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REPORT No. 125/20
PETITION 1528-09
ADMISSIBILITY REPORT

KUNAS DE GARDI COMMUNITIES, KUNA YALA DISTRICT,
NURDARGANA REGION
PANAMA

Approved electronically by the Commission on April 25, 2020

Cite as: IACHR, Report No. 125/20. Admissibility. Kunas de Gardi Communities, Kuna Yala District, Nurdargana Region. Panama. April 25, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner	Atencio López Martínez, Héctor Huertas González, the Corporation of Indigenous Lawyers of Panama and the Kuna General Congress of Kuna Yala
Alleged victim	Kunas de Gardi Communities, Kuna Yala District, Nurdargana Region – <i>Playa Colorada</i> .
Respondent State	Panama ¹
Rights invoked	Articles 4 (right to life), 7 (right to personal liberty), 10 (right to compensation), 12 (freedom of conscience and religion), 17 (rights of the family), 19 (rights of the child), and 21 (right to property) of the American Convention on Human Rights ² in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects); Articles I (life, liberty and personal security), III (religious freedom and worship), V (protection of honor, personal reputation and private and family life), VI (right to a family and to the protection thereof), VII (protection for mothers and children), XI (preservation of health and well-being), XIII (benefits of culture) and XXIII (property) of the American Declaration on the Rights and Duties of Men. ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition	November 30, 2009
Additional information received at the stage of initial review:	December 23 and 24, 2015
Notification of the petition	June 16, 2016
State's first response	October 18, 2016
Additional observations from the petitioner	May, 30 and October 24, 2017; and June 26, July 5 and 12, 2018
Additional observations from the State	September 7, 2017 and July 16, 2018.

III. COMPETENCE

<i>Ratione personae:</i>	Yes
<i>Ratione loci:</i>	Yes
<i>Ratione temporis:</i>	Yes
<i>Ratione materiae:</i>	Yes, American Convention on Human Rights (instrument of ratification deposited on June 22, 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 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 12 (freedom of conscience and religion), 17 (rights of the family), 21 (right to property), 22 (freedom of movement and residence), 24 (right to equal protection) and 25 (right to judicial protection) in relation to Articles 1.1 and 2 of the American Convention; and Article XIII of the American Declaration.
Exhaustion or exception to the exhaustion of remedies	Yes, in the terms of Section VI
Timeliness of the petition	Yes, in the terms of Section VI

¹ As established under Article 17.2.a of the Rules of Procedure of the Commission, Commissioner Esmeralda Arosemena de Troitiño, a Panamanian national, did not participate in the debate or decision of the instant matter.

² Hereinafter, "the American Convention" or "the Convention".

³ Hereinafter, "the American Declaration" or "the Declaration".

⁴ The observations from each party were duly transmitted to the other party.

V. SUMMARY OF ALLEGED FACTS

1. The petition under analysis is presented on behalf of the members of the Kunas de Gardi indigenous communities in view of the alleged massive titling and privatization of their territories by the Panamanian State, in particular the territories of Nurdargana. According to the information presented, the petitioners argue that, although they have exhausted internal dialogue and legal remedies under Panamanian law, there is an imminent danger to the survival of the indigenous communities due to the loss of their ancestral collective lands.

2. In this regard, the petitioners describe the Kuna People of Kuna Yala (also referred to as the "Guna People") as an indigenous people with origins prior to the Spanish conquest, whose first settlement took place in the Dagargunyala region, now part of Colombia, and, during the 16th and 17th centuries, in their current territories in the Darien region which is part of Panama and Colombia. They detail that the Kuna People have maintained in these territories, places of planting, hunting and gathering, including medicinal plants, their sacred sites and have sustained a system of community life in which the use of the islands and coastal marine resources is part of the customs of the communities.

3. The petitioners describe that historically there had been a gradual process of state recognition of collective ownership of Kuna indigenous lands from Cabo de Tiburón to Piedra Negra, which included Nurdargana (Playa Colorada). However, the petitioners explain that with the independence of Panama and thereafter the Panamanian authorities have established administrative boundaries that divide the Kuna indigenous territory without the participation of Kuna indigenous leaders. In that regard, they explain that, as part of these demarcations, a part of the Kuna territory was subsumed under the province of Colón and then became part of the San Blas district and, in particular, the Nurdargana territory was included under the Santa Isabel district, in the province of Colón. They claim that, while the Kuna indigenous territory in the San Blas district was recognized as an indigenous reserve following Law 59 of December, 1930,⁵ the Kuna people have repeatedly insisted that the Kuna indigenous lands in the Nurdargana sector are an important part of the ancestral territory, representing more than 5,000 hectares of land and watersheds on which more than 200 indigenous families depend and are part of their traditional community life.

