INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE XÁKMOK KÁSEK INDIGENOUS COMMUNITY *v.* PARAGUAY

JUDGMENT OF AUGUST 24, 2010
(Merits, Reparations, and Costs)

In the case of the *Xákmok Kásek Indigenous Community*,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Diego García-Sayán, President
Leonardo Franco, Vice President
Manuel E. Ventura Robles, Judge
Margarette May Macaulay, Judge
Rhadys Abreu Blondet, Judge
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge, and
Augusto Fogel Pedrozo, Judge *Ad hoc;*

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and to Articles 30, 32, 59, and 60 of the Court Rules of Procedure[1] (hereinafter "the Rules of Procedure"), delivers this Judgment.

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On July 3, 2009, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), in accordance with Articles 51 and 61 of the Convention, submitted an application against the Republic of Paraguay (hereinafter "the State" or "Paraguay"), based on which the instant case was commenced. The initial petition was lodged before the Commission on May 15, 2001, and, on February 20, 2003, the Commission approved Report No. 11/03,[2] declaring the

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[1] As stipulated in Article 79(1) of the Court's Rules of Procedure that entered into force on June 1, 2010, "[c]ontentious cases submitted to the consideration of the Court before January 1, 2010, will continue to be processed in accordance with the preceding Rules of Procedure until the delivery of to judgment." Consequently, the Court's Rules of Procedure mentioned in this judgment correspond to the instrument approved by the Court at its forty-ninth regular session, held from November 16 to 25, 2000, partially amended at its eighty-second regular session held from January 19 to 31, 2009.

[2] In Admissibility Report No. 11/03, the Commission concluded that it had competence to examine the petition presented by the petitioners and that it was admissible pursuant to Articles 46 and 47 of the

petition admissible. Subsequently, on July 17, 2008, it approved Report on Merits No. 30/08,[3] under Article 50 of the Convention, which included specific recommendations for the State. The State was notified of this report on August 5, 2008. On July 2, 2009, after examining several reports forwarded by the State and the corresponding observations made by the petitioners, the Commission decided to submit the case to the jurisdiction of the Court, "because it considered that the State had not complied with the recommendations made in the Report on Merits." The Commission appointed Paolo Carozza, a Commissioner at the time, and Santiago A. Canton, Executive Secretary, as delegates and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Karla I. Quintana Osuna, Isabel Madariaga and María Claudia Pulido, specialists of the Executive Secretariat, as legal advisors. Subsequently, the Commission appointed María Silvia Guillén, Commissioner, because Commissioner Carozza's mandate had concluded.

2. The application relates to the State's alleged international responsibility for the alleged failure to ensure the right of the Xákmok Kásek Indigenous Community (hereinafter "the Xákmok Kásek Indigenous Community," "the Xákmok Kásek Community," "the Indigenous Community," or "the Community") and its members' (hereinafter "the members of the Community") to their ancestral property, because the actions concerning the territorial claims of the Community were being processed since 1990 "and had not yet been decided satisfactorily." According to the Commission, "[t]his has meant that, not only has it been impossible for the Community to access the property and take possession of their territory, but also, owing to the characteristics of the Community, that it has been kept in a vulnerable situation with regard to food, medicine and sanitation that continuously threatens the Community's integrity and the survival of its members."

3. The Commission asked the Court to declare the State responsible for the violation of the rights established in Articles 3 (Right to Juridical Personality), 4 (Right to Life), 8(1) (Right to Judicial Guarantees), 19 (Rights of the Child), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention. The Commission asked the Court to order the State to adopt specific measures of reparation. The State and the representatives of the alleged victims were notified of the application on August 17, 2009.

4. On October 17, 2009, Oscar Ayala Amarrila and Julia Cabello Alonso, members of the organization *Tierraviva a los Pueblos Indígenas del Chaco* [Land for the Indigenous Peoples of the Chaco] (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") on behalf of and in representation of the members of the Community. The

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Convention. Based on the factual and legal arguments, and without prejudging the respective merits in, considered the petition admissible with regard to the alleged violation of Articles 2, 8(1), 21, and 25 (Domestic Legal Effects, Right to Fair Trial, Right to Property and Right to Judicial Protection) of the American Convention and 1(1) (Obligation to Respect Rights) thereof, based on possible failure to comply with the obligation to adopt domestic legal provisions, to the detriment of the Xákmok Kásek Community of the Enxet-Lengua People and its members.

[3] In Merits Report No. 30/08, the Commission concluded that the State had not complied with the obligations imposed by Articles 21 (Right to Property), 8(1) (Right to Fair Trail [Judicial Guarantees]), and 25 (Judicial Protection), all in relation to Articles 1(1) and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members. Moreover, in application of the *iure novit curia* principle, the Commission concluded that the State of Paraguay had not complied with the obligations imposed by Article 3 (Right to Juridical Personality), 4 (Right to Life), and 19 (Rights of the Child), all in relation to Articles 1(1) and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.

representatives endorsed the Commission's application *in totum* and, in addition to the articles of the Convention cited by the Commission, asked the Court to declare the State responsible for violating the right established in Article 5 (Right to Humane Treatment). Lastly, they requested specific measures of reparation.

5. On December 31, 2009, the State filed its brief in answer to the application and with observations on the pleadings and motions brief (hereinafter "answer to the application"). The State disputed the alleged facts and the legal claims set out by the Commission and the representatives. The State appointed José Enrique García as its Agent and Inés Martínez Valinotti as its Deputy Agent.[4]

II
PROCEEDINGS BEFORE THE COURT

6. At the request of the Commission and the representatives, on October 29, 2009, the expert opinions of José Braunstein, Bartemeu Melia i Lliteres, Enrique Castillo and José Aylwin in the case of the *Yakye Axa Indigenous Community v. Paraguay*[5] were added to the case file. Those expert opinions were forwarded to the State the same day so that it could present any observations it deemed pertinent.

7. In an Order of March 8, 2010,[6] the President of the Court (hereinafter "the President") ordered that the testimony of the alleged victims, witnesses, and experts offered by the parties be received by affidavit. In addition, the parties were convened to a public hearing to hear testimony proposed by the Commission, the State, and the representatives, as well as their final oral arguments on the merits and possible reparations and costs. Lastly, the President gave the parties until May 24, 2010, to submit their briefs with final arguments.

8. On March 29 and 30, 2010, the representatives, the Commission, and the State submitted the affidavits.

9. On March 29, 2010, Amancio Ruiz and Eduvigis Ruiz, alleged victims required by the President to provide their testimony by affidavit (*supra* para. 7), forwarded a communication indicating that Roberto Carlos Eaton Kent, owner of the ranch within which was part of the land claimed by the members of the Community and the employer of Amancio Ruiz, would be "organizing the testimony on behalf of the State of Paraguay." According to the said alleged victims, Mr. Eaton "is the person who has been the most opposed to [their] Community's claims; the person who harassed [them] and who always showed a profound lack of respect for [their] just claims. The person whose rights were always placed above [theirs] by the Paraguayan State; he is a permanent ally of the State to the detriment of [their] life, [their] culture, [their] people."

10. On April 5, 2010, at the request of the Court, the State presented its observations on the information presented by Amancio Ruiz and Eduvigis Ruiz. It indicated that "the representatives of the State [had] accept[ed] in good faith Roberto

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4 When the application was notified to the State, it was informed of its right to appoint a judge *ad hoc* for the consideration of the case. On September 16, 2009, the State appointed Augusto Fogel Pedrozo as Judge *ad hoc*.

5 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, paras. 38.a, b, c, and d, and 39.

6 *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Order of the President of the Court of March 8, 2010.

Carlos Eaton's proposal […] to assume the transportation and accommodation expenses of the [said deponents], so that they could provide their version of the issues involved, in the presence of a notary public, who would guarantee that the statements were free and spontaneous." It also indicated that "this fact was not communicated to the organization *Tierraviva*, because the proposed [alleged] victims proceeded to give statements in documents that they themselves had prepared and signed." It concluded by indicating that "[a]t most, the problem was one of poor communication because having Mr. Eaton as an intermediary gave rise to some distrust among the indigenous people, which [was] unfounded." The State clarified that it had not "intimidated the [alleged] victims" and had not "entered into alliances with any of the parties to the dispute." Lastly, it indicated that it withdrew the said statements it had offered.

11. The public hearing took place on April 14, 2010, during the forty-first special session held in Lima, Republic of Peru.[7]

12. On May 4, 2010, on the instructions of the President, the State, the Commission and the representatives were required to provide specific documentary evidence.

13. On May 24, 2010, the Commission and the representatives, and on May 25, 2010, the State, forwarded their respective briefs with final arguments. The Commission, the State and the representatives presented part of the documentary evidence requested. In addition, the representatives attached several documents to the brief with final arguments.

III
COMPETENCE

14. The Court has competence to hear this case, pursuant to Article 62(3) of the American Convention, because Paraguay has been a State Party to the Convention since August 24, 1989, and accepted the compulsory jurisdiction of the Court on March 11, 1993.

IV
EVIDENCE

15. Based on the provisions of Articles 46 and 47 of the Rules of Procedure applicable to this case, as well as on the Court's case law regarding evidence and its assessment,[8] the Court will examine and evaluate the documentary probative elements submitted by the parties at different procedural stages, as well as the testimony

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[7] There appeared at this hearing: (a) for the Inter-American Commission: María Silva Guillén, Commissioner; Elizabeth Abi-Mershed, Deputy Executive Secretary; Karla I. Quintana Osuna, adviser, and Federico Guzmán, adviser; (b) for the alleged victims: Julia Cabello Alonso, representative; Oscar Ayala Amarilla, representative and, Nicolás Soemer, assistant, and (c) for the State: Modesto Luis Guggiari, Ambassador of the Republic of Paraguay to Peru; Inés Martínez Valinotti, Alternate Agent and Director of Human Rights of the Ministry of Foreign Affairs, and Abraham Franco Galeano, delegate attorney of the Office of the Attorney General of the Republic.

[8] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 50; *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations, and costs*. Judgment of May 25, 2010. Series C No. 212, para. 47, and *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits and reparations*. Judgment of May 26, 2010. Series C No. 213, para. 53.

provided by affidavit and at the public hearing. To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding legal framework.[9]

1. Testimony received

16. Written testimony was received from the following witnesses, experts witnesses and alleged victims:[10]

1) *Clemente Dermontt,* Community leader, alleged victim, offered by the Commission. He testified, *inter alia*, on the "legal proceedings before the domestic jurisdiction for the restitution to the Xákmok Kásek Community of its land";

2) *Marceline López,* Community leader, alleged victim, offered by the representatives. She testified, *inter alia*, on: (i) "the legal proceedings before the domestic jurisdiction for the restitution of their land," and (ii) "the migration and displacement of members of the Community";

3) *Gerardo Larrosa*, member of the Community and health promoter, alleged victim, offered by the representatives. He testified, *inter alia*, on "the past and present health conditions of the Community";

4) *Tomas Dermott*, member of the Community, alleged victim, offered by the representatives. He testified, *inter alia*, on "the peoples of the ancestral lands and the history of the dispossession of the lands of the Xákmok Kásek Community";

5) *Roberto Carlos Eaton Kent*, "owner of the Salazar Ranch," witness proposed by the State. He testified, *inter alia*, on "the factual and legal situation of the land claimed by the Community";

6) *Rodolfo Stavenhagen*, anthropologist and sociologist, former United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, expert witness proposed by the Commission. He testified, *inter alia*, on: (i) "the situation of the indigenous peoples of the Paraguayan Chaco"; (ii) "the importance for indigenous peoples that their ancestral lands and territories be recognized and protected," and (iii) "the consequences of the lack of State recognition";

7) *Antonio Spiridonoff Reyes*, forestry engineer, expert witness proposed by the representatives. He testified, *inter alia*, on: (i) "the assessment of the area claimed by the Xákmok Kásek Indigenous Community as appropriate for human settlement and their demographic expansion," and (ii) the "type of economic activities possible on the land and throughout the traditional territory," and

8) *Sergio Iván Braticevic,* geographer, master's degree in economic sociology and a doctorate in philosophy and letters (anthropology section), expert witness proposed by the State. He has written, *inter alia,* a report entitled "*Breve estudio territorial sobre la Comunidad Xákmok Kásek del Chaco*

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[9] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 25, 2001. Series C No. 76, para. 76; *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 47, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 53.

[10] On March 29, 2010, the Commission indicated that Juan Dermott was unable to give his testimony because he was ill. Also, on March 30, 2010, the State desisted from presenting the testimony of Amancio Ruiz Ramírez, Eduvigis Ruiz Dermott and Oscar Centurión (*supra* para. 6).

Paraguayo"

17. Regarding the evidence submitted during the public hearing, the Court heard the testimony of the following persons:

1) *Maximiliano Ruiz*, teacher and member of the Community, alleged victim, proposed by the Commission and the representatives. He testified, *inter alia*, on (i) the Community's social conditions owing to the lack of their ancestral land; (ii) current social and educational conditions in the Community; (iii) the situation of the Community's children, and (iv) the conditions experienced on the Salazar Ranch while the members of the said Community lived there;

2) *Antonia Ramirez*, Community member, alleged victim, proposed by the Commission and the representatives. She testified, *inter alia*, on: (i) the current situation of the Community, particularly with regard to the general situation of the women and children of the Community owing to the lack of their traditional habitat, and (ii) the conditions experienced on the Salazar Ranch while the members of the said Community lived there;

3) *Rodrigo Villagra Carron*, doctorate in social anthropology, witness proposed by the Commission and the representatives. He testified, *inter alia*, on: (i) the colonization and loss of the Enxet territory; (ii) the initial process carried out by the different communities of this people to recover the said territory; (iii) the specific situation of the land claim of the Xákmok Kásek people and the applicable national laws regarding the land claims of the indigenous peoples of Paraguay, and (iv) the relationship between the current territorial claims, including that of the Xákmok Kásek, and their socio-adaptive process before the Nation-State;

4) *Lidia Acuña,* current President of the INDI, witness proposed by the State. She testified, *inter alia*, on "the steps taken to resolve the problem described by the Xákmok Kásek Community," and

5) *Fulgencio Pablo Balmaceda Rodríguez*, doctor, expert witness, proposed by the Commission and the representatives. He testified, *inter alia*, on the health and sanitation conditions of the Community, specifically on the cause of death of those who have died.

2. Admissibility of the evidence

18. In this case, as in others,[11] the Court accepts the probative value of the documents that were presented by the parties at the appropriate opportunity which were not contested or challenged, and whose authenticity was not questioned, as well as those that refer to supervening facts.

19. Regarding the testimony and the expert opinions, the Court considers them pertinent to the extent that they correspond to the purpose defined by the President in the order requiring them (*supra* para. 7), and they will be assessed in the corresponding chapter. With regard to the statements of the alleged victims, since they

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[11] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140; *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 50, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 56.

have an interest in this case, their testimony will not be assessed alone, but together with all the evidence in the proceedings.[12]

20. Regarding the expert testimony offered by the State to carry out an anthropological study of the traditional lands of the Xákmok Kásek Community, in a brief submitted on April 6, 2010, the State informed the Court that it had designated Sergio Iván Braticevic. Finally, on May 17, 2010, the State forwarded the said expert report.

21. In briefs of April 19 and June 1, 2010, the Commission presented its observations on the designation of Sergio Iván Braticevic and on the expert report submitted. It stated, *inter alia*, that: "the report [was] not signed by Mr. Braticevic, and it is clear from the notarized document forwarded by the State, in which the said brief is supposedly transcribed, that it was a third party, Jose E. Garcia Avalos, apparently a State official, who requested the transcript of the document before a notary"; the expert witness was not a specialist in anthropology, but a geographer; he had only published work on the Argentine Chaco; he was not a specialist in indigenous peoples; his publications focused on development projects and the expansion of production; to prepare his report, he only met with agents of the State and he does not have the necessary experience to provide this kind of opinion. Based on the foregoing, the Commission argued that his expert opinion did not comply with the purpose for which it was proposed and that it was not relevant to receive his expert opinion, since it did not help elucidate the facts.

22. In a brief received on June 1, 2010, the representatives presented their observations on the expert opinion of Sergio Iván Braticevic. They considered it misguided that the study had been based on the documentation of this case and on interviews with officials, without taking the Community into account, and suspected that the intention of the study was to "give a technical appearance or veneer to the State's hope to [be relieved] of its responsibility in the restitution of the 10,700 hectares of land claimed."

23. In this regard, the Court observes that, although the expert opinion forwarded is not signed by Mr. Braticevic, it has been notarized, and that the observations of the Commission and the representatives refer to its probative value and not to its admissibility. Consequently, the Court considers that the expert opinion of Mr. Braticevic is useful for the case, and will assess together with the body of evidence, in keeping with the rules of sound judicial discretion, and any pertinent observations will be assessed, when examining the merits of the dispute.

24. On April 16, 2010, after the public hearing, the State submitted documentary evidence referring, among other matters, to the delivery of provisions and humanitarian assistance. On May 24, 2010, the representatives indicated that this evidence "is not related [to] the matters that are in dispute, so that it is irrelevant," and also it had occurred in recent months. In this regard, the Court admits the documentary evidence forwarded by the State and incorporates it into the body of evidence because it is useful for deciding the case. When examining it, the Court will

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[12] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43; *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 93, and *Case of the "Dos Erres" Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 63.

abide by the principles of sound judicial discretion, within the corresponding legal framework.[13]

25. Regarding the documentation presented by expert witness Pablo Balmaceda and witnesses Rodrigo Villagra Carron and Lida Acuña at the end of the public hearing held in this case, as well as the documentation presented by the representatives with their final written arguments, the Court admits them in application of Article 47(1) of its Rules of Procedure, because they are useful in this case and were not contested and their authenticity or veracity was not questioned.

26. In relation to the documentation requested by the Court on May 4, 2010, (*supra* para. 12), which was submitted by the parties, the Court decides to admit it because it finds it useful, in keeping with Article 47(1) of the Rules of Procedure.

V
OFFER OF A FRIENDLY SETTLEMENT, ACQUIESCENCE, AND REQUEST TO SUSPEND THE PROCEEDINGS

1. Regarding the offer of a friendly settlement and the acquiescence of the State

27. When answering the application, the State indicated that it "has not violated the right to communal property of the Xákmok Kásek's established in domestic law, but recognizes that, due to current circumstances, which cannot be attributed to the State, it has not been able to satisfy that right to date." In addition, the State asked the Court "to reject the claims made" by the Commission and the representatives, and offered a "friendly settlement," an offer that it repeated during the public hearing. In addition, the State indicated that it "acquiesced to the request for reparation."

28. The representatives indicated that they confirmed their unwillingness to accept a friendly settlement, because its purpose, "in the Community's experience, was to delay, unnecessarily, the Court's ruling on the merits of this case." They indicated that in previous years the Community had been "open to the possibility of a friendly settlement of the case on several occasions and, each time, the State had failed to comply, even minimally, with what had been discussed."

29. The Commission observed that on several occasions the State had offered what is known as a "friendly settlement." It noted that, although the State had made the said offers during the proceedings before the Commission, the conciliatory intention was never transformed into the implementation of concrete measures.

30. According to Articles 56(2) and 57 of the Rules of Procedure, and in exercise of its powers concerning the international protection of human rights, the Court can determine whether the offer of a friendly settlement or an acquiescence made by a defendant State offers sufficient grounds, in the terms of the Convention, to continue examining the merits and determining eventual reparations and costs. Since the proceedings before this Court refer to the protection of human rights, a matter of international public order that transcends the will of the parties, the Court must ensure that such acts are acceptable for the objectives that the inter-American system seeks to accomplish. In this task, the Court does not limit itself merely to verifying the formal conditions of the said acts; but rather, it must relate them to the nature and

[13] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and Costs, supra* note 9, para. 76; *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 47, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 53.

seriousness of the alleged violations, the requirements and interest of justice, the particular circumstances of the specific case, and the attitude and positions of the parties.[14]

31. Regarding the offer of a "friendly settlement," such an arrangement is conducted based on the willingness of the parties. In this case, the alleged victims have not accepted the conditions set out by the State in its proposal; consequently, the Court must continue with the analysis of the case.

32. In relation to the above-mentioned "acquiescence" of the State, the Court observes that Paraguay simultaneously denies the facts and the violations of the Convention of which it is accused. Thus, it does not acknowledge international responsibility and the entire dispute regarding the merits of the case remains. It is only in the area of reparations that the State accepts several of the measures of reparation requested by the Commission and the representatives. Accordingly, the Court decides to examine the disputed factual and legal issues. If the State is sentenced for violating any human right, the Court will take into account its acceptance of the requested measures of reparation, but will define the measures that are most appropriate to provide full reparation to the victims, in keeping with the evidence that has been provided and the violations declared.

2. The State's request to suspend these proceedings

33. The State requested "the suspension of these proceedings," because the contradictions found in the name and ethnic roots of the Community would prevent titling land in its favor and would not meet "the requirements of the Indigenous Peoples Statute and international law." It referred to several briefs submitted by the representatives, internal legal documents, and statements by members of the Community that, in its opinion, would cause confusion concerning the identification or ethnic roots of the Community because, in some cases, it appears as belonging to the Enxet people, in others as Enxet-Lengua, and in still others as Sanapaná. The State explained that ethnic roots or membership in a people is an "essential element for the transfer of property." Furthermore, it indicated that, owing to confusion over the name of the Community, its leaders were registered as leaders of the "Zalazar Community,"[15] which would make it impossible to title the land in their favor until they rectified this documentation."

34. The representatives argued that the Community is multi-ethnic. They indicated that, since the processing of the case before the Commission, they have indicated that the Community is composed of Sanapanás and Lenguas, and this is the name accepted by the Community, as well as "by the scientific community and society in general, that characterizes [the said] ethnic groups as belonging to a common people, the Enxet people." They explained that, when the Lenguas began to be known as Enxet some confusion arose among those who "had not followed the scientific advances regarding these peoples."

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[14] *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 24; *Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 24, and *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 25.

[15] In various documents presented by the parties, reference is made to the ranch or area of "Salazar" or "Zalazar" without making a distinction. In this judgment, when the Court cites the arguments of one of the parties or a probative document, it will use the spelling included in the original document. However, when the Court *motu proprio* refers to the said ranch or area, it will use the spelling "Salazar."

35. The Commission argued that the fact that the Community is made up of families that belong to different ethnic groups "does not constitute […] an obstacle for this indigenous community to possess the right to its ancestral territory." It stressed that the "multi-ethnic composition of the Community […] is due to its history" and that the indigenous peoples are dynamic human groups whose cultural composition "is restructured and reconfigured with the passage of time without this giving rise to the loss of its specific indigenous status." It maintained that, irrespective of the different ethnic groups that make up the Community, "it is clearly identified as regards its location and general composition."

36. The Court observes that the alleged differences regarding the identification of the Community refer, on the one hand, to the multi-ethnic nature of the Community and, on the other, its name.

2.1. Multi-ethnic nature of the Xákmok Kásek Community

37. First, the Court emphasizes that it is not for the Court or the State to determine the Community's name or ethnic identity. As the State itself recognizes, it "cannot […] unilaterally assign or deny names of [the] indigenous communities, because this action corresponds to the Community concerned." The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy. This has been the Court's criterion in similar situations.[16] Therefore, the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.

38. Despite the foregoing, this Court observes that, in Paraguay, there are 20 indigenous ethnic groups belonging to five linguistic families, namely: Enlhet-Enenlhet, formerly known as Lengua Maskoy, Mataco Mataguayo, Zamuco, Guaicurú, and Guaraní.[17] In the Chaco region there are up to 17 different indigenous ethnic groups representing all five linguistic families.[18]

39. The Enlhet-Enenlhet[19] linguistic family is composed of six peoples: Enxet (Lenguas or Enxet–Sur), Enlhet (Enlhet–Norte), Sanapaná, Angaité, Toba Maskoy, and Guaná. The Enlhet-Enenlhet have traditionally inhabited the Paraguayan Chaco,[20] particularly the eastern central region,[21] and are a historical people that have

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[16] *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 164.

[17] *Cf.* Expert testimony of Rodolfo Stavenhagen authenticated by notary public (merits file, tome II, folio 620); Notarized expert testimony of Sergio Iván Braticevic by affidavit (file of attachments to the State's final arguments, tome X, folio 4238); testimony of Rodrigo Villagra Carron provided during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru, and testimony of Lida Acuña provided during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru.

[18] *Cf.* Expert testimony of Iván Braticevic, *supra* note 17, folio 4238; testimony of Rodrigo Villagra Carron, *supra* note 17, and testimony of Lida Acuña, *supra* note 17.

[19] *Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17; Testimony of Lida Acuña, *supra* note 17, and Kalish, Hannes and Unruh, Ernesto. 2003. "*Enlhet-Enenlhet. Una familia lingüística chaqueña,*" in *Thule Rivista di studi americanisti*, No. 14/15, April/October 2003 (file of attachments to the pleadings and motions brief, attachment 16, tome VII, folio 2915).

[20] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, para. 73(5), and *Case of the Yakye Axa Indigenous Community v. Paraguay, supra* note 5, para. 50(1).

[21] Kalish, Hannes, and Unruh, Ernesto. 2003. "*Enlhet-Enenlhet. Una familia lingüística chaqueña,*" *supra* note 19, folio 2915.

reconstituted themselves socially and linguistically from a larger and more heterogeneous base of groups and villages distributed throughout that territory.[22] According to the expert testimony presented by the State, the Enlhet-Enenlhet have inhabited the Chaco area since time immemorial and "at least three or four generations of the Sanapaná, Enxet, and Angaité indigenous peoples have lived in the vicinity of the areas known as Pozo Colorado, Zalazar, and Cora-í.[23]

40. The process of colonizing the Chaco and the establishment of ranches forced many of the surrounding indigenous villages to congregate around the ranches. According to the evidence provided, the specific history of the Xákmok Kásek Community reveals that members of the Sanapaná and Enxet villages, who were traditionally found in the area where the Salazar Ranch was later established, gradually departed from their original sites and began settling near the core of the ranch and "there, the people gradually began mixing, intermarrying."[24] Rodrigo Villagra explained that the Sanapaná and the Enxet "are similar peoples related linguistically, ethnically, and geographically."[25] This geographic continuity was also revealed by several maps presented to this Court by the representatives, which were never denied or contradicted by the State.[26]

41. Additionally, the Court notes that, although the State argued that it was only because of the expert opinion of Sergio Iván Braticevic that it was able to elucidate the alleged con Regarding fusion that arose with regard to the ethnic group to which the Community belonged, the Atlas of Indigenous Communities of Paraguay, prepared by State agencies in 2002, establishes that the composition of the Xákmok Kásek Community is 73.7% Sanapanás, 18.0% Enxet-Sur, 5.5% Enlhet-Norte, 2.4% Angaité and 0.4% Toba-Qom.[27]

42. Finally, the members of the Community in this case identify themselves as belonging to the Xákmok Kásek Community, composed above all by members of the Sanapaná and Enxet-Sur people (previously known as Lenguas).[28]

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[22] *Cf.* Expert testimony of José Alberto Braunstein in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5 (merits file, tome I, folios 270 to 702).

[23] *Cf.* Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4243.

[24] Testimony of Tomás Dermott before notary public (merits file, tome II, folio 597), and testimony of Rodrigo Villagra Carron, *supra* note 17.

[25] Testimony of Rodrigo Villagra Carron, *supra* note 17.

[26] *Cf.* Plan of the land belonging to the Quebrachales Paraguayos Corporation (file of attachments to the pleadings and motions brief, tome VII, attachment 15, folios 2902 to 2905); 1908 map of Paraguay (file of attachments to the pleadings and motions brief, tome VII, attachment 15, folios 2898 to 2901), and map of the indigenous villages of the Chaco by Alfred Métraux (file of attachments to the pleadings and motions brief, tome VII, attachment 15, folio 2913).

[27] *Cf.* "*Atlas de las Comunidades Indígenas en el Paraguay*": Second National Indigenous Peoples Census: Xákmok Kásek Community-Salazar Ranch. Available at: http://www.dgeec.gov.py/Publicaciones/Biblioteca/Web%20Atlas%20Indigena/Atlasindigena.htm (last visited, August 2010).

[28] In its final arguments, the Commission indicated that "the Community is clearly identified as regards its location and general composition; its members identify themselves as originating from Xákmok Kásek" (merits file, tome III, folio 1025). For their part, the representatives indicated that "we have before us a community of a multi-ethnic composition, where the Enxet (Lengua Sur) and Sanapaná families predominate"; they added that "this has never been unknown to [the] representatives," and they referred to the contents of their brief with observations on merits before the Commission (merits file, tome III, folios 1055 and 1056 and file of appendices to the application, appendix III, tome IV, folios 1486 and 1487). *Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17; testimony of Maximiliano Ruíz provided during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru, and testimony of Antonia Ramírez provided during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru.

43. Consequently, this Court considers that the multi-ethnic composition of the Community is a proven fact, and the State knew or should have known this previously. The different references to the Community as belonging to the Enxet people or as descendants of the Sanapaná people respond to historical reasons or circumstances,[29] so that the State's argument is an insufficient reason to suspend this case.

2.2. Name of the Community

44. Regarding the name of the Community, the evidence submitted indicates that, in November 1986, the Paraguayan Indigenous Peoples' Institute (hereinafter the "INDI") recognized the "leaders of the Sanapaná Indigenous Community, settled in the place known as Zalazar."[30] Subsequently, in November of 1987, the President of Paraguay granted legal standing to the Zglamo Kacet Community, recognizing that it "belonged to the Maskoy ethnic group."[31] This name was a translation of the version used nowadays, Xákmok Kásek, with a different spelling.[32] Finally, in April of 1994, the INDI recognized the current leaders of the Community as leaders of "the 'Zalazar' indigenous community, belonging to the Sanapaná ethnic group," and expressly annulled the previous recognition of the leaders.[33]

45. In this regard, the Court observes that, in order to formalize the public deed corresponding to the lands currently occupied by the members of the Community (*infra* para. 77), the Government Notary required "the rectification of the Community's legal representation," which "must be arranged by the interested parties."[34] However, the Court notes that, contrary to the State's allegation, the rectification required by the said Notary refers to the name of the Community because, in the resolution recognizing current leaders (*supra* note 30) the Community was called "Zalazar" and not Xákmok Kásek. Hence, the note that the Government Notary sent to the INDI indicated that the recognition of leaders "should correspond to those who represent the actual Community, with the name currently in effect." Consequently, the INDI was required to submit "the resolution corresponding to the recognition of the [actual] leaders of the Xákmok Kásek Indigenous Community." In addition, owing to the different spelling in the decree that recognized the legal status of the Community

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[29] Witnesses presented by both the State and the representatives indicated that the anthropologist, Stephen Kidd, was an authority on the study of the Enxet; he had explained that "[w]ithin the linguistic family of the Maskoy, the Sanapaná, and Angaité, they also refer to themselves as Enxet." Kidd, Stephen: "*Amor and odio entre la gente sin cosas,*" 1999 (file of attachments to the pleadings and motions brief, tome VII, attachment 16, folio 3124). Moreover, the representatives added that "when the Anglican missionaries were the only people coming to these lands, it was common that the different ethnic groups would identify themselves merely as Enlhet-Enenlhet or Enxet[,] according to the spelling chosen, which translates as 'person, people,' and they gave the neighboring peoples who were different from them a more specific name." *Cf.* Brief with final written arguments of the representatives (merits file, tome III, folio 1056).

