

OAS/Ser.L/V/II
Doc. 54
18 April 2023
Original: Spanish

REPORT No. 47/23

PETITION 1880-11

REPORT ON ADMISSIBILITY

MEMBERS OF THE MAPUCHE COMMUNITY
CHILE

Approved electronically by the Commission on April 18, 2023.

Cite as: IACHR, Report No. 47/23. Petition 1880-11. Admissibility.
Members of the Mapuche Community. Chile. April 18, 2023.

I. INFORMATION ABOUT THE PETITION

The petitioner:	Yolanda Llanquitar Parra, Emelina Millanao Ancavil, Tulio Raasen Rivera, Jaime Madariaga De la Barra, Ciro Colombara López and Karina Riquelme Viveros
Alleged victims:	Members of the Mapuche community ¹
Respondent State:	Chile
Rights invoked:	Articles 4 (life), 23 (right to participate in government), 24 (equality before the law) and 26 (progressive development) of the American Convention on Human Rights ² , with regard to its articles 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law); articles 12 (food) and 14 (benefits of culture) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador); and other international treaties ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	December 29, 2011
Notification of the petition to the State:	October 10, 2013
State's first response:	June 16, 2014
Additional observations from the petitioner:	September 23, 2014, and December 29, 2021
Additional observations from the State	April 2, 2018, and November 28, 2022
Notification of the possible archiving of the petition:	June 15, 2020
Petitioner's response to the notification of possible archiving	August 4, 2020

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 August 21, 1990)

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
---	----

¹ The petition refers to sixty-seven alleged victims who are allegedly indigenous traders from the Mapuche community, whose names are listed in the Annex.

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

³ Articles 6 and 23 of Convention 169 of the International Labor Organization (hereinafter "ILO Convention 169"); and International Covenant on Civil and Political Rights.

⁴ The observations of each party were duly forwarded to the opposing party.

Rights declared admissible:	Articles 13 (freedom of thought and expression), 23 (right to participate in government), 24 (equality before the law) and 26 (progressive development) of the American Convention on Human Rights, regarding 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 alleges the violation of the human rights of the members of the Mapuche indigenous community due to the prohibition to sell their products in the center of the city of Temuco, province of Cautin, thus affecting their right to prior consultation, as well as their ancestral uses and customs for economic subsistence.

Position of the Petitioners

2. The petitioner narrates, by way of background, that prior to the establishment of the city of Temuco, the members of the Mapuche community engaged in commercial activities in that region. They hold that the indigenous people who are currently engaged in agriculture and handicrafts, among other activities, have marketed their products in the streets of downtown Temuco for more than one hundred years, mainly as itinerant and stationary traders, as a means of economic subsistence.

3. The petitioners recall that on September 15, 2008, the Chilean State ratified Convention 169 of the International Labor Organization, thereby assuming the obligation to “*to consult the peoples, through their representative institutions and following an appropriate procedure, when legislative or administrative measures are foreseen to directly affect them, with a view to reaching an agreement or obtaining their consent*”. Therefore, they claim that the omission of consultation constitutes a violation of the rights enshrined in the Convention, which includes the obligation of States to consult with indigenous peoples and to guarantee their participation in order to respect their right to equality, with respect to decisions concerning any measure affecting their customs, especially those used for their sustainability and economic development.

4. In that context, the petitioners hold that on January 12, 2011, Mayor's Decree No. 92 (hereinafter the "Decree") was issued, prohibiting the installation of stationary and itinerant commerce in the center of the city of Temuco. In this context, the petitioners claim the violation of the rights of the Mapuche indigenous merchants due to the omission of prior consultation in the issuance of the Decree, which would have directly affected their work activities and would have meant a detriment to their economic, social, and cultural development. They argue that the purpose of the Decree was to prohibit the full development of the ancestral custom used for the sustainment of the indigenous families.

5. The alleged victims filed an amparo remedy against the aforementioned Decree, which was declared inadmissible by the First Chamber of the Temuco Court of Appeals in a judgment of May 30, 2011. This court considered that the Decree was not arbitrary, due to the fact that: i) it is an economic activity developed mainly by citizens who do not belong to the Mapuche community; and ii) it prohibited stationary and itinerant commerce on national public property in a specific perimeter, most of which does not belong to the Mapuche people; therefore, they have the opportunity to continue exercising their activities in the rest of the streets of Temuco. Upon appeal, on July 1, 2011, the Chilean Supreme Court of Justice upheld the appealed judgment, confirming the first instance decision.