4. In this regard, the petitioners argue that the Kuna General Congress has requested legal recognition of the lands of Nurdargana, from 1918 to the present date, through several letters sent to State representatives and has even participated in meetings with State representatives from 2000 to 2014, among other actions.⁶ They argue that the Gardi Kuna communities exercised the territorial rights of use, occupation and collective tenure over the Nurdargana lands until 2004, despite the fact that the legal dispossession over the lands, including access to natural resources in their territories, had occurred since 2005, when the first individual land titles were granted.

5. Specifically, the petitioners allege that, as a result of an initiative by the World Bank and the Panamanian government, a program for the mass land titling at the national level called the National Land Program ("PRONAT") was established in 2000. In response to this project, they describe that the Kuna General Congress raised concerns regarding the claim over the Nurdargana lands and, consequently, a tenure study of the lands called "Socioeconomic and tenure study in a proposed area between the boundaries of the Guna Yala Region and the District of Santa Isabel" was carried out within the framework of PRONAT. The petitioners describe that said study confirmed the possession of the Nurdargana lands by the Kunas de Gardi communities, even if they were not within the Kuna Yala District.

⁵ The petitioners explain that as a result of Law 2 of September 16, 1938, the San Blas indigenous reserve became an indigenous Comarca, and in subsequent years, under Law 16 of February 1953, the Comarca of San Blas (now Kuna Yala) was organized and recognition was granted to the General Kuna Congress as the traditional government of the Kuna indigenous people and the lands of the communities, although they insist that these lands have not been demarcated. They also insist that following Law 20 of 31 January 1957, the lands of the indigenous Comarca of San Blas were declared inadjudicable.

⁶ In particular, the petitioners describe the 1981 Guna Yala Special Wildlife Area Management Program (PEMASKY), carried out with the participation of the Institute of Renewable Resources, now the National Environmental Authority (ANAM) and the Smithsonian Research Institute (STRIT), identified that the indigenous lands of Nurdargana belong to the Gardi communities but were outside the comarca boundaries, which is why the Kuna General Congress presented a draft law to the Panamanian Legislative Assembly with the aim of expanding the comarca boundaries.

6. They emphasize, however, that as a consequence of this initiative and as a result of the tenure study, various titling processes were initiated on the indigenous lands located in Nurdargana by non-indigenous persons. In particular, they argue that at least 12 property titles over indigenous lands had been granted to individuals under irregular titling processes, who then immediately transferred them to companies they owned to prevent the titles from being annulled. They indicate that the indigenous congress was aware of these land titling and, consequently, since May 2009, filed administrative claims for the protection of human rights before the Supreme Court of Justice, requesting the nullification of the resolutions issued by the National Directorate of Agrarian Reform. In such claims, they alleged the violation of the right to collective property in the absence of demarcation of the Comarca by the National Boundary Commission of the Ministry of Government and Justice, and the lack of notification to the Kuna Congress.⁷

7. In this regard, they describe that two cases were withdrawn because the Kuna Congress found in inspections carried out that these were not traditional lands. In relation to the others, they detail that the Third Chamber of the Supreme Court of Justice issued respective decisions in which it held that the resolutions are legal as the lands are outside the Kuna Yala District, denying the claims contained in the lawsuits.⁸

8. The petitioners also indicate that, as of November 2003, the Kuna Congress had filed 20 opposition claims before the National Directorate of Agrarian Reform against applications for the allocation of untitled land, in accordance with Law 37 of September 21 of 1962.⁹ In this regard, they indicate that several of these processes before the National Directorate of Agrarian Reform have not yet been resolved and despite the fact that the Director of Agrarian Reform had suspended them, these were reactivated based on the decisions of the Third Chamber of the Supreme Court of Justice and some have been resolved by rejecting the oppositions of the Kuna General Congress.