[30] *Cf.* Order No. 44/86 issued by the INDI on November 4, 1986 (file of appendices to the application, appendix 3, tome II, folio 782).

[31] *Cf.* Decree No. 25.297 of the President of the Republic of November 4, 1987 (file of appendices to the application, appendix 3, tome II, folio 786).

[32] *Cf.* Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4242.

[33] *Cf.* Resolution P.C. No. 30/94 issued by the INDI on April 25, 1994 (file of appendices to the application, appendix 3, tome IV, folio 1695).

[34] *Cf.* Certification of April 6, 2010, issued by the Government Notary of Paraguay (file of attachments to the State's final arguments, tome X, folio 4207).

(*supra* footnote 31), he asked the INDI "to clarify that the said names correspond[ed] to one and the same community."[35]

46. The Court notes from the evidence submitted that, in parallel, on November 2, 2009, the Community's representatives asked the INDI to make the said change of the Community's name in the resolution recognizing its leaders, indicating that the name Salazar "refer[red] to the Community's former settlement."[36] Furthermore, in response to the representatives' request, the INDI Legal Department indicated that it was necessary to amend the pertinent resolution "only with regard to the correct name of the Community, which should be 'Xákmok Kásek Indigenous Community' of the Sanapaná ethnic group [...]," leaving the names of the Community's leaders unchanged.[37] However, to date, the resolution has not been changed.

47. Contrary to what the President of the INDI indicated during the public hearing, neither the Government Notary nor the INDI Legal Department requested that the ethnic group of the Community be amended in order to continue the process of granting title to the land.[38] What both State bodies did request was the rectification of the name of the Community and, despite the corresponding request by the Community through it representatives, the State has still not done this.

48. The Court observes that the State argued that the representation of the Community is in question because of the different ethnic roots attributed to the Community in various documents, including the resolution recognizing its leaders and the letter in which the representatives requested the change in the Community's name in that resolution. However, bearing in mind the multi-ethnic composition of the Community (*supra* para. 43), the Court notes that this argument is insufficient to reject the usual representation of the Community exercised for more than 20 years, in a procedure before the State itself. If there were serious doubts about the Community's representation, the State could have taken the pertinent measures to verify it, and there is no evidence of that before this Court.

49. Therefore, it is for the State, through the corresponding authorities, to amend the resolution that, according to the State, represents an insuperable obstacle to complying with its obligations towards the Xákmok Kásek Community. Consequently, it would not be reasonable to admit the State's request to suspend the instant case.

50. Based on the foregoing, the Court concludes that the request to suspend the proceedings submitted by the State is not admissible, and therefore it will proceed to examine the merits of the case.

VI
RIGHT TO COMMUNAL PROPERTY, JUDICIAL GUARANTEES, AND JUDICIAL PROTECTION
(ARTICLES 21(1), 8(1) AND 25(1) OF THE AMERICAN CONVENTION)

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[35] *Cf.* Note E.M.G. No. 065 of April 7, 2010 addressed to the President of the INDI by the Government Notary (file of attachments to the State's final arguments, tome X, folio 4208).

[36] *Cf.* Communication of the representatives of November 2, 2009, addressed to the INDI (file of attachments provided by the State at the public hearing, tome IX, folio 3710).

[37] *Cf.* Report No. 88/09 of November 6, 2009, issued by the INDI Legal Department (file of attachments provided by the State at the public hearing, tome IX, folio 3709).

[38] *Cf.* Testimony of Lida Acuña, *supra* note 17.

51. The Inter-American Commission argued that, although Paraguayan legislation recognizes and expressly guarantees the right to property of the indigenous peoples, and even though the members of the Community in the instant case started the procedure for recovering their traditional lands in 1990, "a definitive solution has [still] not been reached." According to the Commission, the area claimed by the victims has been part of their traditional habitat since time immemorial, and therefore they have the right to recover these lands, or to obtain others of the same size and quality in order to guarantee their right to preserve and develop their cultural identity.

52. The representatives also insisted that, to date, the State has not responded to the Community's petition, even though it complies with each and every one of the requirements of Paraguayan law. They argued that the State has recognized the violation of the Community's right to property, but the measures it has adopted have been inadequate to restore the land claimed.

53. The State indicated that it had guaranteed the Community access to all the available legal means to exercise its right to communal property, but it had "not been able to satisfy [that right] fully to date [owing to] factual circumstances that it has not been possible to resolved at the domestic level." The State underlined that domestic law protects the right to private property and that "the owners of the land that the Community claims is their ancestral property possess duly registered property titles"; consequently, the State "is faced with the two protected human rights." It added that the "Community claims [the territory] without owning or possessing the property it claims." According to the State, "the traditional territory [of the members of the Community] covers an area greater than that being claimed and is not limited to the Salazar Ranch," which is a "fully-functioning ranch," so that an alternative solution must be sought. Lastly, Paraguay insisted that it was "taking pertinent measures to re-establish the communal property of the Xákmok Kásek," which, it argued, is reflected in the State's intention to transfer 1,500 hectares to the Community.

54. In this chapter, the Court will examine whether the State has guaranteed and given effect to the right to property of the members of the Community in relation to their traditional lands. To this end, the Court will determine the facts that have been proved and will make the pertinent legal findings.

55. The Court will analyze the facts related to the right to property of the members of the Community and their claim to their traditional lands that took place after March 11, 1993, the date on which the State accepted the compulsory jurisdiction of the Court. However, as it has in previous cases,[39] it will also indicate facts that took place previously, but merely to consider them as background to the case, without drawing any legal conclusions from them.

1. Facts

1.1. Regarding the indigenous communities in Paraguay

56. Before the Chaco was colonized, the indigenous peoples lived in small, flexible communities.[40] The economy of the members of the indigenous peoples of the Chaco

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[39] *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 82; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 178, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 46.

[40] *Cf.* Kidd, Stephen: "*Los Indígenas Enxet: condiciones laborales,*" 1994 (file of attachments provided by the State at the public hearing, tome IX, folio 3678, and file of attachments to the pleadings and motions brief, folios 2740 to 2759), and Testimony of Rodrigo Villagra Carron, *supra* note 17.

was based mainly on hunting, gathering and fishing. They also cultivated small plots of land and had some domestic animals.[41] They roamed their lands using nature to the extent that the seasons and their cultural technology allowed, which meant that they displaced and occupied a very extensive area.[42]

57. The indigenous peoples were unrelated to the interests of the Spanish colonization and remained relatively out of contact with European and Criollo culture until the end of the nineteenth century.[43]

58. Between 1885 and 1887, the State sold two-thirds of the Chaco[44] on the London stock exchange to finance Paraguay's debt after the so-called War of the Triple Alliance. The division and sale of these lands was carried out without the knowledge of the inhabitants of the area who, at that time, were exclusively indigenous peoples.[45]

59. From an economic point of view, for the past two centuries, the structure of the Chaco lands developed mainly by the expansion of the agricultural frontier, based on different kinds of crops, logging and cattle-raising.[46] The settlement of the Chaco by numerous entrepreneurs and ranchers as owners of immense estates increased considerably at the beginning of the twentieth century.[47] Simultaneously, several religious missions settled different areas of the region in order to "christianize" the indigenous peoples.[48]

60. The establishment of the International Products Corporation on the right bank of the Paraguay River, and of Puerto Pinasco as a base, its extension westwards, its gradual division into ranches, its alliance with the Anglican missionaries for the "religious pacification" and work-related training of the indigenous peoples, and its use of mechanisms to control the indigenous population, led to the progressive concentration of villages of mixed ethnic origin in villages where Anglican missions or ranches of the company or of other livestock owners were established nearby.[49] Since then, the lands of the Paraguayan Chaco have been transferred to private owners and progressively divided up.

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[41] *Cf.* Kidd, Stephen: "*Los Indígenas Enxet: condiciones laborales*", *supra* note 40, folio 3678.

[42] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 73(2).

[43] *Cf.* Expert testimony of Rodolfo Stavenhagen, *supra* note 17, folios 620 to 651.

[44] *Cf.* Expert testimony of Rodolfo Stavenhagen, *supra* note 17, folios 620 to 651, and Kidd, Stephen: "*Los Indígenas Enxet: condiciones laborales*", *supra* note 40, folio 3678.

[45] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 73(1), and *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 50(10).

[46] *Cf.* Expert testimony of Rodolfo Stavenhagen, *supra* note 17, folio 623, and expert testimony of Sergio Iván Braticevic, *supra* note 17, folios 4238, 4240, and 4251.

[47] *Cf.* Expert testimony of José Alberto Braunstein, *supra* note 22, folio 279.

[48] *Cf.* Expert testimony of José Alberto Braunstein, *supra* note 22, folio 279; expert testimony of Rodolfo Stavenhagen, *supra* note 17, folios 620 to 651, and Kidd, Stephen. "*Los Indígenas Enxet: condiciones laborales,*" *supra* note 40, folio 3678.

[49] *Cf.* 1950 map entitled "International Product's Corporation" (file of attachments to the pleadings and motions brief, tome VII, attachment 15, folios 2906 to 2909); 2008 map entitled "*Antiguas aldeas Angaité, misiones anglicanas y estancias del IPC*," prepared by Fortis and Villagra (file of attachments to the pleadings and motions brief, tome VII, attachment 15, folio 2910); The Magazine of the South American Missionary Society of October 1930 (file of attachments to the pleadings and motions brief, tome VII, attachment 14, folio 2875); The South American Missionary Society Magazines of January and February 1941 (file of appendices to the application, appendix 3, tome I, 3, folio 368); The Magazines of the South American Missionary Society of January and February 1944 (file of attachments to the pleadings and motions brief, tome VII, attachment 14, folio 2895), and Testimony of Rodrigo Villagra Carron, *supra* note 17.

61. The increasing extermination of wild animals, the large-scale introduction of cattle, and the fencing-off of the land, which meant that hunting became subject to the permission of the landowners, forced the indigenous peoples to occupy progressively the role of providing cheap manual labor for the new companies,[50] and to take advantage of temporary residence on the different ranches in the area to continue practicing their subsistence activities, although with significant changes due to the restrictions imposed by the private property.[51]

62. Although the indigenous peoples continued to occupy their traditional lands, the market economy activities into which they were incorporated led to restrictions to their mobility, and resulted in sedentarization.[52]

63. According to the 2002 Second National Indigenous Peoples Census, 45% of the 412 communities surveyed still did not enjoy definitive legal personality.[53] Currently, even though there are now 525 registered indigenous communities, 45% of them still "do not have access to their own land in order to settle and develop favorable living conditions."[54]

1.2. The Xákmok Kásek Community and the land claim of its members

64. The process of colonizing the Paraguayan Chaco also affected the Xákmok Kásek Community. In 1930, the Anglican Church established the "Campo Flores" mission in order to continue the "christianization" of the Enxet and, in 1939, it founded the Xákmok Kásek missionary substation in the place where the Community was settled until 2008[55] (*infra* para. 77). According to the Community's history, as told by one of their actual leaders, the Sanapaná were in the area where the Salazar Ranch[56] was later founded "from a long time before," even long before the War of the Chaco

[50] *Cf.* Kidd, Stephen: "*Los Indígenas Enxet: condiciones laborales*", *supra* note 40, folio 3678.

[51] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 73(4), and expert testimony of Rodolfo Stavenhagen, *supra* note 17, folio 620 to 627.

[52] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 73(3).

[53] In 2002, 45% of the registered communities represented 185 communities whose land belonged mainly to Government institutions, or to ranches or companies. *Cf.* Expert testimony of Rodolfo Stavenhagen, *supra* note 17, folio 629, and Second National Indigenous Peoples and Household Census, 2002, prepared by the DGEEC of Paraguay (file of attachments to response, tome VIII, attachment 6(1), folios 3602 and 3603).

[54] *Cf.* Draft Social Development Policy 2010-2020, dated February 25, 2010 (file of attachments provided by the State at the public hearing, tome IX, attachment XIX, folio 4091).

[55] *Cf.* Anthropological Report of the Center for Anthropological Studies of the Universidad Católica Nuestra Señora de la Asunción, signed by Miguel Chase Sardi, dated December 21, 1995 (file of appendices to the application, appendix 3, tome II, folios 736 to 749 and appendix 3 tome IV, folios 1732 to 1746); the South American Missionary Society Magazine of January 1939 (file of appendices to the application, appendix 3, tome IV, folio 365); the South American Missionary Society Magazines of January and February 1941, *supra* note 49, folio 371, and testimony of Rodrigo Villagra Carron, *supra* note 17

[56] *Cf.* Testimony of Tomás Dermott, *supra* note 24, folios 597 to 599; Socio-Anthropological Report on the Xákmok Kásek Community by the INDI Legal Department (file of appendices to the application, appendix 3, tome II, folio 841), and testimony of Maximiliano Ruíz, *supra* para 28. The Salazar Ranch was established around 1945, in the Central Chaco area, and at one time covered an area of 110,000 hectares. Following the gradual selling-off of pieces (approximately 71,142 hectares), it was reduced until it covered an area of around 26,434 hectares. (*Cf.* Eaton & Cía. S.A. "*Frente a un pedido de expropiación",* file of attachments provided by the State at the public hearing, tome IX, attachment X, 3785 to 3811, and testimony of Roberto Carlos Eaton Kent before notary public (merits file, tome II, folios 659-664).

(1932 – 1935), and before the arrival of the first foreign residents "the Enxet-Lengua and their encampment were in Xákmok Kásek."[57]

65. According to the evidence provided, the Xákmok Kásek Community is composed of 66 families with a total of 268 individuals;[58] it was created from members of the Sanapaná villages who traditionally inhabited and roamed the area subsequently occupied by the Salazar Ranch, and members of the Enxet village located there who gave their name, which means "many little parrots,"[59] to the Community, as well as by the Dermott family, of Enxet descent, who arrived in the area in 1947.[60]

66. When the indigenous people from different villages gathered near the core of the Salazar Ranch, which was close to the place called Xákmok Kásek, they gradually began to intermingle (*supra* para. 40). Between 1953[61] and March 2008, the Community's main settlement was in the core of the Salazar Ranch, at Km. 340 of the Trans-Chaco Highway, in the Pozo Colorado district, President Hayes department, in the western region of the Chaco.[62]

67. On December 28, 1990,[63] the Community's leaders filed an administrative action before the Rural Welfare Institute (IBR) (currently Land and Rural Development Institute (INDERT), hereinafter "IBR" or "INDERT"), in order to recover their traditional lands under the provisions of Law No. 904/81 the "Indigenous Communities Statute."[64]

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57 *Cf.* Testimony of Tomás Dermott, *supra* note 24, folio 597.

58 *Cf.* Census of the Community updated to October 16, 2009, (file of attachments to the pleadings and motions brief, tome VI, attachment 10, folios 2762 to 2783); Census of the Xákmok Kásek Community, settled on 1,500 hectares, undated (file of attachments to the answer, attachment 6(2), tome VIII, folios 3618 to 3626); Census of the Indigenous Community prepared by the representatives, updated to August 30, 2008 (file of appendices to the application, appendix 3, tome I, folios 320 to 336), and Salazar Indigenous Peoples Census, February 2008 (file of attachments to the answer, attachment 6(2), tome VIII, folios 3221 to 3617).

59 On some occasions, it was translated as "little parrots' nest" (application brief, merits file, folio 23); on other occasions "little birds' nest" (testimony of Maximiliano Ruíz, *supra* note 28.). Also, the private landowners explained that the Salazar Ranch has been known by different names, including, "*Estancia Laguna Koncit*," which appears to mean "place of many parrots" in Enlhet. *Cf.* "*Una breve reseña histórica de los Kent, Mobsbye, Eaton en el Chaco.*" Fortin Juan de Salazar and Espinoza (file of attachments provided by the State at the public hearing, attachment X, tome IX, folio 3836).

60 *Cf.* Testimony of Tomás Dermott, *supra* note 24, folios 594 to 596. The State indicated that the Xákmok Kásek Community was relatively new and had separated from a pre-existing community "whose original place of residence was constituted by an area known as *Misión Inglesa* and '*El Estribo*.'" However, it did not provide evidence to support this argument (answer to the application, merits file, tome 1, folios 370 and 371).

61 *Cf.* Socio-Anthropological Report on the Xakmok Kasek Community, *supra* note 56, folio 841, and testimony of Tomás Dermott, *supra* note 24, folio 597.

62 *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 735; Socio-Anthropological Report on the Xákmok Kásek Community, *supra* note 56, folios 838 to 853; Report of site visit carried out by Pastor Cabanellas (engineer) on May 17, 1991 (file of appendices to the application, appendix 3, tome II, folios 791 to 793), and report of the expanded site visit on September 22, 1992 (file of appendices to the application, appendix 3, tome III, folio 883).

63 According to the representatives, in 1986, Ramón Oviedo, leader of the indigenous community, asked the INDI for 200 hectares, part of its ancestral lands; however, the INDI did not process this request. This affirmation was not denied or contested by the State (merits file, folio 231). Moreover, according to Community leaders Marcelino López and Clemente Dermott, deponents before this Court, the case file corresponding to this initial request was mislaid and a new request was therefore filed in 1990. *Cf.* Testimony of Marcelino López before to notary public (pleadings and motions brief, merits file, tome II, folios 231 and 582, and testimony of Clemente Dermott before a notary public on March 25, 2010 (merits file, tome II, folio 645).

64 *Cf.* Law 904/81 Indigenous Communities Statute of December 18, 1981 (file of appendices to the application, appendix 7, folios 2399 to 2425).

68. The Community is claiming an area of 10,700 hectares, which forms part of its traditional territory, located within the Salazar Ranch, on the outskirts of an area known as *Retiro Primero* or *Mompey Sensap* in the language of the Community.[65] Although it forms part of the Community's ancestral territory, the Community's main settlement until early 2008 (*supra* para. 66) was not part of the area of 10,700 hectares claimed.

69. When the claim was filed, the land in question formed part of a farm owned by Eaton y Cía. S.A.[66] Towards the end of 2002, part of the territory claimed (3,293 hectares) was acquired by the Chortitzer Komitee Mennonite Cooperative.[67] Consequently, the land claimed by the Community is currently the property of Eaton y Cía. S.A. and the Chortitzer Komitee Mennonite Cooperative.[68]

70. Following the failure of the administrative action, the leaders of the Community went directly to the Congress of the Republic on June 23, 1999, to request the expropriation of the lands claimed.[69]

71. In view of this request, the owner of the property presented a report to Congress stating that it was not necessary to expropriate the lands claimed, because "the heart of the ranch [was] established on that part of the land, [and that] land was available adjoining the area claimed."[70]

72. On November 16, 2000, the Paraguayan Senate rejected the bill to expropriate the land claimed by the Community.[71]

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[65] The Community originally requested 6,900 hectares, then increased its request to 20,000 hectares, and ultimately reduced its request to 10,700 hectares, "because it seemed that if we reduced it, the State would be persuaded to return the land to us and also because some members of the Community, who could not hold out any longer left." Testimony of Marcelino López, *supra* note 63, folio 582. Similarly, communication of the leaders of the Community addressed to the President of the IBR on November 11, 1993 (file of appendices to the application, appendix 3, tome III, folio 898), and request of the Community to the IBR on September 28, 1990 (file of appendices to the application, appendix 3, tome II, folio 780).

[66] *Cf.* Report on the site visit carried out by Pastor Cabanellas (engineer), *supra* note 62, folios 791 to 795.

[67] *Cf.* Testimony of Roberto Carlos Eaton Kent, *supra* note 56, folio 662; testimony of Clemente Dermott, *supra* note 63, folio 647: press release of April 3, 2003, entitled, "*Sawatzky dice que desconocía reclamo de Enxet*" [Sawatzky says he was not aware of Enxet claim] (file of appendices to the application, appendix 3, tome IV, folio 1584); press release of April 1, 2003, entitled "*Menonitas ofrecen al INDI tierra reclamada por nativos*" [Mennonites offer the INDI land being claimed by indigenous peoples] (file of appendices to the application, appendix 3 tome IV, folio 1583); press release of January 7, 2003, entitled "*Eaton & Cía. vendió tierra reclamada por indígenas*" [Eaton & Co. sold land claimed by the indigenous peoples] (file of appendices to the application, appendix 3, tome IV, folio 1576), and press release of February 7, 2003, entitled "*Nativos insisten en recuperar tierras vendidas a menonitas*" [Indigenous peoples insist in recovering land sold to Mennonites] (file of appendices to the application, appendix 3, tome IV, folio 1575).

[68] *Cf.* Testimony of Roberto Carlos Eaton Kent, *supra* note 56, folio 662; testimony of Marcelino López, *supra* note 63, folio 581; expert testimony of Sergio Iván Braticevic, *supra* note 17, folios 948 and 949, and expert testimony of Antonio Spiridinoff before notary public (merits file, tome II, folio 614).

[69] *Cf.* Expropriation request made by the Community on June 23, 1999, addressed to the Senate of the Congress of the Republic (file of appendices to the application, appendix 3, tome IV, folios 1837 to 1846).

[70] *Cf.* Report entitled "*Salazar Ranch frente a un pedido de expropiación*" *supra* note 56, folio 3792).

[71] *Cf.* Resolution No. 693 of the Senate of the national Congress (file of appendices to the application, attachment 5, folio 2384). On September 23, 2000, the Senate's Agrarian Reform and Rural Welfare Committee recommended the approval of the expropriation in favor of the Community; however, on November 9, 2000, it retracted this opinion (*Cf.* Opinion No. 11-2000/2001 of November 9, 2000, of the Agrarian Reform and Rural Welfare Committee, file of appendices to the application, attachment 5, folio 2382); bill presented to the Senate on June 25, 1999 (file of appendices to the application, attachment 5,

73. According to the INDI President, society in general "opposes ceding to the claims of the indigenous peoples in this way," and "historically, the national Congress has opposed expropriations."[72]

74. The life of the members of the Community within the Salazar Ranch was conditioned by restrictions to the use of the land because the lands they occupied were privately-owned. In particular, the members of the Community were prohibited from growing crops or possessing livestock.[73] However, although they were settled on a small portion of their traditional territory, they roamed their lands[74] and carried out certain activities such as hunting, even though this was difficult.[75] Furthermore, many members of the Community worked on the Salazar Ranch.[76]

75. However, according to the testimony given before this Court, in recent years the members of the Community faced even more restrictions to their way of life and their mobility within the Salazar Ranch. Several deponents related that hunting had been prohibited completely;[77] the landowner had hired private security guards to control their entrances, exits and movements,[78] and they were unable to practice activities such as fishing and gathering food.[79]

76. In view of these difficulties, on April 16, 2005, the leaders of the Nepoxen, Saria, Tajamar Kabayu and Kenaten Communities, all of Angaité origin (hereinafter "the Angaité communities") agreed to cede 1,500 hectares to the members of the Xákmok Kásek Community.[80] The INDI had restored 15,113 hectares to those communities in 1997.[81] In September 2005, the Community leaders asked the INDI to grant title to this portion of land to the Community.[82] Subsequently, when accepting the title for this portion of land, the members of the Community "reaffirmed [their]

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folio 2381), and Opinion No. 18-2000-2001 of the Agrarian Reform and Rural Welfare Committee (file of appendices to the application, attachment 5, folio 2383).

[72] *Cf.* Testimony of Lida Acuña, *supra* note 17, and testimony of Rodrigo Villagra Carron, *supra* note 17.

[73] *Cf.* CEADUC Anthropological Report, *supra* note 56, folios 741 and 743, and testimony of Tomás Dermott, *supra* note 24, folio 598.

[74] *Cf.* Testimony of Marcelino López, *supra* note 63, folio 580.

[75] *Cf.* Testimony of Gerardo Larrosa before notary public on March 25, 2010 (merits file, tome II, folios 604 to 609), and Testimony of Tomás Dermott, *supra* note 24, folio 595).

[76] *Cf.* Testimony of Maximiliano Ruíz, *supra* note 28; testimony of Marcelino López, *supra* note 28, folio 586, and CEADUC Report, *supra* note 55, folio 712 and 713.

[77] *Cf.* Testimony of Marcelino López, *supra* note 63, folio 580; testimony of Gerardo Larrosa, *supra* note 75, folio 605; testimony of Lida Beatriz Acuña, *supra* note 17; testimony of Maximiliano Ruíz, *supra* note 28, and testimony of Antonia Ramírez, *supra* note 28 folio 1151.

[78] *Cf.* Testimony of Gerardo Larrosa, *supra* note 75, folio 505; testimony of Marcelino López, *supra* note 63, folio 580; testimony of Antonia Ramírez, *supra* note 28, folios 1151, 1152 and 1156, and testimony of Clemente Dermott, *supra* note 63, folio 650.

[79] *Cf.* Testimony of Gerardo Larrosa, *supra* note 75, folio 605, and testimony of Rodrigo Villagra Carron, *supra* note 17.

[80] *Cf.* Agreement signed by the leaders of the communities of Nepoxen, Saria, Tajamar Kabayu, Kenaten, and Xákmok Kásek on April 16, 2005 (case file of documents provided by the State at the public hearing, tome IX, attachment VI, folios 3731 and 3732); testimony of Maximiliano Ruíz, *supra* note 28. The said communities were also known as the Cora-í (*Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17).

[81] *Cf.* Testimony of Roberto Carlos Eaton Kent, *supra* note 56, folio 659, and testimony of Rodrigo Villagra Carron, *supra* note 17.

[82] *Cf.* Letter from the Community of September 9, 2005, addressed to the INDI (case file of documents provided by the State at the public hearing, tome IX, attachment VI, folio 3730).

determination to continue the struggle to reclaim [their] remaining territory; that is, a total of 10,700 hectares."[83]

77. On February 25, 2008, due to the increase in difficulties on the Salazar Ranch, the members of the Community moved and settled on the 1,500 hectares ceded by the Angaité communities. This new settlement was called "25 de Febrero,"[84] and is outside the lands claimed.[85]

78. To date, title to the "25 de Febrero" lands, where they are currently settled, has not been granted to the Xákmok Kásek Community.

79. Upon moving from their old settlement, some members of the Community separated from it and moved to other communities.[86]

1.3. Declaration of part of the claimed land as a private nature reserve

80. On January 31, 2008, the President of the Republic declared 12,450 hectares of the Salazar Ranch a private protected nature reserve for five years.[87] Of the land included, approximately 4,175 hectares form part of the 10,700 hectares claimed by the Community since 1990.[88]

81. The said nature reserve declaration was made without consulting the members of the Community or taking their land claim into account.[89] This was confirmed by the Legal Department of the Environmental Secretariat, which concluded that the process by which part of the Salazar Ranch was declared a nature reserve was seriously flawed, including the fact that the Community's claim had not been taken into account, and should be annulled.[90]

82. According to Law No. 352/94, which establishes the legal regime applicable to protected rural areas, those that are in the private domain cannot be expropriated while the declaration is in force.[91] In addition, the Law establishes restrictions to use

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[83] *Cf.* Minutes of the meeting of the Community of May 2, 2009 (file of attachments to the pleadings and motions brief, attachment 7, tome VI, folio 2736).

[84] *Cf.* Testimony of Marcelino López, *supra* note 63, folio 580; testimony of Gerardo Larrosa *supra* note 75, folio 605; testimony of Maximiliano Ruíz, *supra* note 28; testimony of Clemente Dermott, *supra* note 63, and testimony of Antonia Ramírez, *supra* note 28.

[85] Rodrigo Villagra Carron indicated that the "25 de Febrero" settlement was 35 Km from the Salazar Ranch; while Clemente Dermott indicated that it was 35 Km from the Trans-Chaco Highway. *Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17, and testimony of Clemente Dermott, *supra* note 63, folio 645.

[86] *Cf.* Testimony of Marcelino López, *supra* note 63, folios 586 and 587.

[87] *Cf.* Decree No. 11,804 of the President of the Republic of January 31, 2008, declaring the reserve known as "Salazar Ranch" to be a Private Protected Nature Reserve (file of appendices to the application, attachment 7, folios 2429 to 2435 and 2429 to 2435).

[88] *Cf.* Action on unconstitutionality filed by the Community before the Supreme Court of Justice on July 31, 2008 (file of attachments to the answer, attachment 1.9, tome VIII, folio 3416); Map of the "Salazar Ranch" private nature reserve (file of attachments to the pleadings and motions brief, attachment 4, tome VI, folio 2711), and Map of the Traditional Territory of the Xákmok Kásek Community and Land Claimed (file of attachments to the pleadings and motions brief, attachment 4, tome VI, folio 2712).

[89] *Cf.* Testimony of Marcelino López, *supra* note 63, folio 584, and testimony of Clemente Dermott, *supra* note 63, folio 648.

[90] *Cf.* Report of the Legal Department of the Secretariat of the Environment of December 24, 2009 (file of attachments to the answer, attachment 1.8, tome VIII, folios 3382 to 3388).

[91] *Cf.* Article 56 of Law No. 352/1994 (file of attachments to final written arguments, tome X, folio 4543).

and ownership, including the prohibition to occupy the land, as well as the traditional activities of the members of the Community such as hunting, fishing and gathering.[92] The law sanctions the breach of these prohibitions[93] and assigns a park guard, who can be armed[94] and make arrests.[95]

83. On July 31, 2008, the Community filed an action on unconstitutionality before the Supreme Court of Justice against the said nature reserve declaration.[96]

84. As a result of the filing of this action, the Prosecutor General's Office was notified and, on October 2, 2008, she requested the suspension of the time limit for answering the action owing to the need to add the administrative file on the Community's land claim.[97] The time limit was suspended on October 24, 2008, and even though the representatives of the Community submitted an authenticated copy of the administrative case file on December 14, 2009,[98] the action is still suspended.[99]

2. The right to communal property

85. This Court has considered that the close relationship of indigenous peoples to their traditional lands and the natural resources relevant to their culture that are found there, as well as the intangible elements resulting from them, must be safeguarded under Article 21 of the American Convention.[100]

86. The Court has also taken into account that, among the indigenous peoples:

> There is a tradition in the communities with regard to a communal form of collective ownership of the land, in the sense that this does not belong to an individual, but rather to the group and its community. Because they exist, the indigenous peoples have the right to live freely on their own territories; the close relationships that the indigenous peoples maintain with the land must be recognized and understood as the essential basis of their cultures, their spiritual life, their integrity, and their economic survival. For the indigenous communities, their relationship with the land is not merely a matter of possession and production, but rather a material and spiritual element that they must enjoy fully, even in order to preserve their cultural legacy and transmit it to future generations.[101]

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[92] *Cf.* Article 24(b), 27 and 64 of Law No. 352/1994, *supra* note 91, folios 4537 to 4546; opinion of the Legal Department of the Secretariat of the Environment, *supra* note 90, folios 3382 to 3388, and brochure of the "Salazar Ranch" private nature reserve (file of attachments to the answer, attachment 3(1), tome VIII, folio 3469).

[93] *Cf.* Article 58 of Law No. 352/1994, *supra* note 91, folios 4543 and 4544.

[94] *Cf.* Article 44 of Law No. 352/1994, *supra* note 91, folio 4541.