6. Likewise, the petitioners report that some of the Mapuche merchants suffered acts of violence by members of the militarized police while trying to sell their products in the zones restricted by the Decree. They argue that the cases cannot be brought before an ordinary court because they fall under military jurisdiction. However, they refer that on June 17, 2020, a lawsuit was filed before the Court of Guarantee of Temuco for the illegal detention and mistreatment committed by State agents against three Mapuche women, which was admitted on June 24 of the same year. -However, the IACHR observes that in its last communication of December 29, 2021, the petitioner does not provide information on the development or progress of said complaint filed in 2020-.

7. In conclusion, the petitioner claims the following rights enshrined in the American Convention as violated: (i) life, given the violation of the ancestral customs of the members of the Mapuche community who dedicate themselves as a means of economic subsistence to itinerant commerce, as well as the affectations to the personal integrity of some of its members by police agents; (ii) right to participate in government, specifically, due to the lack of prior consultation with the Mapuche indigenous people who were engaged in itinerant commerce in the center of Temuco, alleging the omission in carrying out a participation mechanism with the community, prior to the issuance of the Decree that affected their ancestral commercial activities; (iii) the right to equality before the law, related to the lack of prior consultation with Mapuche merchants, without considering that the street trade that the Decree prohibited affected their ancestral activities practiced in the center of Temuco for more than a hundred years, which caused persecution and discrimination against them by state authorities; and (iv) the right to progressive development, due to the omission of the Chilean State to guarantee the necessary conditions for a decent life for the Mapuche indigenous people, related to their main means of subsistence, the street trade practiced in the center of Temuco. The petition also claims as violated some provisions of the Protocol of San Salvador; the International Covenant on Civil and Political Rights; and ILO Convention 169.

Position of the Chilean State

8. The State, in its response, asks the IACHR to declare the present petition inadmissible, on the grounds that: (a) the Commission lacks competence *ratione materiae* concerning the alleged violation of ILO Convention 169 and the violations of the International Covenant on Civil and Political Rights; (b) the IACHR lacks competence *ratione temporis* with regard to the alleged violations of the Protocol of San Salvador; and (c) the petitioners failed to exhaust available domestic remedies with respect to the allegations concerning the violation of the right to life against some members of the Mapuche community.

9. With regard to point (a), it argues that the Commission has no competence to resolve violations of ILO Convention 169, since it is not part of the instruments that make up the Inter-American Human Rights System. In addition, it argues that the Commission lacks competence to establish violations of the norms of the International Covenant on Civil and Political Rights, and therefore lacks competence *ratione materiae* to rule on possible violations of both international treaties, in accordance with Article 44 of the American Convention and Article 23 of the Rules of Procedure of the IACHR.

10. With respect to point (b), it claims that the IACHR lacks competence *ratione temporis* with regard to the Protocol of San Salvador, because the facts narrated in the petition took place in 2011 and Chile deposited the instrument of ratification of this international treaty in July 2022. In that sense, it argues that the IACHR lacks temporal competence to hear the facts which give rise to the petition, since they represent violations that took place before the entry into force of the Protocol of San Salvador.

11. Finally, regarding allegation (c), the State contends that the requirement of exhaustion of domestic remedies has not been met with respect to the alleged attacks perpetrated by police officers on street vendors in Temuco. In that sense, it refers that the petitioners omitted to bring the related actions in criminal proceedings, this being the appropriate and effective remedy to address the violations of the right to life.

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

12. For the analysis of the exhaustion of domestic remedies in the present case, the IACHR recalls that, according to its consolidated and reiterated practice, in order to identify the appropriate remedies that should have been exhausted by a petitioner before resorting to the Inter-American System, the first methodological step of the analysis consists of distinguishing the different claims formulated in the corresponding petition in order to proceed to their individualized examination.⁵ In the present case, the petitioners have presented two main claims before the Commission: (i) the violation of the right to consultation of the members of the Mapuche community, derived from the issuance of Decree No. 92 by the Municipality of Temuco, directly affecting their ancestral uses and customs concerning commerce; and (ii) the alleged acts of violence committed by State agents against Mapuche merchants who continued to engage in itinerant commerce in the areas restricted by the aforementioned decree.

