entities in the Inter-American Human Rights System (interpretation and scope of Article 1.2 in relation to articles 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62.3 of the American Convention on Human Rights, in addition to article 8.1.A and B of the Protocol of San Salvador”. Para. 75.

¹¹ IACHR, Report No. 64/15 (Admissibility), Petition 633-04, Mayan Peoples and Members of the Cristo Rey, Bullet Tree, San Ignacio, Santa Elena and Santa Familia Communities. Belize, October 27, 2015, para. 27.

Done and signed in the city of Santo Domingo, Dominican Republic, on the 5th day of the month of May, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, y Flávia Piovesan, Commissioners.