[95] *Cf.* Article 45 of Law No. 352/1994, *supra* note 91, folio 4541.

[96] *Cf.* Action on unconstitutionality filed by the Community, *supra* note 88, folios 3415 to 3427.

[97] Request to suspend the time limit for answering the action filed before the Supreme Court of Justice (file of attachments to the answer to the application, attachment 1(8), tome VIII, folio 3428).

[98] *Cf.* Brief of the representatives of December 14, 2009, addressed to the Constitutional Chamber (file of attachments to the answer, attachment 1(9), tome VIII, folio 3435).

[99] *Cf.* Note S.J.I. No. 211 of May 21, 2010, signed by Judicial Secretary I of the Supreme Court of Justice and addressed to the Human Rights Directorate of the Supreme Court of Justice (file of attachments to the State's final arguments, attachment 24, tome VIII, folio 4593).

[100] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 137; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 118, and *Case of the Saramaka People v. Suriname, supra* note 16, para. 88.

[101] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 149; *Case of the Sawhoyamaxa Indigenous*

87. Moreover, the Court has indicated that the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession is "not focused on individuals, but on the group and its community."[102] This concept of the ownership and possession of land does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the Convention. Failing to recognize the specific versions of the right to use and enjoyment of property that emanate from the culture, practices, customs and beliefs of each people would be equivalent to maintaining that there is only one way of using and enjoying property and this, in turn, would make the protection granted by Article 21 of the Convention meaningless for millions of individuals.[103]

88. In the instant case, the fact that Paraguayan law recognizes the existence of the indigenous peoples as groups that pre-date the formation of the State is not in dispute, or that it recognizes the cultural identity of these peoples, their relationship with their respective habitat, and the communal characteristics of their ownership of their land, while also granting them a series of specific rights that serve as a basis for this Court to define the scope and content of Article 21 of the Convention.

89. The State does not deny that the members of the Xákmok Kásek community have a right to the communal ownership of their traditional land, or that hunting, fishing and gathering are essential elements of their culture. In the instant case, the dispute centers on the need to restore the specific land claimed by the members of the Community and to ensure the effective exercise of the right to property, both questions that the Court will examine below.

2.1. Matters relating to the lands claimed

2.1.1. Traditional nature of the lands claimed

90. The Court observes that, despite indicating that it "does not deny its obligation to restore these peoples' rights," the State questions the ancestral nature of the lands claimed by the Community. Paraguay argued that the victims' ancestors "inhabited a more extensive territory than the one claimed in this application, within which it roamed and remained in a constant state of internal migration." It affirmed that "the Xákmok Kásek community was spread throughout its vast ancestral territory, and had settled in the area of the Salazar Ranch by choice," and that "[t]he truth is that the ranches that are now being claimed as the settlement of their ancestors were never the definitive settlement of the Community." According to the State, since they were "nomadic peoples, at some point they passed by those lands by chance, but that does not empower them to claim ranchland that is being profitably exploited as their own."

91. The Commission indicated that "while the Xákmok Kásek Community refers to its ancestral communal territory and claims it specifically, the State refers to the ancestral territory of the Enxet-Lengua as a whole and, on that basis, affirms that it can grant an alternate piece of land within this extensive ethnic territory." It explained that the 10,700 hectares claimed by the Community correspond to its "specific ancestral territory," which is revealed by the Community's own criteria, the toponymy of the territory, and the development of traditional cultural practices on the territory,

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Community v. Paraguay, supra note 20, para. 118, and *Case of the Saramaka People v. Suriname, supra* note 16, para. 90.

[102] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 101, para. 149; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 120, and *Case of the Saramaka People v. Suriname*, *supra* note 16, para. 89.

[103] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 120.

including in secret; by official technical documents or documents prepared at the request of the State, and by the historic occupation of that territory. It stressed that the State's position "attempts to ignore that the indigenous peoples of the Chaco comprise numerous communities, some with a multi-ethnic composition [...], each one with a specific and particular history that has created clear links to a specific part of the Chaco territory." Similarly, the Commission indicated that the Xákmok Kásek Community, "throughout its history, developed a cultural affiliation with a certain territory – that of *Retiro Primero* on the Salazar Ranch which it is claiming."

92. The representatives indicated that the Community "is only claiming the restitution of a small part of its ancestral territory," which is clearly defined and is known and identified by the members of the Community as *Mompey Sensap* (today *Retiro Primero*) and *Makha Mompena* (today *Retiro Kuñataí*). They emphasized that the lands claimed have been identified in "the collective memory that is still alive in the Community and its members, who clearly and systematically related and associate events, places, memories and traditional economic practices with this geographic area."

93. Regarding the traditional nature of the lands claimed, the Court will examine: (a) the Community's movement and occupation of the land and its surrounding areas; (b) the toponymy of the area; (c) the technical studies prepared on the matter, and (d) the alleged suitability of the land being claimed.

a) Movement and occupation of the traditional territory

94. The Court finds that the original nomadic character of the peoples to which this Community belongs has been proved, and also the fact that its traditional territory covers a larger area than the one claimed (*supra* paras. 56 and 65); neither of these points has been disputed by the parties. However, expert witness Braticevic explained that the nomadic nature of the peoples of the area implied that they roamed their territory in a radial or circular manner, following an annual cycle or period.[104] Expert witness Braunstein gave a similar opinion.[105]

95. The places indicated by the members of the Community as villages, hunting and fishing grounds, burial grounds, sources of medicinal plants, and relevant sites in their history follow this pattern of movement and adaptation that these expert witnesses explained to this Court.[106] Consequently, and based on the scientific criteria presented, the specific traditional territory of the Xákmok Kásek Community can be determined. Even though the Court does not know the precise extension of this territory, since it was not proved in the case file, the Court observes that it coincides with the territory that has always been indicated by the members of the Community as its traditional territory; namely, the Salazar Ranch and its surroundings, and it is less than the 175,000 hectares of ancestral territory corresponding to the ethnic peoples to which the Community belongs.[107] It is worth underlining that, for the purpose of the protection of the right to communal property of the members of the Community, the

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[104] Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4244.

[105] Expert testimony of José Alberto Braunstein, *supra* note 22, folios 276 to 277.

[106] *Cf.* Map entitled *Topónimos y Puntos Geográficos conforme la declaración de Tomás González Dermott de Xákmok Kásek* [Place Names and Geographical Sites according to the testimony of Tomás González Dermott of Xákmok Kásek] (merits file, tome II, folio 602), and Map entitled *Territorio Tradicional de la Comunidad Xákmok Kásek y Tierras Reivindicadas* [Traditional Lands of the Xákmok Kásek Community and Lands Claimed], *supra* note 88, folio 2712.

[107] *Cf.* CEADUC Report, *supra* note 55, folio 735 and 741.

relevant traditional territory is not that of their ancestors but that of the Community itself.

96. Expert witness Braticevic stated that the Enlhet-Enenlet family has "inhabited this area of the Chaco since time immemorial" and that no objections were raised to the determination of the ancestral territory of the Xákmok Kásek Community around the said ranch."[108] Additional support for this is to be found in the map of the Enlhet-Enenlhet villages presented by the representatives, where an area called Lha'acme-Caasec is identified as one of its villages.[109]

97. In addition, in keeping with the history of the indigenous communities in the Paraguayan Chaco (*supra* paras. 56 to 63), many indigenous villages, among them the Community's ancestors, settled around the above-mentioned religious missions and in the centers of the cattle ranches.[110] In the specific case of the Xákmok Kásek Community, in 1939, a religious mission was founded in the place that gave its name to the Community (*supra* para. 64). Tomas Dermott stated that "the Enxet-Lengua and their encampment were there in Xákmok Kásek," long before the arrival of the first foreign occupant (*supra* para. 64).[111] In addition, witness Rodrigo Villagra explained that, when the Salazar Ranch was established, the private owner ordered the different indigenous villages in the area to integrate and go to live near the core of the ranch in order to have more control.[112] Thus, as Tomás Dermott explained, the Sanapaná who "camped and roamed as they wished [in this area], had small farms [and] hunted," "left their villages and went to look for work," with some of them gathering close to the core of the ranch (*supra* paras. 40, 65, and 66).[113] The expert opinion presented by the State endorses this version of the facts.[114]

98. From the time of their settlement in the core of the Salazar Ranch up until recent times (*supra* paras. 74 and 75), the members of the Community continued roaming this traditional territory and using its resources, with certain limitations imposed by the private owners. It was when the restrictions on mobility and traditional subsistence activities became too onerous that the members of the Community decided to leave and settle in the place known as "25 de Febrero" (*supra* paras. 75 to 78).

99. Furthermore, the Court observes that the area currently claimed by the Community around *Retiro Primero* (*supra* para. 68) constitutes a portion of that larger traditional territory roamed by the Community and includes sites that are important within the life, culture, and history of the Community.[115]

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108 Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4243.

109 *Cf.* Map *Apcaoclha Chaco* ("Chaco Region" in the Enlhet language) (file of attachments to the pleadings and motions brief, tome VII, attachment 15, folio 2912).

110 Testimony of Rodrigo Villagrán Carron, *supra* note 17.

111 *Cf.* Testimony of Tomás Dermott, *supra* note 24, folio 597.

112 *Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17.

113 *Cf.* Testimony of Tomás Dermott, *supra* note 24, folio 597.

114 Specifically, Sergio Ivan Braticevic stated that "Salazar Ranch was a centripetal place for the communities around it; although migration in search of work was a usual factor in the area." Expert testimony of Sergio Ivan Braticevic, *supra* note 17, folio 4245.

115 Tomás Dermott states that in *Makha Mompena* (a place located within the 10,700 hectares claimed), "there were and still are many kinds of medicinal plants and plants for shamanic study. Many of the Sanapaná shamans would go there in search of these plants, consume them and, thus, learn to heal; many *panaktema* 'remedies' exist there. The Sanapanás also had many small farms in the area of *Retiro*

b) Toponymy of the area according to the Community

100. Regarding the area's toponymy, the Court recalls that the traditional occupation of territory by the indigenous peoples of the Chaco is revealed, above all, by the names given to certain places within the territory, such as sites of periodic settlement, wells, lakes, woods, palm groves, spartina plantations, areas for gathering and for fishing, cemeteries, etc.[116]

101. In the instant case, since the Community started the process of claiming the lands, it has identified the places it uses as references of its traditional lands with names in its own language. Thus, in the original request submitted to the IBR (*supra* para. 67), the leaders of the Community indicated that those lands should include "the *Mopae Sensap, Yagkamet Wennaktee, Naktee Sagye* and *Mosgamala* sites, and should extend to X*akmaxapak* in the south."[117] Moreover, the only anthropological report prepared at the domestic level concluded that "within the territory claimed, the indigenous peoples [had] a profound knowledge of the traditional places and their names."[118]

c) Technical studies

102. With regard to the technical studies prepared in relation to the traditional character of the lands claimed, the Court observes first that, although there are very few of them, the documents prepared and the studies made at the domestic level during the land claim process have affirmed the traditional character of the lands claimed by the Community.[119] Second, the expert testimony of Antonio Spiridinoff and Sergio Iván Braticevic confirms the traditional character of the lands claimed.[120]

d) Suitability of the lands claimed

103. Finally, regarding the suitability of the lands claimed, the anthropological report prepared by the Center for Anthropological Studies of the Universidad Católica Nuestra Señora de la Asunción (hereinafter "CEADUC") specifically concluded that the lands claimed are appropriate and suitable for the Community's way of life.[121]

104. Furthermore, in his expert testimony, Antonio Spiridinoff observed that, over and above obstructing the indigenous peoples' claim, the technical justification used to declare the private nature reserve on Salazar Ranch validates its potential use for an

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Primero, and they would go there to hunt; there is a large ravine called *Mompey Sensap,* 'Mariposa Blanca' nearby. The people had farms there." *Cf.* Testimony of Tomás Dermott, *supra* note 24, folio 595.

[116] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 50(4).

[117] *Cf.* Request of the Community to the IBR of December 28, 1990, *supra* note 65, folio 780. In fact, when the Community reiterated its request in 1994, it indicated, during a conciliation hearing, that "measurements [should be made] to determine the exact site of the Community's claim [because] the sites claimed are only known by the traditional name[s] used by the indigenous peoples." *Cf.* Minutes No. 7 of the hearing held between the parties on February 11, 1994 (file of appendices to the application, appendix 3, tome 3, folios 905 to 908).

[118] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 740.

[119] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 747; Report No. 2476 of the Head of Indigenous Affairs of the IBR of November 5, 1991 (file of appendices to the application, appendix 3, tome II, folio 864), and memorandum of the INDI President of August 22, 1995 (file of appendices to the application, appendix 3, tome II, folios 859 and 860).

[120] *Cf.* Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4235 to 4252, and expert testimony of Antonio Spiridinoff, *supra* note 68, folios 613 to 616.

[121] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 1736.

indigenous community.[122] Moreover, Sergio Iván Braticevic does not deny that the lands claimed are more suitable than other options. Indeed, the expert witness expressly stated that "priority should be given to the portion of land [claimed]" and that, if the result of the action on unconstitutionality against the private natural reserve declaration was not favorable and "all the legal alternatives were exhausted," only then should recourse be made to lands other than the ones claimed.[123]

105. Similarly, witness Villagra Carron explained that the lands claimed were requested because "there is a specific connection to cemeteries on those lands, because the Sanapaná ancestors had several villages in that area, and because those lands are more appropriate for settling, [since] [...] between Xákmok Kásek and *Mompey Sensap* there is significant biological diversity that would provide support for the families."[124]

106. In addition to the above, the Court notes that the State has not contested the alleged suitability of the land claimed. The State's defense has been limited to indicating that those lands cannot be granted to the Community – a matter that will be examined *infra* – without denying the above. Also, the State merely insists on granting alternate lands, and fails to contest the affirmations of the Community, its representatives, and the Commission.

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107. The Court therefore considers that, based on the history of the occupation and displacement throughout the territory by the members and ancestors of the Community, the place names in the area that were given by its members, the conclusions of the technical studies carried out in this regard, and the considerations regarding the suitability of the said lands within the traditional territory, the 10,700 hectares around *Retiro Primero* or *Mompey Sensap* and *Retiro Kuñataí* or *Makha Mompena* claimed by the Community are its traditional lands and, according to those technical studies, are the most suitable for its settlement.

2.1.2. Ownership of the lands claimed and its requirement for recognition of the communal property

108. Regarding the ownership of the lands claimed, the Commission considers that the State is obliged to recognize and respond to the Community's claim, "even when it does not have full possession of them and they are in private hands." The representatives argued that the Community "has maintained a form of partial possession of the lands claimed and their surroundings as regards access to the natural resources." They added that the members of the Community had carried out their traditional activities on the lands claimed "since before the transfer of the lands to Eaton y Cía., until early 2008, when they were prohibited from carrying out those activities owing to the establishment of the private [nature] reserve." The State maintained that "the petitioners do not have the property duly registered in the Property Registry, and they do not own the property in question."

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[122] *Cf.* Expert testimony of Antonio Spiridinoff, *supra* note 68, folio 615.

[123] *Cf.* Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4248.

[124] Testimony of Rodrigo Villagra Carron, *supra* note 17.

109. The Court recalls its case law regarding the communal ownership of indigenous lands,[125] according to which: (1) the traditional possession by the indigenous peoples of their lands has the same effects as a title of full ownership granted by the State;[126] (2) traditional ownership grants the indigenous peoples the right to demand official recognition of their ownership and its registration;[127] (3) the State must delimit, demarcate and grant collective title to the lands to the members of the indigenous communities;[128] (4) the members of the indigenous peoples who, for reasons beyond their control, have left their lands or lost possession of them, retain ownership rights, even without legal title, except when the land has been legitimately transferred to third parties in good faith,[129] and (5) the members of the indigenous peoples who have involuntarily lost possession of their lands, which have been legitimately transferred to innocent third parties, have the right to recover them or to obtain other lands of the same size and quality.[130]

110. In addition, as established in the cases of the *Yakye Axa* and *Sawhoyamaxa* indigenous communities, Paraguay recognizes the right of the indigenous peoples to request the return of the traditional lands they have lost,[131] even when they are under private ownership and the indigenous peoples do not have full possession of them.[132] Indeed, the Paraguayan Indigenous Communities Statute establishes the procedure to be followed to claim lands under private ownership,[133] which is precisely the issue in the instant case.

111. In this case, although the members of the Community do not own the lands claimed, in keeping with this Court's case law and the laws of Paraguay, they have the right to recover them.

2.1.3. Duration of the right to claim traditional lands

112. Regarding the possibility of recovering the traditional lands, on previous occasions,[134] the Court has established that the spiritual and physical foundations of

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[125] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, paras. 131; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 128, and *Case of the Saramaka People v. Suriname, supra* note 16, para. 89.

[126] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 101, para. 151, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 128

[127] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 101, para. 151, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 128..

[128] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note *101*, para. 164; *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 45, para. 215, and *Case of the Saramaka People v. Suriname*, *supra* note 16, para. 194.

[129] *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of June 15, 2005. Series C No. 124, para. 133, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 128.

[130] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, paras. 128 to 130.

[131] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, paras. 138 to 139, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 129.

[132] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, paras. 135 to 149, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, paras. 127 and 130.

[133] *Cf.* Articles 24, 25, 26, and 27 of Law 904/81 Statute of the Indigenous Communities, *supra* note 64, folios 2399 to 2425.

[134] *Cf. Case of the Moiwana Community v. Suriname, supra* note 129, para. 133; *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, paras. 131, 135 and 137, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, paras. 127 and 131.

the identity of the indigenous peoples are based, above all, on their unique relationship with their traditional lands, so that as long as this relationship exists, the right to claim those lands remains in force. If the relationship ceases to exist, so would this right.

113. To determine the existence of the relationship of indigenous peoples with their traditional land, the Court has established that: (i) it can be expressed in different ways depending on the indigenous people in question and their specific circumstances, and (ii) the relationship with the land must be possible. The ways in which this relationship is expressed could include traditional presence or use, by means of spiritual or ceremonial ties; sporadic settlements or crops; hunting, fishing or seasonal or nomadic gathering; use of natural resources related to their customs, and any other element characteristic of their culture.[135] The second element signifies that the members of the Community should not be prevented by factors beyond their control from carrying out those activities that reveal the persistence of the relationship with their traditional land.[136]

114. In the instant case, the Court observes that the relationship of the members of the Community with their traditional territory is manifested, *inter alia*, by the implementation of their traditional activities on those lands (*supra* paras. 65, 66, 74, and 75). In this regard, the anthropologist Chase Sardi stated in his 1995 report that the Community continued "occupying its territory and practicing its traditional economy, despite the conditions [imposed by] private property."[137] It was of particular relevance that, even in the face of the restrictions imposed on the members of the Community, "they still enter[ed] secretly to hunt."[138] In addition, some members of the Community indicated that, when they lived on the Salazar Ranch, they still practiced some traditional medicine, and the shamans collected medicinal plants in the countryside;[139] also the dead were buried according to the Community's customs,[140] all this with considerable constraints.

115. In addition, for reasons beyond their control, the members of the Community have been entirely prevented from carrying out traditional activities on the land claimed since early 2008 owing to the creation of the private nature reserve on part of it (*supra* paras. 80 and 82).

116. Based on the above, the Court finds that the right of the members of the Xákmok Kásek Community to recover their lost lands remains in effect.

2.1.4. Alleged realization of the right of the members of the Community to their traditional lands with alternate land

117. The State maintained that the right of the members of the Community could be realized with lands other than the ones claimed, since the traditional lands are not limited to those being claimed. However, the State has not identified the alternate lands of the same size and quality that would satisfy the Community's claim. Although it submitted a list of available properties in areas close to the Community's current

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[135] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 154, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, paras. 131 to 132.

[136] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 132.

[137] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 741.

[138] Testimony of Gerardo Larrosa, *supra* note 75, folio 605.

[139] *Cf.* Testimony of Gerardo Larrosa, *supra* note 75, folio 607, and testimony of Maximiliano Ruíz, *supra* note 28.

[140] *Cf.* Testimony of Maximiliano Ruíz, *supra* note 28.

settlement, it did not indicate the characteristics or qualities that would meet the quality required for the sustainability of the Xákmok Kásek.[141]

118. It is not enough that other properties are available. As the State's expert witness testified, in order to grant lands other than those claimed they must, at least, have certain "agro-ecological suitability" and be submitted to a study to determine their potential for being developed by the Community.[142]

119. In this regard, the Court observes that the members of the Community have rejected the alternate lands offered on different occasions during the domestic proceedings, precisely because they did not meet the necessary quality requirements. The State never refuted this argument or took any action to confirm or deny it (*infra* footnote 148).

120. Moreover, regarding the 1,500 hectares where the Community is currently settled, the Court finds that this surface extension can hardly be considered sufficient and, consequently, fulfill the right to communal property of its members, as it does not even meet the minimum legal extension established in Paraguay. Under Paraguayan law, the members of the Community have a right to a minimum of 100 hectares for each family.[143] Since the Community is currently made up of 66 families, an area of 1,500 hectares would not be large enough, particularly as some expert reports consider that not even the Paraguayan legal minimum is sufficient for a community such as Xákmok Kásek to carry out its traditional activities and way of life.[144]

121. Second, while recognizing that the Community's traditional territory is not limited to the land claimed, the Court recalls that that the said traditional territory does not extend to the whole of the Central and Lower Chaco. In this regard, the Court reiterates its previous considerations (*supra* paras. 94 to 107), according to which the area claimed by the Community is that part of its traditional land that is most appropriate for settlement and development. Therefore, the State should have in the past and should still channel its efforts to realize the right to property of the members of the Community in relation to that land.

2.2. Measures taken by the State to recover the traditional lands

122. Since it has been concluded that the lands being claimed is the most appropriate traditional land for the Community to settle on; that possession of this land is not necessary, and that the right to recover the said traditional lands remains in force, the Court will now examine the measures taken by the State to ensure the recovery of that land to the members of the Community.

123. The Commission argued that "[t]he ineffectiveness of the procedures established in Paraguayan law to fulfill indigenous peoples' right to property have meant that, in practice, the State does not guarantee the Community's right to

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[141] List of properties for sale (file of attachments provided by the State at the public hearing, attachment 2, tome IX, folios 3769 to 3774).

[142] *Cf.* Expert testimony of Sergio Iván Braticevic, *supra* note 17, folio 4248.

[143] *Cf.* Article 18 of Law No. 904/81, *supra* note 64, folio 2404.

[144] In the 1995 report presented by the CEADUC, within the administrative action to reclaim their land filed by the Community, it was considered that the area of 178 hectares for each family claimed by the Community at that time was insufficient for the conservation and development of the Community's specific lifestyle. *(Cf.* CEADUC Anthropological Report, *supra* note 55, folios 735 to 750). Expert witness Rodrigo Villagra Carron agreed with this (*Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17).

ownership [...] of its ancestral property." Moreover, it considered that the inexistence of an effective remedy against the violations of the rights recognized in the Convention constitutes in itself a violation of the obligations assumed by Paraguay thereunder. In addition, it indicated that "the delay in the administrative action [...] is due to the systematically delayed and deficient actions of State authorities." It insisted that, from a procedural and substantive perspective, the Paraguayan legal framework has not permitted or does not permit due recognition of the Community's rights.

124. The representatives maintained that "the State has not changed its mechanism for the restitution of indigenous territory," despite the Court's explicit directive in the cases of the *Yakye Axa* and *Sawhoyamaxa* indigenous communities, so that, "in this case, the same legal situation is argued [... against] a different indigenous community," when the ineffectiveness of the procedure established in Paraguayan law has prevented the realization of the right to property. The representatives emphasized that "the period of 20 years during which the case *sub judice* has been underway can hardly be called reasonable."

125. The State explained that, through its administrative courts, it has done everything within its power to ensure that the Community can claim its rights, so that, "[i]t would be unjust [...] to conclude that Paraguay has violated the rights to judicial protection and guarantees under a broad interpretive perspective." It indicated that it had taken specific measures to grant property titles to several different indigenous communities. According to Paraguay, this reveals that "the system for the protection of indigenous rights, as established in the laws in force, is perfectly compatible with the Convention[; because] whenever there is consensus between indigenous peoples, landowners and the State, it is perfectly possible to resolve the problems of lack of access to the communal ownership of land."

126. Based on these arguments, the Court will proceed to examine the due diligence, the reasonable time, and effectiveness of the administrative procedure for claiming indigenous traditional lands.

2.2.1. Due diligence in the administrative procedure

127. The Court observes that throughout the administrative action, which began in 1990, no significant measures have been taken. During the 17 years that the procedure has lasted since the acceptance of the Court's jurisdiction, an anthropological study was requested,[145] some meetings were held to try to reach an agreement between the parties, and the private landowners and the Community exchanged offers on at least five occasions.[146] Before the acceptance of the Court's jurisdiction, two on-site inspections were carried out.[147]

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[145] The INDI asked the CEADUC to prepare a scientific report on the Community's traditional lands. *Cf.* Note P.C. No. 396/95 from the INDI President to the Director of the CEADUC dated August 22, 2005 (file of appendices to the application, appendix 3, tome II, folio 734).

[146] From 1990 to 1994, the Community insisted on the claimed lands, while the private owner offered *Retiro Winchester* (*Cf.* Brief of the Community's lawyer, Florencio Gómez Belotto, addressed to the President of the IBR, of February 19, 1993, file of appendices to the application, appendix 3, tome III, folio 894; Minutes No. 7 of the hearing between the parties held on February 11, 1994, *supra* note 117, folios 905 to 908, and offer of lands to the IBR for the Lengua, Sanapaná, and Angaité indigenous peoples of February 21, 1994, file of appendices to the application, appendix 3, tome III, folios 909 to 913). In addition, in November 1995, the private landowners offered, instead of the lands claimed, land in a sector known as *Cora-í* or, alternately, in the area known as *Potrero Pañuelo* (*Cf.* Brief of the Eaton & Cía. S.A. lawyer of November 7, 1995, file of appendices to the application, appendix 3, tome II, folios 755 to 756). After a meeting in March 1996, the leaders of the Community offered to amend their request, by giving up part of the claimed lands, and substituting them with land known as "*Retiro Cuñata-í*" (*Cf.* Brief of the representatives of the Community of April 2, 1996, file of appendices to the application, appendix 3, tome II, folio 772). In 1998,

128. The limited measures taken by the State were initiated either at the request of the Community or proposed by the private landowner. Nevertheless, none of them were determining factors for obtaining a definitive solution to the Community's claim. Also, faced with the Community's complaint that the land offered as an alternative to its traditional land was not suitable for settlement,[148] neither the IBR nor the INDI asked for technical studies to be conducted to verify or disprove this, even though the said State institutions are legally obliged to provide "suitable land which is at least of equal quality" to the land occupied by the members of the Community."[149]

129. In addition, the Court takes note of the long periods of inactivity in the case file. From June 1994, when it was forwarded to the INDI, the file does not show any measure taken by this agency to settle the action until July 1995, when the Community's representatives requested information on the measures taken.[150] Similarly, following a meeting between the parties in February 1996, arranged on the initiative of the members of the Community, no new measures were taken until 1998, when the private landowner offered the lands claimed;[151] however, the State did not accept the offer. Subsequently, for the next six years, from 2000 to 2006, the only activities recorded in the file are offers made by the private landowners to the State authorities.[152] An even more serious factor was that the administrative case file had to be reconstituted because the documents had been lost.[153]

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the private landowners offered to sell the entire Salazar Ranch and, in 2000, they offered the property known as *Cora'í* "to whoever wanted to buy it". In March 2003, Chortitzer Komitee offered to sell 3,293 hectares of the land claimed (*Cf.* Testimony of Roberto Carlos Eaton Kent, *supra* note 56, folio 662; press release of April 1, 2003, entitled "*Menonitas ofrecen al INDI tierra reclamada por nativos*" [Mennonites offer INDI, land claimed by indigenous peoples], file of appendices to the application, appendix 3, tome IV, folio 1583). Lastly, in 2004, Mr. Eaton offered the Community the Magallanes Ranch (*Cf.* Testimony of Roberto Carlos Eaton Kent, *supra* note 56, folio 660).

[147] *Cf.* Site visit carried out by Pastor Cabanellas, *supra* note 62, folios 791 to 795, and Resolution P. No. 651 of the President of the IBR of August 21, 1992 (file of appendices to the application, appendix 3, tome III, folio 891).

[148] After the expansion of the on-site visit, the Community's lawyer requested a geological study of *Retiro Winchester* offered by the private landowner. However, it appears that there was no response to this request. In August 1993, during an on-site visit to another indigenous community to which the said lands had also been offered, a visit was made to *Retiro Winchester* which concluded that it was not suitable for settlement by the Community (*Cf.* Undated communication of the Community's lawyer to the IBR, file of appendices to the application, appendix 3, tome III, folio 888, and report of the trip made to the Chaco on August 12, 13, 14, 1993, file of appendices to the application, appendix 3, tome III, folio 959 to 960). Meanwhile, the lands on the Magallanes Ranch were apparently inspected by INDI officials who concluded that they were not suitable for settlement by the Community (*Cf.* Minutes of the meeting of the Xákmok Kásek Community on August 12, 2004, file of appendices to the application, appendix 3, tome IV, folio 1286); testimony of Marcelino López, *supra* note 63, folio 587, and testimony of Clemente Dermott, *supra* note 63, folio 647).

[149] Article 15 of Law No. 904/81, *supra* note 64, folio 2403.

[150] The administrative file was forwarded to the INDI in June 1994, and the subsequent activity of which there is evidence is a request by the Community of July 1995, based on which a memorandum was issued and an anthropological study was requested. (*Cf.* Report 1474 of the Head of Indigenous Affairs of the IBR on June 20, 1994, file of appendices to the application, appendix 3, tome II, folio 730, and memorandum of the INDI President of August 22, 1995, *supra* note 119, folio 860).

[151] After the members of the Community had offered to amend their request regarding the extension of land claimed (brief of the representatives of the Community of April 2, 1996, *supra* note 141), the following activity was the offer, in 1998, by the private landowners to sell the whole of the Salazar Ranch (*supra* note 146).

[152] The only activities that appear in the case file were the offers made with regard to Koraí/Cora'í, the area of land claimed that was owned by Chortitzer Komitee, and the Magallanes Ranch (*Cf.* Testimony of Roberto Carlos Eaton Kent, *supra* note 146), until the requests for copies and the reconstitution of the case file by the Community in 2006 (*Cf.* Request of the representatives of the Community of July 6, 2006,

130. Finally, the Court observes that, in June 1994, the IBR asked the INDI to rule on the expropriation request filed by the Community, because it considered that the administrative channel had been exhausted. However, the case file does not record whether the INDI responded to this request. To the contrary, the measures taken by the latter reveal that it sought to continue under the administrative channel, a fact that was confirmed by the INDI President at the time, who stated that "[t]his President's actions focused on trying once more [...] to conclude this administrative case by negotiation."[154]

131. Based on the foregoing, the Court considers that the action filed by the Community to claim its lands was not conducted with due diligence. Consequently, the Court concludes that the actions of the State authorities have not been compatible with the standards of diligence established in Articles 8(1) and 25(1) of the American Convention.