13. With respect to point (i), the Commission observes that the State has not argued that domestic remedies have not been exhausted, nor has it indicated whether there are adequate and effective remedies whose exhaustion would have led to the timely addressing of this situation. In addition, the IACHR takes note that the petitioner provides documentation regarding the contesting of the Decree issued on January 12, 2011 by the Municipality of Temuco, specifically, with regard to the filing of an amparo remedy which was denied in a judgment of May 30, 2001; and against this denial, they appealed to the Supreme Court of Justice of Chile, which on July 1, 2011 confirmed the first instance judgment.

14. In this regard, the Commission notes that the remedy of protection is enshrined in Article 20 of the Political Constitution of the Republic of Chile, which defines it as a means of legal defense that is available to "[t]he one who due to arbitrary or illegal acts or omissions, suffer deprivation, disturbance or threat in the legitimate exercise of rights and guarantees". According to this same constitutional precept, the affected person "may apply by himself or by anyone on his behalf, to the respective Court of Appeals, which will immediately adopt the measures it deems necessary to restore the rule of law and ensure due protection of the affected party, without prejudice to the other rights that may be asserted before the corresponding authority or courts". Thus, by its very definition in the text of the Constitution, it is an ideal internal remedy to achieve the goal of protecting human rights against the actions of the authorities. In addition, in this case the Supreme Court of Justice of Chile accepted the appeal and decided on the merits of the matter.

15. In this logic, the Commission considers that the administrative act alleged in the present case would have a prima facie direct effect on the rights of the alleged victims. In numerous previous pronouncements,⁶ the IACHR has considered that the protection remedy in Chile is an adequate domestic remedy whose filing and decision exhaust domestic remedies and comply with the requirement of Article 46 of the American Convention. Therefore, the Commission considers that the remedy of protection was the appropriate means to annul the Decree that prohibited street commerce practiced by the members of the Mapuche community. With respect to this aspect of the petition, the State has not presented any objection aimed at questioning the failure to exhaust any avenue or the deadline for submitting the petition. Given that in this case there is a final decision issued by the Supreme Court of Justice of Chile, the Commission considers that domestic remedies have been exhausted under the terms of Article 46.1.a) of the American Convention. Regarding the deadline for submission, the Commission notes that the decision was issued on July 1, 2011, and

⁵For illustrative purposes, the following IACHR reports may be consulted: Report No. 117/19. Petition 833-11. Admissibility. Workers released from the Boa-Fé Caru Farm. Brazil. June 7, 2019, paras. 11, 12; Report No. 4/19. Petition 673-11. Admissibility. Fernando Alcántara de Figueiredo and Laci Marinho de Araújo. Brazil. January 3, 2019, paras. 19 and following; Report No. 164/17. Admissibility. Santiago Adolfo Villegas Delgado. Venezuela. November 30, 2017, para. 12; Report No. 57/17. Petition 406-04. Admissibility. Washington David Espino Muñoz. Dominican Republic. June 5, 2017, paras. 26, 27; Report No. 168/17. Admissibility. Miguel Ángel Morales Morales. Peru. December 1, 2017, paras. 15-16; Report No. 122/17. Petition 156-08. Admissibility. Williams Mariano Paría Tapia. Peru. September 7, 2017, paras. 12 and following; Report No. 167/17. Admissibility. Alberto Patishtán Gómez. Mexico. December 1, 2017, paras. 13 and following; or Report No. 114/19. Petition 1403-09. Admissibility. Carlos Pizarro Leongómez, María José Pizarro Rodríguez and their next of kin. Colombia. June 7, 2019, paras. 20 and following.

⁶ See, among others, the following Commission reports: Report No. 30/15, Petition 1263-08. Admissibility. Sandra Cecilia Pavez Pavez. Chile. July 21, 2015, paras. 21-22; Report No. 171/10, Petition 578-03, Admissibility, Miguel Angel Millar Silva et al., Chile, November 1, 2010, para. 29; and Report No. 141/09, Petition 415-07, Admissibility, Comunidad Agrícola Diaguita de los Huascoalinos and its members, Chile, December 30, 2009, paras. 35-38.

the petition was received on December 29, 2011; Consequently, the petition meets the requirement set forth in Article 46.1.b) of the Convention.

16. With regard to point (ii), concerning the alleged acts of violence committed against some members of the Mapuche community, the Commission notes that the petitioners filed a lawsuit in order to complain about the repression committed against them. The State, for its part, argues that domestic remedies have not been exhausted with respect to these events, holding that the alleged victims have not pursued domestic criminal proceedings for the purpose of investigating the alleged acts of violence. However, from the information contained in the casefile, the Commission observes that the petitioners have not provided information with regard to the procedural status of said complaint.