9. The petitioners add that on June 3, 2009, the Kuna General Congress filed a request for collective awarding of lands before the National Directorate of Agrarian Reform, in accordance with Law 72 on the regime of collective titling of lands of indigenous people not within the districts published in 2008. This with the intent of correcting the boundaries of the Kuna Yala District and through which it urged the suspension of all requests for the award of individual titles. They argue that the administrative authority did not undertake any action until 2017 when in the course of the corresponding proceedings, the National Land Administration Authority suspended the request requiring the petitioners to withdraw from it the lands that were the subject of the approved property titles and certified possession rights recognized between June 3, 2009 and 2017, years between which the process was not regulated. The petitioners indicate that this occurs in a context in

⁷ In this regard, the petitioners detail the actions of administrative litigation for the protection of human rights filed between May and July 2009 against resolutions issued by the National Directorate of Agrarian Reform which award property titles, for example: No. DN 3-1540 of August 23, 1995 regarding the title deed granted in favor of *Luis Benavides Caballero*; No. D. N. 3-1081 of May 24, 1995 regarding the title deed granted in favor of *Nelly E. Ballesteros*; No. D. N. 3-1517 of July 28, 2000 concerning the title deed granted in favor of *Robert Zauner*; No. D. N. 3-1643 of August 10, 2001 regarding the title deed granted in favor of *Jorge Alexis Garrido*; No. D. N. 3-2206 of December 26, 2002 regarding the title deed granted in favor of *Luis Carlos Vidal Castillo*; No. D. N. 3-2207 of December 26, 2002 regarding the title deed granted in favor of *Carlos A. Valderrama*; No. 3-2206 of December 26, 2002 regarding the title deed granted in favor of *Luis Carlos Vidal Castillo*; No. D. N. 3-1098 of June 29, 2004 regarding the title deed granted in favor of *Armando Martínez Mendizábal*; No. D. N. 3-1133 of July 5, 2004 regarding the title deed granted in favor of *Elías E. Contreras Billard*; No. D. N. 3-1134 of July 5, 2004 regarding the title deed granted in favor of *Ceferino Domínguez*; and No. D. N. 3-1270 of July 23, 2004 regarding the title deed granted in favor of *Juan M. Benavides Ballesteros*.

⁸ Judgment of the Third Chamber of Administrative Litigation of the Supreme Court of Justice issued on June 23, 2014 regarding Resolution No. D. N. 3-1134 of June 5, 2004; and judgment of the Third Chamber of Administrative Litigation of the Supreme Court of Justice issued on June 27, 2014 regarding Resolution No. D. N. 3-1270 of July 23, 2004.

⁹ For example, the petitioners point out the opposition claim to the request for individual award No. 3-16-02 made by *Bredio Luis Benavides Caballero*, which was denied by Resolution No. D.N. 006-05 of January 6, 2005 and in the face of which, the petitioners describe that an appeal for reconsideration was filed on August 11, 2006. They also point out the following: the opposition claim filed on November 6, 2003 against the request for individual award No. 3-620-01 made by *Isela Carmen Santamaria Jordán*; opposition claim filed January 4, 2005 against individual adjudication request No. 3-14-02 of August 28, 2002 made by *Ana Teresa Bernal de Benavides*; opposition claim filed on November 6, 2003 against individual award application No. 3-169-02 made by *Gentil E. Villafante*; opposition request to the individual award application No. 3-446-01 made by *Armando Mendizábal*; opposition request to adjudication request No. 3-168-02 made by *Jenny Benavides de Céspedes*; and application for opposition to application No. 3-67-02 made by *Julia Edith Botello de Contreras*. Likewise, the petitioners present a petition for reconsideration filed before the National Directorate of Agrarian Reform on November 6, 2003 against the Resolution that resolves to deny the opposition to the request for adjudication No. 3-101-96 made by *Juan de Dios Castaño Hernández*.

which the local authorities of the District of Santa Isabel openly oppose placing edicts of communication to third parties of the collective title of the Nurdargana lands. They insist that to date the titling process remains suspended and that the State does not propose any alternative.

10. Finally, the petitioners argue that on May 26, 2009, representatives of the Kuna Congress filed a constitutional challenge against Article 10 of Law 72 from 2008,¹⁰ which was rejected by the Supreme Court in a ruling issued on December, 2017, and notified on June 13, 2017. In said action, the indigenous congress argued that said norm confers a higher degree of judicial protection to individual titling, thus placing indigenous property in a discriminatory situation by establishing that indigenous collective titling cannot affect existing property titles nor certified possessory rights granted by the agrarian reform. In that regard, the petitioners added that said norm ignores the fact that most indigenous lands have been titled without notification or in direct administrative fraud to the detriment of the indigenous, which has allowed persons that have no relationship with their lands to obtain titles and possessory rights. However, the petitioners indicate that the Supreme Court upheld the primacy of property titles and possessory rights before ancestral or traditional possession.