2.2.2. Principle of reasonable time in the administrative action

132. Both the Commission and the representatives argued that the duration of the land claim action violated the principle of reasonable time. The State did not refer to this argument.

133. Article 8(1) of the Convention establishes that one of the elements of due process is that actions to determine the rights of individuals under the civil, labor, criminal or any other jurisdiction must be conducted within a reasonable time. The Court has considered four elements in order to determine whether the time is reasonable: (i) the complexity of the matter, (ii) the conduct of the authorities, (iii) the procedural activity of the interested party,[155] and (iv) the effects on the legal situation on the person concerned.[156]

134. Regarding the first element, the Court recognizes, as it has done on previous occasions in relation to this remedy,[157] that the matter in this case is complex. However, it notes that the delays in the administrative proceedings were not due to the complexity of the case, but rather to the deficient and delayed actions of the State authorities (second element). As stated previously, the activities of the State organs in charge of deciding the Community's land claim were characterized during the whole

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addressed to the INDERT, file of appendices to the application, appendix 5, folio 2377, and request by the representatives on August 23, 2006, file of appendices to the application, attachment 5, folios 2379 and 2380).

[153] In 2006, the representatives of the Community had to request the reconstitution of the administrative file because it been "mislaid twice" in the INDERT *(Cf.* Request of the representatives of the Community of July 6, 2006, *supra* note 152, folio 2377, and testimony of Clemente Dermott, *supra* note 63, folio 645). In her testimony, the current President of the INDI indicated that, in 2008, "many documents were lost, [so that] even today, the case file of the Xakmok Kasek people was being reconstituted," because the INDI had been occupied by indigenous groups (*Cf.* Testimony of Lida Acuña, *supra* note 17).

[154] Memorandum of the INDI President of August 21, 1995, *supra* note 119, folio 859.

[155] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 77; *Case of Garibaldi v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of September 23, 2009, para. 133, and *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 244.

[156] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 155; *Case of Garibaldi v. Brazil*, *supra* note 155, para. 133, and *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 244.

[157] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 87.

administrative action by the passiveness, inactivity, insufficient diligence, and lack of response of the State authorities.

135. Regarding the third element, the procedural activity of the interested party, the Court observes that, far from hindering the processing of the remedy, many of the activities during the proceedings were initiated at the Community's request.

136. As for the fourth element, in order to determine whether the time frame was reasonable, the effect of the duration of the proceedings on the legal situation of the interested party must be taken into account, considering, among other matters, the matter that is the purpose of the dispute. The Court has established that, if the passage of time has relevant effects on the legal situation of the individual, the proceedings must be advanced with greater diligence so that the case is decided promptly.[158] In this case, the delay in obtaining a final solution to the problem of the land of the members of the Community has had a direct effect on their living conditions. This situation will be examined in detail in Chapter VII *infra*.

137. In addition, the Court recalls that, in the cases of the *Yakye Axa* and *Sawhoyamaxa* indigenous communities, both against Paraguay, this Court found that the period of more than 11 and 13 years, respectively, which the actions on their land claims lasted, were not compatible with the principle of reasonable time.[159] Therefore, the period of more than 17 years that has elapsed in the instant case (*supra* para. 127) can only lead to a similar conclusion.

138. Consequently, the Court finds that the duration of the administrative proceedings is not compatible with the principle of reasonable time established in Article 8(1) of the American Convention.

2.2.3. Effectiveness of the administrative remedy to claim indigenous land

139. Article 25(1) of the Convention establishes the obligation of the States Parties to guarantee to all persons under their jurisdiction an effective legal remedy against acts that violate their fundamental rights.[160] The existence of this guarantee "is one of the basic pillars not only of the American Convention, but of the rule of law itself in a democratic society."[161] In the absence of such effective remedies the individual would be placed in a situation of defenselessness.[162]

140. For the State to comply with the provisions of Article 25 of the Convention, it is not enough for the remedies to exist formally, but rather it is essential that they be

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[158] *Cf. Case of Valle Jaramillo et al. v. Colombia, supra* note 156, para. 155; *Case of Kawas Fernández, supra* note 14, para. 115, and *Case of Garibaldi v. Brazil, supra* note 155, para. 138.

[159] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 89; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 97 and 98.

[160] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No.1, para. 91; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 104, *and Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 190.

[161] *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 82; *Case of Escher et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 6, 2009. Series C No. 200, para. 195, and *Case of Usón Ramírez v. Venezuela Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 128.

[162] *Cf. Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 162, para. 183, and *Case of Usón Ramírez v. Venezuela, supra* note 161, para. 128.

effective in the terms of that provision.[163] This effectiveness means that, in addition to their formal existence, the remedies must produce results or responses to the violations of rights recognized in the Convention, the Constitution, or the law.[164] The Court has reiterated that this obligation means that the remedy must be appropriate to end the violation and its application by the competent authority must be effective.[165] In this regard, those remedies that are found to be illusory, owing to the general conditions of the country or even the particular circumstances of a specific case, cannot be considered effective.[166]

141. In addition, Article 25 of the Convention is closely related to the general obligations contained in Articles 1(1) and 2 thereof, which attribute protective functions to the domestic law of the States Parties. Consequently, the State has the responsibility to design and establish an effective legal remedy, as well as to ensure the due application of the said remedy by its judicial authorities.[167] In this regard, according to Article 25 of the Convention, domestic law must ensure the due application of effective remedies before the competent authorities in order to protect all those under its jurisdiction against acts that violate their fundamental rights or that result in the determination of their rights and obligations.[168]

142. Regarding indigenous peoples, the Court has held that, to guarantee the right of their members to communal property, the States must establish "an effective remedy with guarantees of due process [...] that allows them to reclaim their traditional lands."[169]

143. The Court observes that the right to reclaim indigenous communal lands in Paraguay is guaranteed in law by the Constitution.[170] The specific remedy to reclaim these lands is regulated by Law No. 904/81, which establishes the Indigenous Communities Statute. In the specific case of the Xákmok Kásek Community, the

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[163] *Cf. Case of Ximenes Lopes v. Brazil. Preliminary objection.* Judgment of November 30, 2005. Series C No. 139, para. 4; *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 196, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 202.

[164] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 90; *Case of Usón Ramírez v. Venezuela, supra* note 161, para. 129, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 202.

[165] *Cf. Case of Acosta Calderón v. Ecuador. Merits, reparations and costs.* Judgment of June 24, 2005. Series C No. 129, para. 93; *Case of Radilla Pacheco v. Mexico supra* note 161, para. 291, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 202.

[166] *Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25 and 8 of the American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series No. 9, para. 24; *Case of Usón Ramírez v. Venezuela, supra* note 161, para. 129, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 202..

[167] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237; *Case of Usón Ramírez v. Venezuela, supra* note *161*, para. 130, and *Case of Radilla Pacheco v. Mexico, supra* note *12*, para. 295.

[168] *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 65; *Case of Usón Ramírez v. Venezuela, supra* note 161, para. 130, and *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 295.

[169] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra* note 5, para. 96, and *Case of the Saramaka People, supra* note 16, para. 178.

[170] *Cf.* Article 64 of the Constitution of Paraguay (file of appendices to the application, attachment 7, folio 2437).

applicable laws are those relating to the settlement of indigenous communities on privately-owned land.[171]

144. The Court recalls that, in the cases of the *Yakye Axa* and the *Sawhoyamaxa* indigenous communities, it considered that the domestic administrative proceedings to reclaim traditional lands were ineffective,[172] because they did not offer a real possibility for the members of the indigenous communities to recover their traditional lands if the latter were privately-owned.

145. Since the instant case relates to the same remedy, because the State has not amended either the law or its practice in this regard,[173] the Court reiterates its case law that the administrative procedure in question has the following structural problems that prevent it from being considered effective: (a) limited powers to expropriate; (b) administrative proceedings subject to the existence of a voluntary agreement between the parties, and (c) absence of technical and scientific procedures designed to find a definitive solution to the problem.

a) Limited powers to expropriate

146. First, the reference to the Agrarian Statute limits the possibilities of expropriating land claimed by indigenous communities to those cases involving land that is not being exploited rationally,[174] without considering particular aspects of the indigenous peoples, such as the special meaning that the land has for them.[175] As witness Rodrigo Villagra indicated, "after 100 years of colonization, these lands are going to be exploited in some way." The Court recalls that the argument that the indigenous peoples cannot, under any circumstances, reclaim their traditional land when it is being exploited and in full production, considers the indigenous question exclusively from the perspective of the productivity of the land and the agrarian regime, which is inadequate for the unique characteristics of these peoples.[176]

147. Despite the fact that the consideration in the preceding paragraph has already been established in previous cases against Paraguay, in this case the State argued once again that it "has not been able to satisfy fully" the right to communal property, because the land claimed belongs to private owners, and is being exploited rationally, so that the State is prevented from realizing the right to property of the members of the Community.

148. In this regard, the Inter-American Commission argued that the above-mentioned factual and legal impossibility that the State invokes in its defense is not an argument that relieves it of its international responsibility. The representatives added

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[171] *Cf.* Articles 22, 24, 25, and 26 of Law No. 904/81 Indigenous Communities Statute, *supra* note 64, folios 2405 to 2406.

[172] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 98, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 108.

[173] *Cf.* Testimony of Rodrigo Villagra Carron, *supra* note 17.

[174] *Cf.* Article 94 of Law No. 1.863/02, Agrarian Statute (file of appendices to the application, attachment 7, folio 2472).

[175] According to the State, in order to carry out the expropriation, it is essential to comply with all the legal requirements; in other words, it must relate to a large estate that is not being exploited, or the expropriation is being carried out for reasons of social interest. "The national agrarian legislation in force takes into consideration the profitable use of the land, as well as the productivity achieved by the landowner in order to determine whether or not it can be expropriated." (*Cf.* Answer to the application, folios 386 and 399).

[176] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 139.

that "the mercantilist perspective of the value of the land, which is understood merely as a means of production to generate 'wealth,' is inadmissible and inapplicable when addressing the indigenous question, because it supposes a limited vision of the reality, by failing to consider the possibility of a different concept from our 'western' way of looking at matters that relate to indigenous rights. Arguing that there is only one way to use and dispose of property would render the definition of Paraguay as a multicultural and multi-ethnic State illusory, eliminating the rights of thousands of individuals who inhabit Paraguay and enrich the country with their diversity."

149. The Court again reiterates that, in the case of lands that are exploited and productive, it is the State's responsibility, through the competent national bodies, to determine and to take into account the special relationship of the members of the indigenous community with the land reclaimed when deciding between the two rights. Otherwise, the right to reclaim their lands would be meaningless and would not offer a real possibility of recovering the traditional lands. By limiting the effective realization of the right to property of the members of the indigenous communities in this way, the State not only violates its obligations arising from the provisions of the Convention regarding the right to property, but also incurs responsibility in relation to the guarantee of an effective remedy and discriminatory treatment that produces social exclusion.

150. Additionally, the Court notes that the expropriation of the land claimed was denied based on its rational exploitation and the alleged effect for the company's production unit (*supra* para. 71 and 72) when, of 10,700 hectares claimed, approximately 7,468 hectares were taken out of this production unit, either because they were sold to another owner (*supra* para. 69) or because they are within the area declared a private nature reserve, which establishes rigorous restrictions on its exploitation (*supra* paras. 80 and 82).

b) Administrative procedure subject to the existence of a voluntary agreement between the parties

151. In addition, instead of establishing that a legal or administrative assessment must be made to decide the conflict, which will always exist in the case of traditional indigenous lands under private ownership, the solution is conditioned to a voluntary agreement between the parties. The INDI is only empowered to negotiate the direct purchase of land with the private owner or to negotiate the resettlement of the members of indigenous communities. As the State explained, "provided consensus is achieved between the indigenous peoples, the property owners, and the State, it is perfectly possible to resolve the problems of lack of access to the communal ownership of the land."

152. Expert witness Enrique Castillo gave an opinion in this regard in the *Yakye Axa* case, explaining that the administrative procedure to reclaim land for indigenous communities has had positive results in cases in which the private owners have agreed to negotiate the transfer of the property reclaimed, but has been entirely ineffective in cases in which negotiations with the owners have not been viable.[177]

c) Absence of technical and scientific procedures addressed at finding a definitive solution to the problem.

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[177] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 38(b).

153. The third problem observed in the domestic administrative action is the absence of technical and scientific procedures that make a significant contribution to a final solution to the problem. Despite the fact that Paraguayan laws require the INDERT and the INDI to submit definitive solutions to the requests it receives,[178] during the more than 20 years that this action has extended, the only technical activities carried out by the administrative authorities were two on-site inspections and an anthropological report, which concluded that the land claimed by the Community formed part of its traditional territory and was suitable for settlement (*supra* para. 103). However, apparently this study was insufficient, as revealed by the simple fact that, as of today, the dispute over the Xákmok Kásek's communal property persists. In addition, no other procedure designed to verify the suitability of other lands within the traditional territory was every carried out.

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154. The Court reiterates that the administrative action to reclaim the lands has been ineffective and has not revealed any real possibility for the members of the Xákmok Kásek community to recover their traditional lands. In addition, this lack of an effective remedy for the recovery of indigenous land represents the State's failure to comply with its obligation, established in Article 2 of the Convention, to adapt its domestic law to guarantee in the practice the right to communal property.

2.3. Regarding the decree declaring part of the area claimed a protected wooded area

155. The representatives argued that, if a consultation mechanism had existed for the declaration of the private nature reserve, "the rights of the Xákmok Kásek Community would have been ensured, [because] it would have permitted a discussion of the private project." They also stressed that, almost two years after the filing of the action on unconstitutionality against the decree ordering the creation of the protected wooded area on land claimed by the Community (*supra* para. 83 and 84), the State had not "achieved definitive results in the matter."

156. The State indicated that it had filed a request to annul the declaration on the nature reserve and, to this end, had presented the report of the Environmental Secretariat recommending its annulment (*supra* para. 81).

157. In this regard, the Court finds that, in order to guarantee the right to property of the indigenous peoples, under Article 1(1) of the Convention the State must ensure the effective participation of the members of the Community, in accordance with their customs and traditions, in any plan or decision that could affect their traditional lands and restrict the use and enjoyment of these lands, to ensure that such plans or decision do not negate their survival as indigenous people.[179] This is in keeping with the provisions of ILO Convention 169, to which Paraguay is a State party.

158. In the instant case, it has been duly proved that the indigenous peoples' claim to lands declared a nature reserve was not taken into account when Decree No. 11,804 was issued and the technical justification for this decision was approved; that the

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[178] Article 4 of Law No. 43/89. This article amends the provisions of Law No. 1,372/88; "which establishes a regime for regulating the settlements of the indigenous communities," of December 21, 1989 (file of appendices to the application, appendix 2, tome 1, folio 252).

[179] *Cf. mutatis mutandis, Case of the Saramaka People v. Suriname*, *supra* note 16, para. 129.

Community was not informed of the plans to declare part of the Salazar Ranch a private nature reserve, and that the said declaration prejudiced the way of life of the members of the Community (*supra* paras. 80 to 82).

159. Also, according to the evidence provided by the State itself, the action on unconstitutionality filed by the Community has been halted since October 24, 2008, when "the time limit that the Prosecutor General had to respond to the notification of this action [was suspended …], this being the last activity in the procedure."[180]

160. Moreover, the Court notes that this time limit was suspended owing to the need to add the administrative case file on the Community's land claim, which the representatives forwarded to the Supreme Court on December 14, 2009[181] (*supra* para. 84). However, despite this and the favorable ruling on the partial appeal against the respective decree of the Legal Department of the Environmental Secretariat (*supra* para. 81), the unconstitutionality proceeding remains suspended.[182]

161. The Court considers that the passage of more than two years since the filing of the remedy of unconstitutionality with regard to a decree that has been in force for five years reveals that the State authorities have not proceeded with sufficient diligence, taking into account, also, that the State's technical agencies have recommended that the said declaration of a nature reserve should be annulled, because "it ignored the existence of the indigenous peoples' claim" and "jeopardized their right to communal property and their traditional habitat recognized [in the] Constitution."[183] In addition, with regard to the issue of this decree, the INDI President stated that, "[u]nfortunately, the institutions always acted as watertight compartments," and that "the INDI, which is the institution in charge of implementing the public policy on the indigenous peoples, should have distributed this background information so that the other ministries [of the social cabinet] [would] have been informed of the indigenous peoples' claims."[184]

162. Based on the above, the Court finds that the action on unconstitutionality filed in this case has not provided an effective remedy to the members of the Community for the protection of their right to ownership of their communal lands.

2.4 Alleged failure to file legal remedies

163. The State argued that the representatives had not used the appropriate remedies under domestic law, because, in cases such as this one, it is the courts that must "determine who has [the] most right," between those who invoke the right to ancestral property and those who have title and possession and, at the same time, are exploiting the land productively."

164. The representatives indicated that "the mechanisms described by the State correspond to procedures for acquiring land, and not for the restitution of indigenous territory." Moreover, regarding the possibility of resorting to the courts to contest an administrative decision, they indicated that this "assumed the existence of an administrative decision that could be challenged," which was not the case of the

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[180] *Cf.* Note S.J.I No. 211 of May 21, 2010, *supra* note 99, folio 4593.

[181] *Cf.* Brief of the representatives of December 14, 2009, addressed to the Constitutional Chamber, *supra* note 98, folio 3435.

[182] *Cf.* Note S.J. I No. 211 of May 21, 2010, *supra* note 99, folio 4593.

[183] *Cf.* Report of December 24, 2009, of the Legal Department of the Secretariat of the Environment, *supra* note 90, folios 3383 and 3385.

[184] *Cf.* Testimony of Lida Acuña, *supra* note 17.

Xákmok Kásek Community, because the administrative decisions were favorable to the Community. The problem was "their total ineffectiveness to obtain the land."

165. The Commission underscored that the State "did not indicate the precise judicial remedy that was appropriate for this case" and that, contrary to the State's assertion, the Community "had claimed its land using the available means."

166. The Court observes that Paraguay has not indicated which legal remedies are supposedly available and effective to guarantee the communal right to land of the indigenous peoples, and has not submitted evidence of their existence in domestic law.

167. In addition, the Court notes that expert witness Enrique Castillo stated that:

> [Law 904/81] establishes a procedure under administrative law for claiming indigenous lands, which also removes the matter from the ordinary jurisdiction; in other words, from civil proceedings to claim property. In this way, the claims for indigenous property submitted to the State are filed and processed before administrative bodies [...]. In view of this legal framework and the practice of the courts, no claims for indigenous lands are processed through the ordinary justice system."[185]

168. Therefore, the Court concludes that Paraguay has not proved the existence of any other procedure that would be effective to provide a definitive solution to the claim filed by the Xákmok Kásek Community.

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169. Based on the foregoing, the Court finds that the arguments submitted by the State to justify its failure to realize the alleged victims' right to property were insufficient to relieve it of its international responsibility. Indeed, certain acts and omissions by the State, far from contributing to the realization of the right to property of the members of the Community, have obstructed and prevented it. Thus the declaration of a private nature reserve on part of the territory claimed by the Community (*supra* para. 80) not only prevented them from carrying out their traditional activities on that land, but also its expropriation and occupation under any circumstance (*supra* para. 82). The observations of expert witness Rodolfo Stavenhagen, which were not contradicted by the State, are of particular concern to the Court. He stated that the said declaration as a protected wooded area could constitute a new and sophisticated mechanism adopted by the private owners of land claimed by indigenous communities "to obstruct the land claims of the original peoples [...] using legal mechanisms and even invoking purposes as virtuous as the conservation of the environment."[186]

170. Consequently, the Court concludes that the administrative action filed to recover the 10,700 hectares (*supra* 67 and 68) that correspond to the traditional lands that are most suitable for the settlement of the Community was not conducted with due diligence, was not processed in a reasonable time, was ineffective, and did not offer the Community a real possibility to recover its traditional lands. In addition, the Paraguayan domestic authorities, especially the Congress of the Republic, have considered the issue of indigenous territory exclusively from the perspective of the productivity of the land, disregarding the inherent particularities of the Xákmok Kásek community and the special relationship of its members with the land claimed. Lastly, the State completely ignored the indigenous claim when it declared part of that

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[185] *Cf.* Expert opinion of Enrique Castillo in the *Case of the* Yakye *Axa Indigenous Community v. Paraguay*, *supra* note 5 (merits file, tome I, folio 296).

[186] *Cf.* Expert testimony of Rodolfo Stavenhagen, *supra* note 17, folio 640.

traditional territory a private nature reserve, and the action on unconstitutionality filed to redress this situation has been ineffective. All of this represents a violation of the right to communal property, judicial guarantees, and judicial protection recognized, respectively, in Articles 21(1), 8(1) and 25(1) of the Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the members of the Xákmok Kásek Community.

3. Effects on the cultural identity of the members of the Community of the failure to restore their traditional territory

171. The Commission indicated that, when "restrictions to the indigenous population's access to its traditional lands increased, significant changes [occurred] in their subsistence practices." It indicated that "several families of the Xákmok Kásek Community decided to leave [...] owing to the difficult living conditions, seeking solutions to their needs."

172. The representatives argued that the members of the Community are facing "collective cultural erosion" due to the violation of the right to property. They added that the lack of communal land deprives the Community "of the foundations for implementing its cultural practices, its spiritual life, its integrity, and its economic survival." According to the representatives, there is a close relationship between the spiritual practices of the Community experienced collectively, and the relationship with the ancestral lands. Additionally, they indicated that the lack of land has affected the initiation rites for men, women and shamans.

173. The State did not comment on the foregoing.

174. The culture of the members of the indigenous communities corresponds to a specific way of life, of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are an integral element of their cosmology, their spirituality and, consequently, their cultural identity.[187]

175. In the case of indigenous tribes or peoples, the traditional possession of their lands and the cultural patterns that arise from this close relationship form part of their identity. This identity has a unique content owing to the collective perception they have as a group, their cosmovision, their collective imagination, and the relationship with the land where they live their lives.[188]

176. For the members of the Xákmok Kásek Community, cultural characteristics such as their own languages (*Sanapaná* and *Enxet*), their shamanistic rituals, their male and female initiation rituals, their ancestral shamanic knowledge, the way they commemorate their dead, and their relationship with the land are essential for their cosmovision and particular way of life.

177. All these cultural characteristics and practices of the members of the Community have been affected by the lack of access to their traditional lands. According to the testimony of witness Rodrigo Villagra, the process of displacement from the traditional territory has resulted in "the fact that the people cannot bury [their family members] in their chosen places; [...] that they cannot return [to those

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[187] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 135; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 118, and *Case of the Saramaka People v. Suriname*, *supra* note 16, para. 120.

[188] United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 21, December 21, 2009. E/C.12/GC/21.

places]; that those places have also in some way become less sacred […]. [This] enforced process means that all that affective relationship, or that symbolic or spiritual relationship cannot be developed."[189]

178. Maximiliano Ruiz indicated that the religion and culture have "been almost entirely lost." Witness Rodrigo Villagra Carron explained the difficulties experienced by the members of the Community in their male and female initiation rites,[190] as well as the gradual loss of shamanism.[191]

179. Their languages are another characteristic of the cultural integrity of the members of the Community. During the public hearing, Maximiliano Ruiz stated that, on the Salazar Ranch, they were only taught to speak Spanish or Guaraní, rather than their own languages. Similarly, upon being asked by the Commission during the hearing whether she spoke the Sanapaná language, Antonia Ramírez said that she did, but that her children and her grandchildren did not speak Sanapaná, only Guaraní.

180. Also, the lack of their traditional lands and the limitations imposed by the private owners has had an impact on the means of subsistence of the members of the Community. Hunting, fishing and gathering have become increasingly more difficult, resulting in the indigenous people deciding to leave the Salazar Ranch and relocate in "25 de Febrero" or in other places, thus separating part of the Community (*supra* para. 75 to 77, 79 and 98).

181. All these effects increased with the passage of time and increase the perception of the members of the Community that their claims are not being addressed.

182. In brief, this Court observes that the members of the Xákmok Kásek Community have suffered diverse effects on their cultural identity produced, above all, by the lack of their own territory and the natural resources found on it, which represents a violation of Article 21(1) of the Convention in relation to Article 1(1) thereof. These effects are one more example of the insufficiency of the merely "productive" conception of the land when considering the conflicting rights of the indigenous peoples and the private owners of the lands claimed.

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189 Testimony of Rodrigo Villagra Carron, *supra* note 17.

190 During the public hearing, witness Rodrigo Villagra Carron explained the initiation rites:

> For example, the male rite, which entails a Shaman or the *Cayá* begins to sing all night and people are invited to attend. First, this must be a good season, a good season when the people can collect sufficient fruit and food to invite people to a large feast. In this initiation process, the young men have to eat certain plants, which mean they may faint […] and they are watched over by a shaman or several of the main shamans, and they control the power, the knowledge that is in the plants, which will then allow the plant to possess the knowledge that will give it healing properties. […] [I]t is like a social festivity where […] a shaman is singing and, at the same time, the women and men are dancing […]. The men dress up with feathers and paint themselves, and several neighboring villages come. This allowed for social integration that reduced conflict levels, because it was a feast. […] There were sports competitions, and table games […] sports, specific dances that allowed not only social integration with other villages, but also between men and women.

191 Regarding shamanist practices, witness Villagra Carron indicated that:

> The reality is that today there are far less shamans. For example, in the ["Huanca"] ritual, which is when people are initiated who may come to obtain that knowledge, […] this entails having access to specific places, were the plant is located, or where studies are carried out, far from the people, because it is a dangerous study owing to the implications of the process suffered by the initiated. [Consequently], there are not more initiated shamans. […] [T]he last shamans are dying.

VII
RIGHT TO LIFE
(ARTICLE 4(1) OF THE AMERICAN CONVENTION)

183. The Commission indicated that the right to life "includes [...] the right to [...] conditions that guarantee a decent existence." It added that "the State's failure to comply [...] with its obligation to guarantee the Community's right to property" has meant "the creation of a permanent situation of vulnerability that even threatens the physical survival of the members of the Community."

184. The representatives argued that "[t]he State [did] not [...] rectify the conditions that exacerbate the difficulties faced by the members of the Community to have access to a decent life, in response to its particular vulnerability." According to the representatives, the "failure to restore the ancestral lands and traditional habitat of the Community [...] has made it impossible for its members to hunt, fish and gather on the lands and in the habitat claimed, thus affecting their cultural and religious identity, and placing them in a situation of extreme vulnerability." Lastly, they asked that the State be attributed with international responsibility for the death of several members of the Community.

185. The State affirmed that it had provided assistance with regard to food and hygiene. It also indicated that "there is no relationship between the land and physical survival [...] as a basis for the alleged failure to protect the right to life." It added that, "State agents have never forced the indigenous people to leave their lands; to the contrary, they have made considerable efforts to find other places within the ancestral territory." It emphasized that it was not possible to attribute the State with responsibility for the said deaths.

186. The Court has indicated that the right to life is a fundamental human right, the full enjoyment of which is a precondition for the enjoyment of all the other human rights.[192] If this right is not respected, all the other rights are meaningless. Therefore, restrictive notions with regard to this right are not admissible.[193]

187. Consequently, the States are obliged to ensure the creation of the necessary conditions to prevent violations of this right and, in particular, the obligation to prevent its agents from endangering it. The observance of Article 4, in relation to Article 1(1) of the Convention, not only presumes that no one be deprived of their life arbitrarily (negative obligation), but also requires the States to take all appropriate measures to protect and preserve the right to life (positive obligation),[194] in keeping with the obligation to ensure the full and free exercise, without discrimination, of the rights of all persons under their jurisdiction.[195]

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[192] *Cf. Case of the "Street Children" (Villagrán Morales and et al.) v. Guatemala. Merits, supra* para. 167, para. 144; *Case of Montero Aragorn et al. (Retén de Catia) v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2006, Series C. No. 150, para. 63, and *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, para. 78.

[193] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra* note 167, para. 144; *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela, supra* note 192, para. 63, and *Case of Zambrano Vélez et al. v. Ecuador, supra* note 192, para. 78.

[194] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, *supra* note 167 para. 144; *Case of Kawas Fernández v. Honduras, supra* note 14, para. 74, and *Case of González et al. ("Cotton Field") v. Mexico, supra* note 14 para. 245.

[195] *Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 120; *Case of Kawas Fernández v. Honduras, supra* note 14 para. 74*, and Case of González et al. ("Cotton Field") v. Mexico, supra* note 14, para. 245.

188. The Court has emphasized that a State cannot be held responsible for every situation that jeopardizes the right to life. Taking into account the difficulties involved in the planning and adoption of public policies and the operational choices that must be made based on priorities and resources, the positive obligations of the State must be interpreted in such a way that an impossible or disproportionate burden is not placed on the authorities.[196] To give rise to this positive obligation, it must be established that, at the time of the facts, the authorities knew or should have known of the existence of a situation of real and immediate risk to the life of an individual or group of specific individuals, and that they did not take the necessary measures within their powers that could reasonably be expected to prevent or avoid that risk.[197]

189. In the instant case, on June 11, 1991,[198] and on September 22, 1992,[199] INDI officials verified the situation of special vulnerability of the members of the Community because they did not have title to their land. On November 11, 1993, the indigenous leaders repeated to the IBR that their land claim was a priority because "they [were] living in extremely difficult and precarious conditions and [did] not know how long they [could] hold out."[200]

190. The Prosecutor for labor matters inspected the Salazar, Cora-í, and Maroma Ranches. He recorded "the precarious situation in which [the members of the Community live] [...] without minimum conditions of hygiene, clothing, and space sufficient for the number of inhabitants; and also [the] houses [...] do not have impermeable walls or tile roofs and were built in such a way that they endangered the safety and health of the indigenous people; the floors [were] of earth."[201] In addition, the said report indicated "that they received very limited rations."[202] During the visit, irregularities were also verified with regard to the labor exploitation suffered by the members of the Community.

191. On April 17, 2009, the President of the Republic and the Ministry of Education and Culture, issued Decree No. 1830,[203] declaring a state of emergency in two indigenous communities,[204] one of them the Xákmok Kásek Community. The pertinent part of Decree No. 1830 indicates that:

> Due to situations beyond their control, these Communities are deprived of access to the traditional means of subsistence related to their pre-colonial identity, within the territories claimed as part of their ancestral territories, [...] [and this] hampers the normal way of life of the said communities

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[196] *Cf. Case of the Pueblo Bello Massacre*, *supra* note 195, para. 124, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 155.

[197] *Cf. Case of the Pueblo Bello Massacre*, *supra* note 195, paras. 123 and 124, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 155.

[198] *Cf.* Handwritten record of an on-site inspection of the Xákmok Kásek Community made on June 11, 1991, in relation to the land claimed (file of appendices to the application, appendix 3, tome II, folio 790), and report of on-site visit made by Pastor Cabanellas, *supra* note 62, folios 791 to 794).

[199] *Cf.* Report on the expanded on-site visit on September 22, 1992, *supra* note 62, folios 883 and 884).

[200] Communication of the Community addressed to the IBR President of November 11, 1993, *supra* note 65 (file of appendices to the application, attachment 5, folio 2351).

[201] *Cf.* Report prepared by the Prosecutor for labor matters, undated (file of appendices to the application, appendix 3, tome IV, folio 1808).