17. Given the circumstances described above, the Commission considers that it cannot be concluded that the alleged victims duly exhausted domestic remedies with respect to this aspect of the petition, precisely because of their lack of information and documentation in this regard. Consequently, the Commission concludes that this aspect of the instant petition is inadmissible under Article 47.a) of the American Convention because it does not meet the requirements of Article 46.1.a) thereof. Therefore, these facts fall outside the factual framework of the present petition.

VII. ANALYSIS OF THE CHARACTERIZATION OF THE POSITIONING OF THE PARTIES

18. The present petition includes allegations regarding the adoption without prior, free and informed consultation with the Mapuche community of a ban on street and stationary commerce in specific areas of downtown Temuco, area to which they have traditionally moved to carry out this activity. The State, for its part, does not provide substantive information, tending to establish that the actions of the administrative authorities were not contrary to its international obligations.

19. The Commission considers that the center of Temuco has constituted an important economic center for merchants from the Mapuche community despite not being part of their ancestral territory. In this regard, the Commission will assess in the merits stage if the duty to perform a prior consultation covers situations originated of with effects outside the ancestral territories of the Mapuches. The commercial activities carried out by indigenous peoples within their ancestral territories are different from those carried out on an itinerant basis, that is, when they move to territories close to their ancestral settlements. The IACHR should also assess the potential harm to the rights of third parties.

20. In this sense, the Commission reiterates the need in international law in general, and in inter-American law specifically, for special protection for indigenous peoples and Afro-descendant communities, so that they can exercise their rights fully and equitably with the rest of the population. Particularly with regard to indigenous peoples and Afro-descendant tribal peoples, in accordance with the provisions of ILO Convention 169 and the American Convention on Human Rights, it is essential that the States grant effective protection that takes into account their specific characteristics, their economic and social traits, as well as their situation of special vulnerability, their customary law, values, uses and customs, and their cultural and linguistic diversity.

21. In view of these considerations and after examining the elements of fact and law presented by the parties, the Commission considers that the allegations of the petitioner specifically related to the issuance and application of the Decree are not manifestly unfounded; and require a study of the merits in light of the rights established in Articles 13 (freedom of thought and expression), 23 (right to participate in government), 24 (equality before the law) and 26 (progressive development) of the American Convention, in relation to its Articles 1. 1. and 2, to the detriment of the members of the Mapuche community who have been identified in the Annex to this petition.

22. Likewise, with respect to the claim of alleged violation of Article 4 (life) and 23 (right to participate in government) of the American Convention, the Commission observes that the petitioners have not offered sufficient allegations or support to allow a *prima facie* consideration of a possible violation. Likewise, with regard to the precision of the scope of this decision, the Commission observes that the petitioners do not provide elements to question the manner in which the judicial proceedings to contest Decree No. 92 were

conducted, but rather focus on the alleged consequences of the issuance and application of this decree on the alleged victims.

23. As for the State's allegations of violation of other international treaties, the IACHR recalls that it lacks competence *ratione materiae* to rule on violations of rights contained in treaties outside the inter-American system. Without prejudice to the foregoing, it may resort to the standards established in other treaties in order to interpret the norms of the American Convention by virtue of its Article 29.⁷ With respect to the State's claim regarding ILO Convention 169, the Commission reiterates that, although it lacks the competence to rule on its violation, it can use it as a guideline for the interpretation of treaty obligations, in light of the aforementioned Article 29 of the Convention⁸.

24. Regarding the allegations of violations of Articles 12 (food) and 14 (benefits of culture) of the Protocol of San Salvador, the IACHR notes that the competence provided for in the terms of Article 19.6 of said treaty to establish violations in the context of an individual case is limited to Articles 8 and 13. With respect to the other articles, in accordance with Article 29 of the American Convention, the Commission may take them into account to interpret and apply the American Convention and other applicable instruments.

25. Finally, the IACHR stresses that the criterion for analyzing the admissibility of a petition differs from that used for its analysis on the merits, since it only performs a *prima facie* analysis, in the terms of Article 47 of the Convention, to determine whether the petitioners establish the apparent or possible violation of a right guaranteed by the American Convention. This is a cursory analysis which does not imply prejudging or issuing a preliminary opinion on the merits of the case.