11. The petitioners contend that there is an absence of judicial, administrative or other effective procedure to allow the petitioners to demand that the Government fulfill its obligations to title the land of Nurdargana, taking into account its overwhelming disadvantages such as acute poverty, geographical isolation, language differences and limited education. They argue that the appropriation of the lands by individual persons who then transfer them to tourism and real estate companies with the tolerance of the State affects the right to identity as an indigenous people because of the cultural and spiritual relationship they have with the lands and violates the rights of indigenous children "by not allowing the development to which they are entitled". They also denounce that the gradual destruction of the lands due to pollution, the construction of roads, hotels and fencing of their lands as well as the destruction of their crops. They argue that the individual titling that would later be transferred to corporations, undermine and threaten food security, the development of their community life and their lives while also pointing out that authorities of the region have allegedly urged non-indigenous occupants to equip themselves with weapons as a means of defense in case of disturbances with the indigenous communities living in the area.

12. The State argues that the appellants had access to file their claims. It points out that the request for the allocation of collective lands presented on June 3, 2009 by the Kuna community in the Santa Isabel District area to the Regional Directorate of Colon, could not continue due to the lack of regulation of the law.¹¹ Thus, it adds that once Law 72 was regulated on December 23, 2008 through Executive Decree No. 223 of 2010, the applicants did not submit continuity to the procedure until October 11, 2016, when they filed a document to replace and promote the process of the file containing the original application before the National Directorate of Indigenous Lands and Municipal Property. It maintains that this process is still pending and in that regard, it indicates different acts carried out by the administrative authority within the framework of the process, including Providence No. 002-2016 of May 24, 2017 issued by the National Directorate of Indigenous Lands and Municipal Assets in which it accepts the application for collective title and orders that the corresponding procedures be continued. It also points out the concern expressed by the City Hall of the District of Santa Isabel against Resolution No. 17-2017, considering that Kuna settlements or the extension of the Kuna Region are prohibited within the District of Santa Isabel.

13. The State maintains that the identified adjudication resolutions that were processed within the framework of Law 37 of 1962 and that relate to lands located in the District and Corregimiento of Santa Isabel (2 of 1995 and 4 of 2004) are related to lands that were clearly outside of the Kuna Yala Comarca, in adjudication areas. In this regard, because the awards are from 1994 to 2004, the State argues that they could hardly have been affected by the application for collective land awards filed in 2009 on an area adjacent to the Comarca.

¹⁰ Article 10 of Law 72 estipulates "Awards made in accordance with this Law shall not prejudice the existing property titles and possessory rights certified by the National Directorate for Agrarian Reform".

¹¹ Note NDJ-582-09, from June 9, 2009.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

14. According to the information submitted by the petitioners and uncontroverted by the State, the Commission notes that, in the instant case, representatives from the Kunas indigenous communities have requested to various official authorities the collective title to the lands of Nurdargana and their inclusion as indigenous territory of the Kuna Yala District, even before 1995. The Commission notes that they subsequently filed opposition claims to the applications for individual titles; filed human rights protection claims the individual titles granted; and requested the collective awarding of lands before the National Directorate of Agrarian Reform in accordance with Law 72 of 2008. Lastly, the petitioners filed an appeal of unconstitutionality before the Supreme Court of Justice.

15. For the purposes of admissibility, the IACHR understands that the main claim of the alleged victims relates to the lack of legal recognition of all of their ancestral territories and, as a result, the infringement of their rights. In this sense, the Commission considers relevant to recall that the procedures for the titling of indigenous or tribal communal lands must be effective and must allow that they be filed by the affected communities and not exclusively by individuals. In this sense, the mere possibility of the recognition of rights through certain judicial procedures does not substitute the actual recognition of such rights.

16. The Commission observes that the resources that were attempted domestically by the alleged victims were adequate for the purposes of the allegations made. In light of available information, the application for the allocation of collective lands was submitted by the alleged victims and accepted by the National Directorate of Indigenous Lands and Municipal Assets by means of Ruling No. 002-2016 of 24 May 2017. The Commission notes that according to information submitted by the petitioner and not disputed by the State, the local authorities of the District of Santa Isabel are opposed to publishing the edicts of notification of the communications which, according to Executive Decree No. 233 of June 29, 2010, which regulates Law 72 of 2008, is obligatory in the different stages to proceed with the corresponding procedures. In this respect, the process for the allocation of the collective land is still pending before the administrative authority without any result to date.