[202] *Cf.* Report prepared by the Prosecutor for labor matters, undated, *supra* note 201, folio 1810.

[203] *Cf.* Decree No. 1830 of April 17, 2009 (file of attachments to the answer to the application, attachment 7, folios 3643 to 3646).

[204] The said Decree No. 1830 of April 17, 2009, *supra* note 203, also refers to the Kelyenmagategma Community of the Enxet and Y´ara Marantu People.

> [...] owing to the absence of minimum and essential food and medical care, which is a concern of the Government that requires urgent response [...].
>
> [Consequently, it ordered that]
>
> The [INDI], together with the National Emergency Secretariat and the Ministry of Public Health and Social Welfare take the necessary measures to immediately provide medical care and food to the families that are members of [the Xákmok Kásek Community] until the conclusion of the legal and administrative procedures regarding the legalization of the land claimed as part of the its traditional habitat.[205]

192. In brief, in this case the domestic authorities knew of the existence of a situation of real and immediate risk to the life of the members of the Community. Consequently, this gave rise to certain State obligations of prevention – under the American Convention (Article 4 in relation to Article 1[1]) and under its own domestic law (Decree No. 1830) – that obliged it to take the necessary measures that could reasonably be expected, to prevent or avoid this risk.

193. Based on the above, the Court must assess the measures taken by the State to comply with its obligation to guarantee the right to life of the members of the Xákmok Kásek Community. To this end, the Court will analyze the alleged violation of this right in two parts: (1) the right to a decent existence, and (2) the alleged international responsibility of the State for the alleged deaths.

1. The right to a decent existence

1.1. Access to and quality of water

194. According to the testimony of Dr. Pablo Balmaceda, since 2003, the members of the Community have not had water distribution services.[206] According to the evidence provided, as of April 2009,[207] under Decree No. 1830, the State supplied the following amounts of water to the members of the Community settled in "25 de Febrero": 10,000 liters on April 23, 2009,[208] 20,000 liters on July 3, 2009,[209] 14,000 liters on August 14, 2009,[210] and 20,000 liters on August 10, 2009.[211] The State indicated that, on February 5, 2009, it had given five tanks of 6,000 m^3 to the Community.[212]

195. The Court observes that the water supplied by the State from May to August 2009 amounted to no more than 2.17 liters per person per day.[213] In this regard, according to international standards, most people need a minimum of 7.5 liters per day

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205 *Cf.* Decree No. 1830, *supra* note 203.

206 *Cf.* Health and hygiene report on the Enxet Community of Xákmok Kásek, prepared by Dr. Pablo Balmaceda during 2002 - 2003 (file of appendices to the application, attachment 4, folio 2305).

207 *Cf.* Water distribution schedule, National Emergency Secretariat (file of attachments to the answer to the application, attachment 1.7, folios 3378 to 3381).

208 *Cf.* Water distribution schedule, National Emergency Secretariat, *supra* note 207, folio 3378.

209 *Cf.* Water distribution schedule, National Emergency Secretariat, *supra* note 207, folio 3380.

210 *Cf.* Water distribution schedule, National Emergency Secretariat, *supra* note 207, folio 3381.

211 *Cf.* Water distribution schedule, National Emergency Secretariat, *supra* note 207, folio 3379.

212 *Cf.* Record of February 5, 2005 (file of attachments provided by the State at the public hearing, attachment XIV, folios 3959 to 3962).

213 To obtain this figure, the Court calculated: (total number of liters of water delivered by the State / number of members of the Community who live in 25 de Febrero) = N1; N1 / period of time over which this assistance has been provided, in calendar days = quantity of liters of water per person per day.

per person to meet all their basic needs, including food and hygiene.[214] Also according to international standards, the quality of the water must represent a tolerable level of risk. Judged by these standards, the State has not proved that it is supplying sufficient amounts of water to meet the minimum requirements. Moreover, the State has not submitted updated evidence on the provision of water during 2010, and has not proved that the Community has access to safe sources of water in the "25 de Febrero" settlement where it is currently located. To the contrary, in testimony given during the public hearing, members of the Community indicated, with regard to the provision of water, that "currently, if it is requested, it is not supplied; sometimes it takes a long time; sometimes there is no more water," and that "[they] suffer a great deal during droughts, because, where they move[d] to, in '25 de Febrero,' there is no water tank, there are no lakes, nothing, just forest."[215] They stated that during droughts, they go to a cistern located around seven kilometers away.[216]

196. Consequently, the Court considers that the measures taken by the State following the issue of Decree No. 1830 have not been sufficient to provide the members of the Community with water in sufficient quantity and of adequate quality, and this has exposed them to risks and disease.

1.2. Diet

197. Regarding access to food, the members of the Community suffered "serious restrictions [...] imposed by those with title to [the] lands [claimed]. One was that they could not have their own livestock (cattle or others) as this was prohibited by the owner, [and] they were forbidden to grow crops [and hunt]"[217] (*supra* paras. 74 and 75). Therefore, they had few available sources of food.[218] Also, their diet was limited and of poor quality.[219] However, if the members of the Community had money, they could purchase some foodstuffs in the ranch or from the food trucks on the Trans-Chaco Highway. Nevertheless, these options depended on their limited purchasing power.[220]

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[214] Committee on Economic, Social, and Cultural Rights, United Nations. General Comment No. 15. The right to water (articles 11 and 12 of the Covenant), twenty-ninth session (2002), U.N. Doc. HRI/GEN/1/Rev.7, page 106. para. 12. See J. Bartram and G. Howard, "Domestic water quantity, service level and health" WHO, 2002. WHO/SDE/WSH/03.02: "Based on estimates of requirements of lactating women who engage in moderate physical activity in above-average temperatures, a minimum of 7.5 liters per capita per day will meet the requirements of most people under most conditions. This water needs to be of a quality that represents a tolerable level of risk." See also: P.H. Gleick, (1996) "Basic water requirements for human activities: meeting basic needs", *Water International,* 21, pp. 83-92.

[215] *Cf.* Testimony of Maximiliano Ruíz, *supra* note 28.

[216] *Cf.* Testimony of Maximiliano Ruíz, *supra* note 28.

[217] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 1740. See also: testimony of Tomás Dermott, *supra* note 24, folio 597; testimony of Marcelino López, *supra* note 63, folio 585; testimony of Gerardo Larrosa, *supra* note 75, folio 605, and testimony of Maximiliano Ruíz, *supra* note 28.

[218] *Cf.* Health evaluation in four Enxet Communities, May and June 2007 (attachments to the pleadings and motions brief, tome VI, folio 2650).

[219] Generally, this was composed of and characterized by a cactus with edible fruit, some small plots where papaya and Karanda'y palm were grown, and fishing activities in the ponds. *Cf.* Health evaluation in four Enxet Communities, *supra* note 218, folio 2642.

[220] *Cf.* Health Evaluation in four Enxet Communities, *supra* note 218, folio 2642.

198. The Court recognizes that, in compliance with Decree No. 1830, the State made at least eight deliveries of food[221] between May and November 2009 and in February and March 2010 and that, in each one of these deliveries, it provided food parcels to the members of the Community.[222] However, the Court must assess the accessibility, availability, and sustainability[223] of the food given to the members of the Community and determine whether the assistance provided satisfied the basic requirements of an adequate diet.[224]

199. In this regard, the State indicated that it "had anticipated that the 47-kilo food parcel would last a month, with one parcel per family."[225] However, the delivery of the food is unreliable, the food rations supplied are deficient in nutrients,[226] and most members of the Community eat only one type of food per day, basically rice or noodles; only rarely is this complemented "with fruit, yams, or fish or meat from hunting."[227] In this regard, the report on the Community's health is conclusive; it reveals that, in 2007, "17.9% of the sample (children from 2 to 10 years) were severely underweight to a certain degree,"[228] and the testimony of expert witness Pablo Balmaceda that malnutrition is demonstrated "by short height."[229] Similarly, the alleged victims stated that, although it is true that the State supplied food, "the food provisions are not received often,"[230] and indicated that "the diet is inadequate" and that "there is little nutritional value."[231]

200. The Court notes that a total of 23,554 kilos of food was provided between May 12, 2009, and March 4, 2010.[232] Based on this figure, it can be deduced that the amount of food provided by the State represented approximately 0.29 kilos per person per day, taking into account the census provided.[233] Consequently, the Court finds that

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[221] *Cf.* Note of the National Emergency Secretariat (SEN-SE No. 1467/09) of December 23, 2009 (file of attachments to the answer to the application, tome VIII, attachment 1.7, folios 3332 and 3333), and records of foodstuffs provided by the National Emergency Secretariat (file of attachments to the answer to the application, tome VIII, folios 3349, 3354, 3362, 3364, 3369, 3374).

[222] *Cf.* Records and schedules of assistance to the disadvantaged, by the National Emergency Secretariat of the Presidency of the Republic (file of attachments to the answer to the application, folios 3322 to 3377) and (file of attachments to the State's final arguments, folios 4284 to 4303).

[223] *Cf.* United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 12, May 12, 1999, E/C.12/1999/5. Paras. 6 to 8.

[224] It is worth mentioning that, according to the Committee on Economic, Social, and Cultural Rights, "[t]he right to adequate nutrition shall not [...] be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients." (General Comment No. 12, *supra* note 223, para. 6).

[225] *Cf.* Note of the National Emergency Secretariat (SEN-SE No. 1467/09), *supra* note 221.

[226] *Cf.* Health evaluation in four Enxet Communities, *supra* note 218, folio 2650, and Expert testimony of Pablo Balmaceda during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru.

[227] *Cf.* Health evaluation in four Enxet Communities, *supra* note 218, folios 2650 to 2651.

[228] *Cf.* Health evaluation in four Enxet Communities, *supra* note 218, folio 2650.

[229] *Cf.* Expert testimony of Pablo Balmaceda, *supra* note 226.

[230] *Cf.* Testimony of Antonia Ramírez, *supra* note 28.

[231] *Cf.* Testimony of Gerardo Larrosa, *supra* note 75, folio 607, and Testimony of Maximiliano Ruíz, *supra* note 28.

[232] *Cf.* Records and schedules of assistance to the disadvantaged by the National Emergency Secretariat of the Presidency of the Republic, *supra* note 222, and attachments to the final written arguments, file of attachments to the final written arguments, folios 4284 to 4303).

[233] To obtain this figure, the following formula was applied: 23,554 (total kilos delivered according to the records of assistance to the disadvantaged of the National Emergency Secretariat of the Presidency of

the amount of food provided was insufficient to satisfy, even moderately, the basic daily dietary needs of any individual.[234]

201. The inadequate nutrition of the members of the Community has had an impact on the growth of the children, because "the minimum rate of growth atrophy was 32.2% [...], more than double what would be expected for the population in question (15.9%)."[235] Also, the Community's health care promoter indicated that at least "90% of the children are malnourished."[236]

202. Consequently, despite what the State has indicated, there is no evidence that the assistance provided has met the nutritional requirements that existed prior to Decree No. 1830 (*supra* para. 191).

1.3. Health

203. Regarding access to health care services, the Commission argued that the children "suffer from malnutrition" and, in general, the other members of the Community suffer from diseases such as tuberculosis, diarrhea, Chagas disease, and other occasional epidemics. In addition, it indicated that the Community has not been provided with adequate medical care and the children do not receive the necessary vaccines. The representatives agreed with the Commission's arguments and clarified that the new settlement (the village of "25 de Febrero"), is located 75 kilometers from the nearest health clinic, which operates "deficiently and does not have a vehicle that could, eventually, reach the Community." Consequently, "the seriously ill must be attended to in the hospital in Limpio, which is more than 400 km from the Community's settlement, and the bus fare is beyond the means of the members of the Community."

204. The State indicated that the "complaints of the Xákmok Kásek leaders concerning medical care and medicines have been attended to" and indicated that the public health-care service is free in Paraguay. It reported that, since October 2009, the State has been employing an indigenous health care promoter to provide services to the Community, and a Family Health Unit had been assigned.[237] Additionally, the State indicated that it had provided health-care assistance to the Community in its habitat and that the General Directorate for Vulnerable Groups provided medical assistance and had designed the health-care policy to be implemented.

205. The case file indicates that, prior to Decree No. 1830, the members of the Community had "receiv[ed] [...] minimal medical assistance"[238] and the health clinics were few and far apart. In addition, for years "the children had not received general

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the Republic) / 268 (number of members of the Community) = 87.89 Kg per person. This result 87.89 kg / 300 days, the period of time during which the State provided assistance = 0.29 Kg per day per person during that time.

[234] The Committee on Economic, Social, and Cultural Rights considers that the core content of the right to adequate food is: "The availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture." (United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 12, *supra* note 223, para. 8).

[235] *Cf.* Health evaluation in four Enxet Communities, *supra* note 218, folio 2649.

[236] *Cf.* Testimony of Gerardo Larrosa, *supra* note 75, folio 606.

[237] *Cf.* Report of December 16, 2009, signed by María Filomena Bejarano, General Director of the General Directorate for Assistance to Vulnerable Groups (file of attachments to the answer to the application, attachment 1(4), folios 3307 to 3308).

[238] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 1742.

medical care or vaccinations."[239] Regarding access to health-care services, "only those who work on ranches [could] access the [Health Insurance Institute], and even [then], the use of this insurance is not possible because the cards are not delivered or [the Community members] do not have the resources to travel to and stay in the Loma Plata Hospital, which is the closest one."[240] Also, "a 1993 health census conducted by the National Health Service (SENASA) [...] confirmed that a large percentage of the current Xákmok Kásek population carried the Chagas disease virus."[241]

206. Regarding current conditions, the Court has verified that an indigenous community health care promoter was hired on November 2, 2009.[242] Also, following the issue of Decree No. 1830 on April 17, 2009, the State has organized nine health-care workshops with the Community,[243] during which it attended 474 consultations, providing treatment and medicines in some cases.[244] In addition, the State forwarded documentation on a project to build a health clinic for the Community, at an estimated cost of Gs. 120,000,000 (one hundred and twenty million guaranís).[245]

207. Nevertheless, according to Marcelino Lopez, Community leader, and Gerardo Larrosa, the Community's health-care promoter, the health situation is fairly critical. They indicated that "indigenous people die owing to lack of transportation [or] medicine,"[246] and their perception is that, in the case of "most of the indigenous people concerned, this is because of the [...] Government."[247] Specifically, Gerardo Larrosa indicated that "the health brigades almost never provide assistance, except on a few occasions," and "[t]here is no stock of basic medicines for primary care, or even an adequate place to store them."[248]

208. The Court acknowledges the progress made by the State. However, the measures taken following Decree No. 1830 (2009) are characterized by being temporary and transitory. In addition, the State has not guaranteed members of the Community physical or geographical access to health-care establishments and, from the evidence provided, there is no indication that positive measures were taken to guarantee that the medical supplies and services provided would be acceptable, or that any educational measures were taken on health matters that respected traditional customs and practices.

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[239] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 1742.

[240] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 1742.

[241] *Cf.* CEADUC Anthropological Report, *supra* note 55, folio 1742.

[242] *Cf.* Communication MSPyBS/DGAPS No. 865/2009 of December 18, 2009 (file of attachments to the answer to the application, attachment 1.4, folio 3306).

[243] *Cf.* Report of the General Directorate for Assistance to Vulnerable Groups of December 16, 2009, *supra* note 237.

[244] *Cf.* Information presented by the Ministry of Public Health and Social Welfare on December 16, 2009, with data on medical attention provided between May 1 and November 4, 2009, and data from the lists forwarded by the General Directorate for Assistance to Vulnerable Groups to the Ministry of Public Health and Welfare (file of attachments to the answer to the application, tome VIII, attachment 4, folios 3292 to 3305), and records of attention provided in January and February 2010 (file of attachments to the final arguments of the State, folios 4423 to 4435).

[245] *Cf.* Report on the "medical clinic – for the indigenous settlement of the XV sanitary region of President Hayes" (file of attachments to the answer to the application, attachment 4, folios 3315 to 3321).

[246] Testimony of Marcelino López, *supra* note 63, folio 587.

[247] Testimony of Marcelino López, *supra* note 63, folio 587.

[248] Testimony of Gerardo Larrosa, *supra* note 75, folio 606.

1.4. Education

209. With regard to access to educational services, the Commission noted that the Inter-American Commission's Rapporteur on the Rights of Indigenous Peoples had "verified the precarious conditions of a school attended by around 60 boys and girls from the Community." He indicated that the "the school is approximately 25 [m^2] in size, without a roof that is adequate to provide protection from the rain; there is no floor and no desks, chairs, or educational materials." The Rapporteur also indicated that "the children are increasingly failing to attend school due to lack of food and water." The representatives endorsed the facts alleged by the Commission and added that the children "are taught in Guaraní and Spanish, rather than in Sanapaná or Enxet, which are the languages of the members of the Community.

210. The State indicated that it had provided "teaching materials and school meals [through] the Ministry of Education," and that it planned "to build a school in the Community's settlement once the land titling procedures had been completed." It affirmed that it had provided "additional furniture" to the Dora Kent de Eaton Elementary School.[249] In addition, the body of evidence reveals that, on October 26, 2009, a training workshop was organized for teachers working in the schools in several communities, including Xákmok Kásek. Also, the National Directorate for Indigenous School Education has concluded that "the teachers say they need to continue their training, and to work on the recovery of the language and the revitalization of the culture."[250]

211. According to international standards, States have the obligation to guarantee access to free basic education and its sustainability.[251] In particular, when it comes to satisfying the right to basic education of indigenous communities, the State must promote this right from an ethno-educational perspective.[252] This means taking positive measures to ensure that the education is culturally acceptable from an ethnically differentiated perspective.[253]

212. In the instant case, Maximiliano Ruiz, a teacher in the Community, indicated that there are "85 students [...] most of whom [belong to the] Sanapaná [ethnic group]; but the program of the Ministry of Education is taught." He indicated that the children abandon school owing to their situation. Maximiliano Ruiz acknowledged that the State provided "school meals," but indicated that they were provided sporadically and not on a monthly basis.

213. From the evidence gathered, the Court observes that, although some conditions of the State's provision of education have improved, the facilities for the education of the children are inadequate. The State itself provided a series of photographs in which

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[249] The State noted that it had provided 23 individual student desks, 23 student chairs, a teacher's desk, a teacher's chair, and a cupboard (file of attachments to the answer to the application, tome VIII, attachment 1(6), folio 3323).

[250] *Cf.* Report on the Indigenous Teacher Training Workshop of October 26, 2009, submitted to the General Directorate of Indigenous School Education and forwarded to the Inter-American Court of Human Rights (file of attachments to the answer to the application, attachment 1.6, folios 3324 to 3328).

[251] See Article 13(3)(a) of the Protocol of San Salvador in the Area of Economic, Social, and Cultural Rights, which states that "primary education should be compulsory and accessible to all without cost."

[252] *Cf.* ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, Article 27(1).

[253] *Cf.* United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 13, December 8, 1999, E/C.12/1999/10, para. 50

it can be seen that classes take place under a roof, with no walls, in the open air.[254] In addition, the State does not provide any type of program to prevent students from abandoning their studies.

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214. In short, this Court emphasizes that the assistance provided by the State under Decree No. 1830 of April 17, 2009, has been insufficient to overcome the conditions of special vulnerability of the Xákmok Kásek Community verified in the decree.

215. The situation of the members of the Community is closely tied to its lack of its lands. Indeed, the absence of possibilities for the members to provide for and support themselves, according to their ancestral traditions, has led them to depend almost exclusively on State actions and be forced to live not only in a way that is different from their cultural patterns, but in squalor. This was noted by Marcelino López, Community leader, who said, "[i]f we have our land, then everything else will improve and, above all, we will be able to live openly as indigenous people; otherwise, it will be very difficult to survive."[255]

216. On this point, it should be noted that, as the United Nations Committee on Economic, Social and Cultural Rights has said, "in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to effectively enjoy their own culture."[256]

217. Consequently, the Court declares that the State has not provided the basic services to protect the right to a decent life of a specific group of individuals in these conditions of special, real and immediate risk, and this constitutes a violation of Article 4(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community.

2. The deaths that have occurred in the Community

218. The representatives asked that the State be declared internationally responsible for the death of several members of the Community. In contrast, the Commission indicated that it "lacked evidence to determine if each death described by the representatives [was] indirectly related to the Xákmok Kásek Community's possibility of acceding to its ancestral territory." The State objected that its international responsibility could not be declared and contested the representatives' allegation.

219. In its application, the Commission presented three lists with the names of various members of the Community who had died. In addition, the representatives presented a list with the names of 44 individuals, 38 of whom were also on the list submitted by the Commission,[257] while noting that "more people could have died than

[254] *Cf.* Photographs of Elementary School No. 11531 (file of attachments to the State's final arguments, tome X, folio 4415).

[255] Testimony of Marcelino López, *supra* note 63, folio 585.

[256] United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 21, December 21, 2009, E/C.12/GC/21, para. 38.

[257] Benigno Corrientes Domínguez, who was said to have died in 1991 at the age of one, does not appear in the list presented by the representatives in the pleadings and motions brief, but does appear in the application and in the 2007 census (appendices to the application, folio 2394).

those indicated by the [Commission]" or even than those they themselves had indicated.

220. Regarding the evidence to support the probable cause of death of the deceased, the date of death, and information on previous medical attention, the State indicated that the expert opinion of Pablo Balmaceda "lacks the necessary rigor and grounds for a study of this importance," and added that "it does not include the required documentary support, because it is not accompanied by and does not refer to death certificates, autopsy protocols, or any other pertinent documentation that proves the decease and the cause of death."

221. When testifying, Pablo Balmaceda explained that it was difficult "to collect data on the deaths, [because] there are no places to register births, and much less deaths; thus, the recollection of these individuals was only in the Community's memory." The expert also added that his report corroborated "the epidemiological information that exists in Paraguay, that the indigenous population has the worst health indicators." Lastly, the representatives forwarded two death certificates,[258] which were consistent with the information they had provided previously.

222. In the absence of documentary evidence that contradicts the evidence provided to the proceedings before this Court – namely, the expert opinion of Dr. Balmaceda, the health and hygiene report on the Community prepared in 2002 and 2003,[259] and the two death certificates submitted by the representatives – and taking into account the proven lack of State health care (*supra* paras. 205, 207 and 208), as well as the inexistence of State records with this data (*infra* paras. 252 and 253), which are the responsibility of the State, the Court will consider that the facts alleged by the representatives and supported by the report prepared by the expert witness Pablo Balmaceda are true,[260] stressing that these facts have not been formally contested by the State.

223. The Court observes that the lists presented by the Commission and the representatives include the deaths of Community members that occurred before Paraguay accepted the Court's jurisdiction; that is, before March 11, 1993. Consequently, the Court does not have competence to examine the following cases: Eulalio Dermott Alberto, (NN [no name]) Avalos (twin 1), (NN) Avalos (twin 2), both of whom died in 1981; Adolfino López Dermott and Lorenza López Segundo, who died in 1983; Narciso Larrosa Dermott (m), who died in 1984; Nelly Gonzáles Torres (f), who died in 1987; Élida Dermott Ramírez (f), Benigno Corrientes Domínguez (m), and Herminio Corrientes Domínguez (m), who died in 1991; (NN) González Dermott (m) and Betina Avalos or Betina Rios Torres (f), who died in 1992; Esteban López Dermott (m), who died in February 1993; Luisa Ramírez (f) and Rufino Pérez (m), who died in 1993.[261]

224. Moreover, the Court recalls that, with regard to the facts that are the purpose of these proceedings, the representatives are not permitted to argue new facts that

[258] *Cf.* Death certificate of Felipa Quintana of May 13, 2008; cause of death: septic shock (merits file, tome III, folio 1140), and death certificate of Sara Esther Gonzáles López of August 25, 2008, which indicate that the cause of death was: gastroenteritis, infectious dehydration and convulsions (merits file, tome III, folio 1142).

[259] Expert testimony of Pablo Balmaceda, *supra* note 226, and Health and hygiene report on the Xakmok Kasek Community, *supra* note 206.

[260] *Cf.* Health and hygiene report on the Xakmok Kasek Community, *supra* note 206.

[261] The Court does not have any evidence to determine if the date of death was after the acceptance of its contentious jurisdiction.

differ from those described in the application, although they may submit those that can explain, clarify or reject facts that are mentioned in it. Supervening facts are different, because they can be presented by any of the parties at any stage of the proceedings before the judgment is handed down.[262]

225. From the list of deaths indicated by the representatives, the Court notes that the death of Luisa Ramírez Larrosa, who died in January 2009 at 62 years of age, without a known cause of death and without information on whether she had received medical attention, as well as that of Rosa Larrosa Domínguez, who died of natural causes in October 2009 at the age of 100, and without information on whether she had received medical attention, occurred after the Commission had presented the application; consequently, the Court will examine them as they constitute supervening facts.

226. Based on the above, the Court has competence to examine 28 deaths that occurred while the Court had competence; namely, the following:

No.	***Name and Sex f (female) m (male)***	***Age at time of death***	***Probable date of death***	***Probable cause of death***	***Information on medical attention* (MA)**
1	Luisa Ramírez Larrosa (f)	62 years	01-2009	No information	No information
2	Rosa Larrosa Domínguez (f)	100 years	10-2009	Natural death	No information
3	Sara Gonzáles López (f)	1 year and 5 months	25-07-2008	Gastroenteritis – dehydration	Did not receive MA
4	Felipa Quintana (f)	64 years	13 – 05 - 2008	Septic shock	Received MA
5	Gilberto Dermott Quintana (m)	46 years	2007	Tuberculosis	Received MA, volunteer nurse
6	(NN) Jonás Avalos or Jonás Rios Torres (m)	No information	2007	No information	No information
7	Rosa Dermott (f)	80 years	02-10-2007	Stopped eating	Did not receive MA
8	Remigia Ruiz (f)	38 years	14-05-2005	Complications giving birth	Did not receive MA
9	Yelsi Karina López Cabañas (f)	1 year	2005	Pertussis (whooping cough)	Did not receive MA
10	Tito García (m)	46 years	2005	Cardiac murmur	Received MA
11	Aída Carolina González (f)	8 months	04-06-2003	Anemia, possible hypoalbumina-emia	Did not receive MA
12	Abundio Inter. Dermot (m)	2 months	2003	Pneumonia	Did not receive MA
13	(NN) Dermott Larrosa[263] (f)	at birth	2003	Possible cause: diarrhea, vomiting	Received MA in the Filadelfia Hospital
14	(NN) Corrientes Domínguez (m)	Stillborn	No information	Fetal distress[264]	No information
15	(NN) Ávalos or Rios Torres (m)	No information	1999/2002	Hemorrhage	No information

[262] *Cf. Case of the "Five Pensioners" v. Peru, Merits, reparations and costs.* Judgment of February 28, 2003, Series C No. 98, para. 154; *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 67, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 49.

[263] The Commission's application includes "(NN) Dermott (f)," which may be the same child, given that the year of death and surname are the same. The only difference is that one appears to have died at birth, and the other at the age of one, without the cause of death being specified.

[264] In the 2009 brief presented by the representatives following the issue of IACHR Report on Merits No. 30/08 of July 17, 2008, the year of death is 2003. It is possibly the same person. Moreover, in the medical report, it appears as "Corrientes" and the cause of death is fetal distress.

16	(NN) Dermott Martínez (f)	8 months	31-12-2001	Enterocolitis	No information
17	(NN) Dermott Larrosa (f)	5 days	08-2001	Anemia	Received MA in the Filadelfia Hospital
18	(NN) García Dermott (f)	1 month	2000	Pertussis	Did not receive MA
19	Adalberto González López (m)	1 year and 2 months	2000	Pneumonia	Did not receive MA
20	Roberto Roa Gonzáles	55 years	2000	Tuberculosis	Did not receive MA
21	(NN) Ávalos or Rios Torres (m)	3 days	1999	Hemorrhage	Did not receive MA
22	(NN) Ávalos or Rios Torres (m)	9 days	1998	Tetanus	Did not receive MA
23	(NN) Dermott Ruiz (m)	Stillborn	1998	Undetermined	No information
24	(NN) Dermott Ruiz (m)	1 day	1996	Fetal distress	Did not receive MA
25	Mercedes Dermott Larrosa (f)	2 years	1996	Enterocolitis – dehydration	Received MA, volunteer nurse
26	Sargento Giménez (m)	No information	1996	No information	Did not receive MA
27	Rosana Corrientes Dominguez (f)	10 months	1993[265]	Pertussis	Received MA in 25 Leguas Health Center
28	(NN) Wilfrida Ojeda Chávez (f)	8 months	01-05-1994	Enterocolitis – dehydration	Did not receive MA

227. The Court clarifies that the fact that the State is currently providing emergency assistance (*supra* paras. 191 to 194 and 198) does not relieve it of its international responsibility for having failed to take measures in the past to prevent the risk of a violation of the right to life occurring. Consequently, the Court must examine which of the deaths can be attributed to the State for failing in its obligation to prevent them. This examination will be based on an approach that permits the situation of extreme and special vulnerability, the cause of death, and the corresponding causal connection between them to be related, without imposing on the State an excessive burden for overcoming an indeterminate or unknown risk.

228. Regarding the specific cases of death, in their list, the representatives indicated the name of (NN) Corrientes Domínguez, stillborn, who died from fetal distress, and (NN) Dermott Ruiz, stillborn, who died in 1998 from unknown causes. In this regard, the Court notes that the representatives and the Commission have not presented arguments regarding the alleged violation of the right to life of the "unborn," so that, given the absence of grounds, the Court lacks facts on which to form an opinion as to the State's responsibility in these cases.

229. In relation to Luisa Ramírez Larrosa, Rosa Larrosa Domínguez, (NN) Jonás Avalos or Jonás Rios Torres (m), Rosa Dermott (f), (NN) Ávalos or Rios Torres (m), and Sargento Giménez (m), regarding whom the cause of death is unknown or they died from natural causes or accidents, the State cannot be considered responsible for their deaths, because there is no evidence to determine State responsibility and a causal connection between the presumed cause of death and the vulnerable situation of the members of the Community has not been shown.

230. With regard to the deaths of Felipa Quintana, who died of septic shock in May 2008, at 64 years of age, and received medical attention; Gilberto Dermott Quintana,

[265] In the lists presented by the Commission, the date of death is 1993 with the following clarification: "[i]n the Report on Merits, a Rossana Corrientes of 10 months is included, who died of whooping cough in 1996; possibly this is the same person" (merits file, tome I, folio 33, note 78).

who died of tuberculosis in 2007, aged 46 years, and received medical attention from a volunteer nurse; Tito García, who died from a cardiac murmur in 2005, aged 46 years, probably related to Chagas disease,[266] and received medical attention; NN Dermott Larrosa, who died at birth in 2003, possibly due to vomiting and diarrhea and received medical attention at the Filadelfia Hospital; NN Dermott Larrosa, who died from anemia in 2001, five days after birth, and received medical attention at the Filadelfia Hospital;[267] Mercedes Dermott Larrosa, who died from enterocolitis and dehydration in 1996, at two years of age, and received medical attention from a volunteer nurse, and Rosana Corrientes Dominguez, who died from whooping cough in 1996, 10 months after birth, and received medical attention at the 25 Leguas Health Clinic, the Court finds that responsibility cannot be attributed to the State, because it has not been demonstrated that the medical attention provided was insufficient or deficient, or that there was a causal connection between the death and the situation of vulnerability of the members of the Community.