VIII. DECISION

1. To declare the present petition admissible in relation to Articles 12, 23, 24 and 26 of the American Convention, in relation to Articles 1.1 and 2 thereof;

2. To declare the present petition inadmissible regarding Article 4 of the American Convention; and of the facts that have been declared inadmissible for failure to establish exhaustion of domestic remedies, and;

3. To notify the parties of this decision; to proceed to 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 18th day of the month of April, 2023. (Signed:) Margarete May Macaulay, President; Esmeralda Arosemena de Troitiño, Vice President; Roberta Clarke, Second Vice President; Joel Hernández García (dissident vote), Julissa Mantilla Falcón, Stuardo Ralón Orellana (dissident vote) and Carlos Bernal Pulido, Commissioners.

⁷ IACHR, Report No. 26/17, Petition 1208-08. Admissibility. William Olaya Moreno and family. Colombia. March 18, 2017, para. 9.

⁸ In the same sense, see: IACHR, Admissibility Report No. 87/12, Petition 140-08, Maya Kaqchikel Communities of Los Hornos and El Pericón I and their members (Guatemala), November 8, 2012, para. 32. IACHR, Admissibility Report No. 29/06, Garífuna Community of Triunfo de la Cruz and its members (Honduras), para. 39; and IACHR, Admissibility Report No. 39/07, Garífuna Community of Cayos Cochinos and its members (Honduras), para. 49.

ANNEX

List of alleged victims belonging to the Mapuche community

- | | |
|--|--------------------------------------|
| 1. Clorinda Neculmán Huanchuñir | 34. Héctor Vallejos Nahuelqueo |
| 2. Guillermina Queupumil Quintriqueo | 35. Amalia Antileo Caniuqueo |
| 3. Carmela Chicahual Tralcal | 36. Lucy Levipil Cayunao |
| 4. María Queupumil Quintriqueo | 37. Magdalena Paine Quiñatur |
| 5. Mireya Concha Henríquez | 38. Carmen Levipil |
| 6. Leonarda Henríquez Manquilef | 39. Juan Sergio Vallejos Nahuelcheo |
| 7. Emelina Millanao Ancavil | 40. María Marta Pichulaf |
| 8. Nelly Millanao Ancavil | 41. Elba del Carmen Leiva Huenchuman |
| 9. Jeanette Millanao Ancavil | 42. Teresa Morales Amiñir |
| 10. Emelina Ancavil Ladino | 43. Zunilda Molina Reimahuel |
| 11. Lucía Millanao Ancavil | 44. Viviana Pichunlaf López |
| 12. Eduvina Tralcal Marilaf | 45. Juanita Queupucura Queupucura |
| 13. Avelina Canío Paillamal | 46. Jorge Severo Lincaqueo |
| 14. Raquel Coliñir Cheuqueán | 47. Juan Severo Lincaqueo |
| 15. Rosa Pirquinao Huenchu | 48. Cecilia Antilaf Poblete |
| 16. Yolanda Llanquitur Parra | 49. Marta Sonia Curim Loncon |
| 17. Rosa Llaupe Canío | 50. Juanita Canio Catrilao |
| 18. Angélica Llanquitur Parra | 51. Juanita Trurreupan Lorenzo |
| 19. Marcia Montre Curiqueo | 52. Henrique Huilínir |
| 20. Florinda María Parra Llanquitruf | 53. Alfonso Antipán Marilaf |
| 21. Rosa Carmen Poblete Lauquen | 54. Amalia Antileo Caniuqueo |
| 22. José Eugenio Concha Henríquez | 55. Marta Llanquinao Manqueo |
| 23. Francisco Queupumil Benavente | 56. Orfa Hernández Levuman |
| 24. Ingrid Del Carmen Huencho Inostroza | 57. María Ramírez Trangol |
| 25. Esteban Antonio Huechunir Marihual | 58. Rosa Lauquen Carilao |
| 26. Inés Beatriz Reyes Sánchez | 59. Luis Lingue Alonso |
| 27. Tulio Edmundo Raasch | 60. Juan Cheuquepan López |
| 28. Rivera Sady Eliab Manríquez Marillán | 61. Carlos Huichao Jara |
| 29. Alejandro Lozano Antivil | 62. Sandra Cuicui Montiel |
| 30. Emilia Antivil Llancaqueo | 63. Celestino Collipal Curaqueo |
| 31. Juan Cheuqueñanco Huillin | 64. Elizabeth Llevilao Beltrán |
| 32. Iván Fuentes Huenchulao | 65. Ángel Collipal Painemal |
| 33. Marcia Monte Curiqueo | 66. Juan Paillacan Lefuman |
| | 67. Carmen Millapán Ceballo |