17. In particular, the IACHR observes in this regard that the Inter-American Court of Human Rights has maintained that the rule of the previous exhaustion must never “lead to stopping or delaying international action in support of the victim until it becomes useless”¹². Consequently, the IACHR concludes that the exception to the exhaustion of domestic remedies established under Article 46.2.c of the American Convention is applicable to the instant case. With regards to the timeliness of the petition, the Commission notes that, in addition to the foregoing, the facts denounced were alleged to have occurred as of 1995 and that the petitioners took legal actions in the early 2000s. Therefore, considering that the petition was filed on November 30, 2009, it was filed during a reasonable period of time, in the terms of Article 32.2 of the IACHR’s Rules of Procedure and Article 46.2 of the American Convention.

VII. COLORABLE CLAIM

18. The Commission notes that the present petition includes allegations regarding the lack of recognition and titling of Nurdargana collectively owned lands, the massive titling and privatization of the same lands and its effects on the development of community life, the situation of discrimination of indigenous collective titling as opposed to individual titling established under Law 72 of 2008, as well as the absence of effective judicial or administrative procedures for land titling. In view of these considerations, and after examining the factual and legal elements presented by the parties, the Commission considers that the petitioner’s allegations are not manifestly unfounded and require a substantive study of the alleged facts, If they are corroborated as certain, they could characterize violations of Articles 4 (right to life), 5 (right to a humane treatment), 8 (right to a fair trial), 12 (freedom of conscience and religion), 17 (protection of the family), 21 (right to property), 22 (freedom of movement and residence), 24 (right to equal protection) and 25 (right to judicial protection), in relation to Articles 1.1 and 2 of the American Convention on Human Rights. The

¹² I/A Court., Case of Velásquez Rodríguez Case v. Honduras. Preliminary Objections. Judgment of June 26,1987. Series C No. 1, para. 93; IACHR, Report No. 71/12, Petition 1073-05. Admisibilidad. Inhabitants of the “Barão de Mauá” Residential Complex. Brasil, July 17, 2012, para. 22.

Commission considers that the allegations made regarding the compatibility of the administrative process for applying for the allocation of collective lands and the actions of the authorities with the standards of the American Convention in terms of due process, access to justice, and the approach to the protection of indigenous peoples will be analyzed, as appropriate, in the report that the Commission adopts on the merits of the dispute, in order to determine whether or not they constitute violations of the Convention.

19. With regard to the allegation of violation of Articles 7 (right to personal liberty), 10 (right to compensation), and 19 (rights of the child) of the American Convention, the Commission notes that the petitioners do not present sufficient allegations or elements to identify or determine, *prima facie*, the violation of those provisions of the American Convention.

20. With respect to the alleged violation of the American Declaration, both the Court and the Commission have determined that it is a source of international obligations for the OAS member states, and therefore the Commission has, in principle, competence *ratione materiae* to examine violations of rights enshrined in the Declaration. However, the IACHR has established that once the American Convention enters into force in relation to a State, it is that instrument and not the Declaration that becomes the specific source of the law to be applied by the Inter-American Commission, provided that the petition alleges violations of substantially identical rights enshrined in the two instruments and that there is no situation of continuity¹³. In the instant case, the IACHR notes that the petitioners invoked the right to the benefits of culture (Article XIII), which is contemplated in the Declaration and not expressly in the American Convention. Therefore, the Commission will examine what the petitioners have alleged in relation to that Article of the Declaration.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 4, 5, 8, 12, 17, 21, 22, 24 and 25 of the American Convention, in relation to Articles 1.1 and 2; and in relation to Article XIII of the American Declaration;

2. To declare inadmissible the instant petition in relation to Articles 7, 10 and 19 of the American Convention; and

3. To notify the parties of this decision; to proceed with the analysis on the merits; and to publish this decision and include 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 25th day of the month of April, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; and Stuardo Ralón Orellana, Commissioners.

¹³ IACHR, Report No. 33/15, Case 11754. Admissibility. U'Wa People. Colombia. July 22, 2015, para. 30; IACHR. Report No. 03/01. Admissibility. Case 11.670. Amilcar Menéndez and others (Argentina). January 19, 2001, para. 31; and IACHR. Report No. 16/05. Admissibility. Petition 281/02. Claudia Ivette González (Mexico). February 24, 2005, para. 16.