231. Regarding the other individuals, the Court observes that many died from illnesses that were easily preventable if they had received constant periodic care or adequate health care services.[268] It is enough to underscore that the main causes of death were tetanus, pneumonia, tuberculosis, anemia, whooping cough, serious symptoms of dehydration and enterocolitis, or from complications during labor. In addition, it is worth highlighting that the main victims were children in the early infancy, towards whom the State had increased protection obligations. This will be examined further *infra* para. 259.

232. The death of Remigia Ruíz, who died in 2005 at 38 years of age, and who was pregnant and did not receive medical attention, reveals many of the inherent characteristics of maternal mortality, such as: death during labor without adequate medical care, a situation of exclusion or extreme poverty, lack of access to adequate health services, and a lack of documentation on cause of death, among others.

233. In this regard, the Court underscores that extreme poverty and the lack of adequate medical care for pregnant women or women who have recently given birth result in high maternal mortality and morbidity.[269] Because of this, States must design appropriate health-care policies that permit assistance to be provided by personnel who are adequately trained to attend to births, policies to prevent maternal mortality with adequate pre-natal and post-partum care, and legal and administrative

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[266] The expert Pablo Balmaceda noted that "Tito García [...] had Chagas disease which is endemic to the area; in other words, to almost all of South America, but he never received adequate medical attention for his illness," *supra* note 226.

[267] Nevertheless, in the health and hygiene report on the Xakmok Kasek Community prepared by Dr. Pablo Balmaceda, *supra* note 206, folio 2311, the same person appears, but it is indicated that he never received medical attention.

[268] According to the testimony given by expert witness Pablo Balmaceda during the public hearing held on April 14, 2010, "very many of the deaths that occurred in the Community were due to causes such as diarrhea or tuberculosis, which generally worsened owing to the lack of immediate adequate medical attention. Death from these causes ensued owing to dehydration and serious lung problems that evidently stemmed from their way of life." He also noted that "the children [...] die from vomiting, diarrhea, and ultimately dehydration, and also due to lung problems that begin with a cold that gradually gets worse and finally they die due to lack of medical attention," *supra* note 226.

[269] *Cf.* Paul Hunt. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, A/HRC/14/20/Add.2, April 15, 2010. A maternal death is the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes. WHO, *International Statistical Classification of Diseases and Related Health Problems*, *Tenth Revision*, vol. 2, *Instruction Manual*, 2nd ed. (Geneva, 2005), p. 141.

instruments for health-care policies that permit cases of maternal mortality to be documented adequately. All this is because pregnant women require special measures of protection.

234. Based on the above, the Court declares that the State violated the right established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the persons mentioned in this paragraph, because it failed to take the required positive measures, within its powers, that could reasonably be expected to prevent or to avoid the risk to the right to life. Consequently, the death of the following individuals can be attributed to the State: Sara Gonzáles López, who died from gastroenteritis and dehydration in July 2008, and did not receive medical attention; Yelsi Karina López Cabañas, who died of whooping cough in 2005, at the age of one, and did not receive medical attention; Remigia Ruiz, who died from complications while in labor in 2005, at 38 years of age, and did not receive medical attention; Aida Carolina Gonzáles, who died from anemia in June 2003, at eight months of age, and did not receive medical assistance; NN Ávalos or Ríos Torres, who died from tetanus in 1999, three days after birth, and did not receive medical care; Abundio Inter Dermott, who died from pneumonia in 2003, two months after birth, and did not receive medical care; NN Dermott Martínez, who died from enterocolitis in 2001, at eight months of age, and it is not known if he or she received medical care; NN García Dermott, who died from whooping cough in 2001, at one month of age, and did not receive medical care; Adalberto Gonzáles López, who died from pneumonia in 2000, aged one year and two months, and did not receive medical care; Roberto Roa Gonzáles, who died from tuberculosis in 2000, at 55 years of age, and did not receive medical care; NN Ávalos or Ríos Torres, who died from tetanus in 1998, nine days after birth, and did not receive medical care; NN Dermontt Ruiz, who died at birth in 1996 and did not receive medical care, and NN Wilfrida Ojeda Chavez, who died of dehydration and enterocolitis in May 1994 and did not receive medical care.

VIII
RIGHT TO PERSONAL INTEGRITY
(ARTICLE 5(1) OF THE AMERICAN CONVENTION)

235. The representatives alleged the violation of Article 5(1) of the Convention to the detriment of the Community owing to the "death of their next of kin and also their precarious situation because they do not have access to their lands, which [has violated] their cultural personal integrity and also their cultural *collective* integrity." The representatives stated that the family members who have lost their loved ones have suffered greatly, particularly because of the Community's cultural characteristics. They also indicated that the death of the loved ones affected the Community, owing to its cultural patterns related to the remembrance of the dead and their methods of burial. They emphasized that, "[t]he members of the Xákmok Kásek Community have experienced physical, mental and moral suffering, which has violated their right to personal integrity."

236. The State did not comment on this.

237. The Court reiterates that the alleged victims and their representatives may cite the violation of rights other than the ones included in the application, provided these rights relate to the facts that have been included in the application, because they are the holders of the rights established in the Convention.[270] Nevertheless, the application

[270] *Cf. Case of the "Five Pensioners" v. Peru, supra* note 262, para. 155; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, para. 94, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 49.

constitutes the factual framework for the proceedings before the Court, so that it is not admissible to allege new facts that differ from those described in that brief; although it is admissible to submit facts that help explain, clarify, or deny facts that have been mentioned in the application or that respond to the plaintiff's claims.[271] Supervening facts are the exception to this principle and they can be submitted to the Court at any stage of the proceedings before the judgment is delivered.[272] Moreover, the opportunity for the alleged victims or their representatives to exercise fully that right of *locus standi in judicio* is the pleadings and motions brief.[273] Lastly, the alleged victims must be indicated in the application, and should correspond to the Inter-American Commission's report referred to in Article 50 of the Convention.[274]

238. In the instant case, the representatives asked the Court to declare the violation of Article 5(1) in their pleadings and motions brief; in other words, they presented their request at the appropriate procedural moment.

239. Regarding the observance of the factual framework presented in the application, the Court observes that, although the Commission did not expressly allege a violation of Article 5(1) of the Convention, it indicated in its application that "the lack of an effective guarantee of the Community's right to property has placed its members in a situation of extreme vulnerability and defenselessness that has resulted in the violation of the right to life and personal integrity of the members of the Community." The Commission also indicated that the members of the Community had been subjected to "suffering, anguish and indignities [...] during the years they have waited for an effective response from the State of Paraguay to their land claim." Based on the foregoing, the Court finds that the arguments of the representatives are related to the factual framework described by the Commission in its application.

240. Lastly, regarding the identification of the alleged victims of the violations alleged by the representatives, the Court observes that the next of kin of the deceased were not identified as victims by the Commission in its Report on Merits or in its application. Hence, the Court will not examine the alleged violations to the detriment of the next of kin of the deceased. Consequently, the Court must determine whether or not the members of the Community are victims of the violation of their right to personal integrity.

241. Having verified compliance with the formal requirements, the Court will now examine the merits of the matter.

242. Regarding the alleged violation of "cultural integrity," in paragraphs 174 to 182 *supra*, the Court examined the consequences of the failure to restore the traditional territory of the members of the Community. In addition, in the chapter on Article 4 of the Convention, the Court examined the living conditions of the members of the

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[271] *Cf. Case of the "Five Pensioners" v. Peru*, *supra* note 262, para. 153; *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 42, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 49..

[272] *Cf. Case of the "Five Pensioners" v. Peru, supra* note 262, para. 154; *Case of Perozo et al. v. Venezuela, supra* note 262, para. 67*, and Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 49.

[273] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs.* Judgment September 15, 2005. Series C No. 134, para. 56; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 136*, and Case of González et al. ("Cotton Field") v. Mexico, supra* note 14, para. 232.

[274] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98; *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 108, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 44.

Community. In this regard, it considers that the facts described on this issue by the representatives are not related to Article 5 of the Convention but rather to Articles 4 and 21 thereof that have already been analyzed, and to the reparations that the Court will order below based on Article 63(1) of the Convention.

243. With regard to mental and moral integrity, the Court recalls that, in the case of the *Moiwana Community v. Suriname,* it found that "the separation of the members of the Community from their traditional lands" was a fact that, together with the impunity of the deaths that had occurred within the Community, caused the victims to suffer in such a way that it constituted a violation by the State of Article 5(1) of the American Convention to their detriment.[275]

244. In the instant case, several of the alleged victims who testified before the Court expressed the sorrow that they and the other members of the Community feel owing to the failure to restore their traditional lands, the gradual loss of their culture, and the long wait they have had to endure during the ineffective administrative procedure. In addition, the wretched living conditions that the members of the Community experience, the death of several of the Community's members, and their general situation of abandonment give rise to sufferings that necessarily violate the mental and moral integrity of all the members of the Community. All this constitutes a violation of Article 5(1) of the Convention to the detriment of the members of the Xákmok Kásek Community.

IX
RIGHT TO JURIDICAL PERSONALITY
(ARTICLE 3 OF THE AMERICAN CONVENTION)

245. The Commission argued that the State has not implemented mechanisms that allow the members of the Community access to "the identity documents required to exercise their right to recognition of juridical personality." It indicated that, according to the 2006 census, 57 of the 212 people interviewed did not have identity documents; approximately 48 of them were children. According to the 2008 census, at least 43 of the 273 members of the Community did not have birth certificates; of these, at least 32 were minors.[276] Also, the representatives indicated that according to the latest community census dated October 16, 2009, 35% of the members of the Community did not have documents.

246. The representatives added that a "large number of Xákmok Kásek individuals who lack documents [...] are unable to prove their existence and identity legally." They indicated that "none of the children who died in infancy were registered at birth, so that, when they died, they did not have birth certificates, which meant that their next of kin could not obtain death certificates."

247. The State indicated that it had organized "documentation and registration activities [...] in the Community," and provided evidence of this. In this regard, it indicated that, on December 14, 2009, the INDI and the Civil Registry Office organized a documentation activity where the Community is settled and "receive[d] 35 (first time) requests for a national identity card and 10 renewal requests."[277] Moreover, it

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[275] *Cf. Case of the Moiwana Community v. Suriname, supra* note 129, paras. 101 to 103.

[276] *Cf.* Census of the Xákmok Kásek Community of August 30, 2008, *supra* note 58, folios 2248 to 2264.

[277] *Cf.* Report of the National Police Identification Department of December 21, 2009 (file of attachments to the answer to the application, attachment 1(3), folios 3278 to 3280).

reported "the issue of 66 indigenous identity cards, of which 26 were for adults and 40 for minors."[278] Additionally, the Civil Registry Office had issued birth certificates for 25 minors and 43 copies of birth certificates.[279] The State indicated that it "ha[d] complied with its obligation to respect the right to juridical personality and also ha[d] respected the right to identity of the members of the Community, by granting them identity documents that allow the exercise of any right."

248. The Court has considered that the content of the right to recognition of juridical personality is that it recognizes to the individual:

> anywhere, as a subject of rights and obligations, able to enjoy the basic civil rights[, which] implies the capacity to be the holder of rights (capacity and enjoyment) and of obligations; the violation of this recognition supposes the denial in absolute terms of the possibility of being a holder of [these basic civil] rights and obligations.[280]

249. This right represents a parameter for determining whether an individual is the holder of the rights in question and whether he or she can exercise them; consequently, the denial of this recognition makes the individual vulnerable before the State or private individuals.[281] Thus, the content of the right to recognition of juridical personality refers to the correlative general duty of the State to ensure the legal conditions and means for this right to be freely and fully exercised by its holders.[282]

250. However, in application of the principle of effectiveness and of the needs for protection in cases of vulnerable individuals and groups, this Court has followed a broader legal interpretation of this right by finding that the State is especially "obliged to guarantee to those persons in a situation of vulnerability, exclusion and discrimination, the legal and administrative conditions that ensure them the exercise of this right, pursuant to the principle of equality under the law."[283] For example, in the case of the *Sawhoyamaxa Indigenous Community*, the Court considered that its members had "remained in a legal limbo in which, although they were born and died in Paraguay, their very existence and identity were never legally recognized; in other words, they did not have juridical personality."[284]

251. In this case, the same shortcomings that the Court found in the *Sawhoyamaxa* case can be observed. Several of the individuals who died did not have birth certificates or, at least, they were not provided, and the respective death certificates where not issued, because they did not have the essential identity documents for the determination of their civil rights.

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[278] *Cf.* Report of Miriam Acosta, INDI fieldworker, of December 21, 2009 (file of attachments to the answer to the application, attachment 1(3), folio 3281).

[279] *Cf.* Report of Zunilda López, Civil Registry official, of December 20, 2009 (file of attachments to the answer to the application, attachment 1(3), folio 3283).

[280] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 179; *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 69, and *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 87.

[281] *Cf. Case of the Yean and Bosico Girls v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of September 8, 2005. Series C No. 130, para. 179; *Case of Anzualdo Castro v. Peru, supra* note 280, para. 88, and *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 156.

[282] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 189; *Case of the Saramaka People v. Suriname, supra* note 16, para. 167, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 101.

[283] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 189, and *Case of the Saramaka People v. Suriname, supra* note 16, para. 166.

[284] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 20, para. 192.

252. Consequently, the Court concludes that, although the State has made an effort to overcome the situation of under-registration of the members of the Community, the body of evidence reveals that it has not guaranteed adequate access to civil registration procedures that take into account the particular situation of the members of the Community, in order to ensure that they are issued appropriate identity documents.

253. Nevertheless, the Court was not provided with the names of the members of the Community who lack identity documents. The only persons identified by name are those who died and who are mentioned in section 2 of Chapter VII of this judgment, concerning the right to life. It should be noted, that the Court required the State to provide their identity documents and death certificates. In this regard, the representatives presented some identity documents;[285] however, the State did not provide any documents, which leads the Court to conclude that the documents of the other individuals were not provided because they did not have them.

254. Based on the above, the Court declares that the State violated the right embodied in Article 3 of the American Convention, in relation to Article 1(1) thereof to the detriment of: (NN) Jonás Ávalos or Jonás Ríos Torres; Rosa Dermott; Yelsi Karina López Cabañas; Tito García; Aída Carolina González; Abundio Inter. Dermot; (NN) Dermott Larrosa; (NN) Ávalos or Ríos Torres; (NN) Dermott Martínez; (NN) Dermott Larrosa; (NN) García Dermott; Adalberto González López; Roberto Roa Gonzáles; (NN) Ávalos or Ríos Torres; (NN) Ávalos or Ríos Torres; (NN) Dermott Ruiz; Mercedes Dermott Larrosa; Sargento Giménez and Rosana Corrientes Domínguez.

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255. The representatives also indicated that "the State is violating the right to juridical personality of the Community by denying its ethnic composition." In this regard, the Court has already examined the representatives' arguments in Chapters V(2) and VI. Also, although these facts constitute obstacles to granting title to the land, and also adversely affect the possibility of self-determination for the Xákmok Kásek Community, insufficient evidence and arguments have been presented to allow the Court to declare the autonomous violation of Article 3 of the Convention to the detriment of the Community.

X
RIGHTS OF THE CHILD
ARTICLE 19 OF THE AMERICAN CONVENTION)

256. The Commission indicated that the children, "in particular, have suffered due to the subhuman living conditions to which the Community is subjected." The representatives indicated that "[t]here are children among the victims of all the rights the State is alleged to have violated" and that these children "were not provided with the special measures of protection that their vulnerable situation, due to their age,

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[285] From the documentary evidence provided by the parties, the Court has the following documents in relation to death certificates, identity documents, and birth certificates: copy of death certificate of Felipa Quintana of May 13, 2008 (merits file, tome III, folio 1140); copy of death certificate of Sara Gonzáles of August 25, 2008 (case file of Merits, folio 1142, tome III); copy of identity card of Felipa Quintana (merits file, tome III, folio 1139); copy of birth certificate of Sara Gonzáles (merits file, tome III, folio 1141); copy of identity card of Gilberto Dermott Quintana (merits file, tome III, folio 1143); copy of identity card of Remigia Ruíz (merits file, tome III, folio 1144); copy of birth certificate of Wilfrida Ojeda Chávez (merits file, tome III, folio 1146); copy of identity card of Luisa Ramírez Larrosa (merits file, tome III, folio 1147), and copy of identity card of Rosa Larrosa Domínguez (merits file, tome III, folio 1148).

required." The State maintained that it had provided "integral care" to the children and was therefore not responsible for the alleged violation of Article 19 of the Convention.

257. The Court recalls that children possess the same rights as all human beings and have, in addition, special rights derived from their situation, that correspond to specific obligations of the family, society and the State.[286] The prevalence of the best interest of the child should be understood as the need to satisfy all the rights of the child, which obliges the State and has effects on the interpretation of all the other rights established in the Convention when the case refers to minors.[287] In addition, the State must pay special attention to the needs and the rights of children, owing to their special situation of vulnerability.[288]

258. This Court has established that the provision of education and health care for children involves different measures of protection and constitutes the fundamental pillars that guarantee the enjoyment of a decent existence for children who, owing to their situation, are often without adequate means to defend their rights effectively.[289]

259. In this case, the Court reiterates its previous considerations regarding the access to water, food, health care and education of the members of the Community (*supra* paras. 194 to 213). In addition, it observes that that the proven situation of extreme vulnerability affected the children in particular. As previously mentioned, the lack of adequate nutrition has affected the development and growth of the children, has increased the normal rates of atrophy in their growth, and has resulted in high rates of malnutrition among them (*supra* para. 201). In addition, the evidence provided reveals that, in 2007, the children of the Community "either did not receive all their vaccinations, or were not vaccinated according to international standards, or did not have any certification of the vaccinations received."[290]

260. It is also a matter of concern that 11 of the 13 members of the Community whose death is attributable to the State (*supra* para. 234) were children. Moreover, the Court notes that the causes of those deaths could have been prevented with adequate medical care or assistance from the State. Hence, it is difficult to consider that the State has taken the special protective measures due to the children of the Community.

261. Regarding the cultural identity of the children of indigenous communities, the Court notes that Article 30 of the Convention on the Rights of the Child[291] establishes an additional and complementary obligation that gives content to Article 19 of the

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[286] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02* of August 28, 2002. Series to No. 17, para. 54; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 184, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 156.

[287] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, supra* note 286, paras. 56, 57 and 60; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 184, and *Case of González et al. ("Cotton Field") v. Mexico, supra* note 14, para. 408.

[288] *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 184, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 164.

[289] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02*, *supra* note 286, para. 86.

[290] *Cf.* Health evaluation in four Enxet Communities, *supra* note 218, folio 2643.

[291] Convention on the Rights of the Child, General Assembly res. 44/25, attachment 44, U.N. GAOR Supp. (No. 49) p. 167, UN Doc. A/44/49 (1989), entry into force September 2, 1990. The State of Paraguay signed this Convention on April 4, 1990, and ratified it on September 25, 1990. Article 30 stipulates:

> In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

American Convention, and that consists of the obligation to promote and protect the right of indigenous children to enjoy their own culture, their own religion, and their own language.[292]

262. In addition, this Court finds that, within the general obligation of the States to promote and protect cultural diversity, a special obligation can be inferred to guarantee the right to a cultural life of indigenous children.[293]

263. In this regard, the Court considers that the loss of traditional practices, such as male and female initiation rites and the Community's languages, as well as the harm arising from the lack of territory, particularly affect the cultural identity and development of the children of the Community, who will not be able to develop that special relationship with their traditional territory and that particular way of life unique to their culture if the necessary measures are not implemented to guarantee the enjoyment of these rights.

264. Based on the above, the Court finds that the State has not adopted the necessary measures of protection for all the children of the Community, in violation of the right established in Article 19 of the American Convention, in relation to Article 1(1) thereof.

XI
OBLIGATION TO RESPECT AND GUARANTEE RIGHTS WITHOUT DISCRIMINATION (ARTICLE 1(1) OF THE AMERICAN CONVENTION)

265. The Commission argued that "this case illustrates the persistence of structural discrimination factors in Paraguayan law with regard to the protection of [the indigenous peoples'] right to the ownership of their ancestral territory and the resources found there." It added that, "even though the Paraguayan State has revealed the general progress of its laws towards recognizing the rights of the indigenous peoples as evidence of compliance with its obligations under Article 2 of the Convention [...], it should be stressed that legal provisions persist in civil, agrarian and administrative law that were applied in this case and that result in the discriminatory functioning of the State system, because they give preference to the protection of the right to 'rationally productive' private property over the protection of the territorial rights of an indigenous population."

266. The representatives indicated that "a policy of discrimination [exists] that leads to an easily-observable systematic pattern, which also enjoys a high degree of consensus in Paraguay, and which is leading rapidly to the extreme deterioration of the living conditions of the indigenous communities in general, and in this [specific] case [...] of the Xákmok Kásek [Community]." "The Community has had to survive in a context [...] in which the indigenous peoples were treated as objects without voice or opinion." "The State has not taken specific measures [...] designed to eradicate discrimination against the indigenous peoples, even though it has signed the International Convention on the Elimination of All Forms of Racial Discrimination (domestic Law 2128/03)." They added that "the supposed factual and legal impossibility [of granting title to the land,] mentioned by the State of Paraguay, is nothing more than the deliberate application of a racist and discriminatory policy [...], It is an ingrained situation that has not changed substantively even today, a fact revealed by the Government's positions in this case."

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[292] *Cf. Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 167.

[293] *Cf. Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 168.

267. The State did not respond specifically to these arguments.

268. The Court has established that Article 1(1) of the Convention is a general rule the content of which extends to all the provisions of the treaty, and establishes the obligation of the States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein "without any discrimination." That is to say, whatever the origin or the form it takes, any conduct that could be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it.[294] This State's non-compliance, through any discriminatory practice, with the general obligation to respect and ensure human rights results in its international responsibility.[295] Thus, there is an indissoluble connection between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.

269. The principle of equal and effective protection under the law and of non-discrimination constitutes an outstanding element of the system for the protection of human rights embodied in various international instruments[296] and developed by legal doctrine and case law. In the current stage of the evolution of international law, the basic principle of equality and non-discrimination has entered the sphere of *jus cogens*.

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[294] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984.* Series A No. 4, para 53.

[295] *Cf. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003.* Series to No. 18, para. 85.

[296] Some of these international instruments are: the OAS Charter (Article 3(l)); the American Convention on Human Rights (Articles 1 and 24); the American Declaration on the Rights and Duties of Man (Article II); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 3); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará" (Articles 4(f), 6 and 8(b)); the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (Articles I(2)(a), II, III, IV, and V); the United Nations Charter (Article 1(3)); the Universal Declaration of Human Rights (Articles 2 and 7); the International Covenant on Economic, Social and Cultural Rights (Articles 2(2) and 3); the International Covenant on Civil and Political Rights (Articles 2(1) and 26); the International Convention on the Elimination of All Forms of Racial Discrimination (article 2); the Convention on the Rights of the Child (article 2); the Declaration on the Rights of the Child (Principle 1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (articles 1(1), 7, 18(1), 25, 27, 28, 43(1), 43(2), 45(1), 48, 55, and 70); the Convention on the Elimination of All Forms of Discrimination against Women (articles 2, 3, 5, 7 to 16); the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (articles 2 and 4); the Declaration of the International Labour Organization (ILO) on Fundamental Principles and Rights at Work and its Follow-up (2(d)); International Labour Organization (ILO) Convention No. 97 on Migrant Workers (revised) (article 6); International Labour Organization (ILO) Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (articles 1 to 3); International Labour Organization (ILO) Convention No. 143 (ILO) concerning Migrant Workers (Supplementary Provisions) (articles 8 and 10); International Labour Organization (ILO) Convention No. 168 concerning Employment Promotion and Protection against Unemployment (article 6); the Proclamation of Teheran, the Teheran International Human Rights Conference, May 13, 1968 (paras. 1, 2, 5, 8, and 11); the Declaration and Programme of Action, World Conference on Human Rights, 14 to 25 June 1993 (I(15); I(19); I(27); I(30); II(B)(1), articles 19 to 24; II(B)2, articles 25 to 27); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (articles 2, 3, 4(1), and 5); the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Declaration and Programme of Action (paragraphs 1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66 and 104 of the Declaration); the Convention Relative to the Struggle against Discrimination in Education (articles 1, 3, and 4); the Declaration on Race and Racial Prejudice (Articles 1, 2, 3, 4, 5, 6, 7, 8, and 9); the Declaration on Human Rights of Individuals Who are not Nationals of the Country in which they Live (article 5(1)(b) and 5(1)(c); the Charter of Fundamental Rights of the European Union (articles 20 and 21); the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 14); the European Social Charter (article 19(4), 19(5) and 19(7)); Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 1); the African Charter on Human and Peoples' Rights, Banjul Charter (articles 2 and 3), the Arab Charter on Human Rights (article 2), and the Cairo Declaration of Human Rights in Islam (article 1).

The juridical structure of national and international public order is based on this principle, and it permeates the whole legal system.[297]

270. With regard to indigenous peoples, the Court, in its case law, has specifically established that "it is essential that the States grant effective protection that takes into account their particularities, their economic and social characteristics, and also their situation of special vulnerability, their customary law, values, customs and practices."[298]

271. In addition, the Court has indicated that, "the States must abstain from taking measures that are, in any way, directly or indirectly designed to create *de jure* or *de facto* situations of discrimination."[299] The States are obliged "to adopt positive measures to reverse or change discriminatory situations that exist in their societies and that prejudice a specific group of people. This includes the special obligation of protection that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations."[300]

272. Nevertheless, the Court, referring to Articles 1(1) and 24 of the Convention, has indicated that, "the difference between the two articles is that the general obligation contained in Article 1(1) refers to the State's obligation to respect and ensure 'without discrimination' the rights contained in the American Convention[. I]n other words, if a State discriminates in the respect or guarantee of a treaty-based right, it would violate Article 1(1) and the substantial right in question. If, on the contrary, the discrimination refers to unequal protection by domestic law, it would violate Article 24."[301]

273. In this case it has been established that the situation of extreme and special vulnerability of the members of the Community is due, *inter alia,* to the lack of adequate and effective remedies that protect the rights of the indigenous peoples in practice and not just formally; the limited presence of the State institutions that are obliged to provide supplies and services to the members of the Community, particularly food, water, health care and education, and the prevalence of a vision of property that grants greater protection to the private owners over the indigenous peoples' territorial claims, thus failing to recognize their cultural identity and threatening their physical subsistence. In addition, it has been proved that the declaration of a private nature reserve on part of the land reclaimed by the Community did not take into account its territorial claim and it was not consulted about this declaration.

274. All this reveals *de facto* discrimination against the members of the Xákmok Kásek Community, which has been marginalized in the enjoyment of the rights that

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[297] *Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, supra* note 295, para. 101 and *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 184.

[298] *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra* note 5, para. 63; *Case of the Saramaka People v. Suriname, supra* note 16, para. 178, and *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs.* Judgment of November 26, 2008. Series C No. 190, para. 96.

[299] *Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, supra* note 295, para. 103.

[300] *Cf. Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03*, *supra* note 295, para. 104, and United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, thirty-seventh session, October 11, 1989, HRI/GEN/1/Rev.7.

[301] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84, *supra* note 294, paras. 53 and 54, and *Case of Apitz Barbera et al. ("First Court of Administrative Law") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209.

the Court has declared violated in this judgment. In addition, it is evident that the State has not taken the necessary positive measures to reverse that exclusion.

275. Based on the above, and in accordance with the violations of the rights declared previously, the Court finds that the State has not adopted sufficient and effective measures to guarantee, without discrimination, the rights of the members of the Xákmok Kásek Community and its members, in keeping with Article 1(1) of the Convention, in relation to the rights recognized in Articles 21(1), 8(1), 25(1), 4(1), 3, and 19 thereof.

XII
REPARATIONS
(Application of Article 63(1) of the American Convention)

276. Based on the provisions of Article 63(1) of the Convention, the Court has indicated that any violation of an international obligation that results in harm entails the obligation to provide adequate reparation,[302] and that this provision "reflects a customary norm that is one of the fundamental principles of contemporary international law on State responsibility."[303]

277. The Court will therefore proceed to examine the claims of the Commission and the representatives, as well as the arguments of the State in this regard, so as to order measures tending to repair the violations declared in this judgment.

1. Injured party

278. The Court will consider as injured parties the members of the Xákmok Kásek Community who suffered the violations declared in Chapters VI, VII, VIII, IX, X, and XI of this judgment.

2. Measures of restitution

279. The Commission asked that the State be ordered to take the necessary measures to realize the right to property of the Community and its members and their possession of their ancestral territory as soon as possible; "in particular by delimiting, demarcating and granting title to their land, in accordance with their customary law, values, practices and customs." It also asked that the Court order "the adoption of the necessary measures to safeguard the habitat claimed by the indigenous community, until the ancestral territory has been delimited, demarcated and titled in favor of the Community, [...] specifically those measures intended to prevent immediate and irreparable harm due to the activities of third parties." In addition, it indicated that only "if objective and well-founded reasons make it impossible for the State to award the land identified as the Community's traditional territory, the State must grant it alternate lands of sufficient size and quality, to be selected by consensus." In addition, the representatives asked that the State be ordered to return their lands, in sufficient

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302 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25; *Case of Chitay Nech et al. v. Guatemala supra* note 8, para. 227, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 211.

303 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 62; *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 227, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 211.

size and quality, in keeping with the Community's claim, in the area identified as being part of their traditional habitat, and to grant title to them free of charge.

280. When answering the application, the State acquiesced on this point and recognized the "right to ownership of the communal land of the Xákmok Kásek Indigenous Community in the manner and under the conditions established by the Constitution and the current laws of the Republic of Paraguay." In particular, it indicated that it confirmed "its willingness to grant the Community free of charge [...], as provided for by the Constitution and the laws currently in force, an area of land that accorded with the stable and permanent number of [its] members [...], within the land delimited in the Paraguayan Chaco, the traditional site of the Enxet-Lengua people [...] and without affecting the rights of third parties that are justified by rights to property and rational exploitation." Lastly, it asked the Court to "authorize the State to seek a piece of property, within the historical territory of the Enxet-Lengua, where it can grant ownership to the new Xákmok Kásek Community, something that the State has never opposed." Moreover, the State indicated that, regarding the award of title to the 1,500 hectares, "the transfer of the property is being processed before the Government Notary in order to formalize the registration of the public deed in favor of the Community."

2.1. Return of the traditional territory claimed

281. In light of the conclusions in Chapter VI concerning Articles 21(1), 8(1) and 25(1) of the Convention, the Court considers that the return to the members of the Xákmok Kásek Community of their traditional land is the measure of reparation that comes closest to *restitutio in integrum*, and therefore it decides that the State must take all the necessary legislative, administrative and any other measures to ensure the Community members' right to ownership of their traditional lands and, consequently, to the use and enjoyment of those lands.

282. The Community's connection to those lands is indissoluble and fundamental for its cultural subsistence and its food supply, which is why its return is so important. Contrary to what the State has indicated, the land to be returned to the members of the Community is not just any piece of property "within the historical territory of the Enxet Lengua people," but rather the territory that, in this case, the members of the Community have proved is their specific traditional territory and the most suitable for the indigenous settlement (*supra* para. 107).

283. Consequently, the State must return to the members of the Community the 10,700 hectares claimed by them and identified as *Mopey Sensap* (today *Retiro Primero*) and *Makha Mompena* (today *Retiro Kuñataí*). The specific identification of this territory and its borders must be made by the State within one year of notification of this judgment, using the appropriate technical mechanisms for this purpose, and with the participation of the leaders of the Community and their freely chosen representatives.

284. Once the traditional territory of the members of the Community is fully identified in the manner and within the time frame indicated in the preceding paragraph, if it is owned by private entities, whether natural or legal persons, the State, through its competent authorities, must decide whether it is possible to expropriate the land for the indigenous peoples. To decide this question, the State authorities must follow the criteria established in this judgment (*supra* paras. 85 to 170), taking very much into account the special relationship that the indigenous peoples have with their lands for the preservation of their culture and their survival. At no time should the decision of the domestic authorities be based exclusively on the fact

that the land is owned privately or that it is being rationally exploited, based on the considerations presented in paragraph 149 of this judgment. To do this would be to ignore this ruling and constitute a violation of the commitments assumed by Paraguay of its own free will.

285. The State has three years from notification of this judgment to return the traditional lands to the members of the Community. To this end, it must take a decision on the possibility of expropriation and, if appropriate, implement this. The State must carry out the necessary measures to achieve this objective within the said time frame. Moreover, within this time frame, the State can, if necessary, expedite the negotiations to purchase the corresponding lands.

286. If, for objective and well-founded reasons – which, the Court reiterates, cannot be, exclusively, the fact that the land is in private hands or being rationally exploited – the Paraguayan authorities decide to give priority to the right to property of the private entities rather than to the right to property of the members of the Community, it must provide the latter with alternate land within the traditional territory of their ancestors. The selection of this land must be made with the consensus of the members of the Community, in keeping with their own ways of making decisions. The Court reiterates that the offer of alternate lands will only be admissible when it has been adequately assessed, as indicated in this judgment, that the expropriation is not appropriate and that the negotiations to purchase the land have failed.

287. Following a well-founded request from the State, the Court may grant it an extension of one year to continue the respective domestic procedures commenced for the return of the traditional land. The request for an extension must be presented to the Court at least three months before the expiry of the three-year time limit established in paragraph 285 of this judgment. If the State does not present its request for an extension as indicated above, the Court will understand that it has waived its possibility of requesting it. The Court will reject any request that is time-barred. If the request for an extension is presented opportunely, the Court will forward it to the Commission and the representatives of the victims so that they can submit any observations they deem pertinent. The Court will decide whether or not to grant the extension, taking into account the reasons put forward by the State in its request, the observations of the Commission and the representatives, and the measures already taken by the State to comply with its obligation to deliver the land to the members of the Community. The Court will not grant the extension if, in its opinion, the State has not taken sufficient steps to comply with this measure of reparation. Lastly, the State must report in a precise and detailed manner every six months on the measures taken to return the traditional territory to the victims.

288. Based on the above, the Court orders that, if the three-year time frame established in this judgment expires, or if the extension granted in keeping with paragraph 287 expires or is denied by the Court, without the State having delivered the traditional lands or, if applicable, the alternate lands, in keeping with the provisions of paragraphs 283 to 286, it must pay the leaders of the Community, on behalf of its members, the sum of US$10,000.00 (ten thousand United States dollars) for each month of delay. The Court understands this reparation as compensation to the victims for the State's failure to comply with the time limits established in this judgment and the resulting pecuniary and non-pecuniary damage, so that it does not constitute compensation that replaces the return of the traditional or alternate lands to the members of the Community.

289. The calculation of the months for which the State must compensate the Community for its delay in complying with this judgment will cease when the traditional land, or if applicable, the alternate land, is finally awarded to them.

290. During the procedure of monitoring compliance with this judgment, the Court will establish the dates on which the State must make the respective payments to the leaders of the Community for the delay in complying with this measure of reparation. These payments must be made in keeping with the guidelines stipulated in the section on "method of payment" of this judgment (*infra* paras. 332 to 336). If the State fails to comply with the dates established by the Court for making these payments, it must pay interest on arrears, in keeping with the provisions of paragraph 336 *infra*. The corresponding amounts shall be delivered to the duly recognized leaders of the Community, who will distribute the money as the Community decides based on its own decision-making methods.

2.2. Protection of the territory claimed

291. The State must not carry out any action that further obstructs the effects of this judgment. In this regard, until the traditional territory has been awarded to the Community, the State must ensure that the territory is not harmed by the actions of the State itself or of private third parties. Thus, the State shall ensure that the area is not deforested, that the sites that are of cultural importance to the Community are not destroyed, that the land is not transferred, and that it is not exploited in such a way as to cause irreparable harm to the area or to its natural resources.

2.3. Granting title to the "25 de Febrero" lands

292. The State indicated that it was processing the granting of title to the 1,500 hectares of the place known as "25 de Febrero," where the Community is currently located. However, it underlined certain obstacles to the granting of title and registration of the land owing to formal problems concerning the representation and registration of community leaders.

293. In this regard, the Court considers that the State itself must resolve all these formal obstacles to the granting of title to this land, in keeping with the provisions of paragraphs 48 and 49. Specifically, through the competent authorities, the State must guarantee the rectification of the discrepancies regarding the registration of the leaders of the Community for the necessary legal effects. The State must do this within six months of notification of this judgment.

294. Furthermore, this Court orders the State, within one year of notification of this judgment, to grant title to the 1,500 hectares ceded to the members of the Xákmok Kásek Community by the Angaité communities (*supra* paras. 76 to 78). This will allow the members of the Community to have a territory and ensure their survival provisionally, while its traditional land is demarcated and title is granted. The Court considers it relevant to stress the solidarity and unity of the Angaité communities with the Xákmok Kásek Community.

295. The Court emphasizes that the granting of title to the said 1,500 hectares does not affect or influence the return of the traditional territory to which the members of the Xákmok Kásek Community have a right, in accordance with paragraphs 281 to 290 of this judgment.

3. Measures of Satisfaction

3.1 Public act of acknowledgement of international responsibility

296. The representatives requested that a public act of acknowledgement of responsibility be organized in the Community's main settlement, according to their customs and traditions, and that it be disseminated by the media. The State indicated that it "had no objection to making a public acknowledgement, provided that the exact nature of the Community's intention was defined [...] and [...] that it was organized in a similar way to the act carried out in the *Yakye Axa* and *Sawhoyamaxa* cases."

297. As it has ordered in other cases,[304] in order to repair the damage caused to the victims, the Court finds it necessary that the State carry out a public act to acknowledge its international responsibility for the violations declared in this judgment. This act must be agreed upon previously with the Community. Furthermore, the act must take place at the current site of the Community, during a public ceremony attended by senior State authorities and the members of the Community, including those who live in other areas; to this end, the State must provide the necessary means to facilitate transportation. The leaders of the Community must be permitted to participate in the said act. Moreover, the State must conduct this act in the Community's languages, and in Spanish and Guaraní, and must broadcast it on a radio station with wide coverage in the Chaco. The State must organize this act within one year of notification of this judgment.

3.2 Publication and broadcast of the judgment

298. Although the representatives did not request this measure of reparation, the Court finds that it is relevant and important as a measure of satisfaction due to the length of time that the Community has been claiming its rights. Therefore, as the Court has ordered in other cases,[305] the State must publish once, in the Official Gazette, paragraphs 1 to 5, 32, 42, 43, 48 to 50, 64 to 84, 89, 95, 99, 101, 102, 106, 107, 109 to 116, 119 to 121, 127 a 131, 134 to 138, 143 to 145, 149 to 154, 158, 161, 162, 166, 168 to 170, 182, 189 to 193, 195, 196, 200 to 202, 205, 206, 208, 213 to 217, 222, 223, 225 to 234, 240, 244, 251 to 255, 259 to 260, 263, 264, 273 to 275 and 278, all including the headings of each chapter and the respective section - without the footnotes - as well as the operative paragraphs of this judgment. It must publish the official summary of this judgment prepared by the Court in a daily newspaper with national circulation. In addition, as the Court has ordered in previous cases,[306] this judgment must be published in its entirety on an official web page, to be available for one year. The State must publish this judgment in the newspapers and on the Internet, within six months of notification of this judgment.

299. Moreover, as it has previously,[307] the Court finds it appropriate that the State publicize the official summary of the judgment delivered by the Court on a radio

[304] *Cf. Case of Huilca Tecse v. Peru. Merits, reparations and costs.* Judgment of March 3, 2005. Series C No. 121, para. 111; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 261, *and Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 222.

[305] *Cf. Case of Barrios Altos v. Peru. Reparations and costs.* Judgment of November 30, 2001. Series C No. 87, operative paragraph 5(d)); *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 244, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 220.

[306] *Cf. Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs.* Judgment of March 1, 2005. Series C No. 120, para. 195; *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 244, and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 8, para. 220.

[307] *Cf. Case of Yatama v. Nicaragua, supra* note 297, para. 253; *Case of Tiu Tojín v. Guatemala, supra* note 298, para. 108, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 245.

station with wide coverage in the Chaco. To this end, the State must have the official summary of the judgment translated into the Sanapaná, Enxet and Guaraní languages. The radio broadcasts must be made on the first Sunday of the month at least four times and a recording of the broadcasts must be forwarded to the Court when they have been made. The State has six months to complete this, as of notification of this judgment.

4. Rehabilitation measures: Provision of goods and basic services

300. The Commission asked that the State be ordered to "immediately provide" the members of the Community with adequate supplies and services, including water, education, medical attention, and access to the food necessary for their subsistence. The representatives agreed with this request. The State indicated that it "accepted [...] the request to establish a health clinic and a secondary school, and to provide potable water and sanitation infrastructure to the Community."

301. Based on the conclusions presented in Chapter VII with regard to Article 4 of the American Convention, the Court orders that, until the traditional territory or, if applicable, alternate land is delivered to the members of the Community, the State must take the following measures immediately, periodically, or permanently: (a) provision of sufficient potable water for the consumption and personal hygiene of the members of the Community; (b) medical and psycho-social attention to all the members of the Community, especially the children and the elderly, together with periodic vaccination and deparasitization campaigns that respect their ways and customs; (c) specialized medical care for pregnant women, both pre- and post-natal and during the first months of the baby's life; (d) delivery of food of sufficient quality and quantity to ensure an adequate diet; (e) installation of latrines or any other adequate type of sanitation system in the Community's settlement, and (f) provision of the necessary materials and human resources for the school to guarantee the Community's children access to basic education, paying special attention to ensuring that the education provided respects their cultural traditions and guarantees the protection of their own language. To this end, the State must consult the Community as necessary.

302. The obligations indicated in the preceding paragraph must be complied with immediately.

303. Notwithstanding the foregoing, to ensure that the provision of basic supplies and services is adequate and regular, the State must prepare a study within six months of notification of this judgment that establishes the following:

a) Regarding the provision of potable water: (1) the frequency of the deliveries; (2) the method to be used to deliver the water and ensure its purity, and (3) the amount of water to be delivered per person and/or per family;

b) Regarding the medical and psycho-social care, and the delivery of medicines: (1) the frequency required for the medical personnel to visit to the Community; (2) the main illnesses and diseases suffered by the members of the Community; (3) the medicines and treatment required for those illnesses; (4) the required pre- and post-natal care, and (5) the manner and frequency with which the vaccination and deparasitization should be carried out;

c) Regarding the supply of food: (1) the type of food to be supplies to the members of the Community to guarantee a nutritious diet; (2) the

frequency with which the deliveries should be made; (3) the amount of food to be supplied per person and/or family.

d) Regarding the effective and hygienic management of biological waste: the type and number of latrines to be provided, and

e) Regarding the supply of materials and human resources to the Community's school: (1) the physical and human resources that the school needs to guarantee an adequate bilingual education; (2) the materials that each student needs for an adequate education, and (3) the inputs that the school's teachers require in order to give their classes.

304. To prepare the study mentioned in the preceding paragraph, the experts in charge of it must have the specific technical knowledge required for each task. In addition, the experts must always include the point of view of the members of the Community, expressed in keeping with their decision-making practices. This study could be prepared by the Inter-institutional Commission (CICSI).[308]

305. When the State forwards the report to the Court, it will be forwarded to the Commission and the representatives so that they can submit any observations they deem pertinent. Taking the opinions of the parties into account, the Court may order the State to require its experts to complete or expand the study. From then on, the State must adapt the delivery of basic supplies and services to the members of the Community, ordered in paragraph 301, to the conclusions reached by the experts in their report.

306. Lastly, given the difficulties that the members of the Community have to access health clinics (*supra* para. 208), the State must establish, in the place where the Community is temporarily located, namely, "25 de Febrero," a permanent health clinic with the necessary medicines and supplies to provide adequate health care. To do this, the State has six months as of notification of this judgment. In addition, it must establish immediately a system of communication in the said settlement that allows the victims to contact the competent health-care authorities for attention to emergency cases. If necessary, the State must provide transportation for the individuals who require this. Subsequently, the State must ensure that the health clinic and the communication system are moved to the place where the Community settles permanently.

5. Guarantees of non-repetition

5.1. Implementation of registration and documentation programs

307. The representatives and the Commission asked that a system be implemented to make it possible to register births and issue identity cards to the Community's children "without having to travel to the capital." The State provided information on the work that had been carried out in the Community in relation to the registration of births and the issue of identity cards and ethnic identity cards to its members (*supra* para. 247).

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[308] *Cf.* Decree No. 1,595 of February 26, 2009, "creating and appointing the members of the Inter-institutional Commission responsible for implementing the necessary measures to Comply with the International Judgments (CICSI) delivered by the Inter-American Court of Human Rights and the recommendations issued by the Inter-American Commission on Human Rights" (attachments to the answer to the application, attachment 5(5), tome VIII, folios 3591 to 3595).

308. Based on the conclusions established in Chapter IX concerning Article 3 of the Convention, the Court orders the State to implement, within one year of notification of this judgment at the most, a registration and documentation program, so that the members of the Community can register and to obtain their identity documents.

5.2. Adapting domestic law to the Convention

309. Based on the Court's conclusions in Chapter VI of this judgment, the Court finds it necessary that the State ensure the effective enjoyment of the rights recognized by the American Convention, by its Constitution and by its laws. The Court considers that the State's international responsibility in this case has resulted from the fact that it had failed to adapt its laws in order to guarantee the indigenous communities' right to ownership of their traditional territory, and also that institutional practices limit or fail to guarantee fully the effective application of the laws that have been established formally to guarantee the rights of the members of the indigenous communities. In the Court's opinion, the social interest of property for the indigenous communities should signify that the circumstance that it is indigenous ancestral land should be taken into account, and should be reflected at both the substantive and the procedural levels.

310. Consequently, in accordance with Article 2 of the American Convention, within two years, the State must adopt in its domestic law the necessary legislative, administrative and any other measures to establish an effective system for indigenous peoples to claim their ancestral or traditional lands, which makes it possible to implement their right to property. This system must establish substantive norms that guarantee: (a) that the importance to the indigenous peoples of their traditional lands is taken into account, and (b) that it is not enough that the land claimed is owned privately and is being exploited rationally to reject any land claim. Furthermore, this system must establish that a judicial authority has the competence to decide the disputes that arise between the right to property of private entities and that of the indigenous peoples.

5.2. Regarding the decree declaring part of the land claimed by the members of the Community a protected wooded area

311. With regard to judicial practice, this Court has established that it is aware that domestic judges and tribunals are subject to the rule of law and, therefore, they are obliged to apply the legal provisions in force.[309] However, when a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to it, which obliges them to ensure that the effects of the provisions of the Convention are not weakened by the application of laws contrary to its object and purpose. In other words, the Judiciary must *ex officio* exercise "control that domestic laws are in accordance with the American Convention, evidently, within the framework of its respective competences and the corresponding procedural regulations. In this task, the Judiciary must take into account not only the treaty, but also the interpretation given to it by Inter-American Court, ultimate interpreter of the American Convention.[310]

312. In this case, Decree No. 11,804 issued on January 31, 2008, declaring part of the land claimed by the Community a protected wooded area under private ownership,

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[309] *Cf. Case of Almonacid Arellano et al. v. Chile, supra* note 39, para. 124; *Case of La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 173, and *Case of Radilla Pacheco v. Mexico, supra* note 12, para. 339.

[310] *Cf. Case of Almonacid Arellano et al. v. Chile, supra* note 39, para. 124; *Case of La Cantuta v. Peru, supra* note 308, para. 173, and *Case of Radilla Pacheco v. Mexico, supra* 12, para. 339.

disregarded the indigenous peoples' claim to the land filed with the INDI and, according to the State's own specialized domestic agencies, it should be considered null (*supra* para. 181 and 161).

313. Consequently, the State must take the measures necessary to ensure that Decree No. 11,804 is not an obstacle to returning the traditional land to the members of the Community.

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314. With regard to the other measures of reparation requested by the representatives in their pleadings and motions brief,[311] the Court considers that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the consequences of the violations suffered.

6. Compensation

6.1. Pecuniary damage

315. In its case law, the Court has developed the concept of pecuniary damage and has established that pecuniary damage entails "loss or harm to the income of the victim, the expenses incurred owing to the facts, and the consequences of a monetary nature that have a causal relationship with the facts of the case."[312]

316. The Commission indicated that, to determine the pecuniary damage, the Court must take into account the cosmovision of the Community and the effect on its members and their cosmovision of not having possession of their traditional habitat that, among other consequences, has prevented them from carrying out their traditional subsistence activities. The representatives asked the Court to establish, in equity, a compensatory amount for pecuniary damage taking into account that the members of the Community and its leaders have had to undertake numerous measures and travel a great deal during the years that the land claim action has lasted. The State considered that there is no relationship between the Community's petition on the compensation claimed and the facts denounced.

317. The Court finds that the actions and the measures taken by the Community generated expenses that must be considered as consequential damage, in particular with regard to the actions or the measures taken to claim their land, because the leaders or members had to travel in order to carry out these procedures. However, the Court observes that no documents and receipts were submitted to support the expenses incurred.

318. Consequently, the Court, in equity, establishes the sum of US$10,000.00 (ten thousand United States dollars) as compensation for travel-related expenditure. This sum must be delivered to the leaders of the Community within two years of notification

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[311] The representatives requested: (i) the establishment of a scholarship fund for secondary and university education for the youth of the Xákmok Kásek Community (ii) the establishment of a project fund to strengthen the culture and languages of the Enxent, Angaité, and Sanapaná peoples of the Paraguayan Chaco, to be implemented with the participation of the Xákmok Kásek Community and other communities of the Lower Chaco, and (iii) the establishment of a consultation mechanism for indigenous peoples and/or communities, with regulations for implementing the provisions of ILO Convention 169, to ensure their participation in State procedures that affect their interests.

[312] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 275, and *Case of Chitay Nech et al. v. Guatemala*, *supra* note 8, para. 261.

of this judgment, so that the Community may invest this money as they decide, in accordance with their own decision-making practices.

6.2. Non-pecuniary damage

319. In its case law, the Court has also developed the concept of non-pecuniary damage and established that non-pecuniary damage includes, "the suffering and anguish caused to the direct victim and to the next of kin, the harm to values that are of great significance to the individual, and also the changes of a non-pecuniary nature in the living conditions of the victim and his or her family."[313]

320. The Commission argued that "non-pecuniary damage is caused not only by the loss of a loved one, but also by the inhuman conditions [that affected] the members of the Xákmok Kásek Community, a factor that, in this case, is especially important because that situation was due to the absence of a guarantee [...] of the Community's right to its ancestral territory." It asked "that the State be ordered [...] to pay an amount to the Community and its members based on the non-pecuniary damage they have suffered as a direct consequence of the violations [...] of the American Convention." In addition, the Commission asked the Court to "order the State to pay the next of kin of the deceased members of the Community the amount that it determined, in equity." The representatives agreed with the Commission.

321. When establishing the non-pecuniary damage, the Court will assess the special meaning that land has for indigenous peoples in general, and for the Xákmok Kásek Community in particular (*supra* paras. 107, 149 and 174 to 182). This means that any denial of the enjoyment or exercise of property rights harms values that are very significant to the members of those peoples, who run the risk of losing or suffering irreparable harm to their life and identity and to the cultural heritage to be passed on to future generations.

322. The Court also takes into consideration that the State committed itself "[to] the integral development of this Community by the design and execution of projects for the collective use of the property awarded, with either national or international funding."

323. Based on the above and as it has in previous cases,[314] the Court considers it appropriate to order, in equity, that the State create a community development fund as compensation for the non-pecuniary damage that the members of the Community have suffered. This fund and the programs it will support must be implemented on the land awarded to the members of the Community in accordance with paragraphs 283 to 286 and 306 of this judgment. The State must allocate the sum of US$700,000.00 (seven hundred thousand United States dollars) to this fund, which must be used to implement educational, housing, nutritional and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community. These projects must be decided by an implementation committee, described below, and must be completed within two years of the delivery of the lands to the members of the Community.

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[313] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs, supra* note 303, para. 84; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 255 and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 273.

[314] *Case of the Yakye Axa Indigenous Community v. Paraguay, supra* note 5, para. 234; *Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 164, para. 16, and *Case of the Saramaka People v. Suriname*, *supra* note 16, paras. 201 and 202.

324. The committee mentioned in the preceding paragraph will be responsible for determining how the development fund is implemented and must be established within six months of the delivery of the lands to the members of the Community, with three members: a representative of the indigenous Community, a representative of the State and a third member appointed by mutual agreement between the victims and the State. If the State and the representatives fail to reach agreement regarding the members of the implementation committee within the said time frame, the Court will decide.

325. Moreover, in light of the conclusions reached in the chapter of this judgment on Article 4(1) of the Convention, the Court considers it appropriate, in accordance with the equity principle, and based on a prudent assessment of the non-pecuniary damage, that the State pay the sum of US$260,000.00 (two hundred and sixty thousand United States dollars) to the leaders of the Xákmok Kásek Community. This compensation for non-pecuniary damage for the members of the Community who died (*supra* para. 234) must be made available to the said leaders of the Community within one year of notification of this judgment, so that, in accordance with their customs and traditions, they may distribute the amount that corresponds to each family member of those who died or invest the money as the Community sees fit, in keeping with its own decision-making procedures.

7. Costs and expenses

326. The Commission and the representatives asked that the State be ordered to pay the costs and expenses incurred in processing the judicial, administrative, and legislative proceedings filed by the victims or their representatives at the domestic level, as well as those arising at the international level during the processing of the case before the Commission and the Court.

327. In their final written arguments, the representatives requested US$32,534.17 (thirty-two thousand five hundred and thirty-four United States dollars and seventeen cents), which includes items for fieldwork, travel to the Inter-American Commission, travel to litigate before the Court, and mailing expenses.

328. The State indicated, with regard to the request for payment of costs and expenses related to the domestic proceedings, that "all the proceedings filed by [the] lawyers were insufficient and inconclusive." It also indicated that "the Community's representatives are abusive, because, in addition to their negligence in the professional task entrusted to them, they add the absurd request to order the State to pay costs that they do not deserve owing to the deficient service provided."

329. The Court has indicated that "the claims of the victims or their representatives with regard to costs and expenses, and the vouchers that support them, must be presented to the Court at the first procedural moment granted them, that is, in the pleadings and motions brief; this does not preclude them from updating these claims subsequently, in keeping with the new costs and expenses incurred in the proceedings before this Court."[315] Furthermore, the Court reiterates that "the submission of probative documents is not sufficient; the parties are also required to present arguments that relate the evidence to the fact represented and, in the case of alleged

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[315] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 275; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 302, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 284.

financial disbursements, the items and their justification must be clearly established."[316]

330. The Court has verified that the representatives incurred expenses before this Court with regard to transportation, and courier and communication services, among others, and they forwarded some vouchers with their final arguments brief. However, the representatives did not submit detailed evidence on the rest of the expenses that they have supposedly incurred, although it is logical to assume that the domestic proceedings and the proceedings before the Inter-American Commission entailed certain expenses.

331. Based on the above, the Court establishes, in equity, the amount of US$25,000.00 (twenty-five thousand United States dollars) for expenses in the litigation of this case. The said amount must be paid by the State to the leaders of the Community, who in turn, will pay Tierraviva the amount the Community considers appropriate to reimburse the expenses incurred by this organization. When monitoring compliance with this judgment, the Court may require the State to reimburse the victims or their representatives the duly authenticated reasonable costs.

8. Means of complying with the payments ordered

332. The State must make the payments of the compensation for pecuniary and non-pecuniary damages, as well as the reimbursement of costs and expenses, directly to the Community through their duly chosen leaders, in keeping with their traditions and customs. This must be done within two years of notification of this judgment and in the terms of the following paragraphs.

333. The State must comply with its pecuniary obligations by payment in United States dollars or the equivalent in national currency, using the exchange rate in force on the New York, United States of America, market the day before the payment is made.

334. If, for reasons that can be attributed to the beneficiaries of the compensation, it is not possible to pay the amounts established within the time specified, the State shall deposit the said amounts in an account or a certificate of deposit in their favor in a Paraguayan financial institution, under the most favorable financial conditions allowed by banking practice and law. If, after 10 years, the amount deposited has not been claimed, it shall be returned to the State with the accrued interest.

335. The amounts assigned in this judgment must be delivered to the Community in full, as established in this judgment, with no reductions for eventual taxes or charges

336. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to the bank interest on arrears in Paraguay.

XIII
OPERATIVE PARAGRAPHS

337. Therefore,

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[316] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra* note 314, para. 277; *Case of the "Dos Erres" Massacre v. Guatemala, supra* note 12, para. 301, and *Case of Chitay Nech et al. v. Guatemala, supra* note 8, para. 284.

THE COURT

DECIDES,

Unanimously,

1. To reject the State's request to suspend these proceedings, in the terms of paragraphs 36 to 50 of this judgment.

DECLARES,

By seven votes to one, that:

2. The State violated the rights to communal property, judicial guarantees and judicial protection recognized in Articles 21(1), 8(1), 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the Xákmok Kásek Community, in the terms of paragraphs 54 to 182 of this judgment.

By seven votes to one, that:

3. The State violated the right to life, established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community, in the terms of paragraphs 195, 196, 202 to 202, 205 to 208 and 211 to 217 of this judgment.

By seven votes to one, that:

4. The State violated the right to life established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Sara Gonzáles López, Yelsi Karina López Cabañas, Remigia Ruiz, Aida Carolina Gonzáles, NN [Note: NN = no first name] Ávalos or Ríos Torres, Abundio Inter Dermott, NN Dermott Martínez, NN García Dermott, Adalberto Gonzáles López, Roberto Roa Gonzáles, NN Ávalos or Ríos Torres, NN Dermontt Ruiz and NN Wilfrida Ojeda, in the terms of paragraphs 231 to 234 of this judgment.

Unanimously, that:

5. The State violated the right to personal integrity established in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community, in the terms of paragraphs 242 to 244 of this judgment.

By seven votes to one, that:

6. The State violated the right to juridical personality recognized in Article 3 of the American Convention, in relation to Article 1(1) thereof, to the detriment of NN Jonás Ávalos or Jonás Ríos Torres, Rosa Dermott, Yelsi Karina López Cabañas, Tito García, Aída Carolina González, Abundio Inter. Dermot, NN Dermott Larrosa, NN Ávalos or Ríos Torres, NN Dermott Martínez, NN Dermott Larrosa, NN García Dermott, Adalberto González López, Roberto Roa Gonzáles, NN Ávalos or Ríos Torres, NN Ávalos or Ríos Torres; NN Dermott Ruiz, Mercedes Dermott Larrosa, Sargento Giménez, and Rosana Corrientes Domínguez, in the terms of paragraphs 251 to 254 of this judgment.

Unanimously, that:

7. The State did not violate the right to juridical personality recognized in Article 3 of the American Convention, to the detriment of the Xákmok Kásek Community, in the terms of paragraph 255 of this judgment.

Unanimously, that

8. The State violated the rights of the child established in Article 19 of the American Convention, in relation to Article 1(1) thereof, to the detriment of all the children of the Xákmok Kásek Community, in the terms of paragraphs 259 to 264 of this judgment.

By seven votes to one, that

9. The State failed to comply with its obligation not to discriminate established in Article 1(1) of the American Convention, in relation to the rights recognized in Articles 21(1), 8(1), 25(1), 4(1), 3 and 19 of the American Convention, in the terms of paragraphs 273 to 275 of this judgment.

Unanimously, that:

10. The State indicated its acceptance of certain reparations, according to the provisions of paragraph 32 of this judgment, and this has been assessed positively by the Court, as established in the said paragraph of this judgment.

AND ORDERS,

unanimously, that:

11. This judgment constitutes *per se* a form of reparation.

12. The State must return to the members of the Xákmok Kásek Community the 10,700 hectares it is claiming, in the way and within the time established in paragraphs 281 to 290 of this judgment.

13. The State must ensure immediately that the territory claimed by the Community is not harmed due to actions of the State itself or of private third parties, in the terms of paragraph 291 of this judgment

14. The State must, within six months of notification of this judgment, remove the formal obstacles to granting title to the 1,500 hectares of "25 de Febrero" to the Xákmok Kásek Community, in the terms of paragraph 293 of this judgment.

15. The State must, within one year of notification of this judgment, grant title to the 1,500 hectares of "25 de Febrero" to the Xákmok Kásek Community, in keeping with the provisions of paragraphs 294 and 295 hereof.

16. The State must organize a public act of acknowledgement of responsibility within one year of notification of this judgment, in the terms of paragraph 297 hereof.

17. The State must make the publications ordered in paragraph 298 of this judgment, in the manner and within the time indicated in the said paragraph.

18. The State must broadcast the official summary of the judgment delivered by the Court on a radio station with widespread coverage in the Chaco region, in the way and within the time indicated in paragraphs 301 and 302 of this judgment.

19. While it is processing the award of the traditional land or, if applicable, alternate land to the members of the Community, the State must take immediately, periodically or permanently the measures indicated in paragraphs 301 and 302 of this judgment.

20. The State must prepare the study indicated in paragraph 303 within six months of notification of this judgment in the terms of paragraphs 304 and 305 hereof.

21. The State must establish a permanent health clinic in "25 de Febrero," equipped with the necessary supplies and medicines to provide adequate health care, within six months of notification of this judgment, in the terms of paragraph 306 hereof.

22. The State must establish immediately in "25 de Febrero" the communication system indicated in paragraph 306 of this judgment.

23. The State must ensure that the health care center and the communication system indicated in the twenty-first and twenty-second operative paragraphs *supra* are moved to the site of the Community's definitive settlement once it has recovered its traditional land, in keeping with the provisions of the twelfth operative paragraph *supra*.

24. The State must implement, within one year of notification of this judgment at most, a registration and documentation program, in the terms of paragraph 297 of this judgment.

25. The State must, within two years of notification of this judgment, adopt in its domestic law the legislative, administrative and any other kind of measures that may be necessary to create an effective system for the indigenous peoples to reclaim ancestral or indigenous lands, which allows them to exercise their right to property, in the terms of paragraphs 309 and 310 of this judgment.

26. The State must adopt immediately the necessary measures to ensure that Decree No. 11,804, declaring part of the land claimed by the Community a protected wooded area, will not be an obstacle for the return of the traditional lands, in keeping with the provisions of paragraphs 311 and 313 of this judgment.

27. The State must, within two years of notification of this judgment, pay the amounts established in paragraphs 318, 325 and 331 as compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expenses, as appropriate, in the terms of paragraphs 317, 321, 322 and 330 of this judgment.

28. The State must establish a community development fund, in the terms of paragraph 323 of this judgment, and set up a committee to operate the fund, in the terms and within the time frame established in paragraph 324 of this judgment.

29. The Court will monitor full compliance with this judgment in exercise of its competence and in compliance with its obligations under the American Convention, and will consider the case closed when the State has complied fully with all its provisions. Within six months of notification of the judgment, the State must provide the Court with a report on the measures adopted to comply with it.

Judge Vio Grossi advised the Court of his Concurring Opinion, and Judge *Ad-Hoc* Augusto Fogel Pedrozo advised the Court of his Concurring and Dissenting Opinion, which accompany this judgment.

Done, at San Jose, Costa Rica, on August 24, 2010, in the Spanish and English languages, the Spanish text being authentic.

Diego García-Sayán
President

Leonardo A. Franco | Manuel E. Ventura Robles

Margarette May Macaulay | Rhadys Abreu Blondet

Alberto Pérez Pérez | Eduardo Vio Grossi

Augusto Fogel Pedrozo
Judge *Ad hoc*

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING VOTE OF JUDGE EDUARDO VIO GROSSI
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
OF AUGUST 24, 2010
CASE OF THE XÁKMOK KÁSEK INDIGENOUS COMMUNITY v. PARAGUAY,
(MERITS, REPARATIONS AND COSTS),

INTRODUCTION

1. With this opinion, I concur with the said judgment, not only because I agree with its contents, but also because it advances in a direction that I consider adapted to law and justice and in accordance with the progressive development of international law concerning the indigenous peoples, which I believe should be intensified.

2. On previous occasions, the Inter-American Court of Human Rights (hereinafter the ICourtHR) has declared violations of human rights with regard to members of indigenous peoples, interpreting Article 1(2) of the American Convention on Human Rights
3. [1] (hereinafter the Convention) in the perspective that the holder of the rights recognized therein is the "*person*" and that this means "*every human being.*"

4. Thus, the ICourtHR has consistently declared violations of human rights to the detriment of the members of the indigenous peoples, without, however, doing so, at least directly and explicitly, with regard to them as such; in other words, as a whole or as different ethnic groups or human collectivities with international legal personality in this area. [2]

I. RIGHTS OF THE MEMBERS OF THE INDIGENOUS PEOPLES

A. Traditional approach

5. On this occasion, the ICourtHR has consolidated its case law in this regard when referring to the *members of the Xákmok Kásek Community*[3] as victims in this case, and declaring violations of the human rights established in the Convention[4] to their

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1 Article 1:

> *1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*
>
> *2. For the purposes of this Convention, "person" means every human being."*

2 *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Preliminary objections.* Judgment of February 1, 2000. Series C No. 66; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations, and costs.* Judgment of June 17, 2005. Series C No. 125, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations, and costs.* Judgment of March 29, 2006. Series C No. 146.

3 E.g.: paragraphs 54, 55, 78, 79, 109, 116, 120, 121, 154, 168, 169, 182, 193, 197, 208, 217, 242, 243, 244, 252, 275, 278, 281, 282, 283, 284, 285, 286, 291, 294, 295, 301, 306, 308, 309, 313, 318, 321, 323, etc.

4 Operative paragraphs 2, 3 and 5.

detriment and, as a result, when ordering the return of the 10,700 hectares claimed[5] together with other measures in their favor.[6]

B. Inter-American legal doctrine[7]

6. This perspective seems to be shared by inter-American legal doctrine, as revealed by the 1997 draft American Declaration on the Rights of Indigenous Peoples, prepared by the Inter-American Commission on Human Rights,[8] which indicates that:

> *"Indigenous peoples have the collective rights that are essential for the enjoyment of the individual human rights of their members."*[9]

7. In addition, the 1998 comments on this draft by the Inter-American Juridical Committee[10] follow the same approach when indicating that:

> *"International law in the field of human rights protects, with few exceptions, individual rights, while recognizing that, in certain cases, the exercise of individual rights can only be truly exercised collectively."*

II. RIGHTS OF INDIGENOUS PEOPLES

A. Possible new perspective.

8. However, it is also true that the ICourtHR, in this same judgment, has referred to the *Xákmok Kásek Community* as the subject claiming rights, particularly with regard to the right to territory[11] with the "*communal ownership*" that corresponds to it.[12] In addition, it also expressly mentioned the Community, as the beneficiary of the measures ordered,[13] even though, in some of those measures, it refers to the grounds for its decision where, to the contrary, it refers to the members of the collectivity,[14] and in others, it refers interchangeably, to them and to the Community.[15]

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5 Operative paragraph 12.

6 Operative paragraphs 13, 15, 19, and 23, even though, in these operative paragraphs, the direct reference is made to "*the Community*"; however, when relating this to considering paragraphs 291, 294, 295 and 301, and operative paragraph 12, respectively, it should be understood that this reference is made indirectly to "*the members of the Community.*"

7 Even though, under this subtitle, reference is made to the decisions of two organs of an international organization, the OAS, so that it could be considered that they are expressions of the auxiliary source of international law, the so-called "Decisions of international organizations declaring legal rights," they are, however, cataloged as legal doctrine, another auxiliary source of international law, considering that one is a proposed Declaration, which has not yet been adopted by the corresponding parties, and the other contains observations on the former and, in both cases, they are issued by advisory organs of the said international organization.

8 AG/RES.1479 (XXVII-O/97).

9 Article II(2). First phrase.

10 OEA/Ser.Q CJI/doc.29/98 rev.2

11 E.g.: paragraphs 64 *et seq.* and 80 *et seq.*

12 E.g.: paragraph 85 *et seq.*

13 Operative paragraphs 13 to 15, 23, 25, and 26.

14 See *supra* note 6 in relation to operative paragraphs 13, 15, and 23.

15 Operative paragraphs 25 and 26.

9. Thus, with these references, the ICourtHR, without departing from its traditional position, appears to leave open the possibility that, in the future, it could be able to take a new approach to the matter, particularly when it affirms, in paragraph 85 of this judgment, that it:

> *"has considered that the close relationship of indigenous peoples with their traditional lands and the natural resources linked to their culture that are found there, as well as the intangible elements resulting from them, must be safeguarded by Article 21 of the American Convention."* [16]

10. Similarly, in paragraph 86 of this judgment, the ICourtHR reproduces what it has stated on other occasions,[17] that among the indigenous peoples:

> "There is a tradition in the communities with regard to a communal form of collective ownership of the land, in the sense that this does not belong to an individual, but rather to the group and its community. Because they exist, the indigenous peoples have the right to live freely on their own territories; the close relationships that the indigenous peoples maintain with the land must be recognized and understood as the essential basis of their culture, their spiritual life, their integrity, and their economic survival. For the indigenous communities, their relationship with the land is not merely a matter of possession and production, but rather a material and spiritual element that they must enjoy fully, even in order to preserve their cultural legacy and transmit it to future generations."

11. And, in paragraph 87 of this judgment, the ICourtHR adds that:

> "Moreover, the Court has indicated that the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession is "not focused on individuals, but on the group and its community." This concept of the ownership and possession of land does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the Convention. Failing to recognize the specific versions of the right to use and enjoyment of property that emanate from the culture, uses, customs and beliefs of each people would be equivalent to maintaining that there is only one way of using and enjoying property and this, in turn, would make the protection granted by Article 21 of the Convention meaningless for millions of individuals."

B. The case of Paraguay.

12. To understand the effects of the recently drafted paragraphs and supporting the thesis that the ICourtHR appears to be envisioning an approach that departs from the classic position held in this area, it should be recalled that, in this case, both the Inter-American Commission on Human Rights and the representatives of the victims repeatedly indicated that the rights they considered violated by Paraguay were the rights of both the *Xákmok Kásek Community*, and of its members, without the respondent State in this case, Paraguay (hereinafter the State), contesting the capacity of the Community as a collective subject of rights.[18]

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[16] Article 21. "*Right to Property*

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law."

[17] C*f. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra* note 2, para. 149; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra* note 2, para. *118*, and *Case of the Saramaka People. v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 90.

[18] E.g.: Paragraph 2.

13. Similarly, and in the same regard, it is appropriate to add, in relation to the case in question, that the State had ratified, and by means of Law No. 234/93[19] had incorporated into its domestic law, Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries (1989), which, in its Article 3(1) states that:

> *"Indigenous and tribal peoples shall enjoy full human rights and fundamental freedoms without hindrance or discrimination. The provisions of this Convention shall apply without discrimination to male and female members of these peoples."*

14. On the other hand, and in keeping with the above observations, it should also be noted that the Constitution of Paraguay establishes rights in favor of the indigenous communities as collectives,[20] and that this State has an Indigenous Communities Statute that recognizes the juridical personality of the communities.[21]

15. On this basis, the ICourtHR indicated in the *Yakye Axa case*[22] that:

> *"Under Paraguayan legislation, the indigenous community has ceased to be a factual reality and become a full subject of rights, which are not restricted to the rights of its members as individuals, but rather are rooted in the community itself, endowed with its own singularity."*

16. It would seem clear then that, at least in the case of Paraguay, both international law and its domestic law recognize rights to the indigenous peoples as such, and not merely to their members.

C. Progressive development of international law.

17. Thus, this situation is located in the same process of change that general international law is experiencing in this sphere and that coincides with the new perspective that the ICourtHR could apply in the future when examining this issue;[23] This is revealed, particularly, from the provisions of the said Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries (1989).

a. Decisions of international organizations

18. This process of change is expressed, for example, in the 2007 United Nations Declaration on the Rights of Indigenous Peoples, Article 1 of which establishes that:

> *"Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."*

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19 Law No. 234/93 ratifying ILO Convention No. 169.

20 Constitution, articles 62 and 63.

21 Law No. 904/81, Statute of the Indigenous Communities (f376 p1, merits; f378 p2); Law No. 1.372/88 (f376 p2 merits).

22 *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 83.

23 Article 31 of the Vienna Convention on the Law of Treatises. "*General Rule of Interpretation.*

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [...]*
> *3. There shall be taken into account, together with the context: [...]*
> *c) any relevant rules of international law applicable in the relations between the parties."*

19. The comment of the Committee on Economic, Social, and Cultural Rights of the United Nations regarding the right to benefit from the protection of the moral and material interests resulting from scientific, literary or artistic productions, also belongs to the indigenous peoples in their capacity as collective subjects, and not only to their members as individual subjects of rights.[24]

20. Subsequently and in this regard also, in its General Comment No. 21 of 2009, the said Committee interpreted that the term "*everyone*" contained in Article 15(1)(a) of the International Covenant on Economic, Social, and Cultural Rights:[25]

> *"May denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such."*[26]

b. Inter-American legal doctrine

21. Even inter-American legal doctrine inclines towards this universal trend, as revealed by Article II(1) of the above-mentioned draft of the American Declaration on the Rights of Indigenous Peoples, when it stipulates that:

> *"Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other international human rights law; and nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with the instruments of international law including human rights law."*

22. This concept is reiterated in Article XVIII(2) of the draft, when it notes that:

> *"Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood."*

23. In turn, the above-mentioned comments of the Inter-American Juridical Committee on the recently cited draft, indicate, in paragraph 3(6), that:

> *"There is no doubt that the indigenous peoples and their members have the right to full and effective enjoyment of the human rights recognized universally, and the Declaration must reaffirm this [...]"*

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[24] General Comment 17, paras. 7, 8, and 32.

[25] Article 15

> *"1. The States Parties to the present Covenant recognize the right of everyone:*
> *a) To take part in cultural life;*
> *b) To enjoy the benefits of scientific progress and its applications;*
> *c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
> *3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*
> *4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."*

[26] General Comment 21, para. 9.

c. Other instruments

24. In addition, another international legal instrument, but this time of a regional nature, the 1986 African Charter on Human and People's Rights, incorporates this tendency when it establishes the special protection of certain rights of the indigenous peoples based on their exercise as collective rights.[27]

III. THE SCOPE OF THE HUMAN RIGHTS OF THE INDIGENOUS PEOPLES AND THEIR MEMBERS.

A. Specific rights

25. It could then be argued that the said international texts, autonomous sources of international law, such as the treaties, and auxiliary sources, such as the decisions of organs of international organizations, refer to the human rights of the indigenous peoples and even of their members when it is a matter of the specific rights of either these collectivities or their members, which are, consequently, distinct or different from those in force for all human beings. Otherwise, the special or distinctive declaration in some of the legal instruments mentioned (those which seek precisely to have legal effect, in other words, to establish or to determine the international legal obligations derived from the rights thus declared), would be meaningless and lack justification.

A. Rights of the collectivity

26. All the foregoing allows for a broader understanding of the provisions of Article 1 of the Convention,[28] so that the obligation to respect and ensure to all persons the exercise of the rights established in the Convention would also include the collectivities or communities, such as the indigenous peoples, to the extent that at least some of these rights extend to these entities. Rights that, consequently, the members may only enjoy and exercise through the collectivity and because they form part of it, which, all things considered, would imply that such rights are not merely of an individual nature.

CONCLUSION

27. In other words, based on the above, and applying the provisions of Article 29(b) and 29(d) of the Convention,[29] it can be concluded that, in keeping with the progressive development of international human rights law, it would be appropriate, on the one hand, to include in the term "*person*" contained in several articles of the Convention and as victims of violations of rights established in it, not only the

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27 African Charter on Human and Peoples Rights: Article 20, which protects the right to existence and self-determination; Article 21, which protects the right to the natural resources and ownership of their lands, and Article 22 which guarantees the right to development.

28 See note 1.

29 Article 29:

> *"No provision of this Convention shall be interpreted as: [...]*
> *b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;*
> *[...] and,*
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

members of the indigenous peoples, considered individually, but also the indigenous peoples as such; and, on the other hand, consequently, to consider among these rights, those that concern these peoples, so that not only would justice be served, but, also, the case law would thus be situated, more clearly and without margin for error, in the modern trend that is emerging increasingly clearly in international law on this matter.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING AND DISSENTING OPINION
OF JUDGE AUGUSTO FOGEL PEDROZO

I have participated in the judgment delivered by the Court in the XÁKMOK KÁSEK case and I have dissented with regard to some operative paragraphs of the judgment on the grounds described in the deliberations, which include the following considerations:

I. Concurring Opinion. Rejection of the State's request to suspend the proceedings

1. In item **1 of Chapter XIII "Operative Paragraphs,"** I expressed my agreement with the rejection of the State's request to suspend these proceedings, on the grounds described in paragraphs 36 to 50, and also because, although the different names of the ethnic group indicated by the representatives of the Xákmok Kásek Community constitute a problem for the transfer of ownership of the property, since the registration laws require due clarification of the change that occurred, this can be overcome by the expert appraisal conducted recently by the State's expert, who stated that the Xákmok Kásek Indigenous Community are part of the Sanapaná people, who belong to the same linguistic family as the Enxet-Lengua people. In Sanapaná villages, the families often coexist with members of the Maskoy linguistic group[1] (which Kalish refers to as Enlhet-Enenlhet). From a cultural point of view, it is difficult to determine to which people the children of couples from two different peoples belong, and it is necessary to determine to which people they are assigned by carrying out research among the members of the Community.

2. In the 2002 Indigenous Peoples Census, the Xákmok Kásek Community settled in the Salazar Ranch was identified as Sanapaná. Also, in the book "*Los Indígenas del Paraguay*" by José Zanardini and Walter Biederman, the Salazar Ranch is identified as one of the places where the Sanapaná ethnic group known as Xákmok Kásek lives. Furthermore, in 2003, the representatives of this community took part in meetings of Sanapaná communities in order to establish an Association of Sanapaná Communities.

II. Dissenting opinion. Right to Communal Property, Judicial Guarantees and Judicial Protection

3. Regarding the State's violation of the right to communal property, judicial guarantees and judicial protection, according to paragraph 170 of the judgment also in relation to the alleged violation of Article 21 of the American Convention, it is my understanding that the right to property cannot be interpreted in isolation, but rather taking into consideration the whole legal system in which it operates, as well as domestic and international law.

4. The Paraguayan Constitution guarantees private property – both individual and corporative – and the communal ownership to which the indigenous peoples have a right. Article 63 recognizes and guarantees the right of the indigenous

[1] Zanardini, José and Walter Biedermann. *Los Indígenas del Paraguay*. Asunción. 2006.

peoples to preserve and develop their ethnic identity in their respective habitat. In addition, Article 64 of the Constitution indicates that:

> *The indigenous peoples have the right to communal ownership of land of sufficient area and quality to conserve and develop their characteristic way of life. The State shall provide them with these lands, free of charge, and such land shall be immune from seizure, indivisible, inalienable, non-transferable, inalienable, and ineligible for guaranteeing contractual obligations or lease; furthermore, they shall be exempt from taxes. Removal or transfer from their habitat, without their express consent, is prohibited.*

5. Article 109 of the National Constitution establishes that:

> *Private property is guaranteed, and its content and limits shall be established by law, based on its economic and social function, in order to make it accessible to all.*
>
> *Private property is inviolable.*
>
> *No one can be deprived of his or her property unless this is based on a judicial decision, but expropriation is permitted for reasons of public utility or social interest, which will be determined by law in each case. The law will ensure the prior payment of fair compensation, established contractually or by judicial decision, except in the case of large unproductive estates earmarked for the agrarian reform, in accordance with the expropriation procedure to be established by law.*

6. Meanwhile, Article 137 establishes:

> *The supreme law of the Republic is the Constitution. The Constitution, the international treaties, conventions and agreements acceded to and ratified, the laws enacted by the Congress, and other legal provisions of a lower rank that are approved in consequence, together constitute national positive law, in the said order of priority.*
>
> *Whosoever attempts to change the said order, without respecting the procedures established in this Constitution, shall be guilty of offenses to be defined and punished by the law. [...]*
>
> *Any provision or action of authority contrary to the provisions of this Constitution shall be invalid.*

7. The subjects protected by the right to property include both the indigenous people of the Xákmok Kásek Community and the other indigenous peoples and, in general, all citizens, under the principle of the equality of all individuals, established in Article 46 of the Constitution, which stipulates: "All the inhabitants of the Republic are equal in dignity and rights. Discrimination is not allowed. The State shall remove the obstacles and prevent the factors that maintain or promote it."

8. "The protective measures established in relation to unfair inequalities shall not be considered discriminatory, but rather egalitarian factors." Those who should receive positive discrimination, in the Paraguayan context, include at least 2,000 indigenous families of the Chaco and 2,000 families of the Eastern Region, who lack land, as well as some 90,000 families of landless peasants, living in extreme poverty. In my opinion, it is in this context that the provisions of the American Convention should be interpreted.

9. Law 904/81, enacted in 1992 prior to the Constitution, regulates the access of the indigenous communities to the communal ownership of land. Its article 8 establishes that, following compliance with the established procedures, "the legal personality of the indigenous communities that existed before the promulgation of this Law shall be recognized, as well as of those communities composed of indigenous families that regroup in communities in order to obtain its benefits." In the latter case, the minimum number of indigenous families is 20 (Article 9). Regarding the settlement of the indigenous communities, Law 904 establishes:

> Article 14. The settlement of indigenous communities shall be based, insofar as possible, on the actual or traditional possession of the lands. The free and express consent of the indigenous community shall be essential for its settlement in areas other than its habitual territories, except for reasons of national security.
>
> Article 15. When, in the cases foreseen in the preceding article, the transfer of one or more indigenous communities becomes essential, they shall be provided with suitable lands, of at least the same area as those they occupied, and shall be appropriately compensated for the damage suffered owing to the displacement and for the value of the improvements.

10. Meanwhile, article 22 of the said Law 904 establishes the procedure for the settlement of indigenous communities on public lands, and articles 24 and 25 establish the procedures for their settlement on privately-owned lands, occupied by the indigenous peoples. Article 26 of the law establishes that: "In cases of expropriation, the procedure and the compensation shall be adapted to the provisions of the Constitution and law, and for the payment of compensation, the necessary resources shall be included in the General Budget of the Nation."

11. Law 43/89 establishes a regime for the regularization of the indigenous community settlements. Its article 4 stipulates: "During the administrative and legal procedures established in article 2, the Paraguayan Indigenous Peoples Institute (INDI) and the Rural Welfare Institute (IBR) shall propose definitive solutions for the settlement of the indigenous communities, pursuant to Law 854/63, Agrarian Statute, and Law 904/81, Indigenous Communities Statute, proposing expropriation, pursuant to article 1 of Law 1372/88, when no solution is achieved by other means."[2]

12. In the absence of a formal agreement with the owner, the provisions of both Law 904 and Law 43/89 establish expropriation as the way to regularize the settlements of the indigenous communities established on private land. These provisions are consistent with the norms of the Civil Code, which establish that the ownership of property is lost based on: (a) transfer of title; (b) judicial transfer or declaration (c) execution of judgment; (d) expropriation, and (e) its abandonment declared in a public deed, duly registered with the Property Registry, and in the other cases established by law (article 1967). Also article 1966 lists specifically the ways to accede to the ownership of property: (a) contract; (b) accession, (c) *usucaptio*, and (d) inheritance.

13. On this point, the contradiction between the constitutional provision and article 64 of Law 1863/02 should be noted. While the latter limits the possibilities of expropriation to property that is not exploited rationally, article 109 of the Constitution, the supreme law of the Republic, stipulates that, in the case of the expropriation of large unproductive estates earmarked for agrarian reform, the law itself establishes the amount of the compensation while, in other cases, this amount is established contractually or by judicial decision. The Constitutional Chamber of the Supreme Court has developed case law affirming that, for the expropriation to be admissible, it suffices that the legislator believes that there is a social interest or need, or reasons of public interest, and that they can be remedied with the expropriation of specific properties.

14. On these grounds, I dissent from the judgment when it declares that the State violated the right to property established in Article 21 of the Convention to the

[2] Law 854/63 was derogated by Law 1863/02.

detriment of the Xákmok Kásek Community of the Enxet-Language people. The measures taken to ensure the right of property of the Xákmok Kásek Community were not effective owing to the absence of norms under domestic law.

15. Regarding the alleged violation of Articles 8 and 25 of the American Convention (Judicial Guarantees and Judicial Protection) and, more specifically, with regard to the proceedings filed against the members of the Community, I consider that the harm caused to the Community relating to the violation of procedural guarantees, which originated in the early procedural stages in first instance, could have been remedied under domestic law in later stages of the same proceedings.

III. Dissenting opinion. Right to Life

16. With regard to the alleged violation of Article 4(1) of the American Convention (Right to Life), the Inter-American Commission's application affirms that the State of Paraguay failed to comply, to the detriment of the Xákmok Kásek Community, with the obligation to guarantee the right to life established in Article 4(1) of the American Convention, to the detriment of the duly identified deceased members of the indigenous Community, and that the State "has placed all the members of the Community, in a permanent situation of risk," affecting their exercise and enjoyment of their fundamental human rights, since the Community remains in a vulnerable situation. The said Article 4 of the Convention establishes:

> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

17. Regarding the indigenous persons who are deceased, it should be noted that, if complaints of possible negligence that could lead to avoidable deaths had been alleged opportunely, under domestic law it would have been possible to remedy, or at least alleviate, the ailments in question. If that path had been followed, it would have permitted the investigation of violations of the right to life, the punishment of those responsible, and the granting of reparation to the families of the victims. The absence of reparation, in proven cases of negligence by State agents, could have resulted in the responsibility of the State of Paraguay in the domestic sphere.

18. It is worth mentioning that, unlike other very isolated communities, the settlement of the Xákmok Kásek Community in the Salazar Ranch was a short distance from the Trans-Chaco highway and, therefore, it was possible to request an ambulance from the health clinic of the District of Irala Fernandez, under Dr. Rolon, located on this highway, less than an hour away. In addition, the Community had a health extension worker.

19. Nevertheless, the interpretation of the right to life to include positive measures of protection so that the indigenous peoples may enjoy their right to a decent life is based on legal doctrine and international jurisprudence and entails progress in international human rights law.

20. The Inter-American Court has indicated that the obligation of the State to take positive measures should be prioritized precisely in relation to the protection of the life of the most vulnerable individuals, such as the indigenous peoples. This concept of the right to life, referred to indigenous communities living in extreme poverty, which can be manifested in preventable illnesses and deaths, affirms the

obligation to provide social protection and to eradicate extreme poverty. Owing to their situation of severe deprivations, these indigenous communities lack strategies to enable them to adequately address the risks to which they are exposed in a way that would allow them to take advantage of opportunities to improve their living conditions and achieve the minimum conditions for a decent life.

21. The right to life is established in different instruments and, under them, the existence of extreme poverty, which is increasing in Paraguay, means the denial of economic, social, and cultural rights, including the rights to adequate nutrition, health, food, and work. The United Nations Commission on Human Rights recognized that extreme poverty threatens the fundamental right to life, and determined which human rights are essential for the protection of life (food, potable water, health). For its part, the World Conference on Human Rights, held in Vienna in 1993, considered that extreme poverty constitutes a threat to human dignity, as has been noted in previous judgments. In the case of the indigenous communities, particularly those affected by extreme poverty, that situation involves the systematic denial of the possibility of enjoying the inherent rights of the human being. The Xákmok Kásek Community is certainly affected by extreme poverty, as revealed by the testimony of witnesses and expert witnesses.

22. The State's interventions must prevent, mitigate and overcome the risks, such as malnutrition, the prevalence of anemia, morbidity, and mortality, creating the minimum conditions with regard to health care, adequate nutrition, education, job training, and income generation. In the case of the Paraguayan State, although it attends to the entire vulnerable population, it does not do so more adequately owing to its limited resources.

23. The State's obligation to take positive measures to protect the right to life, even though it includes providing services to vulnerable groups affected by extreme poverty, cannot be limited to this, because, by not attacking the root causes of poverty in general, and extreme poverty in particular, this assistance is unable to create the above-mentioned conditions for a decent life.

24. In my opinion, the evolving interpretation of the right to life established in the American Convention should take into consideration the socio-economic situation of Paraguay and of most Latin American countries, characterized by the increase in extreme poverty in both absolute and relative terms, despite the implementation of social protection policies. The interpretation of the right to life does not relate only to monitoring the State's compliance with the provision of social protection services that guarantee minimum living conditions temporarily without tackling the underlying causes of poverty, which reproduce the situation and create more poor people, as discussed within the United Nations. This implies the need to relate poverty eradication measures to all the factors that give rise to poverty, taking into account the impact of the decisions taken by States, and multinational and multilateral organizations: national and international actors and institutions are among those responsible for the reproduction of conditions of poverty.

25. In this context, the intervention capacity of the States of developing countries, including Paraguay, and the application of international norms relating to extreme poverty is not a legal issue that involves only the State, which is often conditioned both by the limited financial resources available to it and structural factors linked to the "adjustment process," which the State of Paraguay has no control over, considered in isolation. International responsibility is not limited to the

right to international assistance in the event that a State Party is unable to achieve, on its own, the model established by covenant, and embodied in the International Covenant on Economic, Social, and Cultural Rights.

26. Seen from this perspective, the increase in poverty is a result of decisions, basically of an economic and financial nature, taken by private actors and agreed to by public actors who have much more power than the States of developing countries. This is the context in which the responsibilities of the transnational corporations and multilateral agencies for violations of economic, social and cultural rights must be analyzed. Thus, the Commission on Human Rights, while recognizing that poverty threatens the fundamental right to life, has asked that the policies of the World Bank, the World Trade Organization, the International Monetary Fund, and other international organizations be examined.

27. Progress in international human rights law requires the international community to understand that poverty, particularly extreme poverty, is a way of denying all the human, civil, political, economic, and cultural rights, and act accordingly, in order to facilitate the identification of perpetrators who bear international responsibility. The system of economic growth related to a form of globalization that impoverishes growing sectors, is a "massive, flagrant, and systematic [way of] violating human rights," in an increasingly interdependent world. In this interpretation of the right to life, which parallels the changing times and current living conditions, attention should be given to the causes of extreme poverty and to the perpetrators behind them. In this perspective, the international responsibilities of the State of Paraguay and of the other signatories of the American Convention do not cease, but they are shared with the international community which requires new instruments.

IV. Dissenting opinion. Recognition of the Right to Juridical Personality

28. The Commission argued (*para.* 245) that the State has not implemented mechanisms that provide the members of the Community with "the identity documents required to exercise their right to recognition of juridical personality." It indicated that, according to the 2008 census, at least 43 of the 273 members of the Community did not possess identity documents; of these, at least 32 were minors.

29. The representatives added that "the large number of Xákmok Kásek individuals who do not have documents [...] prevents them from legally proving their existence and identity."

30. In my opinion, these documentation shortcomings affected many of the communities and not only the indigenous people of Xákmok Kásek, owing to the lack of budgetary resources; however, they were alleviated by the indigenous "identity card," issued by INDI.

31. This Institute responded to the requests of the community whenever vehicles and fuel were available.

V. Dissenting opinion. Non-compliance with the obligation not to discriminate

32. The Commission argued that "this case illustrates the persistence of structural discrimination factors in the Paraguayan legal system regarding the protection of

their right to the ownership of ancestral territory and the resources found on it"; Despite the general progress made in its laws towards recognizing the rights of the indigenous peoples, there are still legal provisions in its civil, agrarian, and administrative law that were applied in this case and that caused the State system to function in a discriminatory way, since it gave priority to the protection of the right to private property that was being exploited rationally over the protection of the territorial rights of the indigenous population.

33. For their part, the representatives indicated that there is "a policy of discrimination that features an easily-observable systematic pattern and that also enjoys a high level of consensus in Paraguay, which is rapidly leading to the extreme deterioration of the living conditions of the indigenous communities in general and, in this [specific] case [...] of the Xákmok Kásek [Community]." "The alleged factual and legal impossibility [of granting title to the land] mentioned by the State of Paraguay is nothing more than the deliberate application of a racist and discriminatory policy."

34. In my opinion, although there is some discrimination among the population towards the indigenous peoples based on a legacy of colonialism, which the education system is trying to reverse, there is no deliberate agreement or consensus to apply a racist or discriminatory policy, which gives priority to the protection of the right to private property that is being exploited rationally over the protection of the territorial rights of the indigenous population. It is my understanding the obligation not to discriminate was not violated, although, in reality, the law needs to be adapted in order to expedite the procedures for the indigenous communities to have access to their ancestral lands, which endorses the opinion of the Court. However, meanwhile, the provisions of the Constitution are applied, such as those that guarantee private property, which is inviolable and can only be taken away by expropriation, by a decision of the courts, upon payment of fair compensation, and also because of the predominance of the Constitution over any international treaty or convention and the express indication that any provision or act of authority contrary to the provisions of the Constitution is invalid. Lastly, the immense resources allocated by the State in recent years to the acquisition of land should be assessed positively.

Augusto Fogel Pedrozo
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary