

Tools for the
Protection of
Human Rights

Summaries of
Jurisprudence

INDIGENOUS
PEOPLES



CEJIL

*SUMMARIES OF
JURISPRUDENCE*

*Indigenous
Peoples*

CEJIL

Centro por la Justicia y el Derecho Internacional
Center for Justice and International Law
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Pemontón Kowantok Wacúpe Yuwanin Pataset



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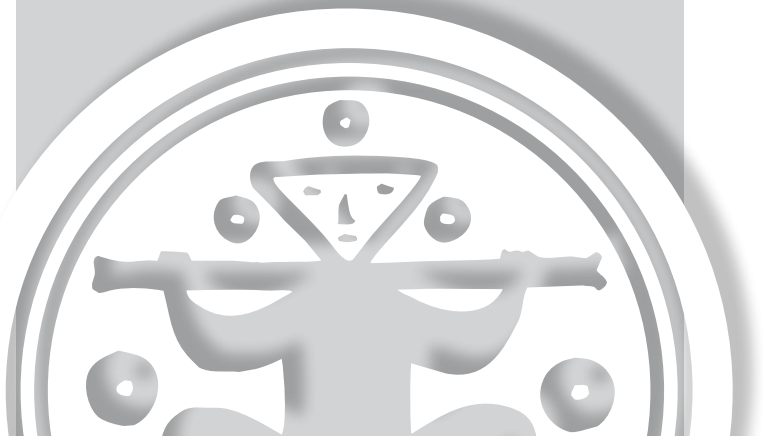
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PRESENTACIÓN

CEJIL is proud to present a new addition to the series *Tools for the Protection of Human Rights: Summaries of Jurisprudence*. The focus of the present publication is the rights of indigenous peoples.

Many indigenous peoples, in different parts of the world, have suffered serious and systematic human rights abuses for various reasons, among which, a lack of recognition and respect for their culture, traditions and customs, and the various ways in which they are discriminated against. In this context, the defense and protection of their rights are of fundamental importance for the construction of truly multicultural, inclusive and fair societies.

In the long struggle of claiming indigenous people's rights and the demand for them to be respected seen some achievements can be mentioned, like the adoption of the International Labour Organization Convention No. 169, and the subsequent United Nations Declaration of the Rights of Indigenous Peoples which represent milestones on the road for complete recognition and respect for the rights of indigenous peoples and tribal communities.

However, it has been through the jurisprudence of human rights bodies – resolving specific cases - that the true scope of these standards has been set, thus establishing important international standards which determine the influence on international human rights law on this topic.

It is important to note that said standards have established for example, the extension property rights of indigenous peoples, based on the special relation that exists between the members of the community and their ancestral lands. Furthermore, advancements have been in the area of the right to political participation, judicial guarantees, cultural identity of indigenous children, etcetera.

The rulings included in this volume are the most relevant on this issue, emitted by the Inter-American Court on Human Rights, the UN's Human Rights Committee and the African Commission on Human and People's Rights.

We would like to offer our sincere thanks to Pablo Colmegna and Maria Lucila Mendoza who during the months they spent as interns at CEJIL Buenos Aires have contributed in various stages of the production of this material, and to Sergio Fuenzalida who was able to push ahead the production of this volume when it was still in its initial stages; to Federico Espeche, Stefania Sánchez Rojo, Luciana Veneziale who worked on the translations of these texts as part of the established programme of internships between CEJIL and the Fundación Universidad de Belgrano (Argentina) and to Ayelén Zaracho and Marjolein Kuijers for their help in the publishing process.

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*Inter-American Court
of Human Rights*

*Mayagna (Sumo) Awas Tingni
Community v. Nicaragua*

Merits, Reparations, and Costs

*Judgment of
August 31, 2001*



[...]

I. INTRODUCTION OF THE CASE

1. On June 4, 1998, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court a lawsuit against the State of Nicaragua (hereinafter “the State” or “Nicaragua”). The case in question had originated in petition No. 11.577, received at the Commission’s Secretariat on October 2, 1995.

2. (...)The Commission presented this case for the Court to decide whether the State violated articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention, in view of the fact that Nicaragua has not demarcated the communal lands of the Awás Tingni Community, nor has the State adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources, and also because it granted a concession on community lands without the assent of the Community, and the State did not ensure an effective remedy in response to the Community’s protests regarding its property rights.

[...]

VIII. VIOLATION OF ARTICLE 25 RIGHT TO JUDICIAL PROTECTION

[...]

Considerations of the Court

[...]

115. In the present case, analysis of article 25 of the Convention must be carried out from two perspectives. First, there is the need to analyze whether or not there is a land titling procedure with the characteristics mentioned above, and secondly whether the amparo remedies submitted by members of the Community were decided in accordance with article 25.

[...]

a) Existence of a procedure for indigenous land titling and demarcation:

[...]

122. (...) the Court believes that the existence of norms recognizing and protecting indigenous communal property in Nicaragua is evident.

123. Now then, it would seem that the procedure for titling of lands occupied by indigenous groups has not been clearly regulated in Nicaraguan legislation. According to the State, the legal framework to carry out the process of land titling for indigenous communities in the country is that set forth in Law No. 14, "Amendment to the Agrarian Reform Law", and that process should take place through the Nicaraguan Agrarian Reform Institute (INRA). Law No. 14 establishes the procedures to guarantee property to land for all those who work productively and efficiently, in addition to determining that property may be declared "subject to" agrarian reform if it is abandoned, uncultivated, deficiently farmed, rented out or ceded under any other form, lands which are not directly farmed by their owners but rather by peasants through mediería, sharecropping, colonato, squatting, or other forms of peasant production, and lands which are being farmed by cooperatives or peasants organized under any other form of association. However, this Court considers that Law No. 14 does not establish a specific procedure for demarcation and titling of lands held by indigenous communities, taking into account their specific characteristics.

[...]

126. On the other hand, it has been proven that since 1990 no title deeds have been issued to indigenous communities (...).

127. In light of the above, this Court concludes that there is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands.

b) Administrative and judicial steps:

128. Due to the lack of specific and effective legislation for indigenous communities to exercise their rights and to the fact that the State has disposed of lands occupied by indigenous communities by granting a concession, the "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", carried out by the Central

American and Caribbean Research Council, points out that “ ‘amparo remedies’ have been filed several times, alleging that a concession by the State (normally to a logging firm) interferes with the communal rights of a specific indigenous community”.

[...]

131. (...) this Court has maintained that the procedural institution of amparo has the required characteristics to effectively protect fundamental rights⁵⁰, that is, being simple and brief. (...)

[...]

134. In light of the criteria established on the subject by this Court, and bearing in mind the scope of reasonable terms in judicial proceedings⁵¹, it can be said that the procedure followed in the various courts which heard the amparo remedies in this case did not respect the principle of a reasonable term protected by the American Convention. According to the criteria of this Court, amparo remedies will be illusory and ineffective if there is unjustified delay in reaching a decision on them.⁵²

135. (...) the Court has already said that article 25 of the Convention is closely linked to the general obligation of article 1.1 of the Convention, which assigns protective functions to domestic law in the States Party, and therefore the State has the responsibility to designate an effective remedy and to reflect it in norms, as well as to ensure due application of that remedy by its judicial authorities.⁵³

50 cfr. *Case of the Constitutional Court*, Decision of January 31, 2001. C Series No. 71, para. 91 and *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights) Advisory Opinion OC-9/87 of October 6, 1987, para. 23.

51 cfr. *Case of the Constitutional Court*, *supra* note 50, para. 93; *Paniagua Morales et al. case*. Judgment of March 8, 1998. C Series No. 37, para. 152; and *Genie Lacayo case*. Judgment of January 29, 1997. C Series No. 30, para. 77.

52 cfr. *Ivcher Bronstein case*, Judgment of February 6, 2001. C Series No. 74, para.137; *Case of the Constitutional Court*, *supra* note 50, para. 93; and *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights), *supra* note 50, para. 24.

53 cfr. *Villagrán Morales et al. case* (“Street Children” case). Judgment of November 19, 1999. C Series No. 63, para. 237; also see, *Ivcher Bronstein case*, *supra* note 52, para. 135; and *Cantoral Benavides case*, Judgment of August 18, 2000. C Series No. 69, para. 163.

[...]

138. The Court believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community.

139. From all the above, the Court concludes that the State violated article 25 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1.1 and 2 of the Convention.

*IX. VIOLATION OF ARTICLE 21- RIGHT TO PRIVATE PROPERTY*⁵⁵

[...]

Considerations of the Court

[...]

143. Article 21 of the American Convention recognizes the right to private property. In this regard, it establishes: a) that “[e]veryone has the right to the use and enjoyment of his property”; b) that such use and enjoyment can be subordinate, according to a legal mandate, to “social interest”; c) that a person may be deprived of his or her property for reasons of “public utility or social interest, and in the cases and according to the forms established by law”; and d) that when so deprived, a just compensation must be paid.

144. “Property” can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all

55 There is no substantial variation among the Spanish-, English- Portuguese-, and French-language text for article 21 of the Convention. The only difference is that the epigraph in the English-language text reads “Right to Property” while in the other three languages it reads “Right to Private Property”.

movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.⁵⁶

145. During the study and consideration of the preparatory work for the American Convention on Human Rights, the phrase “[e]veryone has the right to the use and enjoyment of private property, but the law may subordinate its use and enjoyment to public interest” was replaced by “[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the social interest.” In other words, it was decided to refer to the “use and enjoyment of his property” instead of “private property”.⁵⁷

146. The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.⁵⁸

147. Article 29.b of the Convention, in turn, establishes that no provision may be interpreted as “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”.

148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29.b of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the

56 *cf. Ivcher Bronstein case, supra* note 52, para. 122.

57 The right to private property was one of the most widely debated points within the Commission during the study and appraisal of the preparatory work for the American Convention on Human Rights. From the start, delegations expressed the existence of three ideological trends, i.e.: a trend to suppress from the draft text any reference to property rights; another trend to include the text in the Convention as submitted, and a third, compromise position which would strengthen the social function of property. Ultimately, the prevailing criterion was to include the right to property in the text of the Convention.

58 *cf. The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process* Advisory Opinion OC-16/99 of October 1, 1999. A Series No. 16, para. 114.

indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.

149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

[...]

151. Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.

[...]

153. It is the opinion of the Court that, pursuant to article 5 of the Constitution of Nicaragua, the members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities. Nevertheless, the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers that the members of the Awas Tingni Community have the right that the State, 1. carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and 2. abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third

parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.

Based on the above, and taking into account the criterion of the Court with respect to applying article 29.b of the Convention (...), the Court believes that, in light of article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.

[...]

155. For all the above, the Court concludes that the State violated article 21 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1.1 and 2 of the Convention.

[...]

XI. APPLICATION OF ARTICLE 63.1 – REPARATIONS

Considerations of the Court

[...]

163. In the instant case the Court established that Nicaragua breached articles 25 and 21 of the Convention in relation to articles 1.1 and 2 of the Convention. In this regard, the Court has reiterated in its constant jurisprudence that it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it.⁶³

63 *cf. Cesti Hurtado case. Reparations, Reparations (art. 63.1 American Convention on Human Rights. Judgment of May 31, 2001. C Series No. 78, para. 32; “Street Children” case (Villagrán Morales et al. vs. Guatemala). Reparations, (art. 63.1 American Convention on Human Rights). Judgment of May 26, 2001. C Series No. 77,*

164. For the aforementioned reason, pursuant to article 2 of the American Convention on Human Rights, this Court considers that the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. Furthermore, as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores. Until the delimitation, demarcation, and titling of the lands of the members of the Community have been carried out, Nicaragua must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities.

[...]

167. The Court considers that due to the situation in which the members of the Awas Tingni Community find themselves due to lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must also be repaired, by

para. 59; *“White van” case (Paniagua Morales et al. vs. Guatemala)*. Reparations (art. 63.1 American Convention on Human Rights). Judgment of May 25, 2001. C Series No. 76, para. 75; *Ivcher Bronstein case, supra* note 52, para.177; *Baena Ricardo et al. case*, Judgment of February 2, 2001. C Series No. 72, para.201; *Case of the Constitutional Court, supra* note 50, para.118; *Suárez Rosero case*. Reparations (art. 63.1 American Convention on Human Rights). Judgment of January 20 1999. C Series No. 44, para.40; *Loayza Tamayo Case*. Reparations (Art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998. C Series No. 42, para.84; *Caballero Delgado and Santana case*. Reparations (art. 63.1 American Convention on Human Rights). Judgment of January 29, 1997. C Series No. 31, para.15; *Neira Alegria et al. case*. Reparations (art. 63.1 American Convention on Human Rights). Judgment of September 19, 1996. C Series No. 29, para.36; *El Amparo case*. Reparations (art. 63.1 American Convention on Human Rights). Judgment of September 14, 1996. C Series No. 28, para.14; and *Aloeboetoe et al. case*. Reparations (art. 63.1 American Convention on Human Rights). Judgment of September 10, 1993. C Series No. 15, para.43. In this same direction, *cf.*, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; *Factory at Chorzów, Merits*, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; and *Factory at Chorzów, Jurisdiction*, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.

way of substitution, through a monetary compensation. Under the circumstances of the case it is necessary to resort to this type of compensation, setting it in accordance with equity and based on a prudent estimate of the immaterial damage, which is not susceptible of precise valuation.⁶⁵ (...)

[...]

XII. OPERATIVE PARAGRAPHS

173. Therefore,

THE COURT,

1. *finds* that the State violated the right to judicial protection enshrined in article 25 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1.1 and 2 of the Convention, (...).

2. *finds* that the State violated the right to property protected by article 21 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1.1 and 2 of the Convention, (...).

3. *decides* that the State must adopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores, (...).

65 *cf.* *Cesti Hurtado case*. Reparations, *supra* note 63, para.51; “*White van*” case (*Paniagua Morales et al. vs. Guatemala*). Reparations, *supra* note 13, para.105; *Ivcher Bronstein case*, *supra* note 52, para.183; *Baena Ricardo et al. case*, *supra* note 63, para. 206; and *Castillo Páez case*, Reparations (Art. 63.1 American Convention on Human Rights). Judgment of November 27, 1998. C Series No. 43, para. 84. Also *cf.*, *inter alia*, *Eur. Court H.R.*, *Wiesinger* Judgment of 30 October 1991, series A no. 213, para. 85; *Eur. Court H.R.*, *Kenmache v. France (Article 50)* judgment of 2 November 1993, Series A no. 270-B, para. 11; *Eur. Court H.R.*, *Mats Jacobsson* judgment of 28 June 1990, Series A no. 180-A, para. 44; and *Eur. Court H.R.*, *Ferraro* judgment of 19 February 1991, Series A no. 197-A, para. 21.

4. *decides* that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and, until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities, (...).

5. *finds* that this Judgment constitutes, in an of itself, a form of reparation for the members of the Mayagna (Sumo) Awas Tingni Community.

6. *finds* that, in equity, the State must invest, as reparation for immaterial damages, in the course of 12 months, the total sum of US\$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Mayagna (Sumo) Awas Tingni Community, by common agreement with the Community and under supervision by the Inter-American Commission of Human Rights, (...).

7. *finds* that, in equity, the State must pay the members of the Mayagna (Sumo) Awas Tingni Community, through the Inter-American Commission of Human Rights, the total sum of US\$ 30,000 (thirty thousand United States dollars) for expenses and costs incurred by the members of that Community and their representatives, both those caused in domestic proceedings and in the international proceedings before the inter-American system of protection, (...).

[...]

JOINT SEPARATE OPINION OF JUDGES
A.A. CAÑADO TRINDADE, M. PACHECO GÓMEZ AND
A. ABREU BURELLI

[...]

6. As it can be inferred from the testimonies and expertises rendered in the aforementioned public hearing, the Community has a tradition contrary to the privatization and the commercialization and sale (or rent) of the natural resources (and their exploitation)⁵. The communal concept of the land - including as a spiritual place - and its natural resources form part of their customary law; their link with the territory, even if not written, integrates their day-to-day life, and the right to communal property itself has a cultural dimension. In sum, the habitat forms an integral part of their culture, transmitted from generation to generation.

7. The Inter-American Court has duly acknowledged these elements, in paragraph 149 of the present Judgment, in which it points out that "(...) Among the indigenous persons there exists a communitarian tradition about a communal form of the collective property of the land, in the sense that the ownership of this latter is not centered in an individual but rather in the group and his community. (...) To the indigenous communities the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations".

8. We consider it necessary to enlarge this conceptual element with an emphasis on the intertemporal dimension of what seems to us to characterize the relationship of the indigenous persons of the Community with their lands. Without the effective use and enjoyment of these latter, they would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future.

5 Cf., e.g., the testimony of Mr. Charlie Webster Mclean Cornelio, member of the Community Mayagna, *in ibid.*, p. 40, and the expertise of Mr. Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist, *in ibid.*, p. 78.

9. Hence the importance of the strengthening of the spiritual and material relationship of the members of the Community with the lands they have occupied, not only to preserve the legacy of past generations, but also to undertake the responsibilities that they have assumed in respect of future generations. Hence, moreover, the necessary prevalence that they attribute to the element of conservation over the simple exploitation of natural resources. Their communal form of property, much wider than the civilist (private law) conception, ought to, in our view, be appreciated from this angle, also under Article 21 of the American Convention on Human Rights, in the light of the facts of the *cas d'espèce*.

10. The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future)⁶, in respect of which we have obligations.

11. Cultural manifestations of the kind form, in their turn, the substratum of the juridical norms which ought to govern the relations of the community members inter se and with their goods. As timely recalled by the present Judgment of the Court, the Political Constitution in force of Nicaragua itself provides about the preservation and the development of the cultural identity (in the national unity), and the proper forms of social organization of the indigenous peoples, as well as the maintenance of the communal forms of property of their lands and the enjoyment, use and benefit of them (Article 5)⁷.

12. These forms of cultural manifestation and social self-organization have, in this way, materialized, with the passing of time, into juridical norms and into case-law, at both

6 Future generations begin to attract the attention of the contemporary doctrine of international law: cf., e.g., A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 *Recueil des Cours de l'Académie de Droit International de La Haye* (1982) pp. 109-253; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; E. Agius and S. Busuttill et alii (eds.), *Future Generations and International Law*, London, Earthscan, 1998, pp. 3-197; J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 1-153.

7 Cf. also Articles 89 and 180 of the Political Constitution in force of Nicaragua.

international and national levels. This is not the first time that the Inter-American Court has kept in mind the cultural practices of collectivities. (...).

13. (...) in this Judgment on the merits in the case of the Community Mayagna (Sumo) Awas Tingni, the Court, for the first time, goes into greater depth in the analysis of the matter, in an approximation to an integral interpretation of the indigenous cosmovision, as the central point of the present Judgment.

14. In fact, there are nowadays many multicultural societies, and the attention due to the cultural diversity seems to us to constitute an essential requisite to secure the efficacy of the norms of protection of human rights, at national and international levels. Likewise, we consider that the invocation of cultural manifestations cannot attempt against the universally recognized standards of observance and respect for the fundamental rights of the human person. Thus, at the same time that we affirm the importance of the attention due to cultural diversity, also for the recognition of the universality of human rights, we firmly discard the distortions of the so-called cultural "relativism".

15. The interpretation and application given by the Inter-American Court to the normative content of Article 21 of the American Convention in the present case of the Community Mayagna (Sumo) Awas Tingni represent, in our view, a positive contribution to the protection of the communal form of property prevailing among the members of that Community. This communal conception, besides the values underlying it, has a cosmovision of its own, and an important intertemporal dimension, in bringing to the fore the bonds of human solidarity that link those who are alive with their dead and with the ones who are still to come.

*CONCURRING OPINION
OF JUDGE HERNÁN SALGADO PESANTES*

1. In our hemisphere, land tenure by indigenous peoples and communities in the form of communal property or by ancestral tenure, is a recognized right that many Latin American countries have raised to the level of a constitutional right.

2. This right to the land –which is the entitlement of indigenous peoples- comes under the general heading of the right to property. However, it transcends the right to property in the traditional sense, which mainly concerns the right to private property. Communal or collective tenure, on the other hand, better serves the necessary social function that it is intended to have.

3. The anthropology of the XX century made it abundantly clear that indigenous cultures have a very unique bond with their ancestral lands. They rely upon the land for their survival and look to it for moral and material fulfillment.

4. In this case, there are a number of settlements of indigenous communities (traslapés). When a State delimits and demarcates communal lands, the overriding criterion must be proportionality. With the interested parties participating, the State deeds over those lands that all the inhabitants-members of the indigenous communities will need to carry on their way of life and ensure it for their posterity.

5. Finally, when the right to property is asserted, one must be careful to bear in mind that the enjoyment and exercise of the right to property carries with it duties, from moral to political to social. Overarching all these is a juridical duty, specifically the limitations that law in a democratic State imposes. In the words of the American Convention: "The law may subordinate such use and enjoyment to the interest of society." (Art. 21.1).

*CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN
THE JUDGMENT ON THE MERITS AND REPARATIONS IN THE
"MAYAGNA (SUMO) AWAS TINGNI COMMUNITY CASE"*

[...]

6. Various international instruments on the life, culture and rights of indigenous peoples call for explicit recognition of their legal institutions, one of them being the concepts of property once and still prevalent among them. The review of these texts was informed by a wide array of beliefs, experiences and requirements. The finding was that the documents were legitimate and that the land tenure systems must be respected. It necessarily follows, then, that those systems must be recognized and protected. In the final analysis, the individual rights of indigenous persons and the collective rights of their peoples fit into the regime created by the more general instruments on human rights that apply to all persons, as illustrated by the texts of the more specific instruments for which there exists an ever broader and more robust consensus. This information is useful, if not indispensable, for an interpretation of those Convention provisions that the Court must apply.

7. Geneva Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries was adopted by the 76th General Conference of the International Labour

Organisation (Geneva, 1989) out of a concern for the survival of indigenous and tribal peoples' cultures and the institutions that their cultures have produced and protect. It provides that "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." (Article 13.1). The Convention also provides that "[T]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." (Article 14.1).

8. The Draft Declaration on Discrimination against Indigenous Peoples, prepared by the United Nations Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994) makes clear reference to these very same issues and sets the standards that the international juridical community is to observe in matters bearing upon indigenous peoples and the members of their communities. Article 4 stipulates the following: "Indigenous peoples have the right to maintain and strengthen (...) their legal systems (...)" Article 25 provides that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard." In Article 26, the Draft Declaration recognizes indigenous peoples' right to "own, develop, control and use the lands and territories," and adds the following: "This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems (...) and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights."

[...]

10. Various bodies of law within the Ibero-American world contain similar provisions, informed by the very same historical and cultural experience. A case in point is the Constitution of Nicaragua, the country to whose jurisdiction the Mayagna (Sumo) Awas Tingni Community is subject. That community is on Nicaragua's Atlantic Coast. Under the heading "Rights of the Atlantic Coastal Communities," that Constitution stipulates that: "The State recognizes the communal land-tenure systems of the Atlantic Coast communities. It also recognizes their right to enjoy, use and exploit the waters and forests on their communal lands." This recognition must be taken into account when interpreting and applying the American Convention, in keeping with the Convention's Article 29.a).

11. When examining this case, the Court considered the scope of Article 21 of the American Convention. Under the title "Right to Property," that article provides that "(e) everyone has the right to the use and enjoyment of his property." When the Court examined this question, it had before it the travaux préparatoires of the Convention. There one can trace the evolution of the language of Article 21 to its present-day wording. Originally, the article was to speak of the right to private property, specifically. Later, the proposed language changed until the authors finally settled on the wording we have today: "the right to the use and enjoyment of [one's] property." The language in which this right is framed was meant to accommodate all subjects protected by the Convention. Obviously, there is no single model for the use and enjoyment of property. Every people, according to its culture, interests, aspirations, customs, characteristics and beliefs, can institute its own distinctive formula for the use and enjoyment of property. In short, these traditional concepts have to be examined and understood from the same perspective.

[...]

13. Such is the case with the indigenous property system, which does not preclude other forms of land ownership or tenure that are the product of differing historical and cultural processes. Indeed, it and the other forms of property and land tenure fit into the broad and pluralistic universe of rights that the inhabitants of various American countries enjoy. This set of rights has spread because of shared basic beliefs --the core idea of the use and exploitation of goods-, although there are significant differences as well --especially apropos the final disposition of those goods. But, taken together, these laws and rights are the property system that most of our countries have in common. To ignore the idiosyncratic versions of the right to use and enjoy property, recognized in Article 21 of the American Convention, and to pretend that there is only one way to use and enjoy property, is tantamount to denying protection of that right to millions of people, thereby withdrawing from them the recognition and protection of essential rights afforded to other people. Far from ensuring the equality of all persons, this would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights.

14. In its analysis of the matter subject to its jurisdiction, the Inter-American Court regarded the rights to use and enjoy property, protected under Convention Article 21, from a perfectly valid perspective, that of the members of the indigenous communities. In my opinion, the approach taken for purposes of the present judgment does not in any way imply a disregard or denial of other related rights that differ in nature, such as the collec-

tive rights so frequently referenced in the domestic and international instruments that I have cited in this opinion. It must be recalled that individual subjective rights flow from and are protected by these community rights, which are an essential part of the juridical culture of many indigenous peoples and, by extension, of their members. In short, there is an intimate and inextricable link between individual and collective rights, a linkage that is a condition sine qua non for genuine protection of persons belonging to indigenous ethnic groups.

15. During the hearing held to receive evidence on the merits of the case that the Court has now decided, opinions were proffered that alluded directly to this very point. In his verbal opinion, summarized in the Judgment, expert witness Rodolfo Stavenhagen Gruenbaum pointed out that "(i)n certain historical contexts, the rights of the human person can be fully guaranteed and exercised only by recognizing the rights of the collectivity and of the community to which that person has belonged since birth and of which he is part, a community that affords him the elements necessary to be able to feel self-fulfilled as a human being, which also means a social and cultural being."

[...]

17. The judgment of the Inter-American Court of Human Rights in the Mayagna (Sumo) Awas Tingni Community Case contributes to the recognition of certain specific juridical relationships that together make up the body of law shared by a good portion of the inhabitants of the Americas, a body of law being increasingly accepted by and recognized in domestic laws and international instruments. The topic of this judgment, and by extension the judgment itself, is at that point where civil laws and economic, social and cultural laws converge. In other words, it stands at that junction where civil law and social law meet. The American Convention, applied in accordance with the interpretation that it authorizes and in accordance with the rules of the Law of Treaties, must be and is a system of rules that affords the indigenous people of our hemisphere the same, certain protection that it affords to all people of the American countries who come under the American Convention's umbrella.

*Inter-American Court
of Human Rights*

*Plan de Sánchez Massacre
v. Guatemala*

Reparations

*Judgment of
November 19, 2004*



[...]

I. INTRODUCTION OF THE CASE

1. On July 31, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed an application against the State of Guatemala (hereinafter “the State” or “Guatemala”), before the Inter-American Court, originating from petition No. 11,763, received by the Secretariat of the Commission on October 25, 1996.

2. The Commission submitted the application, based on Article 61 of the American Convention, for the Court to “declare that the State was internationally responsible (...) for violations to the rights to humane treatment, judicial protection, a fair trial, (...) equal protection, freedom of conscience and religion, and (...) property, in relation to the obligation to respect rights, which are embodied in Articles 5, 8, 25, 24, 12, 21 and 1[.1] of the American Convention.” In the application, the Commission alleged “denial of justice and other acts of intimidation and discrimination affecting the rights to humane treatment, freedom of conscience and religion, and property of the survivors, and the next of kin of the victims of the massacre of 268 individuals (...), mostly members of the Maya indigenous people of the village of Plan de Sánchez, Municipality of Rabinal, Department of Baja Verapaz, perpetrated by members of the Guatemalan Army and civilian collaborators, under the guidance of the Army, on Sunday, July 18, 1982.

[...]

VIII. REPARATIONS – APPLICATION OF ARTICLE 63.1

[...]

c) Non-Pecuniary Damage

[...]

Considerations of the Court

[...]

85. The Court observes that, in the instant case, the victims belonging to the Mayan indigenous people, of the Achí linguistic community, possess their own traditional authorities and forms of community organization, centered on consensus and respect. They have their own social, economic and cultural structures. For the members of these communities, harmony with the environment is expressed by their spiritual relationship with the land, the way they manage their resources and a profound respect for nature. Traditions, rites and customs have an essential place in their community life. Their spirituality is reflected in the close relationship between the living and the dead, and is expressed, based on burial rites, as a form of permanent contact and solidarity with their ancestors. The transmission of culture and knowledge is one of the roles assigned to the elders and the women.

86. Given that the victims in this case are members of the Mayan people, this Court considers that an important component of the individual reparation is the reparation that the Court will now grant to the members of the community as a whole.

87. Bearing in mind the above, and also the different aspects of the damage adduced by the Commission and by the representatives, the Court establishes in fairness the value of the compensation for non-pecuniary damage, which must be delivered to each of the victims (...) and in accordance with the following parameters:

a) It must be taken into consideration that the victims were unable to bury appropriately their next of kin who had been executed in the massacre or practice funeral rites in accordance with their traditions. And, it is necessary to recall the special significance for the Mayan culture, and particularly the Maya-Achí culture, of the funeral rites, and the magnitude of the damage caused to the victims because these rites were not respected. Moreover, it has been proved that, owing to the conditions of decomposition and calcination in which the remains were found after the exhumations conducted in 1994 and 1996, only a few victims could bury their next of kin and perform the corresponding ceremonies (...)

b) It must also be recalled that the victims in this case could not freely celebrate ceremonies, rites and other traditional manifestations for some time, which affected the reproduction and transmission of their culture. It has been proved that the death of the women and the elders, oral transmitters of the Maya-Achí culture, caused a cultural vacuum. (...)

c) The damage caused to the victims by the permanent military presence, surveillance and repression to which they were subjected should be taken into account.

It has also been established that the victims were forced to patrol with the perpetrators and to come in contact with them in the town's common areas. The victims were stigmatized, pointed out as "guerrillas" and, as such, responsible for the events. All the foregoing resulted in the victims feeling terror, paralysis, insecurity, frustration, humiliation, guilt and anguish, which has significantly altered their living conditions and their family and community relationships. (...)

d) The non-pecuniary damage caused to the members of the Plan de Sánchez community owing to the militarization of the village must be borne in mind. It has been proved that the traditional community structure of Plan de Sánchez was substituted by a vertical, militaristic control system, in which the natural leaders of the community could not perform their role and were replaced by the military authorities. (...)

e) It must be considered that the facts of this case remain unpunished, which has caused the victims frustration, impotence and profound anguish. It has been proved that the victims remained in complete silence, without being able to speak or report what had happened for almost ten years. Since the complaint was filed in December 1992, the criminal proceedings have been characterized by the delay in the investigation and the negligence of the Attorney General's office. (...)

f) It must be borne in mind that the discrimination to which the victims have been subjected has affected their possibilities of access to justice, which has caused them to feel excluded and undervalued (...), and

g) it must be taken into account that, as a result of the facts, the physical and mental health of the victims has been affected and requires care and treatment (...)

[...]

b) Public act acknowledging international responsibility to make reparation to the victims and to commemorate those executed in the massacre

100. In its judgment on merits of April 29, 2004 (...), the Court stated that the State's acknowledgment of responsibility made a positive contribution to the evolution of this proceeding and to the application of the principles that inspire the American Convention. The Court also recognizes that, during the public hearing held on April 24, 2004, the State manifested "its profound regret for the events endured and suffered by the Plan de Sánchez community on July 18, 1982, [and] apologize[d] to the victims, the survivors and the next of kin[,] as an initial sign of respect, reparation and guarantee of non-repetition." However, for this declaration to be fully effective as reparation to the victims and serve as a guarantee of non-repetition, the Court considers that the State must organize

a public act acknowledging its responsibility for the events that occurred in this case to make reparation to the victims. The act should be carried out in the village of Plan de Sánchez, where the massacre occurred, in the presence of high-ranking State authorities and, in particular, in the presence of the members of the Plan de Sánchez community and the other victims in this case, inhabitants of the villages of Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac; the leaders of these affected communities must also take part in the act. The State must provide the means to facilitate the presence of these persons in the said act. Also, Guatemala must conduct this act in both Spanish and in Maya-Achí, and publicize it in the media. The State shall carry out this activity within one year of notification of this judgment.

101. Bearing in mind the characteristics of the case as regards those who were executed in the Plan de Sánchez massacre, carried out by State agents on July 18, 1982, the Court considers that, during this act, the State must honor publicly the memory of those executed, most of them members of the Mayan indigenous people, belonging to the Achí linguistic community, who were the inhabitants of the village of Plan de Sánchez and also the villages of Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac. The State must take into account the traditions and customs of the members of the affected communities in this act.

c) Translation of the judgments of the Court into the Maya-Achí language

102. The Court considers that the State must translate the American Convention on Human Rights into the Maya-Achí language, if this has not been done already, as well as the judgment on merits delivered by the Court on April 29, 2004, and this judgment. Guatemala must also provide the necessary resources to publicize these texts in the municipality of Rabinal and deliver them to the victims of the instant case. To this end, the State has one year from notification of this judgment.

[...]

h) Development program (health, education, production and infrastructure)

[...]

110. Given the harm caused to the members of the Plan de Sánchez community and to the members of the communities of Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac, owing to the facts of this case, the Court decides that the State shall implement the following programs in these communities (in addition to the public works financed by the national budget allocated to that region or municipality): a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) sewage system and potable water supply; d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment.

[...]

XI. OPERATIVE PARAGRAPHS

125. Therefore,

THE COURT,

unanimously,

[...]

ORDERS:

[...]

2. The State shall organize a public act to acknowledge its responsibility for the events that occurred in this case and to make reparation to its victims. The act must be carried out in the village of Plan de Sánchez, where the massacre occurred, in the presence of senior State authorities and, particularly the members of the Plan de Sánchez community and the other victims in this case, inhabitants of the villages of Chipuerta, Joya de Ramos,

Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac; the leaders of these affected communities must participate in this act. The State shall provide the necessary means to facilitate the presence of these people in the act. Furthermore, the State shall conduct the act in both Spanish and Maya-Achí and publicize it in the media, (...).

[...]

4. The State shall translate the American Convention on Human Rights into Maya-Achí, if this has not been done already, and also the judgment on merits delivered by the Court on April 29, 2004, and this judgment. The State shall also provide the necessary resources to publicize these texts in the municipality of Rabinal and deliver them to the victims in this case, (...).

[...]

9. The State shall implement the following programs in the communities of Plan de Sánchez, Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac: a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) sewage system and potable water supply; d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, and also training for the personnel of the Rabinal Municipal Health Center so that they may provide medical and psychological care to those who have been affected and who require this kind of treatment, (...).

*Inter-American Court
of Human Rights*

Moiwana Community v. Suriname

*Preliminary Objections, Merits,
Reparations and Costs*

*Judgment of
June 15, 2005*



[...]

I. INTRODUCTION OF THE CASE

1. On December 20, 2002, pursuant to Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted an application against the State of Suriname (hereinafter “the State” or “Suriname”) to the Court, originating from petition No. 11,821, which had been received at the Commission’s Secretariat on June 27, 1997.

[...]

3. According to the Commission, on November 29, 1986, members of the armed forces of Suriname attacked the N’djuka Maroon village of Moiwana. State agents allegedly massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack supposedly fled into the surrounding forest, and then into exile or internal displacement. Furthermore, as of the date of the application, there allegedly had not been an adequate investigation of the massacre, no one had been prosecuted or punished and the survivors remained displaced from their lands; in consequence, they have been supposedly unable to return to their traditional way of life. Thus, the Commission stated that, while the attack itself predated Suriname’s ratification of the American Convention and its recognition of the Court’s jurisdiction, the alleged denial of justice and displacement of the Moiwana community occurring subsequent to the attack comprise the subject matter of the application.

[...]

IX. ARTICLE 5 OF THE AMERICAN CONVENTION (RIGHT TO HUMANE TREATMENT) IN RELATION WITH ARTICLE 1.1 (OBLIGATION TO RESPECT RIGHTS)

[...]

a) Obstruction of Moiwana community members’ efforts to obtain justice

The Court’s Assessment

[...]

95. (...) the ongoing impunity has a particularly severe impact upon the Moiwana villagers, as a N'djuka people. As indicated in the proven facts (...), justice and "collective responsibility" are central precepts within traditional N'djuka society. If a community member is wronged, the next of kin – which includes all members of his or her matrilineage – are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit – and perhaps other ancestral spirits – may torment their living next of kin.

[...]

b) Inability of Moiwana community members to honor properly their deceased loved ones

98. As indicated in the proven facts (...), the N'djuka people have specific and complex rituals that must be precisely followed upon the death of a community member. Furthermore, it is extremely important to have possession of the physical remains of the deceased, as the corpse must be treated in a particular manner during the N'djuka death ceremonies and must be placed in the burial ground of the appropriate descent group. Only those who have been deemed unworthy do not receive an honorable burial.

99. If the various death rituals are not performed according to N'djuka tradition, it is considered a profound moral transgression, which will not only anger the spirit of the individual who died, but also may offend other ancestors of the community (...). This leads to a number of "spiritually-caused illnesses" that become manifest as actual physical maladies and can potentially affect the entire natural lineage (...). The N'djuka understand that such illnesses are not cured on their own, but rather must be resolved through cultural and ceremonial means; if not, the conditions will persist through generations (...). In this way, Ms. Diefenjo stated that, if the death ceremonies are not performed: it will burden all the children, also be after ourselves. (...) It is if we do not exist on earth. I mean, that will be the burden. (...) If it is not done properly with those killed, then many things can happen with us (...). So if it is not taken care of properly for those died, then we are nowhere.

100. Thus, one of the greatest sources of suffering for the Moiwana community members is that they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture. The Court notes that it is understandable, then, that community members have been distressed by reports indicating that some of the corpses were burned at a Moengo mortuary. As Mr. Willemdam stated, "that is one of the worst things that could occur to us, if you burn the body of someone who died."

c) The separation of community members from their traditional lands

101. The proven facts demonstrate that a N'djuka community's connection to its traditional land is of vital spiritual, cultural and material importance (...). Indeed, as the expert witnesses Thomas Polimé and Kenneth Bilby commented (...), in order for the culture to preserve its very identity and integrity, the Moiwana community members must maintain a fluid and multidimensional relationship with their ancestral lands.

102. However, Moiwana Village and its surrounding traditional lands have been abandoned since the events of November 29, 1986 (...). Numerous community members are internally displaced within Suriname and the rest remain to this day as refugees in French Guiana (...). Unable to practice their customary means of subsistence and livelihood, many, if not all, have suffered poverty and deprivation since their flight from Moiwana Village (...). Ms. Difenjo testified before the Court that since the attack, her life "has been completely disturbed"; moreover, she feels that the plight of the refugees has been ignored by the State and emphasized that French Guiana "is not [her] place." Mr. Ajintoena, for his part, stated that they "lost everything" after the events of 1986 and need "badly" to return to their traditional lands in order "to restore [their] lives." He further testified that, with the attack, "the government destroyed the cultural tradition [...] of the Maroon communities in Moiwana."

103. Taking into account the foregoing analysis, the Court concludes that the Moiwana community members have endured significant emotional, psychological, spiritual and economic hardship – suffering to a such a degree as to result in the State's violation of Article 5.1 of the American Convention, in relation to Article 1.1 of that treaty, to the detriment of said community members.

X. *ARTICLE 22 OF THE AMERICAN CONVENTION (FREEDOM OF MOVEMENT AND RESIDENCE) IN RELATION WITH ARTICLE 1.1 (OBLIGATION TO RESPECT RIGHTS)*

[...]

117. In the instant case, as discussed above, many Moiwana community members have remained in French Guiana, owing to fears for their safety and the failure of the State's criminal investigation. Nevertheless, in 1993 a minority of the community members returned to Suriname and were placed in a temporary reception center in Moengo – yet, many remain in the reception center to this day, as they haven't been provided with a suitable alternative. Ms. Difenjo expressed indignation at the State's approach to the refugees in general; she testified that, although Moiwana community members have written the State letters, government officials have very rarely visited them in French Guiana or attended to their needs: "they consider us like dogs: you can kill them, you don't have to pay that much attention to them." As established previously (...), since their flight from Moiwana Village in 1986, both the refugees in French Guiana and those who never left Suriname have typically faced impoverished conditions and lack access to many basic services.

118. In sum, only when justice is obtained for the events of November 29, 1986 may the Moiwana community members: 1) appease the angry spirits of their deceased family members and purify their traditional land; and 2) no longer fear that further hostilities will be directed toward their community. Those two elements, in turn, are indispensable for their permanent return to Moiwana Village, which many – if not all – of the community members wish to accomplish (...).

119. The Court observes that Suriname has disputed that the Moiwana survivors suffer restrictions upon their travels or residence; in that regard, the State asserts that they may indeed move freely throughout the country. Regardless of whether a legal disposition actually exists in Suriname that establishes such a right – upon which the Tribunal deems it unnecessary to rule – in this case the Moiwana survivors' freedom of movement and residence is circumscribed by a very precise, de facto restriction, originating from their well-founded fears described above, which excludes them only from their ancestral territory.

120. Thus, the State has failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have a special depen-

gency and attachment – as there is objectively no guarantee that their human rights, particularly their rights to life and to personal integrity, will be secure. By not providing such elements – including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack – Suriname has failed to ensure the rights of the Moiwana survivors to move freely within the State and to choose their place of residence. Furthermore, the State has effectively deprived those community members still exiled in French Guiana of their rights to enter their country and to remain there.

121. For the foregoing reasons, the Court declares that Suriname violated Article 22 of the American Convention, in relation to Article 1.1 of that treaty, to the detriment of the Moiwana community members.

XI. ARTICLE 21 OF THE AMERICAN CONVENTION (RIGHT TO PROPERTY) IN RELATION TO ARTICLE 1.1 (OBLIGATION TO RESPECT RIGHTS)

[...]

128. In the preceding chapter regarding Article 22 of the Convention, the Court held that the State's failure to carry out an effective investigation into the events of November 29, 1986, leading to the clarification of the facts and punishment of the responsible parties, has directly prevented the Moiwana community members from voluntarily returning to live in their traditional lands. Thus, Suriname has failed to both establish the conditions, as well as provide the means, that would allow the community members to live once again in safety and in peace in their ancestral territory; in consequence, Moiwana Village has been abandoned since the 1986 attack.

129. In order to determine whether such circumstances constitute the deprivation of a right to the use and enjoyment of property, naturally, this Court must first assess whether Moiwana Village belongs to the community members, bearing in mind the broad concept of property developed in the Tribunal's jurisprudence.

130. The parties to the instant case are in agreement that the Moiwana community members do not possess formal legal title – neither collectively nor individually – to their traditional lands in and surrounding Moiwana Village. According to submissions from the representatives and Suriname, the territory formally belongs to the State in default, as no private individual or collectivity owns official title to the land.

131. Nevertheless, this Court has held that, in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership.⁷¹ That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival.⁷² For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.⁷³

132. The Moiwana community members are not indigenous to the region; according to the proven facts, Moiwana Village was settled by N'djuka clans late in the 19th Century (...). Nevertheless, from that time until the 1986 attack, the community members lived in the area in strict adherence to N'djuka custom. Expert witness Thomas Polimé described the nature of their relationship to the lands in and around Moiwana Village: [the] N'djuka, like other indigenous and tribal peoples, have a profound and all-encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement has severed these fundamental ties. Many of the survivors and next of kin locate their point of origin in and around Moiwana Village. Their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well being. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions, further detracting from their personal and collective security and sense of well being.

133. In this way, the Moiwana community members, a N'djuka tribal people, possess an “all-encompassing relationship” to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the commu-

71 Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 151.

72 Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149

73 Case of the Mayagna (Sumo) Awas Tingni Community, supra note 71, para. 149.

nity as a whole.⁷⁴ Thus, this Court's holding with regard to indigenous communities and their communal rights to property under Article 21 of the Convention must also apply to the tribal Moiwana community members: their traditional occupancy of Moiwana Village and its surrounding lands – which has been recognized and respected by neighboring N'djuka clans and indigenous communities over the years (...) – should suffice to obtain State recognition of their ownership. The precise boundaries of that territory, however, may only be determined after due consultation with said neighboring communities (...).

134. Based on the foregoing, the Moiwana community members may be considered the legitimate owners of their traditional lands; as a consequence, they have the right to the use and enjoyment of that territory. The facts demonstrate, nevertheless, that they have been deprived of this right to the present day as a result of the events of November 1986 and the State's subsequent failure to investigate those occurrences adequately.

135. In view of the preceding discussion, then, the Court concludes that Suriname violated the right of the Moiwana community members to the communal use and enjoyment of their traditional property. In consequence, the Tribunal holds that the State violated Article 21 of the American Convention, in relation to Article 1.1 of that treaty, to the detriment of the Moiwana community members.

[...]

XIII. REPARATIONS (APPLICATION OF ARTICLE 63.1 OF THE AMERICAN CONVENTION)

[...]

C) Moral Damages

The Court's Assessment

194. Given that the victims of the present case are members of the N'djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; (...).

74 Cf. Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 71, para. 149.

195. The Court's assessment of moral damage in the instant case particularly takes into account the following aspects of the Moiwana community members' suffering: a) their inability, despite persistent efforts, to obtain justice for the attack on their village, particularly in light of the N'djuka emphasis upon punishing offenses in a proper manner (...). Such long-standing impunity, fostered by violent State efforts to obstruct justice (...), humiliates and infuriates the community members, as much as it fills them with dread that that offended spirits will seek revenge upon them (...). In addition, due to the failure of the State's criminal investigation, community members are fearful that they could once again confront hostilities if they were to return to their traditional lands (...); b) they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture, which causes them deep anguish and despair (...). Since the various death rituals have not been performed according to N'djuka tradition, the community members fear "spiritually-caused illnesses," which they believe can affect the entire natural lineage and, if reconciliation is not achieved, will persist through generations (...); and c) the Moiwana community members' connection to their ancestral territory was brusquely severed – dispersing them throughout Suriname and French Guiana. Since a N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance, their forced displacement has devastated them emotionally, spiritually, culturally, and economically (...).

196. In consideration of the severe circumstances discussed above, the Tribunal sees fit, on grounds of equity, to direct the State to grant an indemnity for moral damages (...).

D) Other Forms of Reparation (Satisfaction measures and non-repetition guarantees)

[...]

The Court's Assessment

[...]

b) Collective title to traditional territories

209. In light of its conclusions in the chapter concerning Article 21 of the American Convention (...), the Court holds that the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were

expelled, and provide for their use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories.

210. The State shall take these measures with the participation and informed consent of the victims as expressed through their representatives, the members of the other Cottica N'djuka villages and the neighboring indigenous communities, including the community of Alfonsdorp.

211. Until the Moiwana community members' right to property with respect to their traditional territories is secured, Suriname shall refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment of the property located in the geographical area where the Moiwana community members traditionally lived until the events of November 29, 1986.

c) *State guarantees of safety for those community members who decide to return to Moiwana Village*

212. The Court is aware that the Moiwana community members do not wish to return to their traditional lands until: 1) the territory is purified according to cultural rituals; and 2) they no longer fear that further hostilities will be directed toward their community. Neither of these elements is possible without an effective investigation and judicial process, leading to the clarification of the facts and punishment of the responsible parties. As these processes are carried out and led to conclusion, only the community members themselves can decide when exactly it would be appropriate to return to Moiwana Village. When community members eventually are satisfied that the necessary conditions have been reached so as to permit their return, the State shall guarantee their safety. To that effect, upon the community members' return to Moiwana Village, the State shall send representatives every month to Moiwana Village during the first year, in order to consult with the Moiwana residents. If the community members express concern regarding their safety during those monthly meetings, the State must take appropriate measures to guarantee their security, which shall be designed in strict consultation with said community members.

d) *Developmental fund*

213. As the 1986 military operation destroyed Moiwana Village property and forced survivors to flee, both the representatives and the Commission have emphasized the neces-

sity of implementing a developmental program that would provide basic social services to the community members upon their return. The State, for its part, has shown willingness “to pay for the reasonable costs of survivors and family members to commence cultural activities [...], with regard to the occurrences [of November 29, 1986].”

214. In that regard, this Court rules that Suriname shall establish a developmental fund, to consist of US \$1,200,000 (one million, two hundred thousand dollars of the United States of America), which will be directed to health, housing and educational programs for the Moiwana community members. The specific aspects of said programs shall be determined by an implementation committee, which is described in the following paragraph, and shall be completed within a period of five years from the date of notification of the present judgment.

215. The abovementioned committee will be in charge of determining how the developmental fund is implemented and will be comprised of three members. The committee shall have a representative designated by the victims and another shall be chosen by the State; the third member shall be selected through an agreement between the representatives of the victims and the State. If the State and the representatives of the victims have not arrived at an agreement regarding the composition of the implementation committee within six months from the date of notification of the present judgment, the Court will convene them to a meeting in order to decide upon the matter.

e) *Public apology and acknowledgment of international responsibility*

216. The Court notes with appreciation Suriname’s statement that it “has no objections to issue a public apology to the whole nation with regard to the occurrences that took place in the Village of Moiwana and to the survivors and family members in particular.” In this regard, as a measure of satisfaction to the victims and in attempt to guarantee the non-repetition of the serious human rights violations that have occurred, the State shall publicly recognize its international responsibility for the facts of the instant case and issue an apology to the Moiwana community members. This public ceremony shall be performed with the participation of the Gaanman, the leader of the N’djuka people, as well as high-ranking State authorities, and shall be publicized through the national media. Furthermore, in consideration of the particular circumstances of the instant case, the event must also honor the memory of Herman Gooding, the civilian police official who was murdered due to his courageous efforts to investigate the events of November 29, 1986.

[...]

XVI. OPERATIVE PARAGRAPHS

233. Therefore,

THE COURT,

DECIDES,

[...]

AND DECIDES,

Unanimously, that:

1. The State shall implement the measures ordered with respect to its obligation to investigate the facts of the case, as well as identify, prosecute, and punish the responsible parties, (...).
2. The State shall, as soon as possible, recover the remains of the Moiwana community members killed during the events of November 29, 1986, and deliver them to the surviving community members, (...).
3. The State shall adopt such legislative, administrative, and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for the members' use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories, (...).
4. The State shall guarantee the safety of those community members who decide to return to Moiwana Village, (...).
5. The State shall establish a community development fund, (...)

[...]

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

[...]

IX. From the Right to a Project of Life to the Right to a Project of After-Life.

[...]

68. The present case of the Moiwana Community, in my view, takes us even further than the emerging right to the project of life. A couple of years ago this Court broke into new ground by asserting the existence of a damage to the project of life. The whole construction took into account, however, the living. In the present case, however, I can visualize, in the griefs of the N'djukas of the Moiwana village, a claim to the right to the project of after-life, taking into account the living in the relations with their dead, altogether. International Law in general, and the International Law of Human Rights in particular, cannot remain indifferent to the spiritual manifestations of human beings, such as the ones expressed in the proceedings before this Court in the present case of the Moiwana Community.

69. There is no cogent reason to remain in the world exclusively of the living. In the *cas d'espèce*, it appears to me that the Ndjukas are certainly well entitled to cherish their project of after-life, the encounter of each of them with their ancestors, the harmonious relationship between the living and their dead. Their outlook of life and after-life embodies fundamental values, long forgotten and lost by the sons and daughters of the industrial and the communications "revolutions" (or rather, involutions, from the spiritual perspective).

70. My years of experience in this Court have enabled me to adjudicate on cases which have raised issues which have gone, in fact, beyond this world of the living (such as the *Bámaca Velásquez* case, 2000-2002, and the *Massacre of Plan de Sánchez* case, 2004, among others). These have been cases with a dense cultural content, and the solutions arrived at by the Court have left with me the impression that there is a fertile ground on which to advance further. I have, ever since those decisions, much reflected on the matter, and the present Moiwana Community case appears to me to constitute a most adequate occasion to propose an entirely new category of damage, not covered by the existing categories to date.

X. Beyond the Moral Damage: the Configuration of the Spiritual Damage.

71. I would dare to conceptualize it as a spiritual damage, as an aggravated form of moral damage, which has a direct bearing on what is most intimate to the human person, namely, her inner self, her beliefs in human destiny, her relations with their dead. This spiritual damage would of course not give rise to pecuniary reparations, but rather to other forms of reparation. The idea is launched herein, for the first time ever, to the best of my knowledge.

72. This new category of damage, - as I perceive it, - embodies the principle of humanity in a temporal dimension, encompassing the living in their relations with their dead, as well as the unborn, conforming the future generations. This is how I see it. The principle of *humanitas* has, in fact, a long historical projection, and owes much to ancient cultures (in particular to that of the Greeks), having become associated in time with the very moral and spiritual formation of human beings⁸⁸.

73. This new type of damage that I am proposing herein can be distinguished from moral damages, as these became commonly understood. May I dwell upon this point for a while. Moral damages have developed in legal science under a strong influence of the theory of civil responsibility, which, in turn, was constructed in the light, above all, of the fundamental principle of the *neminem laedere*, or *alterum non laedere*. This basic conception was transposed from domestic into international law, encompassing the idea of a reaction of the international legal order to harmful acts (or omissions) to the human person (individually and collectively) and to shared social values.

74. The determination of moral damages ensuing therefrom (explained by the Roman law notion of *id quod interest*) has, in legal practice (national and international), taken usually the form of “quantifications” of the damages. Moreover, a “quantification” of the kind is undertaken as a form of reparation, to the benefit essentially of the living (direct or indirect victims). When one comes to the proposed spiritual damage, however, I cannot see how to separate the living from their dead.

75. In historical perspective, the whole doctrinal discussion on moral damages was marked by the sterile opposition between those who admitted the possibility of repara-

88 G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 153-154

tion of moral damages (e.g., Calamandrei, Carnelutti, Ripert, Mazeaud et Mazeaud, Aubry et Rau, and others) and those who denied it (e.g., Savigny, Massin, Pedrazzi, Esmein, and others); the point that they all missed, in their endless quarrels about the *pretium doloris*, was that reparation did not, and does not, limit itself to pecuniary reparation, to indemnization. Their whole polemic was conditioned by the theory of civil responsibility.

76. Hence the undue emphasis on pecuniary reparations, feeding that long-lasting doctrinal discussion. This has led, in domestic legal systems, to reductionisms, which paved the way to distorted “industries of reparations”, emptied of true human values. The advent of the International Law of Human Rights, and in particular the case-law of the Inter-American Court, came fortunately to widen considerably the horizon of reparations, and render that doctrinal difference largely immaterial, if not irrelevant, in our days. There appears to be no sense at all in attempting to resuscitate the doctrinal differences as to the *pretium doloris* in relation to the configuration of the proposed spiritual damage. This latter is not susceptible of pecuniary reparations, it requires other forms of reparation.

77. The testimonial evidence produced before this Court in the *cas d’espèce* indicated that, in the N’djukas cosmovision, in circumstances like those of the present case the living and their dead suffer together, and this has an intergenerational projection. Unlike moral damages, in my view the spiritual damage is not susceptible of “quantifications”, and can only be repaired, and redress be secured, by means of obligations of doing (*obligaciones de hacer*), in the form of satisfaction (e.g., honouring the dead in the persons of the living).

78. It should be kept in mind that, in the present case of the Moiwana Community, as a result of the massacre of 1986, the whole community life in the Moiwana village was disrupted; family life was likewise disrupted, displacements took place which last until now (almost two decades later). The fate of the mortal remains of the direct victims, the non-performance of funerary rites and ceremonies, and the lack of a proper burial of the deceased, deeply disrupted the otherwise harmonious relations of the living N’djukas with their dead. The grave damage caused to them, in my view, was not only psychological, it was more than that: it was a true spiritual damage, which seriously affected, in their cosmovision, not only the living, but the living with their dead altogether.

79. Moreover, the resulting impunity, in the form of a generalized and sustained violence (increased by the sense of indifference of the public power to the fate of the

victims) which has persisted to date, has generated, in the members of the Moiwana Community, a sense of total defencelessness. This has been accompanied by their loss of faith in human justice, the loss of faith in Law, the loss of faith in reason and conscience governing the world.

80. In addition, in the public hearing of 09.09.2004 before this Court, as pointed out in the present Judgment, former residents of the Moiwana village indicated that they were haunted by their ancestors for not having had a proper burial; this had negative consequences for the next-of-kin. They stressed that in the N'djuka culture they had the obligation to pursue justice, and because of the denial of justice that they experienced in the present case, it is as if they were "dying a second time"⁸⁹. The State-planned massacre of 1986 "destroyed the cultural tradition (...) of the Maroon communities in Moiwana"⁹⁰. The expert evidence produced before this Court expressly referred to "spiritually-caused illnesses"⁹¹.

81. All religions devote attention to human suffering, and attempt to provide the needed transcendental support to the faithful; all religions focus on the relations between life and death, and provide distinct interpretations and explanations of human destiny and after-life⁹². Undue interferences in human beliefs - whatever religion they may be attached to - cause harm to the faithful, and the International Law of Human Rights cannot remain indifferent to such harm. It is to be duly taken into account, like other injuries, for the purpose of redress. Spiritual damage, like the one undergone by the members of the Moiwana Community, is a serious harm, requiring corresponding reparation, of the (non-pecuniary) kind I have just indicated.

[...]

89 Paragraph 80(b), (c) and (d).

90 Paragraph 80(a) and (d).

91 Paragraphs 80(e) and 83(9).

92 Cf., e.g., [Various Authors,] *Life after Death in World Religions*, Maryknoll N.Y., Orbis, 1997, pp. 1-124.

*Inter-American Court
of Human Rights*

*Yakye Axa Indigenous Community
v. Paraguay*

Merits, Reparations and Costs

*Judgment of
June 17, 2005*



[...]

I. FILING OF THE CASE

[...]

1. On March 17, 2003 the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Inter-American Court an application against the State of Paraguay (hereinafter “the State” or “Paraguay”), originating in complaint No. 12,313, received at the Secretariat of the Commission on January 10, 2000.

2. The Commission filed the application based on Articles 51 and 61 of the American Convention, for the Court to decide whether Paraguay breached Articles 4 (Right to Life); 8 (Right to Fair Trial); 21 (Right to Property) and 25 (Judicial Protection) of the American Convention, in combination with the obligations set forth in Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of that same Convention, to the detriment of the Yakye Axa Indigenous Community of the Enxet-Lengua People (hereinafter the “Yakye Axa indigenous Community”, the “Yakye Axa Community”, the “indigenous Community” or the “Community”) and its members. The Commission alleged that the State has not ensured the ancestral property rights of the Yakye Axa Indigenous Community and its members, because said Community’s land claim has been processed since 1993 but no satisfactory solution has been attained. According to the Commission in its application, this has made it impossible for the Community and its members to own and possess their territory, and has kept it in a vulnerable situation in terms of food, medical and public health care, constantly threatening the survival of the members of the Community and of the latter as such.

[...]

VII. PRIOR CONSIDERATIONS

51. In view of the fact that the instant case addresses the rights of the members of an indigenous Community, the Court deems it appropriate to recall that, pursuant to Articles 24 (Right to Equal Protection) and 1.1 (Obligation to Respect Rights) of the American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals who are not subject to their jurisdiction. However, it is necessary

to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as it will do in the instant case, to assess the scope and content of the Articles of the American Convention, which the Commission and the representatives allege were breached by the State.

VIII. VIOLATION OF ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION (RIGHT TO FAIR TRIAL AND JUDICIAL PROTECTION) IN COMBINATION WITH ARTICLES 1.1 AND 2 OF THAT SAME CONVENTION

[...]

62. The effective remedies that the States must offer pursuant to Article 25 of the American Convention, must be substantiated according to the rules of due legal process (Article 8 of the Convention), all this set within the general obligation of the States themselves to guarantee free and full exercise of the rights recognized by the Convention for all persons under their jurisdiction.¹⁷⁷ In this regard, the Court has deemed that due legal process must be respected in administrative proceedings and in any other proceedings where the decision may affect individuals' rights.¹⁷⁸

63. As regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs (supra para. 51).

[...]

a) Existence of an effective procedure for indigenous land claims

[...]

177 See Case of the Serrano Cruz Sisters, Judgment of March 1, 2005. Series C No. 120, para. 76; Case of the 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109, para. 194, and Case of Las Palmeras. Judgment of December 6, 2001. Series C No. 90, para. 60.

178 See Case of Baena Ricardo. Judgment of February 2, 2001. Series C No. 72, para. 127.

iii. *Administrative procedure for land claims*

[...]

82. The Court deems that granting legal status makes operative the previously existing rights of the indigenous communities, who have exercised them historically and not since they acquired legal status. Their systems of political, social, economic, cultural and religious organization, and the rights associated with them, such as appointment of their own leaders and the right to claim their traditional lands, are recognized not to the legal entity that must be registered to comply with a legal formality, but to the Community itself, which the Paraguayan Constitution itself recognizes existed before the State.

83. For Paraguayan legislation, the indigenous Community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity. Legal status, in turn, is a legal mechanism that grants them the necessary status to enjoy certain basic rights, such as communal property, and to demand their protection when they are abridged.

84. Therefore, the Court finds that legal status, under Paraguayan domestic legislation, is another right guaranteed to the Indigenous Community, as an entity entitled to rights, and thus the date on which it is granted is irrelevant for establishment of the beginning of the duration of the administrative land claim procedure. For this reason, the Court will consider October 5, 1993 as the date when said procedure began (...).

[...]

86. The Court deems that a protracted delay, such as the delay in this case, constitutes in itself a violation of the right to fair trial¹⁸⁰. The State can, however, assert that the delay is not unreasonable, if it states and proves that the delay is directly related to the complexity of the case or to the conduct of the parties involved.

180 See Case of the Serrano Cruz Sisters, *supra* note 177, para. 69; Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, para. 142, and Case of the 19 Tradesmen, *supra* note 177, para. 191.

87. Based on the background set forth in the chapter on Proven Facts, the Court recognizes that the matter in this case is a complex one and that this must be taken into account to assess whether the duration is reasonable.

88. However, the Court notes that delays in the administrative proceeding addressed in the instant Judgment have not been due to the complexity of the case, but rather to systematic delays in the actions of the State authorities. (...)

89. The Court therefore deems that despite the proven complexity of the administrative procedure to claim land in the instant case, actions by the competent State authorities have not been compatible with the principle of reasonable term.

[...]

95. (...) (a)rticle 14.3 of ILO Convention No. 169, incorporated into Paraguayan domestic legislation by Law No. 234/93, provides that: [a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

96. This international provision, in combination with Articles 8 and 25 of the American Convention, places the State under the obligation to provide an effective means with due process guarantees to the members of the indigenous communities for them to claim traditional lands, as a guarantee of their right to communal property.

97. The procedures set forth in Law No. 854/63 and in Law No. 904/81 only allow the IBR and the INDI, respectively, to grant public lands, expropriate land that is not under rational use, or negotiate with the private owners, to give them to the indigenous communities, but when the private owners refuse to sell the land and prove that it is under rational use, the members of the indigenous communities have no effective administrative recourse to claim them.

98. Due all the above, the Court deems that the administrative proceeding followed before the IBR in collaboration with the INDI did not comply with the principle of a reasonable term embodied in the American Convention. The Court also finds that this procedure was clearly ineffective to address the claims by the members of the Yakye Axa Indigenous Community to the land they consider their traditional, ancestral habitat.

99. The Court has said that Article 25 of the Convention is closely linked to the general obligation set forth in Article 1.1 of that same Convention, which give the States Party

the obligation to respect rights under domestic law, entailing the States' responsibility to design and legally establish an effective recourse, as well as to ensure due application of said recourse by its judicial authorities.¹⁸²

100. Article 2 of the American Convention places the States Party under the obligation to establish, in accordance with their Constitutional procedures and the provisions of this Convention, such legislative or other measures as may be necessary for effective exercise of the rights and freedoms protected by this same Convention. Therefore, it is necessary to reaffirm that the obligation to adapt domestic legislation is, by its very nature, one that must be reflected in actual results.¹⁸³

101. The Court has stated before that this provision places the States Party under the general obligation to adjust their domestic legislation to the standards of the Convention itself, to thus ensure the rights embodied in the Convention. Domestic legal provisions for this purpose must be effective (principle of the *effet utile*), and this means that the State must take such measures as may be necessary to actually comply with the provisions of the Convention.

102. Pursuant to Article 2 of the Convention it is necessary to establish appropriate procedures in the framework of the domestic legal system to process the land claims of the indigenous peoples involved. The States must establish said procedures to resolve those claims in such a manner that these peoples have a real opportunity to recover their lands. For this, the general obligation to respect rights set forth in Article 1.1 of said treaty places the States under the obligation to ensure that said procedures are accessible and simple and that the bodies in charge of them have the necessary technical and material conditions to provide a timely response to the requests made in the framework of said procedures.

103. In the instant case, Paraguay has not taken appropriate domestic legal steps necessary to ensure an effective procedure to offer a definitive solution to the claim made

182 See Case of the Mayagna (Sumo) Awas Tingni Community, Judgment of August 31, 2001. Series C No. 79, para. 135; Case of Ivcher Bronstein, Judgment of February 6, 2001. Series C No. 74, para. 135, and Case of the "Street Children" (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 237.

183 See Case of Caesar, Judgment of March 11, 2005. Series C No. 123, para. 93.

by the members of the Yakye Axa Community, under the terms set forth in the previous paragraph.

104. Based on all the above, the Court deems that the legal procedure for the land claim made by the members of the Yakye Axa Community disregarded the principle of reasonable term and was clearly ineffective, all this in violation of Articles 8 and 25 of the American Convention, in combination with Articles 1.1 and 2 of that same Convention.

105. With regard to the amparo remedy and the motions to restrain innovation and register the complaint, the Court deems that these are ancillary proceedings, which depend on the administrative land claim proceeding that was already deemed ineffective by the Court. Therefore, it is unnecessary to enter into further details.

[...]

IX. VIOLATION OF ARTICLE 21 OF THE AMERICAN CONVENTION (RIGHT TO PROPERTY) IN COMBINATION WITH ARTICLES 1.1 AND 2 OF THAT SAME CONVENTION

[...]

Considerations of the Court

[...]

124. In its analysis of the content and scope of Article 21 of the Convention in the instant case, the Court will take into account, in light of the general rules of interpretation set forth in Article 29 of that same Convention, as it has done previously,¹⁹¹ the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generations, as well as the steps that the State has taken to make this right fully effective (*supra* para. 51).

191 See Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 182, para. 148.

125. Previously this Court¹⁹² as well as the European Court of Human Rights¹⁹³ have asserted that human rights are live instruments, whose interpretation must go hand in hand with evolution of the times and of current living conditions. Said evolutionary interpretation is consistent with the general rules of interpretation embodied in Article 29 of the American Convention, as well as those set forth in the Vienna Convention on Treaty Law.

126. In this regard, this Court has stated that interpretation of a treaty should take into account not only the agreements and documents directly related to it (paragraph two of Article 31 of the Vienna Convention), but also the system of which it is a part (paragraph three of Article 31 of said Convention).¹⁹⁴

127. In the instant case, in its analysis of the scope of Article 21 of the Convention, mentioned above, the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention No. 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law.

128. In this regard, the Court has pointed out that: The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this

192 See Case of the Gómez Paquiyauri brothers. Judgment of July 8, 2004. Series C No 110, para. 165; Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 182, para. 146; Case of the "Street Children" (Villagrán Morales et al.), *supra* note 182, para. 193, and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/97 of November 14, 1997. Series A No. 16, para. 114.

193 See Eur. Court H.R., *Tyrer v. The United Kingdom*, 5856/72, judgment of April 25, 1978. Series A no. A26, para. 31.

194 See Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 144; Case of the Gómez Paquiyauri brothers, *supra* note 192, para. 164; Case of the "Street Children" (Villagrán Morales et al.), *supra* note 182, paras. 192 and 193; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, *supra* note 192, para. 113.

question in the context of the evolution of the fundamental rights of the human person in contemporary international law.¹⁹⁵

129. It is also necessary to take into account that, in view of Article 29.b of the Convention, none of its provisions can be interpreted as “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.”

130. ILO Convention No. 169 contains numerous provisions pertaining to the right of indigenous communities to communal property, which is addressed in this case, and said provisions can shed light on the content and scope of Article 21 of the American Convention. The State ratified and included said Convention 169 in its domestic legislation by means of Law No. 234/93.

131. Applying said criteria, this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.¹⁹⁶

[...]

135. The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.

136. The above relates to the provision set forth in Article 13 of ILO Convention No. 169, that the States must respect “the special importance for the cultures and spiritual values

195 Juridical Condition and Rights of the Undocumented Migrants. Juridical Condition and Rights of the Undocumented Migrants Advisory, Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 120, and see The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, *supra* note 192, para. 115.

196 See Case of the Plan de Sánchez Massacre. Reparations (Art. 63.1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 85, and Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 182, para. 149.

of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

137. Therefore, the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21 of the American Convention. In this regard, the Court has previously asserted that the term “property” used in said Article 21 includes “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value”¹⁹⁷.

[...]

140. Now, in the instant case there is no discussion of the right of the members of the indigenous communities, specifically of the Yakye Axa Community, to their territory, understanding what the land means for its members, nor is there any discussion of the fact that hunting, fishing and gathering are essential components of their culture. There is a consensus among the parties regarding domestic provisions that enshrine the territorial rights of the members of the indigenous communities. What is under discussion is the effective realization of those rights.

141. As pointed out above, Paraguay recognizes the right of the indigenous peoples to communal property, but in the instant case, the Court must establish whether it has made said right effective in reality and actual practice. It has been proven (...) that the members of the Community began since 1993 to take the steps required by domestic legislation to claim the territory that they consider their own, and to date their territorial rights have not become effective. In its reply to the application the State, in fact, “recognize[d] that due to factual and legal circumstances it has not been able to satisfy this right to date.”

[...]

197 See Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 182, para. 144, and Case of Ivcher Bronstein, *supra* note 182, para. 122.

143. The Court agrees with the State that both the private property of individuals and communal property of the members of the indigenous communities are protected by Article 21 of the American Convention. However, merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established.

144. Now, when indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.

145. Article 21.1 of the Convention provides that “[t]he law may subordinate [the] use and enjoyment [of property] to the interest of society.” The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.¹⁹⁸

146. When they apply these standards to clashes between private property and claims for ancestral property by the members of indigenous communities, the States must assess, on a case by case basis, the restrictions that would result from recognizing one right over the other. Thus, for example, the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.

198 See (mutatis mutandi) Case of Ricardo Canese, supra note 180, para. 96; Case of Herrera Ulloa Judgment of July 2, 2004. Series C No. 107, para. 127, and Case of Ivcher Bronstein, supra note 182, para. 155.

147. Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.

148. On the other hand, restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21.2 of the Convention.

149. This does not mean that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former. When States are unable, for concrete and justified reasons, to adopt measures to return the traditional territory and communal resources to indigenous populations, the compensation granted must be guided primarily by the meaning of the land for them (...).

150. In this regard, Article 16.4 of ILO Convention No. 169, when it refers to the return of indigenous peoples to territories from which they were displaced, states that: when such return is not possible, (...) these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

151. Selection and delivery of alternative lands, payment of fair compensation, or both, are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law.

[...]

154. To guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values. In

connection with their milieu, their integration with nature and their history, the members of the indigenous communities transmit this non-material cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities.

155. While Paraguay recognizes the right to communal property in its own legal order, it has not taken the necessary domestic legal steps to ensure effective use and enjoyment by the members of the Yakye Axa Community of their traditional lands, and this has threatened the free development and transmission of their traditional practices and culture, in the terms set forth in the previous paragraph.

156. For all the aforementioned reasons, the Court finds that the State violated Article 21 of the American Convention, to the detriment of the members of the Yakye Axa Community, in combination with Articles 1.1 and 2 of that same Convention.

X. VIOLATION OF ARTICLE 4.1 OF THE AMERICAN CONVENTION (RIGHT TO LIFE) IN COMBINATION WITH ARTICLE 1.1 OF THAT SAME CONVENTION

[...]

Considerations of the Court

[...]

161. This Court has asserted that the right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one.²⁰⁰ When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist.²⁰¹ Due to the basic nature of this right, approaches that

200 See Case of the “Juvenile Reeducation Institute”. Judgment of September 2, 2004. Series C No. 112, para. 156; Case of the Gómez Paquiyauri brothers, *supra* note 192, para. 128; Case of Myrna Mack Chang, Judgment of November 25, 2003. Series C No. 101, para. 152, and Case of the “Street Children” (Villagrán Morales et al.), *supra* note 182, para. 144.

201 See Case of the “Juvenile Reeducation Institute”, *supra* note 200, para. 156; Case of the Gómez Paquiyauri brothers, *supra* note 192, para. 128; Case of Myrna Mack Chang, *supra* note 200, para. 152, and Case of the “Street Children” (Villagrán Morales et al.), *supra* note 182, para. 144.

restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.²⁰²

162. One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person²⁰³ and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

163. In the instant case, the Court must establish whether the State generated conditions that worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfill that obligation, taking into account the especially vulnerable situation in which they were placed, given their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and their life aspirations, both individual and collective, in light of the existing international corpus juris regarding the special protection required by the members of the indigenous communities, in view of the provisions set forth in Article 4 of the Convention, in combination with the general duty to respect rights, embodied in Article 1.1 and with the duty of progressive development set forth in Article 26 of that same Convention, and with Articles 10 (Right to Health); 11 (Right to a Healthy Environment); 12 (Right to Food); 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights,²⁰⁴ and the pertinent provisions ILO Convention No. 169.

164. In the chapter on proven facts (...) the Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land

202 See Case of the "Juvenile Reeducation Institute", supra note 200, para. 156; Case of the Gómez Paquiyaui brothers, supra note 192, para. 128; Case of Myrna Mack Chang, supra note 200, para. 152, and Case of the "Street Children" (Villagrán Morales et al.), supra note 182, para. 144.

203 See Case of the "Juvenile Reeducation Institute", supra note 200, para. 159.

204 Paraguay ratified the Additional Protocol to the American Convention on Human Rights regarding Economic, Social and Cultural Rights on June 3, 1997. The Protocol entered into force internationally on November 16, 1999.

and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case (...), the members of the Yakye Axa Community could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

165. These conditions have a negative impact on the nutrition required by the members of the Community who are at this settlement (...). Furthermore, as has been proven in the instant case (...), there are special deficiencies in the education received by the children and lack of access to health care for the members of the Community for physical and economic reasons.

166. In this regard, the United Nations Committee on Economic, Social, and Cultural Rights, in General Comment 14 on the right to enjoy the highest attainable standard of health, pointed out that: [i]ndigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines [...]. [I]n indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this regard, the Committee considers that [...] denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.²⁰⁵

167. Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their

205 UN. Doc. E/C.12/2000/4. The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (22d session, 2000), para. 27.

ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.²⁰⁶

168. In the previous chapter, this Court established that the State did not guarantee the right of the members of the Yakye Axa Community to communal property. The Court deems that this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity, despite the fact that on June 23, 1999 the President of Paraguay issued Decree No. 3.789 that declared a state of emergency in the Community (...).

[...]

171. This Court has deemed it proven that an important part of the Yakye Axa Community voluntarily left their former settlement on "El Estribo" estate in 1996, with the aim of recovering the lands that they consider their own, from which they had left in 1986 (...). In face of the prohibition to enter the territory they claim, the members of the Community decided to settle alongside a national road, facing that land, as part of the struggle to claim their territory. While the State has offered to temporarily relocate them on other lands, these offers have been turned down because, according to the members of the Community, they were not duly consulted, bearing in mind the significance for them of remaining on those lands, or because there could be conflicts with other indigenous communities (...).

172. The Court must highlight the special gravity of the situation of the children and the elderly members of the Yakye Axa Community. The Court has established, in previous

206 See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16.

cases, that regarding the right to life of children, the State has, in addition to the obligations regarding all persons, the additional obligation of fostering the protection measures mentioned in Article 19 of the American Convention. On the one hand, it must play the role of guarantor with greater care and responsibility, and it must take special measures based on the principle of the best interests of the child.²⁰⁷ In the instant case, the State has the obligation, *inter alia*, of providing for the children of the Community the basic conditions to ensure that the situation of vulnerability of their Community due to lack of territory will not limit their development or destroy their life aspirations.²⁰⁸

[...]

175. As regards the special consideration required by the elderly, it is important for the State to take measures to ensure their continuing functionality and autonomy, guaranteeing their right to adequate food, access to clean water and health care. Specifically, the State must provide care for the elderly with chronic diseases and in terminal stages, to help them avoid unnecessary suffering. In this case, it is necessary to take into account that in the Yakye Axa Indigenous Community oral transmission of the culture to the younger generations is primarily entrusted to the elderly (...).

176. Based on the above, the Court finds that the State abridged Article 4.1 of the American Convention, in combination with Article 1.1 of that same Convention, to the detriment of the members of the Yakye Axa Community, for not taking measures regarding the conditions that affected their possibility of having a decent life.

177. Finally, the Commission and the representatives alleged that the State is responsible for the death of sixteen members of the Yakye Axa Community due to causes that could have been avoided with adequate food and medical care, and as a consequence of the

207 See Case of the “Juvenile Reeducation Institute”, *supra* note 200, para. 160; Case of the Gómez Paquiyauri brothers, *supra* note 192, paras. 124, 163-164, and 171; Case of Bulacio, Judgment of September 18 2003, Series C No. 100, paras. 126 and 134; and Case of the “Street Children” (Villagrán Morales et al.), *supra* note 182, paras. 146 and 191. Likewise, see Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

208 See Case of the “Juvenile Reeducation Institute”, *supra* note 200, para. 160; Juridical Condition and Human Rights of the Child, *supra* note 207, paras. 80-81, 84, and 86-88, and Case of the “Street Children” (Villagrán Morales et al.), *supra* note 182, para. 196.

lack of an appropriate and timely response by the State to the Community's claim to its ancestral land. Pursuant to Article 4.1 of the Convention every person has the right for his or her life to be respected and guaranteed, and not to be arbitrarily deprived of it. While this Court deems that, in general, the obligation to respect and guarantee the life of the individuals under its jurisdiction is linked to the responsibility of the State that can derive from its actions or omissions, in the case of the alleged responsibility for the death of those sixteen individuals, this Court does not have sufficient evidence to establish the causes of said deaths.

[...]

XI. REPARATIONS – APPLICATION OF ARTICLE 63.1

[...]

Considerations of the Court

188. In the instant case, the Court shares the view of the Commission and the representatives that the reparations take on a special collective significance. In this regard, the Court deemed in another case involving indigenous peoples that “individual reparation has as an important component the reparations that this Court will subsequently grant to the members of the communities as a whole.”²¹⁴

189. (...) the Court deems that the beneficiaries of the reparations ordered in the instant Judgment are the members of the Yakye Axa Indigenous Community, specified in the list included in annex A to this Judgment.

B) Pecuniary Damages

[...]

194. The Court deems that in the instant case compensation for pecuniary damages must include the expenses incurred by the members of the Yakye Axa Community in the various steps they took to recover the lands they consider their own, such as going and traveling to various State agencies (...). The Court deems that the State must grant com-

²¹⁴ See Case of the Plan de Sánchez Massacre. Reparations, supra note 196, para. 86.

penetration for said expenses, because there is a direct causal link with the facts involving violations in this case, and they are not expenses incurred in connection with access to justice.²¹⁶ (...)

195. In this regard, the Court notes that some of these expenses were made by the Tierraviva organization, representative of the victims, and they are general expenses resulting from the abridgments found in this Judgment. Therefore, the Court sets, in fairness, US\$ 45,000.00 (forty-five thousand United States dollars) or their equivalent in Paraguayan currency, for said expenses incurred by the members of the Yakye Axa Community, some of which were covered by Tierraviva. Said amount will be made available to the leaders of the Community, who must reimburse Tierraviva the appropriate amount, and the remainder will be used for the purpose decided by the members of the Indigenous Community in accordance with their own needs and manner of decision-making, practices, values, and customs.

C) *Non-Pecuniary damages*

[...]

202. This Court notes that when it orders reparation for non-pecuniary damages, it must consider the fact that the right to communal property of the members of the Yakye Axa Community has not been made effective, as well as the grave living conditions to which they have been subjected as a consequence of the State's delay in making their territorial rights effective.

203. Likewise, the Court notes that the special significance of the land for indigenous peoples in general, and for the Yakye Axa Community in particular (...), entails that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations.

[...]

216 See Case of the Serrano Cruz Sisters, *supra* note 177, para. 152.

205. Bearing in mind the above, as well as the various aspects of the damage alleged by the Commission and by the representatives, the Court, in fairness and based on a judicious assessment of the non-pecuniary damage, deems it pertinent for the State to create a community development fund and program that will be implemented on the lands that will be given to the members of the Community, pursuant to paragraphs 215 to 217 of this Judgment. The community program will consist of the supply of drinking water and sanitary infrastructure. In addition to said program, the State must allocate US \$950,000.00 (nine hundred and fifty thousand United States dollars), to a community development program that will consist of implementation of education, housing, agricultural and health programs for the benefit of the members of the Community. The specific components of said projects will be decided by the implementation committee, described below, and they must be completed within two years of the date the land is given to the members of the Indigenous Community.

[...]

D) Other Forms of Reparation (Measures of Satisfaction and Guarantees of Non-Recidivism)

[...]

Considerations of the Court

[...]

a) Handing over of traditional territory to the Yakye Axa Indigenous Community

211. The common basis of the human rights violations against the members of the Yakye Axa Community found in the instant Judgment is primarily the lack of materialization of the ancestral territorial rights of the members of the Community, whose existence has not been challenged by the State. (...)

[...]

215. It is not for the Court to define the traditional territory of the Yakye Axa Indigenous Community, but rather to establish whether the State has respected and guaranteed its members' right to communal property, and it has done so in the instant Judgment (...).

Therefore, the State must delimit, demarcate, grant title deed and transfer the land, pursuant to paragraphs 137 to 154 of the instant Judgment.

216. For this, it is necessary to consider that the victims of the instant case have to date an awareness of an exclusive common history; they are the sedentary expression of one of the bands of the Chanawatsan indigenous peoples, of the Lengua-Maskoy linguistic family, whose traditional form of occupation was as hunter-gatherers (...). Possession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity. In the process of sedentarization, the Yakye Axa Community took on an identity of its own that is connected to a physically and culturally determined geographic space, which is a specific part of what was the vast Chanawatsan territory.

217. For the aforementioned reasons, the State must identify said traditional territory and give it to the Yakye Axa Community free of cost, within a maximum period of three years from the date of notification of the instant Judgment. If the traditional territory is in private hands, the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society (...). For this, it must take into account the specificities of the Yakye Axa Indigenous Community, as well as its values, practices, customs and customary law. If for objective and well-founded reasons the claim to ancestral territory of the members of the Yakye Axa Community is not possible, the State must grant them alternative land, chosen by means of a consensus with the community, in accordance with its own manner of consultation and decision-making, practices and customs. In either case, the area of land must be sufficient to ensure preservation and development of the Community's own manner of live.

218. To comply with the requirement set forth in the previous paragraph, the State, if necessary, will establish a fund exclusively for the purchase of the land to be granted to the Yakye Axa Community, within a maximum period of one year from the date of notification of the instant Judgment, and that fund will be used either to purchase the land from private owners or to pay fair compensation to them in case of expropriation, as appropriate.

b) Providing basic services and goods

[...]

221. (...) the Court orders that, as long as the Community remains landless, given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms, the State must supply, immediately and on a regular basis, sufficient drinking water for consumption and personal hygiene of the members of the Community; it must provide regular medical care and appropriate medicine to protect the health of all persons, especially children, the elderly and pregnant women, including medicine and adequate treatment for worming of all members of the Community; it must supply food in quantities, variety and quality that are sufficient for the members of the Community to have the minimum conditions for a decent life; it must provide latrines or any other type of appropriate toilets for effective and healthy management of the biological waste of the Community; and it must supply sufficient bilingual material for appropriate education of the students at the school in the current settlement of the Community.

c) *Adapting domestic legislation to the American Convention*

[...]

225. The Court deems it necessary for the State to guarantee effective exercise of the rights set forth in its Constitution and in its legislation, pursuant to the American Convention. Therefore, the State, within a reasonable term, must adopt in its domestic legislation, pursuant to the provisions of Article 2 of the American Convention, such legislative, administrative and any other measures as may be necessary to create an effective mechanism for indigenous peoples' claims to ancestral lands, such that it makes their right to property effective, taking into account their customary law, values, practices, and customs.

d) *Public act of acknowledgment of international responsibility*

226. As the Court has ordered in other cases²²⁰, the Court deems it necessary, with the aim of redressing the damage caused to the victims, for the State to conduct a public act of acknowledgment of its responsibility, one that is previously agreed upon with the victims and their representatives, in connection with the violations found in this Judgment. This act must be conducted at the current seat of the Yakye Axa Community, at a

220 See Case of HUILCA TECSE, Judgment of March 3, 2005. Series C No. 121, para. 111; Case of the Serrano Cruz Sisters, supra note 177, para. 194, and Case of Carpio Nicolle et al., Judgment of November 22, 2004. Series C. No. 117, para. 136.

public ceremony attended by high State authorities and the members of the Community living in other areas, and with participation by the leaders of the Community.²²¹ The State must provide the means for said persons to attend the aforementioned act.²²² The State must conduct said act both in the Enxet language and in Spanish or Guaraní, and make it known to the public by means of the media.²²³ At this act, the State must take into account the traditions and customs of the members of the Community. To do this, the State has one year's time from the date of notification of the instant Judgment.

[...]

XIV. OPERATIVE PARAGRAPHS

242. Now therefore,

THE COURT,

DECLARES THAT:

[...]

AND, UNANIMOUSLY, ORDERS THAT:

6. the State must identify the traditional territory of the members of the Yakye Axa Indigenous Community and grant it to them free of cost, within a maximum of three years from the date of notification of the instant Judgment, (...).

7. as long as the members of the Yakye Axa Indigenous Community remain landless, the State must provide them with the basic services and goods required for their subsistence, (...).

221 See Case of the Plan de Sánchez Massacre. Reparations, *supra* note 196, para. 100.

222 See Case of the Serrano Cruz Sisters, *supra* note 177, para. 194, and Case of the Plan de Sánchez Massacre. Reparations, *supra* note 196, para. 100.

223 See Case of the Serrano Cruz Sisters, *supra* note 177, para. 194; Case of the Plan de Sánchez Massacre. Reparations, *supra* note 196, para. 100, and Case of Myrna Mack Chang, *supra* note 200, para. 278.

8. the State must set up a fund exclusively for the purchase of land to be granted to the members of the Yakye Axa Indigenous Community, within a maximum period of one year from the date of notification of the instant Judgment, (...).
9. the State must implement a community development fund and program, (...).
10. the State must take such domestic legislative, administrative and other steps as may be necessary, within a reasonable term, to guarantee effective exercise of the right to property of the members of the indigenous peoples, (...).
11. the State must conduct a public act of acknowledgment of its responsibility, within one year of the date of notification of the instant Judgment, (...).
12. the State must publish, within one year of the date of notification of the instant Judgment, at least once, in the Official Gazette and in another nationally-distributed daily, both the section on Proven Facts and operative paragraphs One to Fourteen of this Judgment. The State must also fund the radio broadcast of this Judgment, (...).
13. the State must make the payments for pecuniary damages and costs and expenses within one year of the date of notification of the instant ruling, (...).
14. the Court will oversee compliance with this Judgment and will close the instant case once the State has fully complied with its provisions. Within one year of the date of notification of this Judgment, the State must submit to the Court a report on the measures taken to comply with it, (...).

[...]

*Inter-American Court
of Human Rights*

*Indigenous Community Yakye Axa
v. Paraguay*

*Interpretation of the Judgment of Merits,
Reparations and Costs*

*Judgment of
February 6, 2006*



[...]

III. INTRODUCTION OF THE REQUEST FOR INTERPRETATION AND ITS PURPOSE

5. On October 14, 2005, the representatives submitted a request for interpretation of the Judgment on the merits, in accordance with Article 67 of the Convention and Article 59 of the Rules of Procedure.

6. The representatives' request for interpretation made reference to two aspects: (a) the provisions in the sixth operative paragraph of the Judgment on the merits, which, according to them, "orders the State to return the territory historically owned by the members of the [C]ommunity, whilst at the same time it seems to direct that the area in issue has to be 'identified'; and (b) the manner in which the State should fulfill its obligation under the eighth operative paragraph of the Judgment on the merits, to establish a fund for the sole purpose of acquiring the territories to be conveyed to the members of the Yakye Axa Community, "since the term within which to accomplish this is shorter than that given to identify, delimit, demarcate, title, and transfer for no consideration the lands[,] the price of which must be previously assessed."

[...]

VI. ON THE TERRITORIES TO IDENTIFY (SIXTH OPERATIVE PARAGRAPH OF THE JUDGMENT ON THE MERITS, REPARATIONS AND COSTS)

[...]

Considerations of the Court

23. (...) the Inter-American Court has clearly established that it is the State's duty to identify the Community's territory and subsequently delimit, demarcate, title and transfer the lands, inasmuch as it is the State who has the technical and scientific means to carry out these tasks. However, as follows from the "Proven Facts" section of the Judgment on the merits, certain procedural steps have already been taken before the competent governmental entities to that end, which certainly must be taken into account by the State in identifying and measuring the lands to be transferred to the Yakye Axa Community.

Likewise, the Court has recognized in paragraph 216 of the Judgment on the merits, that “possession [of] the ancestral territory is engraved in [the] historical memory [of the members of the Yakye Axa Community],” and throughout its process of sedentarization, the Community “adopted a particular identity, associated with a physically and culturally determined geographical area.” Such historical memory and particular identity must be especially considered in identifying the land to be transferred to them.

24. In addition, as follows from the Judgment on the merits issued in the instant case, the Court has allowed for the possibility that, after carrying out the necessary steps, the competent governmental authorities establish that the Yakye Axa Community’s ancestral lands correspond to all or part of one or more private properties. In effect, in such a case, paragraph 217 of the Judgment on the merits sets forth that the State “must assess the legitimacy, necessity and proportionality of the condemnation of the territories with the aim of achieving a legitimate goal in a democratic society,” and to that end “it must take into account the Yakye Axa indigenous community’s individual characteristics, values, customs and customary law.”

25. The Court likewise anticipated that “[i]f, for objective and justified reasons, it is not possible to recover the ancestral territories of the members of the Yakye Axa Community, the State must convey them an alternative territories, to be selected in consultation with the Community, in accordance to their own rules for consulting and deciding, values and customs.”⁵ In this regard, it must be noted that, pursuant to paragraphs 144–149 of the Judgment on the merits, the fact that the Community’s ancestral territories are currently in private hands, is not in and of itself an “objective and justified” reason to impede the recovery of lands.

26. Thus, the Court clearly establishes that the task of identifying the Yakye Axa Community’s ancestral lands is the responsibility of Paraguay. However, in carrying out such task, Paraguay must comply with the provisions in the Court’s judgment, giving careful consideration to the values, uses, customs and customary laws of the members of the Community, which bind them to an specific territory. In addition, as regards to the transfer of such territories, in the event that after identifying them it transpires that they are in private hands, the State must evaluate the convenience of condemning them, taking into account how particularly important they are for the Community. Finally, provided there

5 Case of the Indigenous Community Yakye Axa. Judgment of June 17, 2005. Series C No. 125, para. 217.

are objective and justified reasons that prevent the State from claiming the territories identified as traditionally belonging to the Community, it must convey them alternative lands, which will be selected in consultation with the Community. In either case, according to paragraph 217 of the Judgment on the merits, “the extension of the lands must be large enough to support and develop the Community’s way of life.”

27. Pursuant to the foregoing, the Court has established the meaning and scope of the sixth operating paragraph of the Judgment on the merits.

[...]

VIII. OPERATIVE PARAGRAPHS

38. Therefore,

THE INTER-AMERICAN COURT ON HUMAN RIGHTS

pursuant to Article 67 of the American Convention on Human Rights and Articles 29.3 and 59 of the Rules of Procedure

DECIDES:

Unanimously,

1. To determine the meaning and scope of what has been set forth in the sixth operative paragraph of the Judgment on the merits, reparations and costs, pursuant to para. 21-27 of this interpretation Judgment.

[...]

*Inter-American Court
of Human Rights*

Yatama v. Nicaragua

*Preliminary Objections, Merits,
Reparations and Costs*

*Judgment of
June 23, 2005*



[...]

I. INTRODUCTION OF THE CASE

1. On June 17, 2003, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted to the Court an application against the State of Nicaragua (hereinafter “the State” or “Nicaragua”), originating from petition No. 12.388, received by the Secretariat of the Commission on April 26, 2001.

2. The Commission presented the application for the Court to decide whether the State had violated Articles 8 (Right to a Fair Trial), 23 (Right to Participate in Government) and 25 (Judicial Protection) of the American Convention, all of them in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of the candidates for mayors, deputy mayors and councilors presented by the indigenous regional political party, Yapti Tasba Masraka Nanih Asla Takanka (hereinafter “YATAMA”). The Commission alleged that these candidates were excluded from participating in the municipal elections held on November 5, 2000, in the North Atlantic and the South Atlantic Autonomous Regions (hereinafter “RAAN” and “RAAS”), as a result of a decision issued on August 15, 2000, by the Supreme Electoral Council. The application stated that the alleged victims filed several recourses against this decision and, finally, on October 25, 2000, the Supreme Court of Justice of Nicaragua declared that the application for amparo that they had filed was inadmissible. The Commission indicated that the State had not provided a recourse that would have protected the right of these candidates to participate and to be elected in the municipal elections of November 5, 2000, and it had not adopted the legislative or other measures necessary to make these rights effective; above all, it had not provided for “norms in the electoral law that would facilitate the political participation of the indigenous organizations in the electoral processes of the Atlantic Coast Autonomous Region of Nicaragua, in accordance with the customary law, values, practices and customs of the indigenous people who reside there.”

[...]

X. VIOLATION OF ARTICLES 23 AND 24 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLES 1.1 AND 2 THEREOF (RIGHT TO PARTICIPATE IN GOVERNMENT AND RIGHT TO EQUAL PROTECTION)

[...]

Considerations of the Court

[...]

3) Obligation to guarantee the enjoyment of political rights

201. The Court understands that, in accordance with Articles 23, 24, 1.1 and 2 of the Convention, the State has the obligation to guarantee the enjoyment of political rights, which implies that the regulation of the exercise of such rights and its application shall be in keeping with the principle of equality and non-discrimination, and it should adopt the necessary measures to ensure their full exercise. This obligation to guarantee is not fulfilled merely by issuing laws and regulations that formally recognize these rights, but requires the State to adopt the necessary measures to guarantee their full exercise considering the weakness or helplessness of the members of certain social groups or sectors.¹⁶⁵

[...]

204. According to Article 29.a) of the Convention, the full scope of political rights cannot be restricted in such a way that their regulation or the decisions adopted in application of this regulation prevent people from participating effectively in the governance of the State or cause this participation to become illusory, depriving such rights of their essential content.

[...]

165 Cf. *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 89; and *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46.

206. Instituting and applying requirements for exercising political rights is not, per se, an undue restriction of political rights. These rights are not absolute and may be subject to limitations.¹⁷² Their regulation should respect the principles of legality, necessity and proportionality in a democratic society. Observance of the principle of legality requires the State to define precisely, by law, the requirements for voters to be able to take part in the elections, and to stipulate clearly the electoral procedures prior to the elections. According to Article 23.2 of the Convention, the law may regulate the exercise of the rights and opportunities referred to in the first paragraph of this Article, only for the reasons established in this second paragraph. The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose. When there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.¹⁷³

207. States may establish minimum standards to regulate political participation, provided they are reasonable and in keeping with the principles of representative democracy. These standards should guarantee, among other matters, the holding of periodic free and fair elections based on universal, equal and secret suffrage, as an expression of the will of the voters, reflecting the sovereignty of the people, and bearing in mind, as established in Article 6 of the Inter-American Democratic Charter, that “[p]romoting and fostering diverse forms of participation strengthens democracy”; to this end, States may design norms to facilitate the participation of specific sectors of society, such as members of indigenous and ethnic communities.

[...]

172 Cf. *Case of Hirst v. the United Kingdom* (no. 2), no. 74025/01, § 36, ECHR-2004.

173 Cf. *Case of Ricardo Canese*, Judgment of August 31, 2004. Series C No. 111, paras. 96 and 133; *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, paras. 121 and 123; and *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 46. Also cf. Eur. Court H.R., *Case of Barthold v. Germany*, Judgment of 25 March 1985, Series A no. 90, para. 58; Eur. Court H.R., *Case of Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A no. 30, para. 59; U.N., Human Rights Committee, General comment No. 27, Freedom of movement (art. 12) of November 2, 1999, paras. 14 and 15; and U.N., Human Rights Committee, General comment No. 25, Right to participate in public affairs, voting rights and the right of equal access to public service (art. 25) of July 12, 1996, paras. 11, 14, 15 and 16.

215. There is no provision in the American Convention that allows it to be established that citizens can only exercise the right to stand as candidates to elected office through a political party. The importance of political parties as essential forms of association for the development and strengthening of democracy are not discounted,¹⁷⁶ but it is recognized that there are other ways in which candidates can be proposed for elected office in order to achieve the same goal, when this is pertinent and even necessary to encourage or ensure the political participation of specific groups of society, taking into account their special traditions and administrative systems, whose legitimacy has been recognized and is even subject to the explicit protection of the State. Indeed, the Inter-American Democratic Charter states that “[t]he strengthening of political parties and other political organizations is a priority for democracy.”¹⁷⁷

216. Political parties and organizations or groups that take part in the life of the State, such as in electoral processes in a democratic society, must have aims that are compatible with regard for the rights and freedoms embodied in the American Convention. In this regard, Article 16 of the Convention establishes that the exercise of the right to associate freely “shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.”

217. The Court considers that the participation in public affairs of organizations other than parties, based on the conditions mentioned in the preceding paragraph, is essential to guarantee legitimate political expression and necessary in the case of groups of citizens who, otherwise, would be excluded from this participation, with all that this signifies.

218. The restriction that they had to participate through a political party imposed on the YATAMA candidates a form of organization alien to their practices, customs and traditions as a requirement to exercise the right to political participation, in violation of domestic laws (...) that oblige the State to respect the forms of organization of the

176 Cf. *Rehaf Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 87, ECHR 2003-II; *Case of Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 32, ECHR 2002-II; and *Eur. Court H.R., Case of Socialist Party and Others v. Turkey*, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, para. 29.

177 *Inter-American Democratic Charter*. Adopted at the first plenary session of the OAS General Assembly, held on September 11, 2001, Article 5.

communities of the Atlantic Coast, and affected negatively the electoral participation of these candidates in the 2000 municipal elections. The State has not justified that this restriction obeyed a useful and opportune purpose, which made it necessary so as to satisfy an urgent public interest. To the contrary, this restriction implied an impediment to the full exercise of the right to be elected of the members of the indigenous and ethnic communities that form part of YATAMA.

219. Based on the foregoing, the Court considers that the restriction examined in the preceding paragraphs constitutes an undue limitation of the exercise of a political right, entailing an unnecessary restriction of the right to be elected, taking into account the circumstances of the instant case, which are not necessarily comparable to the circumstances of all political groups that may be present in other national societies or sectors of a national society.

220. Having established the foregoing, the Court finds it necessary to indicate that any requirement for political participation designed for political parties, which cannot be fulfilled by groups with a different form of organization, is also contrary to Articles 23 and 24 of the American Convention, to the extent that it limits the full range of political rights more than strictly necessary, and becomes an impediment for citizens to participate effectively in the conduct of public affairs. The requirements for exercising the right to be elected must observe the parameters established in paragraphs 204, 206 and 207 of this judgment.

[...]

224. The Court finds that Nicaragua did not adopt the necessary measures to guarantee the enjoyment of the right to be elected of the candidates proposed by YATAMA, who are members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua, because they were affected by legal and real discrimination, which prevented them from participating, in equal conditions, in the municipal elections of November 2000.

225. The Court considers that the State should adopt all necessary measures to ensure that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, in equal conditions, in decision-making on matters and policies that affect or could affect their rights and the development of these communities, so that they can incorporate State institutions and bodies and participate directly and proportionately to their population in the conduct of public affairs, and also do this from

within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention.

226. The violations of the rights of the candidates proposed by YATAMA are particularly serious because, as mentioned above, there is a close relationship between the right to be elected and the right to vote to elect representatives (...). The Court finds it necessary to observe that the voters were affected as a result of the violation of the right to be elected of the YATAMA candidates. In the instant case, this exclusion meant that the candidates proposed by YATAMA were not included among the options available to the voters, which represented a direct limitation to the exercise of the vote and affected negatively the broadest and freest expression of the will of the electorate, which implies grave consequences for democracy. This harm to the electors constituted non-compliance by the State with the general obligation to guarantee the exercise of the right to vote embodied in Article 1.1 of the Convention.

227. To assess the scope of this harm, it should be recalled that YATAMA contributes to the consolidation and preservation of the cultural identity of the members of the indigenous and ethnic communities of the Atlantic Coast. Its structure and purposes are related to the practices, customs and forms of organization of these communities. Consequently, the exclusion of the participation of the YATAMA candidates particularly affected the members of the indigenous and ethnic communities that were represented by this organization in the municipal elections of November 2000, by placing them in a situation of inequality as regards the options among which they could choose to vote, since those persons who, in principle, deserved their confidence because they had been chosen directly in assemblies (according to the practices and customs of these communities) to represent the interests of their members, had been excluded from participating as candidates. This exclusion resulted in a lack of representation of the needs of the members of the said communities in the regional bodies responsible for adopting policies and programs that could affect their development.

228. This harm to the voters was reflected in the 2000 municipal elections; for example, there was an abstention rate of approximately 80% in the RAAN, due to the fact that part of the electorate did not consider they were adequately represented by the participating parties (...) and five political parties requested the Supreme Electoral Council to “[d]eclare the nullity of the elections in the RAAN[... and o]rganize new municipal elections (...), with the inclusion of the YATAMA Indigenous Party” (...). Also, the expert

witness, Carlos Antonio Hurtado Cabrera, emphasized that YATAMA “is the principal indigenous political organization in the country” (...).

229. In view of the above, the Court finds that the State violated Articles 23 and 24 of the Convention, in relation to Articles 1.1 and 2 thereof, to the detriment of the candidates proposed by YATAMA to participate in the municipal elections of November 2000, because it established and applied provisions of Electoral Act No. 331 of 2000, that create an undue restriction to the exercise of the right to be elected and regulates these provisions in a discriminatory manner. The Court also finds that the State violated Article 23.1 of the Convention, in relation to Article 1.1 thereof, to the detriment of these candidates, because the decisions that excluded them from exercising this right were adopted in violation of the guarantees embodied in Article 8 of the Convention and could not be contested by means of a judicial recourse (...).

XI. REPARATIONS – APPLICATION OF ARTICLE 63.1

[...]

B) Pecuniary and non-pecuniary damage

[...]

Considerations of the Court

[...]

246. With regard to the non-pecuniary damage caused to the candidates, the Court must bear in mind that being proposed as a candidate to participate in an electoral process has particular importance and is a great honor among the members of the indigenous and ethnic communities of the Atlantic Coast. Those who accept a candidacy must demonstrate capacity, honesty, and commitment to the defense of the needs of the communities, and assume the significant responsibility of representing their interests. (...).

247. The Court considers these special circumstances when assessing the frustration that the candidates felt at finding themselves unduly excluded from participating in the elections and representing their communities. This feeling was accentuated by the fact

that the Supreme Electoral Council did not provide any justification to explain why the candidates proposed by YATAMA could not be registered. This meant that the communities did not understand the reasons for the exclusion of their candidates. The latter felt powerless to give an explanation to their communities and considered that the exclusion was the result of their condition as members of indigenous communities.

248. In view of the foregoing, the Court establishes, based on the principle of equity, the amount of US\$ 80,000.00 (eighty thousand United States dollars) or the equivalent in Nicaraguan currency, as compensation for the said pecuniary and non-pecuniary damage, to be delivered to YATAMA, which should distribute it as appropriate.

c) Other Forms of Reparation (Measures of Satisfaction and Guarantees of Non-Repetition)

[...]

Considerations of the Court

a) Publication of the judgment

[...]

253. The Court takes into account that “the communities use community radio as a means of information”; it therefore considers it necessary for the State to publicize, on a radio station with broad coverage on the Atlantic Coast, (...). This should be done in Spanish, Miskito, Sumo, Rama and English. The radio broadcast should be made on at least four occasions with an interval of two weeks between each broadcast. To this end, the State has one year from notification of this judgment.

[...]

c) Reforms to Electoral Act No. 331 of 2000, and other measures

[...]

259. The State must reform the regulation of the requirements established in Electoral Act No. 331 of 2000 that, it has been declared, violate the Convention (...) and adopt,

within a reasonable time, the necessary measures to ensure that the members of the indigenous and ethnic communities may participate in the electoral processes effectively and taking into account their traditions, practices and customs, within the framework of a democratic society. The requirements established should permit and encourage the members of these communities to have adequate representation that allows them to intervene in decision-making processes on national issues that concern society as a whole, and on specific matters that pertain to these communities; therefore, these requirements should not constitute barriers for such political participation.

260. Finally, the Court finds that this judgment constitutes, per se, a form of reparation.¹⁸⁸

[...]

XII. OPERATIVE PARAGRAPHS

275. Therefore,

THE COURT,

DECIDES,

[...]

AND ORDERS:

[...]

6. The State shall publish, within one year, in the official gazette and in another newspaper with widespread national circulation, (...) the violations declared by the Court, and the operative paragraphs of this judgment, (...).

[...]

188 Cf. Case of Caesar, Judgment of March 11, 2005. Series C No. 123, para. 126; Case of Huilca Tecse, Judgment of March 3, 2005. Series C No. 121, para. 97; and Case of the Serrano Cruz Sisters, Judgment of March 1, 2005. Series C No. 120, paras. 157 and 201.

8. The State shall publicize, using a radio station with widespread coverage on the Atlantic Coast, within one year, (...) the violations declared by the Court, and the operative paragraphs of this judgment, in Spanish, Miskito, Sumo, Rama and English, on at least four occasions, with an interval of two weeks between each broadcast (...).

[...]

9. The State shall adopt, within a reasonable time, the necessary legislative measures to establish a simple, prompt and effective recourse to contest the decisions of the Supreme Electoral Council that affect human rights, such as the right to participate in government, respecting the corresponding treaty-based and legal guarantees, and derogate the norms that prevent the filing of this recourse, (...).

10. The State shall reform Electoral Act No. 331 of 2000, so that it regulates clearly the consequences of failure to comply with the requirements for electoral participation, the procedures that the Supreme Electoral Council should observe when determining such non-compliance, and the reasoned decisions that this Council should adopt in this regard, as well as the rights of the persons whose participation is affected by a decision of the State, (...).

11. The State shall reform the regulation of the requirements established in Electoral Act No. 331 of 2000 that, it has been declared, violate the American Convention on Human Rights and adopt, within a reasonable time, the necessary measures to ensure that the members of the indigenous and ethnic communities may participate in the electoral processes effectively and according to their traditions, practices and customs (...).

12. The State shall pay the amount established in paragraph 248 of this judgment in compensation for the pecuniary and non-pecuniary damage, and this shall be delivered to YATAMA, which shall distribute it as appropriate.

[...]

*CONCURRING OPINION OF JUDGE SERGIO GARCIA-RAMIREZ TO THE
JUDGMENT IN YATAMA V. NICARAGUA OF JUNE 23, 2005*

A) Categories of violations. Individuals and members of groups or communities

1. The Inter-American Court has heard cases concerning isolated violations committed against individuals, which may be reduced to one specific case or reveal a pattern of behavior and suggest measures designed to avoid renewed violations of a similar kind against many people. The Court has also heard cases of violations that affect numerous members of a human group and reflect attitudes or situations with a general scope and even deep historical roots.

2. This second category of issues leads to reflections, based on a specific case and certain individualized victims, on the situation of the members of this group and even the group itself, without in any way exceeding the jurisdictional attributes of the Inter-American Court, since each decision refers to a concrete presumption and decides on it, even though it may lead to reflections and criteria that could be useful for examining other similar situations. If these are posed before the same jurisdiction, they would be examined individually, but case law elaborated on other occasions would contribute to this examination.

3. Furthermore, the idea that case law, which is rationally developed, pondered and reiterated – until it constitutes “consistent case law” – can be extended to situations with the same conditions de facto and de jure that have determined it, is entirely consequent with the work of an international treaty-based tribunal, such as the Inter-American Court of Human Rights, which is called on to apply the American Convention on Human Rights and other multilateral instruments that grant it material jurisdiction.

4. The regional human rights tribunal is not another instance for the review of resolutions of judicial bodies, but a unique international instance, created to define the scope of the human rights contained in the American Convention, by applying and interpreting it. The Convention itself has established this, and the Court has understood it likewise, and this is recognized with increasing uniformity and emphasis, by the highest courts of the countries of the Americas, whose acceptance of the Inter-American Court’s case law is one of the most recent, valuable and encouraging characteristics of the development of the jurisdictional protection of human rights throughout the continent.

5. The Court’s deliberations are described in all the cases submitted to its consideration, and also in the advisory opinions it issues. They have acquired their greatest im-

portance in cases concerning members of minority groups – generally, indigenous and ethnic communities – present in different national societies, when examining factors relating to elimination, exclusion, marginalization or “containment.” These are expressions or elements of the violation of rights exercised with different levels of intensity. They follow the same line of conduct and reveal different moments of the historical processes of which they form part. They possess specific characteristics and imply a violation or an imminent risk of violation of the principles of equality and non-discrimination, in different areas of social life. They translate into the violation of numerous rights.

6. When examining these cases, the Court has always recalled the objective scope of its jurisdiction in light of Article 1.2 of the American Convention on Human Rights, which clarifies the connotation that this international instrument gives to the concept of “person”: the human being, the individual, as the possessor of rights and freedoms. The Court cannot go beyond the frontier established by the Convention that defines its jurisdiction. But, neither can it abstain from the thorough examination of the issues submitted to it, to define their real characteristics, origins implications, consequences, etc., in order to understand the nature of the violations committed, when applicable, and come to an appropriate decision on possible reparations.

7. Consequently, in several decisions – particularly in relation to members of indigenous or ethnic groups – the Court has considered the rights of the individuals, who are members of the communities or groups, within their necessary, characteristic, physical framework: the collective rights of the communities to which they belong: their culture, which endows them with a “cultural identity,” to which they have a right and which influences their individuality and personal and social development, and their customs and practices, which coalesce to integrate a point of reference required by the Court in order to understand and decide the cases submitted to it. It would be useless and lead to erroneous conclusions to extract the individual cases from the context in which they occur. Examining them in their own circumstances – in the broadest meaning of the expression: actual and historical – not only contributes factual information to understand the events, but also legal information through the cultural references – to establish their juridical nature and the corresponding implications.

8. The Court has also had to examine certain issues relating to other large human groups, also exposed to violations or victims of violations, even when the elements of their social identification are different from those that exist in the contentious cases

that I referred to in the previous paragraphs. It has done this, especially in recent years, in various advisory opinions that have helped clarify the scope of the human rights of people exposed to rejection, abuse or marginalization; for example, foreign detainees, in the terms of Advisory Opinion OC-16; children who commit offences or are subject to measures of public protection, Advisory Opinion OC-17, and migrant workers, especially if they are undocumented, in Advisory Opinion OC-18. I have added separate opinions to these three opinions. I refer to what I said in them.

9. The Inter-American Court has also examined pending issues relating to groups of people with professional or occupational connections or the same interests. In these cases, it has been necessary to order provisional measures in the terms of Article 63.2 of the Convention, in order to preserve rights and maintain unharmed the juridical prerogatives they protect. In these cases, the Court has gone further, an advance explained and justified taking into account the inherent characteristics of the cases submitted and the very nature of provisional measures. Indeed, the Court has ruled on immediate precautionary protection in relation to many unidentified persons, whose rights were in grave danger. These are not measures for a group, a corporation, an association, a people, but rather for each member: physical persons, possessors of the endangered rights.

10. This new scope of international protection, produced by the evolution of inter-American case law – which could advance even further to the extent allowed by the reasonable interpretation of the Convention – occurred following the order on provisional measures in the Case of the Peace Community of San José de Apartadó, as can be seen in the joint separate opinion issued by Judge Alirio Abreu Burelli and I, five years' ago, adopting a criterion on which I have insisted in other separate opinions relating to provisional measures that have followed the precedent established in that case.

B) Indigenous communities

11. During its sixty-seventh regular session (June 13 to 30, 2005), the Inter-American Court deliberated and delivered judgment on several cases in which the considerations that I am setting out in this opinion attached to the judgment in *YATAMA v. Nicaragua* are applicable. Evidently, I refer to the latter, and the final rulings in the *Moiwana Community v. Suriname* and in the *Indigenous Community Yakyé Axa v. Paraguay*; also, to some extent, the order for provisional measures in the *Matter of the Pueblo Indígena de Sarayaku*, concerning Ecuador.

12. These three contentious cases, which have culminated in judgments on merits and reparations, examine points related to issues that involve the members of indigenous and ethnic communities, as such – not for strictly personal or individual motives – and which have their origin or development in the relationship that these communities have historically kept and still maintain with other sectors of society and, evidently, with the State itself, a relationship that affects the members of these groups and has an impact on their human rights. Obviously, this does not refer to isolated issues or issues exclusive to the States or national societies within which the conflicts examined in these cases have arisen, although the judgments refer – as is natural – exclusively to these conflicts and do not attempt – nor could they attempt – to affect other current or potential cases.

13. For anyone who studies these issues – and, in any case, for the author of this opinion – it is interesting to observe that, in other parts of the American continent, problems such as those examined herein have also arisen, and they have been brought to the attention of the Court with increasing frequency and have produced certain developments in its case law. These developments, which are binding in the sphere of each judgment, could be of interest in a broader sphere – as I have mentioned above – bearing in mind the great similarity and even sameness of the juridical, social and cultural conditions – historical and actual – that are found at the origin of the disputes observed in very diverse national territories.

14. Some significant precedents should be recalled, as a useful reference for the identification of certain categories of cases and the definition of the general profile of our case law. The list begins, probably, with the Case of Aloeboetoe, one of the oldest in the case history of the Inter-American Court, in which issues associated with the victims' membership in a specific minority group were presented. Likewise, the case of the Mayagna (Sumo) Awas Tingni Community of Nicaragua should be stressed; this has special relevance since it engendered a wide-reaching examination of the rights of the members of indigenous communities in an American country. I also attached a separate opinion to that judgment in which I referred extensively to these issues.

15. Evidently, there have been other cases in which issues of membership in indigenous communities and cultures has been relevant; they reveal the right to identity and the different implication that this can and does have under the American Convention. All this invites us to consider that we are not looking at occasional, isolated cases, circumscribed to a single area, or to ordinary disputes that must be examined and resolved on the basis of abstract, uniform formulas, which disregard the history and inherent legal system of

the parties concerned, a legal system that helps to establish the scope – here and now, at a precise place and time, and not outside them – of the juridical concepts that underlie the American Convention.

C) Elimination. Case of the Moiwana Community

16. In the Case of the Moiwana Community, the Court did not examine the massacre that occurred on November 29, 1986, because this related to facts prior to the date on which the Inter-American Court could exercise its jurisdiction, *ratione temporis*. Rather, it examined violations that had continued since that date – namely, continuing or permanent violations, a concept that case law has defined in other cases, particularly in relation to the presumption of enforced disappearance – or more recent violations of the American Convention, over which it evidently has jurisdiction. It is not excessive to observe – because it is a historical fact – that if we need to seek a starting point for the tribulations of the members of the Moiwana community, we would not find this in the date of the massacre, but at the time when their ancestors were forced to leave their African lands and were brought to America as slaves, an episode that constitutes one of the darkest pages in the history of humanity.

17. In this case - even though the Court did not issue a declaration or condemnation in this respect, owing to the lack of jurisdiction *ratione temporis* that I referred to above – the most severe public action that could be produced against the members of a community occurred: their physical elimination. This led to the dispersion of the survivors, but not to the loss of the members’ rights, or to the alteration of the characteristics of these rights, or to the disappearance of the State’s obligation to respect and ensure such rights (that remain in force), precisely in the terms imposed by their nature.

18. All this is contained in the Court’s judgment, which emphasizes: (a) the ownership of rights to the territory traditionally occupied, regardless of the lack of documentation authenticating this, considering that the documentary formality is not an element that constitutes ownership in these cases, nor the only evidence of the ownership of rights and not even an appropriate means of authenticating them; (b) the nature *sui generis* of the relationship that the members of the community, within its framework, have to the territory they own, a relationship that must be considered and that influences another of the state’s obligation (which has, of course, its own justification): the obligation of criminal justice, inasmuch as the exercise of the latter permits the “purification” of the territory, which, in turn, encourages the return of the inhabitants, and (c) the protection

of the community's culture, which extends to the members of the group as a right to cultural identity, as illustrated by the decisions that the Court structures, based specifically on the characteristic elements of that culture.

D) Exclusion. Case of the Indigenous Community Yakye Axa

19. The Case of the Indigenous Community Yakye Axa presents problems of ancient origin: not only those that began with the avatars of the first conquest and colonization, common to the countries of Latin America, but those that derive from certain very remote events, which also produced adverse consequences for the indigenous groups, as was seen during the proceeding. I refer to what is briefly described in a revealing paragraph of the proven facts in the respective judgment: "At the end of the nineteenth century, vast areas of the Paraguayan El Chaco were sold on the stock market in London." This second process of colonization, if one can refer to it thus, determined a long process during which, for different motives, there were several displacements of the indigenous communities whose ancestors had once been lords and masters of those lands.

20. In its judgment in that case, the Inter-American Court discusses two very relevant issues, among others (which include the issue of due process applied to territorial claims). They are: a) the community's ownership of its ancestral lands, or more important still: the relationship – which is much more than a traditional right to property, as I will indicate below – that the community has to the land it has occupied; a relationship that, evidently, extends to the members of the community and makes a specific contribution to all their rights, and b) the right to life of the members of the community, in the terms of Article 4.1 of the Convention, in relation also to the meaning of the right to ownership of the land and all that derives from the ways this is exercised.

21. Once again, the Court establishes the scope of ownership in the case of members of indigenous communities, or rather: once again it determines its scope (which the State must respect), under the auspices of an ancestral culture in which this right is deeply rooted and from which it takes its principle characteristics. In these cases, ownership has different characteristics from those that it has (also validly) in other spheres. It implies a singular relationship between the possessor of the right and the property this relates to. It is more than a real right, according to the meaning currently attributed to that expression. It incorporates other components that are also of interest – or of great interest – in order to redefine ownership in light of the indigenous culture in which ownership is exercised. In my opinion, by doing this, the Court affirmed another interpretation of

Article 21 of the Convention, so that it protects both the right to property in its classic sense – which the liberal principles that prevailed in the twenty-first century transferred to our continent – and also the underlying right to property that finally reappeared. This other interpretation is the appropriate one.

22. Both the constitutional and other laws of Paraguay have recognized the existence of the indigenous peoples “as cultural groups that existed prior to the establishment and organization of the Paraguayan State.” This emphatic recognition not only of a demographic fact, by also of a cultural reality, that entails juridical consequences, must translate into respect for the traditional forms of land ownership – prior to the establishment and organization of the state – and into the assurance that all the rights derived from this ownership will be effective and effectively guaranteed by the public authorities in their legislative, executive and jurisdictional functions.

23. The Court has previously examined the right to life. This examination has revealed both the prohibitions that this right embodies with regard to the arbitrary action of the State, and the actions, initiatives, entitlements and promotions that the State itself must assume and develop to establish or foster conditions for a decent life. The first absolutely essential element of these obligations was supplied by a previous stage in the development of law and the provision of rights. The second element, which is also necessary – so that the right to ‘life,’ a concept with a moral tone, is not resumed in a simple ‘possibility of existence or subsistence,’ a biological fact – is characteristic of the current stage. This concept has entered into force in the Court’s case law.

24. I understand that the creation of the conditions for a decent life, which signifies the development of an individual’s potential and the search for his own destiny, should take place in accordance with that individual’s own decisions, his respective opinions, his shared culture. This is the basis for the close connection between the right to a decent life, on the one hand, and the right to the “relationship between man and the land” – ownership, property, in the broadest sense – which the judgment has taken into account, on the other. This explains why there was a violation of the right to life embodied in Article 4.1 of the Convention – with the scope we have described – to the detriment of the members of the Yakye Axa community. The lack of evidence about the causes of the death of 16 members of the community, which explains the majority vote in that judgment, does not exclude or reduce the terms of the declaration formulated in the third operative paragraph: there was a violation of the right to life and this violation affected all the members of the community.

E) Containment. Case of YATAMA

25. The Case of YATAMA has examined another group of violations that harm members of communities. This case does not deal with the more dramatic aspects seen in the previous cases, such as: physical suppression, deprivation of land, violation of the right to life. The circumstances in which the facts of this case occurred suggest that, following a long struggle which has produced appreciable progress, YATAMA, which unites members of many communities, has opened up its own space in political and social life, which gives it a relevant and accepted position – not without severe reticence, with diverse juridical implications – and safeguards it from aggressions such as those observed in the other cases. This case deals with the acts or omissions by which the progress of the communities, as such, is “contained.” Thus, we find ourselves faced with a different situation which, perhaps, corresponds to the final stage in the series of refusals to accept equality and non-discrimination in favor of every individual, including, of course, the members of these minority groups.

26. In this case the acts and omissions that harm the right recognized in the Convention are concentrated in political activities and, in this regard, affect the possibility of the members of indigenous communities from intervening on an equal footing with their fellow citizens, members of other social sectors, and participating effectively in the decisions that affect them, together with the latter. One of the ways in which this intervention and participation occurs is through the exercise of political rights.

27. Here, I refer, as I have already said, to material equality and effective non-discrimination, not to a mere formal equality that leaves intact – or scarcely hides – marginalization and maintains discrimination. This type of equality tends to be obtained through factors or elements of compensation, equalization, development or protection that the State provides to the members of the communities, by means of a juridical regime that recognizes the facts relating to a certain cultural background and is established on the basis of a genuine recognition of real limitations, discriminations or restrictions and contributes to overcoming, suppressing or compensating them with appropriate instruments; not merely with general declarations on an inexistent and impracticable equality. Equality is not a starting point, but a finishing point to which the State’s efforts should be addressed. In the words of Rubio Llorente, the “Law attempts to be fair, and it is the idea of justice that leads directly to the principle of equality, which, in a way, constitutes its essential content.” Nevertheless, “equality is not a starting point, but rather a goal.”

F) Participation and political rights

28. These objectives are not being achieved – nor, therefore, are equality and non-discrimination being protected – if the path of those who are struggling for political participation through the exercise of the respective rights, including the right to vote, is strewn with obstacles and unnecessary and disproportionate requirements. The requirement that participation is only through political parties, which today is being established as a natural fact in the democracies of the Americas, should accept the methods suggested by the traditional organization of the indigenous communities. In no way, is this an attempt to undermine the party system, but rather to protect the living conditions, work and organization of the indigenous communities, in the way and in terms that are reasonable and pertinent. The acceptance of these conditions and the respective methods of political participation are not transferred automatically to all mechanisms, nor do they extend beyond the territorial, social and temporal framework in which they are proposed and resolved. The Court decides what it considers admissible based on the circumstances before it.

29. This is the first time that the Court reflects on political rights, which are referred to in Article 23 of the Pact of San José, and which the Court has examined in connection with the other provisions of a broader scope: Articles 1.1, 2 and 24 of the same instrument. In the Court's opinion – as I understand it – these rights should be considered in the circumstances in which their possessors have to assume them and exercise them. It is not possible, even now, to consider rights in abstract, as empty, neutral, colorless formulas provided to conduct the life of imaginary citizens, defined by texts and not by the strict reality.

30. In the instant case, the object is to promote the participation of people in managing their own lives, through political activities. Consequently, the form that this promotion should take must be considered, in keeping with the specific circumstances of those who are the possessors of rights, which should not be examined in abstract. To this end, it is necessary to remove determined obstacles, consider organizational alternatives, provide measures; in brief, “create circumstances” that allow certain individuals, in a specific characteristic situation, to achieve the objectives sought by human rights in the area of politics. To suppose that general declarations will be sufficient to facilitate the actions of people who are in distinct and distant conditions from those that the authors of these declarations had in mind, is to label illusion as reality.

31. The Court has not established, nor would it have to, the characteristics of a system of laws – and, in general, public action, which is more than general norms – favorable to the exercise of the political rights of members of indigenous communities, so that they are, truly, “as much citizens as the other citizens.” The State must examine the situation before it in order to establish the means to allow the exercise of the rights universally assigned by the American Convention, precisely in those situations. The fact that the rights are of a universal nature does not mean that the measures that should be adopted to ensure the exercise of the rights and freedoms has to be uniform, generic, the same, as if there were no differences, distances and contrasts among their possessors. Article 2 of the Pact of San José should be read carefully: the States must adopt the necessary measures to give effect to the rights and freedoms. The reference to “necessary” measures that “give effect” to the rights, refers to the consideration of particularities and compensations.

32. Obviously, we have not exhausted the examination of democracy, which is the foundation and the destiny of political participation, understood in light of the American Convention. The need to have means of participating in the conduct of public affairs is clear, in order to intervene in the guidance of the nation and in community decisions, and this is related to the active and passive right to vote, among other participatory instruments. Achieving this signifies a historical step from the time – which still exists, as we have seen in other cases decided by the Inter-American Court in the current session and mentioned in this opinion – when the struggle for the right was related only to the physical survival, the patrimony and the settlement of the community. However, the progress on the path towards electoral presence – an advance contained, confronted by measures that foster inequality and discrimination – should not detain or dissuade access to comprehensive democracy, in which the access of individuals to the means that will encourage the development of their potential is promoted.

33. As can be observed, the contentious cases I have mentioned in this concurring opinion to the respective judgments examine issues that are common to the indigenous communities and to the rights of their members, even though they do so in relation to different facts and according to the specific circumstances of each case. These decisions are situated in one and the same historical reality and attempt to resolve the specific manifestations that this has resulted in today. Thus, they encourage the application of solutions guided by the same liberating and egalitarian objective that permits the exercise of the individual rights of those who are members – and have full rights to continue

being members – of ethnic and indigenous communities that form part of the broader national communities. After all, the idea is to resolve, in the twenty-first century, the problems inherited from preceding centuries. The specific increasingly abundant and comprehensive case law of the Inter-American Court can contribute to this.

*Inter-American Court
of Human Rights*

López Álvarez v. Honduras

Merits, Reparations and Costs

*Judgment of
February 1, 2006*



[...]

I. INTRODUCTION OF THE CASE

[...]

2. The Commission submitted the petition for the Court to decide if the State has violated Articles 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 25 (Right to Judicial Protection), and 24 (Right to Equal Protection) of the American Convention, in relation with the obligations established in Articles 2 (Domestic Legal Effects) and 1.1 (Obligation to Respect Rights) of said treaty, in detriment of Mr. Alfredo López Álvarez (hereinafter "Alfredo López Álvarez", "Mr. López Álvarez" or "alleged victim"), member of a Honduran Garifuna community. The Commission stated that: a) the alleged victim was deprived of his personal liberty as of April 27, 1997, date on which he was arrested for the possession and illegal trafficking of narcotic drugs; b) on November 7, 2000 the judge that examined the case issued a conviction against Mr. López Álvarez that was annulled on May 2, 2001 by the Appellate Court of the Ceiba; it ordered that the trial be taken back to its preliminary stage, and c) on January 13, 2003 the Lower Court issued a new judgment, confirmed by the Appellate Court of the Ceiba, which acquitted Mr. López Álvarez; however, he remained in custody until August 26, 2003.

[...]

XI. VIOLATION OF ARTICLES 13 AND 24 OF THE AMERICAN CONVENTION IN RELATION WITH ARTICLE 1.1 OF THE SAME (FREEDOM OF THOUGHT AND EXPRESSION, RIGHT TO EQUAL PROTECTION AND OBLIGATION TO RESPECT RIGHTS)

[...]

Considerations of the Court

160. Although the Inter-American Commission did not argument the violation of Mr. López Álvarez's right to express himself in the Garifuna language, the alleged victims, his next of kin, or representatives may argument violations based on the facts considered in the Commission's application (...).

[...]

163. The Court has previously stated, regarding the content of the right to freedom of thought and expression, that it contains a double dimension: the individual one, which consists in the right to disseminate information and the social one that consists in the right to seek, receive and disseminate information and ideas of all types.¹¹² Both aspects are equally important and must be guaranteed in full simultaneously in order to grant total effectiveness to the right to freedom of thought and expression in the terms of Article 13 of the Convention.¹¹³

164. Article 13.1 expressly enshrines the liberty to orally impart information. The Court considers that one of the mainstays of the freedom of expression is precisely the right to speak, and that the latter necessarily implies the right of people to use the language of their choice when expressing their thoughts. The expression and dissemination of thoughts and ideas are indivisible; therefore a restriction to the possibilities of spreading information directly represents, in the same measure, a limit to the right to express oneself freely.¹¹⁴

165. The “need” and, therefore, the legality of the restrictions to the freedom of expression based on Article 13.2 of the American Convention, will depend on if they are oriented to satisfying an imperative public interest, which clearly predominates over the social need of the complete enjoyment of the right guaranteed in Article 13. Among several options to reach this objective, the one that least restricts the right protected is the one that must be chosen.¹¹⁵ The above applies to laws, as well as administrative decisions, and acts, and acts or decisions of any other nature, that is, to all demonstration of state power.

112 Cf. *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 77; *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, para. 108, and *Case of Ivcher Bronstein*, Judgment of February 6, 2001. Series C No. 74, para. 146.

113 Cf. *Case of Ricardo Canese*, *supra* note 112, para. 80; *Case of Herrera Ulloa*, *supra* note 112, para. 111, and *Case of Ivcher Bronstein*, *supra* note 112, para. 149.

114 Cf. *Case of Palamara-Iribarne*, Judgment of November 22, 2005. Series C No. 135, para. 72; *Case of Ricardo Canese*, *supra* note 112, para. 78, and *Case of Herrera Ulloa*, *supra* note 112, para. 109.

115 Cf. *Case of Palamara-Iribarne*, *supra* note 114, para. 85; *Case of Ricardo Canese*, *supra* note 112, para. 96, and *Case of Herrera Ulloa*, *supra* note 112, paras. 121 and 123.

166. In the present case, in the year 2000 the Director of the Criminal Center of Tela prohibited the Garifuna population of said criminal center, among which Mr. Alfredo López Álvarez was included, from speaking their mother tongue (...). Said measure denied the alleged victim from expressing himself in the language of his choice. This measure was not justified by the State. Said prohibition infringes the detainee's individuality and does not obey to security conditions or treatment needs.

167. The penitentiary authorities exercise a strong control over the people subject to their custody. Therefore, the State must guarantee the existence of adequate conditions so that the person deprived of his liberty may develop a decent life, ensuring him the exercise of the rights whose restriction is not a necessary consequence of the deprivation of liberty, pursuant to the rules that are characteristic of a democratic society.¹¹⁶

168. The Court considers that the observance of rules in the collective treatment of the detainees within a criminal center, does not give the State, in the exercise of its power to punish, the legal authority to limit, in an unjustified manner, the freedom of the people to express themselves through any means and in the language chosen by them.

169. According to the facts of this case, the prohibition was issued regarding the native language of Mr. Alfredo López Álvarez, which is the form of expression of the minority to which the alleged victim belongs. Therefore the prohibition acquires a special seriousness, since the mother tongue represents an element of identity of Mr. Alfredo López Álvarez as a Garifuna. In this way, the prohibition affected his personal dignity as a member of that community.

170. This Tribunal has reiterated that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that the States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights. Moreover, States must combat discriminatory practices and must adopt the measures needed to ensure the effective right to equal protection for all individuals before the law.¹¹⁷

116 *Cf. Case of García-Asto and Ramírez-Rojas*, Judgment of November 28, 2005. Series C No. 137, para. 221; *Case of Raxcacó-Reyes*, Judgment of September 15, 2005. Series C No. 133, para. 95, and *Case of Fermín Ramírez*, Judgment of June 20, 2005. Series C No. 126, para. 118.

117 *Cf. Case of the Girls Yean and Bosico*, Judgment of September 8, 2005. Series C No. 130, para. 141; *Case of Yatama*, Judgment of June 23, 2005. Series C No. 127, para. 185, and *Judicial Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 88.

171. The States must take into consideration the information that differentiates the members of the Indian populations from that of the population in general, and that make up their cultural identity.¹¹⁸ Language one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture.

172. In the present case, the restriction on the liberty to speak Garifuna applied to some inmates of the Criminal Center of Tela was discriminatory in detriment of Mr. Alfredo López Álvarez, as a member of the Garifuna community.

173. The Court finds that by prohibiting Mr. Alfredo López Álvarez to express himself in the language of his choice, during his detention in the Criminal Center of Tela, the State applied a restriction to the exercise of his liberty of expression incompatible with the guarantee established in the Convention and that, at the same time, constituted a discriminatory act against him.

174. The above considerations lead the Court to conclude that the State is responsible for the violation of the rights to liberty of thought and expression and equal protection before the law, enshrined in Articles 13 and 24 of the American Convention, and for the non-compliance of the general obligation to respect and guarantee the rights and liberties established in Article 1.1 of the same instrument, in detriment of Mr. Alfredo López Álvarez.

[...]

XIV. OPERATIVE PARAGRAPHS

225. Therefore,

THE COURT,

DECLARES:

Unanimously, that:

[...]

118 Cf. *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 51.

4. The State violated the rights of freedom of thought and expression and of equal protection enshrined in Articles 13 and 24 of the American Convention on Human Rights, and did not comply with the general obligation to respect and guarantee the rights and liberties established in Article 1.1 of the same, in detriment of Mr. Alfredo López Álvarez, (...).

[...]

*Inter-American Court
of Human Rights*

*Sawhoyamaxa Indigenous Community
v. Paraguay*

Merits, Reparations and Costs

*Judgment of
March 29, 2006*



[...]

I. INTRODUCTION OF THE CASE

[...]

2. The Commission filed the application pursuant to Article 61 of the American Convention, in order that the Court should decide whether Paraguay had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment), 21 (Right to Property), 8 (Right to A Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, with relation to the obligations set forth in Articles 1.1 (Obligation to Respect Rights) and 2 (Obligation to Adopt Domestic Law Measures) thereof, to the detriment of the Sawhoyamaxa Indigenous Community of the Enxet-Lengua people (hereinafter, the "Sawhoyamaxa Indigenous Community", the "Sawhoyamaxa Community", the "Indigenous Community" or the "Community", irrespectively) and its members (hereinafter, "the members of the Community"). The Community alleged that the State has not ensured the ancestral property right of the Sawhoyamaxa Community and its members, inasmuch as their claim for territorial rights is pending since 1991 and it has not been satisfactorily resolved to date. As stated in the Commission's application, this has barred the Community and its members from title to and possession of their lands, and has implied keeping it in a state of nutritional, medical and health vulnerability, which constantly threatens their survival and integrity.

[...]

IX. VIOLATION OF ARTICLE 21 OF THE AMERICAN CONVENTION (RIGHT TO PROPERTY) IN RELATION TO ARTICLES 1.1 AND 2 THEREOF

[...]

Considerations of the Court

[...]

117. In analyzing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation

rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law.¹⁸⁴ The State ratified Convention No. 169 and incorporated its provisions to domestic legislation by Law No. 234/93.¹⁸⁵

118. Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention.¹⁸⁶ The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity.¹⁸⁷

119. The foregoing is related to the contents of Article 13 of Convention No. 169 of the ILO, in that States must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

120. Likewise, this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land “is not centered on an individual but rather on the group and its community.”¹⁸⁸ This notion of ownership and possession of land does not necessarily conform to the classic

184 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, paras. 124-131, and Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August, 31, 2001. Series C No. 79, paras. 148 and 149.

185 Law No. 234/93 whereby ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries is ratified.

186 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 137, and Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 184, para. 149.

187 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 135.

188 Cf. Case of the Mayagna (Sumo) Awas Tingni Community, *supra* note 184, para. 149.

concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.

121. Consequently, the close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element deriving therefrom, must be secured under Article 21 of the American Convention. On the matter, the Court, as it has done before, is of the opinion that the term “property” as used in Article 21, includes “material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value”.¹⁸⁹

[...]

126. Consequently, in order to address the issues in the instant case, the Court will proceed to examine, in the first place, whether possession of the lands by the indigenous people is a requisite for official recognition of property title thereto. In the event that possession not be a requisite for restitution rights, the Court will analyze, in the second place, whether enforcement of said rights is time-restricted. Finally, the Court will address the actions that the State must take to enforce indigenous communal property rights.

i) The possession of the lands

127. Acting within the scope of its adjudicatory jurisdiction, the Court has had the opportunity to decide on indigenous land possession in three different situations. On the one hand, in the Case of the Mayagna (Sumo) Awas Tingni Community, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.¹⁹⁰ On the other hand, in the Case of the Moiwana Community,

189 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para 137; Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 144, and Case of Ivcher-Bronstein. Judgment of February 6, 2001. Series C No. 74, para. 122.

190 Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 151.

the Court considered that the members of the N'djuka people were the “legitimate owners of their traditional lands” although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them. In this case, the traditional lands have not been occupied by third parties.¹⁹¹ Finally, in the Case of the Indigenous Community Yakye Axa, the court considered that the members of the Community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualize those lands and transfer them on a for no consideration basis.¹⁹²

128. The following conclusions are drawn from the foregoing: 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights. The instant case is categorized under this last conclusion.

[...]

130. Consequently, under the very laws of Paraguay, the members of the Sawhoyamaya Community have the right to claim restitution of their traditional lands even though said lands may be privately held and they, as claimants, may not be in full possession thereof.

ii) Time-restriction on the right to restitution

131. The second issue under analysis refers to whether the right to the restitution of traditional lands lasts indefinitely in time. In order to solve this matter, the Court takes into consideration that the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands. As long as said relation-

191 Cf. Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124. para. 134.

192 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, paras. 124-131.

ship exists, the right to claim lands is enforceable, otherwise, it will lapse. Said relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.¹⁹⁴

132. It is to be further considered that the relationship with the land must be possible. For instance, in situations like in the instant case, where the relationship with the land is expressed, inter alia, in traditional hunting, fishing and gathering activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear.

133. As it stems from the Proven Facts Chapter in the instant judgment (...), the members of the Sawhoyamaxa Community, in spite of having been dispossessed and of being denied access to the claimed lands, still carry out traditional activities in them and still consider them their own. (...)

134. Based on the foregoing, the Court considers that the land restitution right of the members of the Sawhoyamaxa Community has not lapsed.

iii) Actions to enforce the rights of the community members over their traditional lands

135. Once it has been proved that land restitution rights are still current, the State must take the necessary actions to return them to the members of the indigenous people claiming them. However, as the Court has pointed out, when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.¹⁹⁹

194 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 154.

199 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 149.

136. Nevertheless, the Court can not to decide that Sawhoyamaxa Community's property rights to traditional lands prevail over the right to property of private owners or vice versa, since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties. This power is vested exclusively in the Paraguayan State. Nevertheless, the Court has competence to analyze whether the State ensured the human rights of the members of the Sawhoyamaxa Community.

137. Following this line of thought, the Court has ascertained that the arguments put forth by the State to justify non-enforcement of the indigenous people's property rights have not sufficed to release it from international responsibility. The State has put forth three arguments: 1) that claimed lands have been conveyed from one owner to another "for a long time" and are duly registered; 2) that said lands are being adequately exploited, and 3) that the owner's right "is protected under a bilateral agreement between Paraguay and Germany[,] which [...] has become part of the law of the land."

138. Regarding the first argument, the Court considers that the fact that the claimed lands are privately held by third parties is not in itself an "objective and reasoned" ground for dismissing prima facie the claims by the Indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other. The contents of each parameter have been defined by the Court in the Case of the Indigenous Community Yakye Axa, hence express reference to said decision is hereby made.²⁰⁰

139. The same rationale is applicable to the second argument put forth by the State as regards to land productivity. This argument lodges the idea that indigenous communities are not entitled, under any circumstances, to claim traditional lands when they are exploited and fully productive, viewing the indigenous issue exclusively from the standpoint of land productivity and agrarian law, something which is insufficient for it fails to address the distinctive characteristics of such peoples.

200 Cf. Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 149.

140. Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a “public purpose or interest”, which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.²⁰¹

141. Based on the foregoing, the Court dismisses the three arguments of the State described above and finds them insufficient to justify non-enforcement of the right to property of the Sawhoyamaya Community.

142. Finally, it is worth recalling that, under Article 1.1 of the Convention, the State is under the obligation to respect the rights recognized therein and to organize public authority in such a way as to ensure to all persons under its jurisdiction the free and full exercise of human rights.²⁰²

143. Even though the right to communal property of the lands and of the natural resources of indigenous people is recognized in Paraguayan laws, such merely abstract or legal recognition becomes meaningless in practice if the lands have not been physically delimited and surrendered because the adequate domestic measures necessary to secure effective use and enjoyment of said right by the members of the Sawhoyamaya Community are lacking. The free development and transmission of their culture and traditional rites have thus been threatened.

144. For the aforementioned reasons, the Court concludes that the State violated Article 21 of the American Convention, to the detriment of the members of the Sawhoyamaya Community, in relation to Articles 1.1 and 2 therein.

201 Cf. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29.

202 Cf. *Case of the Yakye Axa Comunidad Indígena Community*, Judgment of June 17, 2005. Series C No. 125, para. 153; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 142, y *Case of Ivcher Bronstein*, supra note 189, para. 168.

X. VIOLATION OF ARTICLE 4 OF THE AMERICAN CONVENTION (RIGHT TO LIFE) AS REGARDS TO ARTICLES 19 AND 1.1 THEROF

[...]

Considerations by the Court

[...]

i) *general principles*

150. The right to life is a fundamental human right, which full enjoyment is a pre-requisite for the enjoyment of the other human rights.²⁰³ If this right is not respected, all other rights do not have sense. Having such nature, no restrictive approach of the same is admissible.²⁰⁴ Pursuant to Article 27.2 of the Convention, this right forms part of the essential nucleus, since it is consecrated as one of the rights that cannot be suspended in cases of war, public danger or any other threat to the independence or security of a State Party.²⁰⁵

151. By virtue of this fundamental role that the Convention assigns to this right, the States have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right.²⁰⁶

203 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 120; Case of 19 Merchants. Judgment of July 5, 2004. Series C No. 109, para. 153; , Judgment of November 25, 2003, Series C No. 101, para. 152; Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 110, and the Case of the "Street Children" (Villagrán Morales et al.), Judgment of November 19, 1999. Series C No. 63, para. 144.

204 Cf. The "Street Children" Case (Villagrán Morales et al.) supra note 203, para. 144; in this sense see also Nachova and others v. Bulgaria application nos. 43577/98 and 43579/98, EurCourt HR [gc], Judgment 6 July 2005, para. 94.

205 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 119.

206 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 120.

152. In that sense, the Court has constantly shown in the cases heard that regarding the compliance with the obligations imposed by Article 4 of the American Convention, as regards to Article 1.1 thereof, it is not only presumed that no person shall be deprived of his life arbitrarily (negative obligation), but also that, in the light of its obligation to secure the full and free enjoyment of human rights, the States shall adopt all appropriate measures²⁰⁷ to protect and preserve the right to life (positive obligation)²⁰⁸

153. In view of the above, the States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents,²⁰⁹ or by individuals;²¹⁰ and to protect the right of not being prevented from access to conditions that may guarantee a decent life,²¹¹ which entails the adoption of positive measures to prevent the breach of such right.

154. The Court has determined that, within the framework of the American Convention, the international responsibility of States arises at the moment of the violation of the general obligations embodied in Articles 1.1 and 2 of such treaty.²¹² From these general obligations

207 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 120; in that sense, also Cf. *L.C.B. vs. United Kingdom* (1998) III, EurCourt HR 1403, 36.

208 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 120; Case of the “Mapiripán Massacre”, Judgment of September 15, 2005. Series C No. 134, para. 232; Case of *Huilce Tecse*. Judgment of March 3, 2005. Series C No. 121, para. 66; Case of the “Juvenile Reeducation Institute” Judgment of September 2, 2004. Series C No. 112, para. 158; Case of the Brothers Gómez-Paquiyaui. Judgment of July 8, 2004. Series C No. 110, para. 129; Case of 19 Merchants, *supra* note 203, para. 153; Case of *Myrna Mack Chang*, *supra* note 203, para. 153; Case of *Juan Humberto Sánchez*, *supra* note 203, para. 110; Case of *Bámaca-Velásquez*. Judgment of November 25, 2000. Series C No. 70, para. 172; and the “Street Children” Case (*Villagrán Morales et al.*) *supra* note 203, 144 to 146.

209 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 120, y *Kiliç v. Turkey* (2000) III, EurCourt HR, 62 and 63.

210 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 120; Case of the “Mapiripán Massacre”, Judgment of September 15, 2005. Series C No. 134, para. 111; see also *Osman v. the United Kingdom* (1998) VIII, 115 and 116.

211 Cf. Case of Indigenous Community of *Yakye Axa*, Judgment of June 17, 2005. Series C No. 125, para. 161; the “Street Children” Case (*Villagrán Morales et al.*) *supra* note 203, para. 144, y Case of the “Juvenile Reeducation Institute” Judgment of September 2, 2004. Series C No. 112, para. 156.

212 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 111; Case of the “Mapiripán Massacre”, Judgment of September 15, 2005. Series C No. 134, para. 111, and *Judicial*

special duties are derived that can be determined according to the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face,²¹³ such as extreme poverty, exclusion or childhood.

155. It is clear for the Court that a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities.²¹⁴ In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.²¹⁵

ii) application of such principles to the instant case

156. (...) The dispute lies regarding the determination of the State's responsibility for the conditions in which the alleged victims are, and regarding whether the State has adopted any necessary measures within the scope of its authority which could be reasonably expected to prevent or avoid the risk to the right to life of the alleged victims.

[...]

163. The Court acknowledges the criterion of the State in the sense that it has not induced or encouraged the members of the Community to move and settle by the side

Condition and Rights of the Undocumented Migrants. Advisory Opinion AO-18/03, of September 17, 2003. Series A No. 18, para. 140.

213 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, 111 and 112; Case of the "Mapiripán Massacre", Judgment of September 15, 2005. Series C No. 134, paras. 108 and 110, and Case of the Gómez-Paquiyaúri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 71.

214 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 124, and Kiliç v. Turkey (2000) III, EurCourt HR, 63.

215 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, paras. 123 and 124, see also Kiliç v. Turkey (2000) III, EurCourt HR, 63, Öneriyildiz v. Turkey, application no. 48939/99, EurCourt HR [gc], Judgment 30 November 2004, 93, and Osman v. the United Kingdom (1998) VIII, 116.

of the road. However, the Court considers that there were powerful reasons for the members of the Community to abandon the estates where they lived and worked, due to the extremely hard physical and labor conditions they had to endure (...) Likewise, this argument is not enough for the State to disregard its duty to protect and guarantee the right to life of the alleged victims. It is necessary that the State proves that it carried out all necessary actions take the indigenous peoples from the roadside, and in the meantime, to adopt all necessary measures to reduce the risk that they were facing.

[...]

165. In that same sense, the State has pointed out that the indigenous people have refused to move to a provisional location while the issue is solved in the domestic jurisdiction. However, the Court does not find any evidentiary support for such an allegation. From the case file before the Court, it is not evident that specific offerings have been made, no indication has been made as to the possible locations to which the members of the Community could have been sent, or as to the distances from their traditional habitat, or as to any other details that may be taken into account to assess the feasibility of such offerings.

166. Consequently, this Court considers that the State has not adopted the necessary measures for the members of the Community to leave the roadside, and thus, abandon the inadequate conditions that endangered, and continue endangering, their right to life.

167. (...) However, the Court considers, as in many other occasions,²¹⁸ that legislation alone is not enough to guarantee the full effectiveness of the rights protected by the Convention, but rather, such guarantee implies certain governmental conducts to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights.

168. In the instant case, together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes (...).

[...]

218 Cf. Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 142.

173. The Court does not accept the State argument regarding the joint responsibility of the ill persons to go to the medical centers to receive treatment, and of the Community leaders to take them to such centers or to communicate the situation to the health authorities. From the issuance of the emergency Order, the INDI and the Ministerio del Interior [Ministry of the Interior] and the Ministerio de Salud Pública y Bienestar Social [Ministry of Public Health and Social Welfare] had the duty to take “the actions that might be necessary to immediately provide food and medical care to the families that form part of [the Sawhoyamaya Community], pending the judicial proceedings regarding the legislation of the lands claimed by such Community as part of [their] traditional habitat” (...) Therefore, the provision of goods and health services did no longer specifically depend on the individual financial capacity of the alleged victims, and therefore, the State should have taken action contributing to the provision of such goods and services. That is to say, those measures which the State undertook to adopt before the members of the Sawhoyamaya Community were different, in view of their urgent nature, from those that the State should adopt to guarantee the rights of the population and of the indigenous communities in general. To accept the contrary would be incompatible with the object and purpose of the American Convention, which requires that its provisions be interpreted and applied so that the rights contemplated therein be effectively protected in practice.

174. The serious impediments for the members of this Community to reach the health centers on their own must be added to the foregoing. The alleged victims pointed out the following:

We are near a big city, Concepción, where the nearest hospital is located. When our people get ill we think of taking them there, but we suffer a lot, because we know that without money we are not going to get assistance, there are no medicines for the poor, they only provide you with the prescription to buy the medicines in pharmacies, and the little money that we sometimes have is not enough, we have to request help through some radio broadcast that campaigns, this is the only way, when people of good will help us.²²⁰

In our situation, in case of illness or death, for example, our community is totally unprotected. There are no records of births or deaths occurring in our communities. The State disregards us for being indigenous and we are discriminated. We cannot even get assistance when we manage to get to the health centers because we do not have any money

220 Cf. Affidavit of Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 676 to 679)

or because they tell us that “there are no doctors.” Furthermore, many of us do not have identity cards. Many times we want to resort to our knowledge of traditional medicine, but we cannot get to gather medicinal herbs because these are to be found inside the wire-fenced lands and we must contemplate disease and death with resignation.²²¹

[...]

176. (...) the Court considers that the facts stated (...), which have not been contested by the State, and in respect of which the State has not filed any specific evidence to the contrary, confirm the statement by expert witness Balmaceda, in the sense that “the few [ill persons in the Community] that managed to reach a doctor or a medical center, did so when it was too late or were very deficiently treated, or more precisely, were inhumanely treated.” Therefore, the Court considers that such deaths are attributable to the State.

177. As regards to the right to life of children, the State has, in addition to the duties regarding any person, the additional obligation to promote the protective measures referred to in Article 19 of the American Convention, which states the following: “[E]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” Thus, on the one hand, the State must undertake more carefully and responsibly its special position as guarantor, and must adopt special measures based on the best interest of the child.²²² The aforesaid cannot be separated from the likewise vulnerable situation of the pregnant women of the Community. States must devote special attention and care to protect this group and must adopt special measures to secure women, specially during pregnancy, delivery and lactation, access to adequate medical care services.

221 Cf. Affidavit of Leonardo González-Fernández, before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 728 to 731), and response of the State to the request for evidence to facilitate the adjudication of the case made by the President of the Court on January 20, 2006 (case file on the merits, reparations, and costs, Volume III, folios 610 and 611).

222 Cf. Case of the “Mapiripán Massacre”, Judgment of September 15, 2005. Series C No. 134, para. 152; Case of the Indigenous Community of Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 172, and Case of “Juvenile Reeducation Institute” supra note 211, para. 160. In that sense, also, Cf. Juridical Condition and Human Rights of Children. Advisory Opinion AO-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

178. (...) The Court considers that the deaths of 18 children members of the Community, (...) are attributable to the State, precisely for the lack of prevention, which furthermore additionally violates Article 19 of the Convention. Likewise, the Court finds that the State violated Article 4.1 of the American Convention, as regards to Article 1.1 thereof, due to the death of Luis Torres-Chávez, who died of enterocolitis, without any kind of medical care (...).

[...]

XII. VIOLATION OF ARTICLE 3 OF THE AMERICAN CONVENTION (RIGHT TO JURIDICAL PERSONALITY)

[...]

188. The right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such person can enforce such rights.²²⁴ The breach of such recognition implies the absolute denial of the possibility of being holder of such rights and of assuming obligations²²⁵, and renders individuals vulnerable to the non-observance of the same by the State or by individuals.²²⁶

189. The State has a duty to provide the means and legal conditions in general, so that the right to personality before the law may be exercised by its holders. Specially, the State is bound to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law.

190. In the instant case, the Court has considered proved that 18 out of the 19 members of the Sawhoyamaxa Community who died as a consequence of the failure by the State to comply with its preventive duty regarding their right to life (...) did not have any birth

224 Cf. International Covenant on Civil and Political Rights. Examination of Reports submitted by the State Parties pursuant to Article 40 of the Convention. UN Doc CCPR/C/ 31/ADD. 4 (1996), para. 58.

225 Cf. Case of Bámaca-Velásquez. Judgment of November 25, 2000, Series C No. 70, para. 179.

226 Cf. Case of the Yean and Bocico girls, Judgment of September 8, 2005. Series C No. 130, para. 178; Case of Bámaca-Velásquez, supra note 225, para. 179.

or death records, nor any other document provided by the State capable of evidencing their existence and identity.

191. Likewise, it stems from by the facts that the members of the Community lived in extremely risky and vulnerable conditions, and thus they have economic and geographical hindrances to get births and deaths duly registered, as well as to obtain any other identification documents. In that sense, Carlos Marecos, Community leader expressed that: As regards to personal documents, we indigenous peoples have always had many problems, there are still people that have never had any identification documents, and there are persons that have got identity cards only when they reached old age, because they had never gone to Asunción. They worked on estates, just like that, without any documents [...], not even my children have identity cards, we have to go to Asunción to get the birth certificate and then the identity card, but the fare to get there is expensive, it is not easy to travel [...]. Most children born in the Community are not registered. (...) Neither are the demises of the persons who die registered.

192. The above mentioned members of the Community have remained in a legal limbo in which, though they have been born and have died in Paraguay, their existence and identity were never legally recognized, that is to say, they did not have personality before the law. Indeed, the State, in the instant proceeding before the Court, has intended to use this situation for its own benefit. In fact, at the time of referring to the right to life, the State alleged: If neither the existence of these persons nor even their death has even been proved, it is not possible to claim liability from anyone, lest the State, where are their birth and death certificates?

193. (...) The Court considers that it was the duty of Paraguay to implement mechanisms enabling all persons to register their births and get any other identification documents, ensuring that these processes are, at all different levels, accessible both legally and geographically, to render the right to personality before the law operative.

194. On the basis of the above considerations, and notwithstanding the fact that other members of the Community may be in the same situation, the Court finds that the State violated the right to personality before the law enshrined in Article 3 of the American Convention, (...).

XIII. REPARATIONS – ENFORCEMENT OF ARTICLE 63.1

[...]

Considerations of the Court

A) Beneficiaries

204. The Court considers that the members of the Sawhoyamaxa Indigenous Community are the injured parties, in their capacity as victims of the violations specified above (...).

[...]

207. The compensation to be established by the Court to the benefit of the members of the Sawhoyamaxa Community as a whole will be placed at the disposal of the leaders of the Community, in their capacity as representatives thereof.

208. Furthermore, this Court considers “injured party” the 19 members of this Indigenous Community who died as a result of the events (...).

209. The amount to be granted in favor of these persons must be delivered to their next of kin, pursuant to the practices and customary law of the Community.

B) Restitution of traditional lands to the members of the Sawhoyamaxa Community

210. In view of its conclusions contained in the chapter related to Article 21 of the American Convention (...), the Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the *restitutio in integrum* principle, therefore the Court orders that the State shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands.

211. (...) However, restitution of such lands to the Community is barred, since these lands are currently privately owned.

212. On that matter, pursuant to Courts precedent,²³⁴ the State must consider the possibility of purchasing these lands or the lawfulness, need and proportionality of condemning these lands in order to achieve a lawful purpose in a democratic society, as reaffirmed in paragraphs 135 to 141 of the instant Judgment and paragraphs 143 to 151 of the judgment entered by the Court in the Case of the Indigenous Community Yakye Axa. If restitution of ancestral lands to the members of the Sawhoyamaya Community is not possible on objective and sufficient grounds, the State shall make over alternative lands, selected upon agreement with the aforementioned Indigenous Community, in accordance with the community's own decision-making and consultation procedures, values, practices and customs. In either case, the extension and quality of the lands must be sufficient to guarantee the preservation and development of the Community's own way of life.

[...]

214. In this regard, it must be taken into account that, pursuant to paragraphs 135 to 141 of the instant Judgment, the fact that the Community's traditional lands is currently privately held or reasonably exploited, is not in itself an "objective and sufficient ground" barring restitution thereof.

215. The State shall, within three years as from notice of the instant Judgment, formally and physically grant tenure the lands to the victims, irrespective of whether they be acquired by purchase or by condemnation, or whether alternative lands are selected. The State shall guarantee all the necessary funds for the purpose.

[...]

D) Non-pecuniary damage

[...]

221. This Court finds that the non enforcement of the right to hold title to the communal property of the members of the Sawhoyamaya Community, and the detrimental living conditions imposed upon them as a consequence of the State's delay in enforcing their

234 Cf. Case of Indigenous Community Yakye Axa. Interpretation of the Judgment on the Merits, Reparations, and Costs (art. 67(1) American Convention on Human Rights). Judgment of February 6, 2006. Series C No. 142, para. 26, and Case of Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 144 to 154 and 217.

rights over the lands must be taken into account when assessing the value of the non-pecuniary damage sustained.

222. Similarly, the Court finds that the special meaning that these lands have for indigenous peoples, in general, and for the members of the Sawhoyamaxa Community, in particular (...), implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations.

223. In the instant case, the State recognized “the need of the members of the Community to generate a productive yield out of the lands to be made over to them in order to cater for the needs of the Community and to allow the adequate development of such lands. To such effect, the State will implement a project for the adequate development of such lands, immediately after consultations with and acceptance by the Community” (...).

224. Based on the above the Court considers meet, on equitable grounds, to order the State to establish a community development fund in the lands to be made over to the members of the Community, as set forth in paragraph 207 of the instant Judgment. The State shall allocate the amount of US\$ 1,000,000.00 (one million United States Dollars) to such fund, which will be used to implement educational, housing, agricultural 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 established by an implementation committee, as described below, and must be completed within two years as from delivery of the lands to the members of the Indigenous Community.

225. The abovementioned committee will be in charge of defining the ways in which the development fund is to be implemented and will be made up of three members: a representative appointed by the victims, a representative appointed by the State and another representative jointly appointed by the victims and the State. Should the State and the representatives fail to reach an agreement as to the members of the implementation committee within six months after notice of the instant Judgment, the Court will convene a meeting to discuss the matter.

226. On the other hand, in view of the conclusions contained in the chapter of the instant Judgment regarding Article 4.1 of the Convention, given the existence of sufficient

grounds to presume the suffering of the deceased persons, mostly boys and girls, as a result of the circumstances described above (...).

[...]

a) *Delivery of property and basic services*

[...]

230. With the foregoing in mind and in view of the conclusions contained in the chapter related to Article 4 of the American Convention (...), the Court orders that, while the members of the Community remain landless, the State shall immediately, regularly and permanently adopt measures to: a) supply sufficient drinking water for consumption and personal hygiene to the members of the Community; b) provide medical check-ups, tests and care to all members of the Community, especially children, elder people and women, together with periodic parasite removal and vaccination campaigns, respecting their practices and customs; c) deliver sufficient quantity and quality of food; d) set up latrines or other type of sanitation facilities in the settlements of the Community, and e) provide the school of the "Santa Elisa" settlement with all necessary material and human resources, and establish a temporary school with all necessary material and human resources for the children of the "Kilómetro 16" settlement. The education provided must, inasmuch as possible, respect the cultural values of the Community and of Paraguay, and is to be bilingual; in the Exent language, and at the discretion of the members of the Community, either in Spanish or in Guarani.

231. Likewise, in view of the conclusions contained in the chapter related to Article 3 of the Convention, the Court orders the State to implement, within one year as from the date notice of the instant Judgment be served, a registration and documentation program aimed at offering the members of the Community the possibility to register and to obtain their identification documents.

232. Lastly, given the difficulties encountered by the members of the Community to access health care centers (...), the State shall set up in the Santa Elisa and Kilómetro 16 settlements of the Sawhoyamaya Community a communication system to allow victims to contact health authorities competent to address emergency cases. If necessary, the State shall provide transportation. The State shall establish such communication system within six months as from the date notice of the instant Judgment be served.

233. To comply with the provisions of the preceding paragraphs, the State shall secure participation and informed consent by the victims, which must be expressed by their representatives and leaders.

c) *Adapting domestic legislation to the American Convention*

[...]

235. Based on the above and in view of the conclusions reached by the Court in the chapters relating to Articles 8, 21, 25 and 2 of the American Convention, the Court finds that the State shall guarantee the effective exercise of the rights contemplated in its Political Constitution and domestic legislation, pursuant to the American Convention. Consequently, the State shall, within a reasonable time, enact into its domestic legislation, as per Article 2 of the American Convention, the legislative, administrative and other measures necessary to provide an efficient mechanism to claim the ancestral lands of indigenous peoples enforcing their property rights and taking into consideration their customary law, values, practices and customs.

e) *Publication and disclosure of the pertinent parts of the Court's Judgment*

236. As ordered in prior cases,²³⁹ the Court finds that, as a measure of satisfaction, the State shall publish within one year as from the date notice of the instant Judgment be served and at least once, in the Official Gazette and in another national daily newspaper, the section entitled Proven Facts, without the footnotes, and operative paragraphs one to fourteen of the instant Judgment. Furthermore, the State shall finance the radio broadcasting²⁴⁰ of the content of paragraphs 73.1 to 73.75 of chapter VII on Proven Facts, without the footnotes, and of operative paragraphs one to fourteen of the instant Judgment, in the language indicated by the members of the Community, in a radio station accessible to them. Said radio broadcasting shall be made at least four times in two-week intervals.

[...]

239 Cf. Case of Acevedo-Jaramillo et al., Judgment of February 7, 2006. Series C No. 144, para. 313; Case of López-Álvarez, Judgment of February 1, 2006. Series C No. 141, para. 208; Case of the Pueblo Bello Massacre, Judgment of January 31, 2006. Series C No. 140, para. 279.

240 Cf. . Case of Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125, para. 227; and Case of Yatama, Judgment of June 23, 2005. Series C No. 127, para. 253.

XIV. OPERATIVE PARAGRAPHS

248. Therefore,

THE COURT,

[...]

(...) Rules,

6. The State shall adopt all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaxa Community their traditional lands, within three years, (...).

7. The State shall implement a community development fund, (...).

[...]

9. As long as the members of the Sawhoyamaxa Indigenous Community remain landless, the State shall deliver to them the basic supplies and services necessary for their survival, (...).

10. Within six months as from the date notice of the instant Judgment be served, the State shall set up in the Santa Elisa and Kilómetro 16 settlements of the Sawhoyamaxa Community a communication system enabling victims to contact health authorities competent to address emergency cases, (...).

[...]

12. The State shall enact into its domestic laws and within a reasonable time the legislative, administrative or other measures necessary to establish a mechanism to claim restitution of the ancestral lands of the members of indigenous communities, that be efficient in enforcing their rights over traditional lands, (...).

[...]

*Inter-American Court
of Human Rights*

Saramaka People v. Suriname

*Preliminary Objections, Merits,
Reparations, and Costs*

*Judgment of
November 28, 2007*



[...]

I. INTRODUCTION OF THE CASE AND SUBJECT OF THE DISPUTE

[...]

2. The application submits to the Court's jurisdiction alleged violations committed by the State against the members of the Saramaka people, an allegedly tribal community living in the Upper Suriname River region. The Commission alleged that the State has not adopted effective measures to recognize their right to the use and enjoyment of the territory they have traditionally occupied and used, that the State has allegedly violated the right to judicial protection to the detriment of such people by not providing them effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions, and that the State has allegedly failed to adopt domestic legal provisions in order to ensure and guarantee such rights to the Saramakas.

[...]

VII. NON-COMPLIANCE WITH ARTICLE 2 (DOMESTIC LEGAL EFFECTS), AND VIOLATION OF ARTICLES 3 (RIGHT TO JURIDICAL PERSONALITY), 21 (RIGHT TO PROPERTY) AND 25 (RIGHT TO JUDICIAL PROTECTION) OF THE AMERICAN CONVENTION, IN RELATION TO ARTICLE 1.1 (OBLIGATION TO RESPECT RIGHTS) THEREOF*

77. In light of the interrelatedness of the arguments submitted to the Court in the present case, the Tribunal will address in a single chapter the alleged non-compliance with Article 2, and violations of Articles 3, 21, and 25 of the Convention. Accordingly, the Court will address the following eight issues: first, whether the members of the Saramaka people make up a tribal community subject to special measures that ensure the full exercise of their rights; second, whether Article 21 of the American Convention protects the right of the members of tribal peoples to the use and enjoyment of communal property; third, whether the State has recognized the right to property of the members of the Saramaka people derived from their system of communal property; fourth, whether and to what

* (Note of the editor) Footnotes 56 through 60 which transcribe the respective articles were left out.

extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their alleged traditionally owned territory; fifth, whether and to what extent the State may grant concessions for the exploration and extraction of natural resources found on and within alleged Saramaka territory; sixth, whether the concessions already issued by the State comply with the safeguards established under international law; seventh, whether the lack of recognition of the Saramaka people as a juridical personality makes them ineligible under domestic law to receive communal title to property as a tribal community and to have equal access to judicial protection of their property rights; and finally, whether there are adequate and effective legal remedies available in Suriname to protect the members of the Saramaka people against acts that violate their alleged right to the use and enjoyment of communal property.

A. The members of the Saramaka people as a tribal community subject to special measures that ensure the full exercise of their rights

[...]

79. First of all, the Court observes that the Saramaka people are not indigenous to the region they inhabit; they were instead brought to what is now known as Suriname during the colonization period (...). Therefore, they are asserting their rights as alleged tribal peoples, that is, not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.

A.1) The members of the Saramaka people as a distinct social, cultural and economic group with a special relationship with its ancestral territory

80. According to the evidence submitted by the parties, the Saramaka people are one of the six distinct Maroon groups in Suriname whose ancestors were African slaves forcibly taken to Suriname during the European colonization in the 17th century.⁶¹ Their ancestors escaped to the interior regions of the country where they established autonomous com-

61 This fact is recognized by the State (Merits, volume II, folio 291). Cf. also Testimony of Head Captain and Fiscali Wazen Eduards during the public hearing at the Court held on May 9 and 10, 2007 (transcription of public hearing, pp. 3-4).

munities.⁶² The Saramaka people are organized in twelve matrilineal clans (lös), and it is estimated that the contemporary size of the Saramaka population ranges from 25,000 to 34,000, which is spread over 63 communities on the Upper Suriname River and in a number of displaced communities located to the north and west of said area.⁶³

81. Their social structure is different from other sectors of society inasmuch as the Saramaka people are organized in matrilineal clans (lös), and they regulate themselves, at least partially, by their own customs and traditions.⁶⁴ Each clan (lö) recognizes the political authority of various local leaders, including what they call Captains and Head Captains, as well as a Gaa'man, who is the community's highest official.⁶⁵

82. Their culture is also similar to that of tribal peoples insofar as the members of the Saramaka people maintain a strong spiritual relationship with the ancestral territory⁶⁶ they have traditionally used and occupied. Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people.⁶⁷ The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence. In this territory, the Saramaka people

62 This fact is recognized by the State (Merits, volume II, folio 288). Cf. also Testimony of Head Captain and Fiscali Wazen Eduards, *supra* note 61 (transcription of public hearing, p. 4), Expert opinion of Professor Richard Price during the public hearing at the Court held on May 9 and 10, 2007 (transcription of public hearing, p. 57), and Expert opinion of Salomon Emanuels during the public hearing at the Court held on May 9 and 10, 2007 (transcription of public hearing, p. 67).

63 This fact is recognized by the State (Merits, volume II, folio 297). Cf. also Professor Richard Price, "Report in support of Provisional Measures", October 15, 2003 (case file of appendices to the application and Appendix 1, appendix 2, folio 15).

64 Although the question of land ownership is in dispute, the parties agree that the Saramaka people have their own traditional norms and customs that relate to how the Saramaka people use and enjoy property.

65 Cf. Professor Richard Price, "Report in support of Provisional Measures", *supra* note 63.

66 By using the term "territory" the Court is referring to the sum of traditionally used lands and resources. In this sense, the Saramaka territory belongs collectively to the members of the Saramaka people, whereas the lands within that territory are divided among and vested in the twelve Saramaka clans (*supra* para. 100). Cf. Affidavit of Head Captain and Fiscali Eddie Fonkie, April 5, 2007 (case file of affidavits and observations thereto, appendix 4, folio 1911); Expert opinion of Professor Richard Price, *supra* note 62 (transcription of public hearing, pp. 60-61), and Professor Richard Price, "Report in support of Provisional Measures", *supra* note 63.

67 Cf. Professor Richard Price, "Report in support of Provisional Measures", *supra* note 63, (folios 17-18).

hunt, fish, and farm, and they gather water, plants for medicinal purposes, oils, minerals, and wood.⁶⁸ Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them.⁶⁹ In particular, the identity of the members of the Saramaka people with the land is inextricably linked to their historical fight for freedom from slavery, called the sacred “first time”.⁷⁰ (...)

[...]

84. Thus, in accordance with all of the above, the Court considers that the members of the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions. Accordingly, the Court will now address whether and to what extent the members of the tribal peoples require special measures that guarantee the full exercise of their rights.

A.2) Special measures of protection owed to members of the tribal community that guarantee the full exercise of their rights

85. This Court has previously held, based on Article 1.1 of the Convention, that members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.⁷⁵ Other sources of international

68 Cf. Testimony of Captain Cesar Adjako during the public hearing at the Court held on May 9 and 10, 2007 (transcription of public hearing, p. 15); Expert opinion of Professor Richard Price, *supra* note 62 (transcription of public hearing, p. 55); Report of Professor Richard Price, September 30, 2000 (case file of appendices to the application and Appendix 1, appendix 1, folio 4), and Professor Richard Price, “Report in support of Provisional Measures”, *supra* note 63, (folio 16).

69 Cf. Professor Richard Price, “Report in support of Provisional Measures”, *supra* note 63, (folio 14), and Affidavit of Dr. Peter Poole of April 30, 2007 (case file of affidavits and observations, appendix 8, folio 1961).

70 Cf. Professor Richard Price, “Report in support of Provisional Measures”, *supra* note 63.

75 Cf. Case of The Mayagna (Sumo) Awas Tingni Community, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 148-149, and 151; Case of the Indigenous Community Sawhoyamaxa v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118-121, and 131, and Case of the Indigenous Community Yakye Axa v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005 Series C No. 125, paras. 124, 131, 135-137 and 154.

law have similarly declared that such special measures are necessary.⁷⁶ Particularly, in the *Moiwana* case, this Court determined that another Maroon community living in Suriname was also not indigenous to the region, but rather constituted a tribal community that settled in Suriname in the 17th and 18th century, and that this tribal community had “a profound and all-encompassing relationship to their ancestral lands” that was centered, not “on the individual, but rather on the community as a whole”.⁷⁷ This special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal *Moiwana* community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention.⁷⁸

86. The Court sees no reason to depart from this jurisprudence in the present case. Hence, this Tribunal declares that the members of the *Saramaka* people are to be considered a tribal community, and that the Court’s jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their

76 As early as 1972, in the resolution the Commission adopted on “Special Protection for Indigenous Populations – Action to Combat Racism and Racial Discrimination”, the Commission proclaimed that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of states”. Cf. Resolution on Special Protection for Indigenous Populations. Action to Combat Racism and Racial Discrimination, OEA/Ser.LV/II.29 Doc. 41 rev. 2, March 13, 1973, cited in Inter-American Commission on Human Rights, Report 12/85, Case No. 7615, *Yanomami*. Brazil, March 5, 1985, para. 8. Cf. also Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OAS/Ser.LV/II.96 Doc.10 rev 1, April 24, 1997, Chapter IX (stating that “within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions”); UN CERD, General Recommendation No. 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V, August 18, 1997, para. 4 (calling upon States to take certain measures in order to recognize and ensure the rights of indigenous peoples), and ECHR, *Case of Connors v. The United Kingdom*, Judgment of May 27, 2004, Application no. 66746/01, para. 84 (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law).

77 Cf. *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras. 132-133.

78 Cf. *Case of the Moiwana Community*, supra note 77, para. 133.

ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival.

B. The right of members of tribal peoples to the use and enjoyment of communal property in accordance with Articles 21, 1.1, and 2 of the American Convention

87. The Court will now address whether Article 21 of the American Convention recognizes the rights of members of tribal peoples to the use and enjoyment of communal property.

B.1) Right to communal property under Article 21 of the American Convention

88. This Court has previously addressed this issue and has consistently held that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving there from, must be secured under Article 21 of the American Convention.⁷⁹

[...]

90. The Court's decisions to this effect have all been based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples. In this sense, the Court has declared that: the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy [...] to preserve their cultural legacy and transmit it to future generations.⁸³

79 Case of the Indigenous Community Sawhoyamaya, *supra* note 75, para. 118. Cf. also Case of the Indigenous Community Yakye Axa, *supra* note 75, para. 137.

83 Case of The Mayagna (Sumo) Awas Tingni Community, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149. Cf. also Case of the Plan de Sánchez Massacre v. Guatemala. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, para. 85; Case of the Indigenous Community Sawhoyamaya, *supra* note 75, para. 118, and Case of the Indigenous Community Yakye Axa, *supra* note 75, para. 131.

91. In essence, pursuant to Article 21 of the Convention, States must respect the special relationship that members of indigenous and tribal peoples have with their territory in a way that guarantees their social, cultural, and economic survival.⁸⁴ Such protection of property under Article 21 of the Convention, read in conjunction with Articles 1.1 and 2 of said instrument, places upon States a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied.

B.2) Interpretation of Article 21 of the American Convention in the present case

92. The Court recognizes that it has arrived at such an interpretation of Article 21 in previous cases in light of Article 29.b) of the Convention, which prohibits an interpretation of any provision of the Convention in a manner that restricts its enjoyment to a lesser degree than what is recognized in the domestic laws of the State in question or in another treaty to which the State is a party. Accordingly, the Court has interpreted Article 21 of the Convention in light of the domestic legislation pertaining to indigenous peoples' rights in Nicaragua⁸⁵ and Paraguay,⁸⁶ for example, as well as taking into account

84 Cf. Case of The Mayagna (Sumo) Awas Tingni Community, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 148-149, and 151; 148-149, and 151; Case of the Indigenous Community Sawhoyamaya, supra note 75, paras. 118-121, and Case of the Indigenous Community Yakye Axa, supra note 75, paras. 124, 131, 135 and 154. Cf. also Inter-American Commission on Human Rights, Report 75/02, Case 11.140. Mary and Carrie Dann. United States, December 27, 2002, para. 128 (observing that "continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective wellbeing, and indeed the survival of, indigenous peoples"), and Inter-American Commission on Human Rights, Report 40/04, Merits. Case 12.052. Maya Indigenous Communities of the Toledo District. Belize, October 12, 2004, para. 114 (emphasizing that "organs of the interAmerican human rights system have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human right more broadly.")

85 Cf. Case of The Mayagna (Sumo) Awas Tingni Community, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, paras. 148, 150 and 152-153.

86 Cf. Case of the Indigenous Community Yakye Axa, supra note 75, paras. 138-139, and Case of the Indigenous Community Sawhoyamaya, supra note 75, paras. 122-123.

the International Labor Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter "ILO Convention 169").⁸⁷

93. As will be discussed *infra* (...), Suriname's domestic legislation does not recognize a right to communal property of members of its tribal communities, and it has not ratified ILO Convention 169. Nevertheless, Suriname has ratified both the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social, and Cultural Rights.⁸⁸ The Committee on Economic, Social, and Cultural Rights, which is the body of independent experts that supervises State parties' implementation of the ICESCR, has interpreted common Article 1 of said instruments as being applicable to indigenous peoples.⁸⁹ Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence".⁹⁰ Pursuant to Article 29.b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.⁹¹ This Court consid-

87 Cf. Case of the Indigenous Community Yakye Axa, *supra* note 75, paras. 127-130, and Case of the Indigenous Community Sawhoyamaya, *supra* note 75, para. 117.

88 Suriname ratified both on March 28, 1977. International Covenant on Civil and Political Rights, 19 December 1966, 99U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered in force 23 March 1976), and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 368 (entered into force 3 January 1976).

89 Cf. UNCESCR, Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations on Russian Federation (Thirty-first session), U.N. Doc. E/C.12/1/Add.94, December 12, 2003, para. 11, in which the Committee expressed concern for the "precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant."

90 Common Article 1 of the ICCPR and ICESCR.

91 Cf. Article 29 of the American Convention. Cf. also Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 37, and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 113115 (endorsing an interpretation of international human rights instruments that takes into account development in the corpus juris gentium of international human rights law over time and in present day conditions).

ers that the same rationale applies to tribal peoples due to the similar social, cultural, and economic characteristics they share with indigenous peoples (...).

94. Similarly, the Human Rights Committee has analyzed the obligations of State Parties to the ICCPR under Article 27 of such instrument, including Suriname, and observed that "minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, [which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority".⁹³

95. The above analysis supports an interpretation of Article 21 of the American Convention to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied. Thus, in the present case, the right to property protected under Article 21 of the American Convention, interpreted in light of the rights recognized under common Article 1 and Article 27 of the ICCPR, which may not be restricted when interpreting the American Convention, grants to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition.

96. Applying the aforementioned criteria to the present case, the Court thus concludes that the members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.

C. The property rights of the members of the Saramaka people derived from their system of communal property (Article 21 of the Convention in conjunction with Articles 1.1 and 2 thereof)

93 UNHRC, General Comment No. 23: The rights of minorities (Art. 27) (Fiftieth session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add.5, August 4, 1994, paras. 1 and 3.2.

97. Having declared that the American Convention recognizes the right of the members of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property, the Court will now proceed to analyze whether the State has adopted an appropriate framework to give domestic legal effect to this right.

98. This Court, in the *Moiwana* case, already addressed the general issue regarding communal property rights of indigenous and tribal peoples in Suriname. There, the Court held that the State did not recognize such peoples a collective right to property.⁹⁴ The Court observes that such conclusion is further supported by a variety of international bodies and organizations that have also addressed this issue. The United Nations Committee on the Elimination of Racial Discrimination,⁹⁵ the United Nations Human Rights Committee,⁹⁶ and the United Nations Commission on Human Rights' Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people⁹⁷ have

94 Cf. *Case of the Moiwana Community*, *supra* note 77, paras. 86.5 and 130.

95 Cf. UN CERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Suriname, (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/CO/9, April 28, 2004, para. 11 (case file of appendices to the representatives' brief, appendix 4.2, folios 1487).

96 Cf. UNHRC, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Concluding observations on Suriname, (Eightieth session, 2004), U.N. Doc. CCPR/CO/80/SUR, May 4, 2004, para. 21 (expressing concern "at the lack of legal recognition and guarantees for the protection of indigenous and tribal rights to land and other resources", and recommending that Suriname "guarantee to members of indigenous communities the full enjoyment of all the rights recognized by article 27 of the Covenant, and adopt specific legislation for this purpose") (case file of appendices to the representatives' brief, appendix 4.3, folios 1495-1496).

97 Cf. U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session), U.N. Doc. E/CN.4/2003/90, January 21, 2003, para. 21 (explaining that, "[l]egally, the land they occupy is owned by the State, which can issue land property grants to private owners. Indigenous and tribal lands, territories and resources are not recognized in law. [...] Despite petitions to the national Government and the Inter-American system of protection of human rights (Commission and Court), the indigenous and Maroon communities have not received the protection they require"). The Inter-American Development Bank further supported this analysis in its August 2006 study on indigenous peoples and maroons in Suriname. Said study states that "Surinamese law does not recognize and protect the traditional land tenure systems of indigenous and tribal peoples, or their special relationship with the forest. All land and all natural resources are considered to be owned by the State". Cf. Inter-American Development Bank, *Indigenous Peoples and Maroons in Suriname*, August 2006 (merits, volume II, folio 567).

all observed that Suriname does not legally recognize the rights of members of indigenous and tribal peoples to their communal land, territories, and resources.

[...]

C.1) Land tenure system of the members of the Saramaka people

100. First, the issue regarding the alleged lack of clarity of the members of the Saramaka people's traditional land ownership regime was thoroughly addressed by the parties, witnesses, and expert witnesses in the present case. (...)

101. In any case, the alleged lack of clarity as to the land tenure system of the Saramakas does not present an insurmountable obstacle for the State, which has the duty to consult with the members of the Saramaka people and seek clarification of this issue (...), in order to comply with its obligations under Article 21 of the Convention, in conjunction with Article 2 of such instrument.

C.2) Complexity of issues involved and the State's concern regarding discrimination against non-indigenous or non-tribal members

102. Two additional related arguments submitted by the State as to why it has failed to legally recognize and protect the land-tenure systems of indigenous and tribal communities' are the alleged "complexities and sensitivities" of the issues involved, and the concern that legislation in favor of indigenous and tribal peoples may be perceived as being discriminatory towards the rest of the population. Regarding the first issue, the Court observes that the State may not abstain from complying with its international obligations under the American Convention merely because of the alleged difficulty to do so. The Court shares the State's concern over the complexity of the issues involved; nevertheless, the State still has a duty to recognize the right to property of members of the Saramaka people, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognized in the Convention, as interpreted by this Tribunal in its jurisprudence (...).

103. Furthermore, the State's argument that it would be discriminatory to pass legislation that recognizes communal forms of land ownership is also without merit. It is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimina-

tion.¹⁰³ Legislation that recognizes said differences is therefore not necessarily discriminatory. In the context of members of indigenous and tribal peoples, this Court has already stated that special measures are necessary in order to ensure their survival in accordance with their traditions and customs (...). Thus, the State's arguments regarding its inability to create legislation in this area due to the alleged complexity of the issue or the possible discriminatory nature of such legislation are without merit.

C.3) Judge-made law

105. The Court observes that although so-called judge-made law may certainly be a means for the recognition of the rights of individuals, particularly under common-law legal systems, the availability of such a procedure does not, in and of itself, comply with the State's obligation to give legal effect to the rights recognized in the American Convention. That is, the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights. The judicial process mentioned by the State is thus to be understood as a means by which said rights might be given domestic legal effect at some point in the future, but that has not yet effectively recognized the rights in question. In any case, the right of the members of the Saramaka people in particular, or members of indigenous and tribal communities in general, to collectively own their territory has not, as of yet, been recognized by any domestic court in Suriname.

[...]

103 Cf., for example, ECHR, *Connors v. The United Kingdom*, supra note 76, para. 84 (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law). Cf. also Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, supra note 76, (stating that "within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions"). Cf. also U.N. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.4 (stating that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination"), and UNCERD, General Recommendation No. 23, Rights of indigenous peoples, supra note 76, para. 4 (calling upon States to take certain measures in order to recognize and ensure the rights of indigenous peoples).

C.4) Domestic legislation

[...]

115. In sum, the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court has previously held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment.¹¹⁶ This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighboring peoples.¹¹⁷ In this regard, the Court has previously declared that "a strictly juridical or abstract recognition of indigenous lands, territories or resources lacks true meaning where the property has not been physically established and delimited."¹¹⁸

116. (...) to date, the State's legal system does not recognize the property rights of the members of the Saramaka people in connection to their territory, but rather, grants a privilege or permission to use and occupy the land at the discretion of the State. For this reason, the Court is of the opinion that the State has not complied with its duty to give domestic legal effect to the members of the Saramaka people's property rights in accordance with Article 21 of the Convention in relation to Articles 2 and 1.1 of such instrument.

117. The Court must now determine the scope of the Saramakas' right to their traditionally owned territory and the State's corresponding obligations, within the context of the present case.

116 Cf. Case of The Mayagna (Sumo) Awas Tingni Community, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 153; Case of the Indigenous Community Yakye Axa, supra note 75, para. 215, and Case of the Moiwana Community, supra note 77, para. 209.

117 The Court observes that in the Moiwana Community case the State was ordered to create an effective mechanism for the delimitation, demarcation and titling of the traditional territories of the Moiwana community. Cf. Case of the Moiwana Community, supra note 77, para. 209.

118 Cf. Case of the Indigenous Community Yakye Axa, supra note 75, para. 143.

D. The right of the members of the saramaka people to use and enjoy the natural resources that lie on and within their traditionally owned territory

118. An issue that necessarily flows from the assertion that the members of the Saramaka people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources. In the present case, both the State and the members of the Saramaka people claim a right to these natural resources. The Saramakas claim that their right to use and enjoy all such natural resources is a necessary condition for the enjoyment of their right to property under Article 21 of the Convention. The State argued that all rights to land, particularly its subsoil natural resources, (...). The Court will address this complex issue in the following order: first, the right of the members of the Saramaka people to use and enjoy the natural resources that lie on and within their traditionally owned territory; second, the State's grant of concessions for the exploration and extraction of natural resources, including subsoil resources found within Saramaka territory; and finally, the fulfillment of international law guarantees regarding the exploration and extraction concessions already issued by the State.

119. First, the Court must analyze whether and to what extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory. (...)

120. In this regard, this Court has previously held¹²¹ that the cultural and economic survival of indigenous and tribal peoples, and their members, depend on their access and use of the natural resources in their territory "that are related to their culture and are found therein", and that Article 21 protects their right to such natural resources (...).¹²²

121 Cf. Case of the Indigenous Community Yakye Axa, *supra* note 75, para. 137, and Case of the Indigenous Community Sawhoyamaya, *supra* note 75, para. 118.

122 The Court also takes notice that the African Commission, as well as the Canadian Supreme Court and the South African Constitutional Court, have ruled that indigenous communities' land rights are to be understood as including the natural resources therein. Nevertheless, according to the African Commission and the Canadian Supreme Court, these rights are not absolute, and may be restricted under certain conditions. Cf. African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (2001), paras. 42, 54 and 55, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (December 11, 1997), paras. 194, 199 and 201. The South African Constitutional Court, citing a domestic law that required the return of land to owners

Nevertheless, the scope of this right needs further elaboration, particularly regarding the inextricable relationship between both land and the natural resources that lie therein, as well as between the territory (understood as encompassing both land and natural resources) and the economic, social, and cultural survival of indigenous and tribal peoples, and thus, of their members.

121. In accordance with this Court's jurisprudence as stated in the *Yakye Axa* and *Sawhoyamaxa* cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake.¹²³ Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.

122. As mentioned above (...), due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory, in accordance with Article 21 of the Convention, is necessary to guarantee their very survival. Accordingly, the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found

who had been dispossessed by racially discriminatory policies, affirmed the right of an indigenous peoples to the mineral resources in its lands. Cf. *Alexkor Ltd. and the Government of South Africa v. Richtersveld Community and Others*, CCT/1903 (October 14, 2003), para. 102.

123 Cf. *Case of the Indigenous Community Yakye Axa*, supra note 75, para. 137, and *Case of the Indigenous Community Sawhoyamaxa*, supra note 75, para. 118.

on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.¹²⁴

123. Thus, in the present case, the Court must determine which natural resources found on and within the Saramaka people's territory are essential for the survival of their way of life, and are thus protected under Article 21 of the Convention. Consequently, the Court must also address whether and to what extent the State may grant concessions for the exploration and extraction of those and other natural resources found within Saramaka territory.

E. The State's grant of concessions for the exploration and extraction of natural resources found on and within Saramaka territory

[...]

E.1) Restrictions on the right to property

125. This brings the Court to the issue of whether and to what extent the State may grant concessions for the exploration and extraction of natural resources found within Saramaka territory. (...)

126. The State seems to recognize that resources related to the subsistence of the Saramaka people include those related to agricultural, hunting and fishing activities. This is consistent with the Court's previous analysis on how Article 21 of the Convention protects the members of the Saramaka people's right over those natural resources necessary for their physical survival (...). Nevertheless, while it is true that all exploration and extraction activity in the Saramaka territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory. Clean natural water, for example, is a natural resource essential for the Saramakas to be able to carry out some of their subsistence economic activities, like fishing. The Court observes that this natural

124 Cf. Case of the Indigenous Community Yakye Axa, supra note 75, paras. 124 and 137, and Case of the Indigenous Community Sawhoyamaya, supra note 75, paras. 118 and 121.

resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka people and, consequently, its members (...). Similarly, the forests within Saramaka territory provide a home for the various animals they hunt for subsistence, and it is where they gather fruits and other resources essential for their survival (...). In this sense, wood-logging activities in the forest would also likely affect such subsistence resources. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the Saramakas.

127. Nevertheless, the protection of the right to property under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. Although the Court recognizes the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival, said property rights, like many other rights recognized in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the "law may subordinate [the] use and enjoyment [of property] to the interest of society". Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.¹²⁵ In accordance with this Article, and the Court's jurisprudence, the State will be able to restrict, under certain circumstances, the Saramakas' property rights, including their rights to natural resources found on and within the territory.

128. Furthermore, in analyzing whether restrictions on the property right of members of indigenous and tribal peoples are permissible, especially regarding the use and enjoyment of their traditionally owned lands and natural resources, another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members. That is, under Article 21 of the Convention, the State may restrict the Saramakas' right to use and enjoy

125 Cf. *Case of the Indigenous Community Yakye Axa*, supra note 75, paras. 144-145 citing (*mutatis mutandi*) *Case of Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96; *Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 127, and *Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. para. 155. Cf., also, *Case of the Indigenous Community Sawhoyamaya*, supra note 75, para. 137.

their traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements and, additionally, when it does not deny their survival as a tribal people (...).¹²⁶

E.2) Safeguards against restrictions on the right to property that deny the survival of the Saramaka people

129. In this particular case, the restrictions in question pertain to the issuance of logging and mining concessions for the exploration and extraction of certain natural resources found within Saramaka territory. Thus, in accordance with Article 1.1 of the Convention, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”)¹²⁷ within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

130. These safeguards, particularly those of effective participation and sharing of benefits regarding development or investment projects within traditional indigenous and tribal territories, are consistent with the observations of the Human Rights Committee, the text of several international instruments, and the practice in several States Parties to

126 Cf., e.g. UNHRC, *Länsman et al. v. Finland* (Fifty-second session, 1994), Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1994, November 8, 1994, para. 9.4 (allowing States to pursue development activities that limit the rights of a minority culture as long as the activity does not fully extinguish the indigenous people’s way of life).

127 By “development or investment plan” the Court means any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.

the Convention.¹²⁸ In *Apirana Mahuika et al. v. New Zealand*, for example, the Human Rights Committee decided that the right to culture of an indigenous population under Article 27 of the ICCPR could be restricted where the community itself participated in the decision to restrict such right. The Committee found that “the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy”.¹²⁹

131. Similarly, Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples, which was recently approved by the UN General Assembly with the support of the State of Suriname,¹³⁰ states the following¹³¹: 1. Indigenous peoples have the right to

128 Cf., e.g. I.L.O. Convention No. 169, Article 15.2 (stating that “[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”) Similar requirements have been put in place by the World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10). Other documents more broadly speak of a minority’s right to participate in decisions that directly or indirectly affect them. Cf., e.g. UNHRC, General Comment No. 23: The rights of minorities (Art. 27), supra note 93, para. 7 (stating that the enjoyment of cultural rights under Article 27 of the ICCPR “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”); UNCERD, General Recommendation No. 23, Rights of indigenous peoples, supra note 76, para. 4(d) (calling upon States parties to “[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”).

129 UNHRC, *Apirana Mahuika et al. v. New Zealand* (Seventieth session, 2000), U.N. Doc. C/PR/C/70/D/547/1993, November 15, 2000, para. 9.5.

130 By a vote of 143 in favor to 4 against, with 11 abstentions, the UN General Assembly adopted on September 13, 2007 the United Nations Declaration on the Rights of Indigenous Peoples (Cf. <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>).

131 The Court observes that, in explaining the position of the State in favor of this text, the representative of Suriname is reported to have specifically alluded to the aforementioned text of Article 32 of such instrument. The UN Press Release states the following: “[The representative of Suriname] said his Government accepted the fact that the States should seek prior consultation to prevent a disregard for human rights. The level of such consultations depended on the specific circumstances. Consultation should not be viewed as an end in itself, but should serve the purpose of respecting the interest of those who used the land”, supra note 130.

determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

[...]

E.2.a) Right to consultation, and where applicable, a duty to obtain consent

133. First, the Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions (...). This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.¹³³

133 Similarly, in *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission observed that States must undertake effective and fully informed consultations with indigenous communities with regard to acts or decisions that may affect their traditional territories. In said case, the Commission determined that a process of “fully informed consent” requires “at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives”. Cf. Inter-American Commission on Human Rights, Report 40/04, Merits. Case 12.052. *Maya Indigenous Communities of the Toledo District*, supra note 84, para. 142. Cf. also, Equator Principles, Principle 5.

134. Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions. The Court considers that the difference between “consultation” and “consent” in this context requires further analysis.

135. In this sense, the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has similarly observed that: [w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.¹³⁴

Consequently, the U.N. Special Rapporteur determined that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects”.¹³⁵

136. Other international bodies and organizations have similarly considered that, in certain circumstances, and in addition to other consultation mechanisms, States must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories.¹³⁶

134 U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *supra* note 97, p. 2.

135 U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *supra* note 97, para. 66.

136 The UNCERD has observed that “[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought”. Cf. UNCERD, Consideration of Reports submitted by

137. (...) The Court agrees with the State and, furthermore, considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.

E.2.b) Benefit-sharing

138. The second safeguard the State must ensure when considering development or investment plans within Saramaka territory is that of reasonably sharing the benefits of the project with the Saramaka people. The concept of benefit-sharing, which can be found in various international instruments regarding indigenous and tribal peoples' rights,¹³⁷ can be said to be inherent to the right of compensation recognized under Article 21.2 of the Convention, (...).

139. The Court considers that the right to obtain compensation under Article 21.2 of the Convention extends not only to the total deprivation of property title by way of expropriation by the State, for example, but also to the deprivation of the regular use and enjoyment of such property. In the present context, the right to obtain "just compensation" pursuant to Article 21.2 of the Convention translates into a right of the members of the Saramaka people to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty second session, 2003), U.N. Doc. CERD/C/62/CO/2, June 2, 2003, para. 16.

137 United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 130, Article 32 (stating that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources"), and I.L.O. Convention No. 169, *supra* note 128, Article 15.2 (stating that "[t]he peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities").

140. In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories, but also “that the equitable sharing of benefits to be derived from such exploitation be ensured.”¹³⁸ Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has suggested that, in order to guarantee “the human rights of indigenous peoples in relation to major development projects, [States should ensure] mutually acceptable benefit sharing (...).”¹³⁹ In this context, pursuant to Article 21.2 of the Convention, benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Saramaka people.

F. The fulfillment of the guarantees established under international law in relation to the concessions already granted by the State

141. Having declared that the Saramakas’ right to use and enjoy their traditionally owned lands necessarily implies a similar right with regards to the natural resources that are necessary for their survival, and having set safeguards and limitations regarding the State’s right to issue concessions that restrict the use and enjoyment of such natural resources, the Court will now proceed to analyze whether the concessions already issued by the State within Saramaka territory complied with the safeguards mentioned above.

[...]

143. As mentioned above, Article 21 of the Convention does not per se preclude the issuance of concessions for the exploration and exploitation of natural resources in indigenous or tribal territories. Nonetheless, if the State wants to restrict, legitimately, the Saramakas’ right to communal property, it must consult with the communities affected by the development or investment project planned within territories which they have traditionally occupied, reasonably share the benefits with them, and complete prior assessments of the environmental and social impact of the project (...).

138 UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador, *supra* note 136, para. 16.

139 U.N., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *supra* note 97, para. 66.

F.1) Logging concessions

144. Thus, with regard to timber logging, a question arises as to whether this natural resource is one that has been traditionally used by the members of the Saramaka people in a manner inextricably related to their survival. In this regard, Dr. Richard Price, an anthropologist who gave his expert opinion during the public hearing in the present case, submitted a map in which the Saramaka people made hundreds of marks illustrating the location and variety of trees they use for different purposes.¹⁴³ For example, the Saramakas use a special type of tree from which they build boats and canoes to move and transport people and goods from one village to another.¹⁴⁴ The members of the Saramaka community also use many different species of palm trees to make different things, including roofing for their houses, and from which they obtain fruits that they process into cooking oil.¹⁴⁵ When referring to the forest, one of the witnesses stated during the public hearing that it “is where we cut trees in order to make our houses, to get our subsistence, to make our boats (...); everything that we live with”.¹⁴⁶ (...)

[...]

146. This evidence shows that the members of the Saramaka people have traditionally harvested, used, traded and sold timber and non-timber forest products, and continue to do so until the present day.¹⁴⁹ Thus, in accordance with the above analysis regarding the extraction of natural resources that are necessary for the survival of the Saramaka people, and consequently, its members, the State should not have granted logging concessions within Saramaka territory unless and until the three safeguards of effective participation, benefit-sharing, and prior environmental and social impact assessments were complied with.

[...]

154. In conclusion, the Court considers that the logging concessions issued by the State in the Upper Suriname River lands have damaged the environment and the deterioration

143 Expert opinion of Professor Richard Price, *supra* note 62 (transcription of public hearing, pp. 55-56).

144 Expert opinion of Professor Richard Price, *supra* note 62 (transcription of public hearing, pp. 55-56).

145 Expert opinion of Professor Richard Price, *supra* note 62 (transcription of public hearing, pp. 55-56).

146 Testimony of Head Captain and Fiscal Wazen Eduards, *supra* note 61 (transcription of public hearing, p. 6).

149 Cf. Expert opinion of Professor Richard Price, *supra* note 62 (transcription of public hearing, p. 58), and Testimony of Captain Cesar Adjako, *supra* note 68 (transcription of public hearing, p. 13).

has had a negative impact on lands and natural resources traditionally used by members of the Saramaka people that are, in whole or in part, within the limits of the territory to which they have a communal property right. The State failed to carry out or supervise environmental and social impact assessments and failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concessions would not cause major damage to Saramaka territory and communities. Furthermore, the State did not allow for the effective participation of the Saramakas in the decision-making process regarding these logging concessions, in conformity with their traditions and customs, nor did the members of the Saramaka people receive any benefit from the logging in their territory. All of the above constitutes a violation of the property rights of the members of the Saramaka people recognized under Article 21 of the Convention, in connection with Article 1.1 of said instrument.

F.2) Gold-mining concessions

155. The Court must also analyze whether gold-mining concessions within traditional Saramaka territory have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka people. According to the evidence submitted before the Court, the members of the Saramaka people have not traditionally used gold as part of their cultural identity or economic system. Despite possible individual exceptions, members of the Saramaka people do not identify themselves with gold nor have demonstrated a particular relationship with this natural resource, other than claiming a general right to “own everything, from the very top of the trees to the very deepest place that you could go under the ground.”¹⁷¹ Nevertheless, as stated above (...), because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the Saramakas, such as waterways, the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. The same analysis applies regarding other concessions within Saramaka territory involving natural resources which have not been traditionally used by members of the Saramaka community, but that their extraction will necessarily affect other resources that are vital to their way of life.

171 Testimony of Head Captain and Fiscali Wazen Eduards, *supra* note 61 (transcription of public hearing, p. 8).

156. The Court recognizes that, to date, no large-scale mining operations have taken place within traditional Saramaka territory. Nevertheless, the State failed to comply with the three safeguards when it issued small-scale gold mining concessions within traditional Saramaka territory.¹⁷² That is, such concessions were issued without performing prior environmental and social impact assessments, and without consulting with the Saramaka people in accordance with their traditions, or guaranteeing their members a reasonable share in the benefits of the project. As such, the State violated the members of the Saramaka peoples' right to property under Article 21 of the Convention, in conjunction with Article 1.1 of such instrument.

157. With regard to the concessions within Saramaka territory that have already been granted to private parties, including Saramaka members, the Court has already declared (...) that "when indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights".¹⁷³ Thus, the State has a duty to evaluate, in light of the present Judgment and the Court's jurisprudence,¹⁷⁴ whether a restriction of these private property rights is necessary to preserve the survival of the Saramaka people.

158. From all of the above considerations, the Court concludes the following: first, that the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory that are necessary for their survival; second, that the State may restrict said right by granting concessions for the exploration and extraction of natural resources found on and within Saramaka territory only if the State ensures the effective participation and benefit of the Saramaka people, performs or supervises prior environmental and social impact assessments, and implements adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional Saramaka lands and natural resources; and finally, that the concessions already issued by the State did not comply with these safeguards. Thus, the Court considers that the State has violated Article 21 of the Convention, in

172 Cf. Map prepared by the Ministry of Natural Resources, Resources (case file of appendices to the application and appendix 1, appendix 16, folios 180-181).

173 Case of the Indigenous Community Yakye Axa, *supra* note 75, para. 144. Cf. also, UNHRC, Ivan Kitok v. Sweden, Communication No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985, August 10, 1988, para. 9.8.

174 Cf. Case of the Indigenous Community Yakye Axa, *supra* note 75, paras. 144-145, and Case of the Indigenous Community Sawhoyamaya, *supra* note 75, para. 137.

conjunction with Article 1 of such instrument, to the detriment of the members of the Saramaka people.

G. The lack of recognition of the Saramaka people as a juridical personality makes them ineligible under domestic law to receive communal title to property as a tribal community and to have equal access to judicial protection of their property rights

[...]

164. The State's first argument is that the voluntary inclusion of some of the members of the Saramaka people in "modern society" has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct legal personality. That is, the State questions whether the Saramaka can be legally defined in a way that takes into account the different degrees to which various self-identified members of the Saramaka people adhere to traditional laws, customs, and economy, particularly those living in Paramaribo or outside of the territory claimed by the Saramaka. In this regard, the Court has already declared that the Saramaka people can be defined as a distinct tribal group (...), whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner (...). The fact that some individual members of the Saramaka people may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group nor its communal use and enjoyment of their property. Moreover, the question of whether certain self-identified members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case. Accordingly, the lack of individual identification with the traditions and laws of the Saramaka by some alleged members of the community may not be used as a pretext to deny the Saramaka people their right to juridical personality.

165. Having emphasized that the Saramaka people are a distinct tribal group, whose members enjoy and exercise certain rights collectively, the Court will address the State's second argument regarding the possibility of recognizing the legal personality of a distinct group rather than that of its individual members.

166. The Court has previously analyzed the right of individual persons to have their juridical personality recognized pursuant to Article 3 of the American Convention.¹⁷⁶ Accordingly, the Court has defined it as the right to be legally recognized as a subject of rights and obligations.¹⁷⁷ That is, the “right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such person can enforce such rights”.¹⁷⁸ The Court has also declared that a violation of the right to juridical personality entails an absolute failure to recognize or acknowledge the capability of a person to exercise and enjoy said rights and obligations,¹⁷⁹ which in turn places the person in a vulnerable position in relation to the State or third parties.¹⁸⁰ In particular, the Court has observed that “the State is bound to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law”.¹⁸¹ The issue at hand in the present case is whether these criteria can be applied to the members of the Saramaka people as a group and not merely as individuals.

167. The Court has previously addressed the right to juridical personality in the context of indigenous communities, and has held that States have a duty to provide the means and general juridical conditions necessary to guarantee that each person enjoys the right

176 This right is also recognized in other international instruments. Cf., *inter alia*, Universal Declaration of Human Rights, Article 6; International Covenant on Civil and Political Rights, Article 16; American Declaration of the Rights and Duties of Man, Article XVII, and African Charter on Human and Peoples’ Rights, Article 5.

177 Cf. *Case of Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 179; *Case of the Indigenous Community Sawhoyamaya*, *supra* note 75, para. 188, and *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 177. Cf. also UNHRC, *Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Concluding Observations on Gabon*, U.N. Doc. CCPR/C/31/ADD.4, November 18, 1996, para. 54.

178 *Case of the Indigenous Community Sawhoyamaya*, *supra* note 75, para. 188.

179 Cf. *Case of Bámaca Velásquez*, *supra* note 177, para. 179; *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 120, and *Case of the Indigenous Community Sawhoyamaya*, *supra* note 75, para. 188.

180 Cf. *Case of the Girls Yean and Bosico*, *supra* note 177, para. 179, and *Case of the Indigenous Community Sawhoyamaya*, *supra* note 75, para. 188.

181 *Case of the Indigenous Community Sawhoyamaya*, *supra* note 75, para. 189.

to the recognition of his or her juridical personality.¹⁸² The question presented in this case is of a different nature. Here the question is whether the lack of recognition of the Saramaka people as a juridical personality makes them ineligible under domestic law to receive communal title to land as a tribal community and to have equal access to judicial protection of their property rights. The individual right to have each member's juridical personality recognized by the State is not in question. In Suriname, all persons, whether they are individual Saramaka members or not, are recognized the right to own property and to seek judicial protection against any alleged violation of that individual right.¹⁸³ Yet, the State does not recognize the Saramaka people as a juridical entity capable of using and enjoying communal property as a tribal group. Furthermore, the State does not recognize the Saramaka people as a juridical entity capable of seeking equal access to judicial protection against any alleged violation of their communal property rights.

168. The Court observes that the recognition of the juridical personality of individual members of a community is evidently necessary for their enjoyment of other rights, such as the right to life and personal integrity.¹⁸⁴ Yet, such individual recognition fails to take into account the manner in which members of indigenous and tribal peoples in general, and the Saramaka in particular, enjoy and exercise a particular right; that is, the right to use and enjoy property collectively in accordance with their ancestral traditions.

169. The Court observes that any individual member of the Saramaka people may seek judicial protection against violations of his or her individual property rights, and that a judgment in his or her favor may also have a favorable effect on the community as a whole. In a juridical sense, such individual members do not represent the community as a whole. The decisions pertaining to the use of such individual property are up to the individual and not to the Saramaka people in accordance with their traditions. Consequently, a recognition of the right to juridical personality of the Saramaka people as a whole would help prevent such situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members.

182 Cf. *Case of the Indigenous Community Sawhoyamaya*, supra note 75, para. 189.

183 Cf. Constitution of Suriname, Article 41, (case file of appendices to the application and Appendix 1, appendix 3, folio 28), and Article 1386 of Civil Code of Suriname (case file of appendices to the application and Appendix 1, appendix 4, folios 51).

184 Cf. *Case of the Indigenous Community Sawhoyamaya*, supra note 75, paras. 188-190.

[...]

171. The recognition of their juridical personality is a way, albeit not the only one, to ensure that the community, as a whole, will be able to fully enjoy and exercise their right to property, in accordance with their communal property system, and the right to equal access to judicial protection against violations of such right.

172. The Court considers that the right to have their juridical personality recognized by the State is one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions. This is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner.

173. In this case, the State does not recognize that the Saramaka people can enjoy and exercise property rights as a community.¹⁸⁶ Furthermore, the Court observes that other communities in Suriname have been denied the right to seek judicial protection against alleged violations of their collective property rights precisely because a judge considered they did not have the legal capacity necessary to request such protection.¹⁸⁷ This places the Saramaka people in a vulnerable situation where individual property rights may trump their rights over communal property, and where the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their property rights recognized under Article 21 of the Convention.¹⁸⁸

174. In conclusion, the members of the Saramaka people form a distinct tribal community in a situation of vulnerability, both as regards the State as well as private third parties, insofar as they lack the juridical capacity to collectively enjoy the right to property and to challenge before domestic courts alleged violations of such right. The Court consid-

186 Cf. Case of the Moiwana Community, *supra* note 77, para. 86.5.

187 Affidavit of Mariska Muskiet of April 3, 2007 (case file of affidavits and observations, appendix 7, folio 1946).

188 Cf., for example, Marijkedorp case (holding that private property titles trump traditional forms of ownership), cf. Affidavit of Mariska Muskiet, *supra* note 187, and Inter-American Development Bank, Indigenous Peoples and Maroons in Suriname, *supra* note 97, (folio 568) (stating that “[u]nder Surinamese law, indigenous and tribal peoples and communities lack legal personality and are therefore incapable of holding and enforcing rights[...] Attempts by indigenous peoples to use the court system have therefore failed”).

ers that the State must recognize the juridical capacity of the members of the Saramaka people to fully exercise these rights in a collective manner. This may be achieved by implementing legislative or other measures that recognize and take into account the particular way in which the Saramaka people view themselves as a collectivity capable of exercising and enjoying the right to property. Thus, the State must establish, in consultation with the Saramaka people and fully respecting their traditions and customs, the judicial and administrative conditions necessary to ensure the recognition of their juridical personality, with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law.¹⁸⁹

175. The State's failure to do so has resulted in a violation, to the detriment of the members of the Saramaka people, of the right to the recognition of their juridical personality pursuant to Article 3 of the Convention in relation to their right to property under Article 21 of such instrument and their right to judicial protection under Article 25 thereof, as well as in relation to the general obligation of States to adopt such legislative or other measures as may be necessary to give effect to those rights and to respect and ensure their free and full exercise without discrimination, pursuant to Articles 2 and 1.1 of the Convention.

H. The availability of adequate and effective legal remedies in Suriname to protect the Saramaka people against acts that violate their right to property

[...]

178. With regard to members of indigenous peoples, the Court has stated that "it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs."¹⁹³ Specifically, the Court has held that, in order to guarantee members of indigenous peoples their right to communal property, States must establish "an effective means with due process guarantees [...] for them to claim traditional lands."¹⁹⁴

189 Cf. Case of the Indigenous Community Sawhoyamaya, *supra* note 75, para. 189.

193 Cf. Case of the Indigenous Community Yakye Axa, *supra* note 75, para. 63.

194 Cf. Case of the Indigenous Community Yakye Axa, *supra* note 75, para. 96.

H.1) Suriname's Civil Code

179. The Court considers that the judicial recourse available under Article 1386 of the State's Civil Code is inadequate and ineffective to remedy alleged violations of the Saramakas' right to communal property for the following two reasons. First, such recourse is presumably available only for individuals claiming a violation of their individual rights to private property. The Saramaka people, as a collective entity whose legal personality is not recognized by the State, may not resort to such recourse as a community asserting its members' rights to communal property (...). Second, the Saramakas' legal right to communal property is not recognized by the State (...) and, therefore, judicial recourse that requires the demonstration of a violation of a legal right recognized by the State would not be an adequate recourse for their claims.

[...]

VIII. REPARATIONS (APPLICATION OF ARTICLE 63.1 OF THE AMERICAN CONVENTION)²⁰⁴

[...]

B) Injured Party

188. The Tribunal has previously held that in a contentious case before the Court, the Commission must individually name the beneficiaries of possible reparations.²⁰⁸ However, given the size and geographic diversity of the Saramaka people,²⁰⁹ and particularly the

204 Article 63(1) establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

208 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, and Case of Goiburú et al., supra note 11, para. 29. Cf. also Case of The Mayagna (Sumo) Awas Tingni Community, supra note 49, paras. 162-167.

209 The Saramaka population is comprised of approximately 30,000 people. Given the dearth of accurate census information on the Saramaka community, estimates broadly range from 25,000 to 34,482 members. The Saramaka people are also dispersed throughout the Upper Suriname River, Brokopondo District, and other areas of Suriname, including Paramaribo (supra para. 80).

collective nature of reparations to be ordered in the present case, the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party. Nevertheless, the Court observes that the members of the Saramaka people are identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal *lös* in which the community is organized.

189. Thus, in accordance with the Court's jurisprudence regarding indigenous and tribal peoples²¹⁰, the Court considers the members of the Saramaka people as the "injured party" in the present case who, due to their status as victims of the violations established in the present Judgment (...), are the beneficiaries of the collective forms of reparations ordered by the Court.

C) Measures of Redress

[...]

C.1) Measures of Satisfaction and Guarantees of Non-Repetition

194. In order to guarantee the non-repetition of the violation of the rights of the members of the Saramaka people to the recognition of their juridical personality, property, and judicial protection, the State must carry out the following measures:

a) delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities. Until said delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people. With regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court's jurispru-

210 Cf. Case of The Mayagna (Sumo) Awas Tingni Community, supra note 49, para. 164; Case of the Indigenous Community Yakye Axa, supra note 75, para. 189, and Case of the Indigenous Community Sawhoyamaxa, supra note 75, para. 204.

dence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people. The State must begin the process of delimitation, demarcation and titling of traditional Saramaka territory within three months from the notification of the present Judgment, and must complete this process within three years from such date;

b) grant the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions. The State must comply with this reparation measure within a reasonable time;

c) remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt, in its domestic legislation, and through prior, effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied, which includes the lands and natural resources necessary for their social, cultural and economic survival, as well as manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system, and without prejudice to other tribal and indigenous communities. The State must comply with this reparation measure within a reasonable time;

d) adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out. The Saramaka people must be consulted during the process established to comply with this form of reparation. The State must comply with this reparation measure within a reasonable time;

e) ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people, and

f) adopt legislative, administrative and other measures necessary to provide the members of the Saramaka people with adequate and effective recourses against acts that violate their right to the use and enjoyment of property in accordance with their communal land tenure system. The State must comply with this reparation measure within a reasonable time.

195. Additionally, the Court considers that the present Judgment per se is a form of reparation²¹¹ that should be understood as a form of satisfaction that recognizes that the rights of the members of the Saramaka people addressed in the present Judgment have been violated by the State.

196. Furthermore, as a measure of satisfaction, the State must do the following:

[...]

b) finance two radio broadcasts, in the Saramaka language, of [some of] the content of (...) the present Judgment, (...) in a radio station accessible to the Saramaka people. The time and date of said broadcasts must be informed to the victims or their representatives with sufficient anticipation.

[...]

C.2) *Measures of Compensation*

198. The Court has developed in its jurisprudence the concept of material and immaterial damages and the situations in which said damages must be compensated.²¹² Thus, in light

211 Cf. Case of Suárez Rosero v. Ecuador. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44, para. 72; Case of Cantoral Huamani and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 180, and Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 142.

212 Cf. Case of Velásquez Rodríguez, v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 50; Case of Cantoral Benavides v. Perú. Reparations and Costs. Judgment of December 3, 2001. Series C No. 88, paras. 53 and 57, and Case of Bámaca Velásquez, Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 43. Cf. also Case of La Cantuta, supra note 179, paras 213 and 216, and Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, paras. 423 and 430.

of said criteria, the Court will proceed to determine whether measures of pecuniary compensation are warranted in this case, and if so, the appropriate amounts to be awarded.

C.2.a) Material Damages

199. According to the evidence submitted before the Tribunal, a considerable quantity of valuable timber was extracted from Saramaka territory without any consultation or compensation (...). Additionally, the evidence shows that the logging concessions awarded by the State caused significant property damage to the territory traditionally occupied and used by the Saramakas (...). For these reasons, and based on equitable grounds, the Court considers that the members of the Saramaka people must be compensated for the material damage directly caused by these activities in the amount of US\$ 75.000,00 (seventy-five thousand United States dollars). This amount shall be added to the development fund described infra (...).

C.2.b) Immaterial Damages

200. In the previous chapter the Court described the environmental damage and destruction of lands and resources traditionally used by the Saramaka people, as well as the impact it had on their property, not just as it pertains to its subsistence resources, but also with regards to the spiritual connection the Saramaka people have with their territory (...). Furthermore, there is evidence that demonstrates the suffering and distress that the members of the Saramaka people have endured as a result of the long and ongoing struggle for the legal recognition of their right to the territory they have traditionally used and occupied for centuries (...), as well as their frustration with a domestic legal system that does not protect them against violations of said right (...), all of which constitutes a denigration of their basic cultural and spiritual values. The Court considers that the immaterial damage caused to the Saramaka people by these alterations to the very fabric of their society entitles them to a just compensation.

201. For these reasons, and on equitable grounds, the Court hereby orders the State to allocate US\$ 600,000.00 (six hundred thousand United States Dollars) for a community development fund created and established for the benefit of the members of the Saramaka people in their traditional territory. Such fund will serve to finance educational, housing, agricultural, and health projects, as well as provide electricity and drinking water, if necessary, for the benefit of the Saramaka people. The State must allocate said amount for this development fund in accordance with paragraph 208 of the present Judgment.

202. An implementation committee composed of three members will be responsible for designating how the projects will be implemented. The implementation committee shall be composed of a representative appointed by the victims, a representative appointed by the State, and another representative jointly appointed by the victims and the State. The Committee shall consult with the Saramaka people before decisions are taken and implemented. Furthermore, the members of the fund's implementation committee must be selected within six months from the notification of the present Judgment. Should the State and the representatives fail to reach an agreement as to the members of the implementation committee within six months after notice of the present Judgment, the Court may convene a meeting to resolve the matter.

[...]

IX. OPERATIVE PARAGRAPHS

Therefore,

THE COURT

DECLARES,

[...]

AND DECIDES:

Unanimously that:

4. This Judgment constitutes, per se, a form of reparation in the terms of paragraph 195 of this Judgment.

5. The State shall delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities. Until said delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment

of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people. With regards to the concessions already granted within traditional Saramaka territory, the State must review them, in light of the present Judgment and the Court's jurisprudence, in order to evaluate whether a modification of the rights of the concessionaires is necessary in order to preserve the survival of the Saramaka people, (...).

6. The State shall grant the members of the Saramaka people legal recognition of the collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property, as well as collective access to justice, in accordance with their communal system, customary laws, and traditions, (...).

7. The State shall remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt, in its domestic legislation, and through prior, effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied, which includes the lands and natural resources necessary for their social, cultural and economic survival, as well as manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system, and without prejudice to other tribal and indigenous communities, (...).

8. The State shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such projects with the members of the Saramaka people, should these be ultimately carried out. (...).

9. The State shall ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people, (...).

10. The State shall adopt legislative, administrative and other measures necessary to provide the members of the Saramaka people with adequate and effective recourses against acts that violate their right to the use and enjoyment of property in accordance with their communal property system, (...).

[...]

12. The State shall finance two radio broadcasts, in the Saramaka language, of the content of (...) the present Judgment, (...) in a radio station accessible to the Saramaka people, (...).

13. The State shall allocate the amounts set in this Judgment as compensation for material and non-material damages in a community development fund created and established for the benefit of the members of the Saramaka people in their traditional territory, (...).

14. The State shall reimburse of costs and expenses, (...).

[...]

*Inter-American Court
of Human Rights*

Saramaka People v. Suriname

*Interpretation of the Judgment on
Preliminary Objections, Merits,
Reparations, and Costs*

*Judgment of
August 12, 2008*



[...]

I. PRESENTATION OF THE REQUEST FOR INTERPRETATION AND PROCEEDINGS BEFORE THE COURT

1. On March 17, 2008, the State submitted a request for an interpretation of the Judgment on preliminary objections, merits, reparations, and costs¹ issued in this case on November 28, 2007 (hereinafter “the Judgment”), based on Articles 67 of the Convention and 59 of the Rules of Procedure. The State requested interpretation as to the “meaning and scope” of several issues, which the Court hereby summarizes in the following order:

a) with whom must the State consult to establish the mechanism that will guarantee the “effective participation” of the Saramaka people ordered in the Judgment;

b) to whom shall a “just compensation” be given when, for example, only part of the Saramaka territory is affected by concessions granted by the State; that is, whether it must be given to the individuals directly affected or to the Saramaka people as a whole;

c) to whom and for which development and investment activities affecting the Saramaka territory may the State grant concessions;

d) under what circumstances may the State execute a development and investment plan in Saramaka territory, particularly in relation to environmental and social impact assessments, and

e) whether the Court, in declaring a violation of the right to juridical personality recognized in Article 3 of the Convention, took into consideration the State’s arguments on that issue.

[...]

1 Cf. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172.

IV. *THE REQUIREMENTS OF “EFFECTIVE PARTICIPATION” AND “BENEFIT SHARING”*

[...]

14. The issues raised by the State refer to (a) the establishment of a consultation mechanism with the Saramaka people, and (b) the determination of the beneficiaries of a “just compensation” in relation to development and investment projects in Saramaka territory. The Court considers that both concerns are addressed in the Judgment, particularly, but not exclusively, in paragraphs 81, 100, 101, 129-140, 147, 155, 164, 170, 171, 174, and 194, and in Operative Paragraphs 5 through 9. (...).

a) Regarding the establishment of a consultation mechanism with the Saramaka people

15. Regarding the first issue, the Court reiterates that the State has a duty to consult with the Saramaka people in order to comply with several of the Court’s orders, and that the Saramaka must determine, in accordance with their customs and traditions, which tribe members are to be involved in such consultations.

[...]

18. The Court deliberately omitted from the Judgment any specific consideration as to who must be consulted. By declaring that the consultation must take place “in conformity with their customs and tradition”, the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal.¹³

19. Accordingly, the Saramaka people must inform the State which person or group of persons will represent them in each of the aforementioned consultation processes. The State must then consult with those Saramaka representatives to comply with the Court’s

13 Cf. Case of the Saramaka People, *supra* note 1, para. 133.

orders.¹⁴ Once such consultation has taken place, the Saramaka people will inform the State of the decisions taken, as well as their basis.

20. In a related issue, the Tribunal observes that the State seems to misunderstand the difference between the State's obligation to consult with the Saramaka people, pursuant to their customs and traditions, and the content and purpose of the petitioning system described in Article 44¹⁵ of the Convention.

21. In paragraphs 22 through 24 of the Judgment, the Court addressed whether, in light of Article 44 of the Convention, the original petitioners had standing to file a petition before the Commission. The Court declared that any person or group of persons other than the alleged victims may file a petition before the Commission without first obtaining authorization from the Gaa'man, or, for example, from each member of the community. That analysis of the petitioning system under the American Convention bears no relation to the State's obligation under the Judgment to consult with the Saramaka in accordance with their customs and traditions.

22. Thus, the decision as to whom should be consulted regarding each of the various issues mentioned above (...) must be made by the Saramaka people, pursuant to their customs and traditions. The Saramaka people will then communicate to the State who must be consulted, depending on the issue that requires consultation.

14 The Court declared in paragraph 137 that, "in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs." Case of the Saramaka People, *supra* note 1, para. 137.

15 Article 44 of the Convention provides that "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

b) Regarding the determination of beneficiaries of a “just compensation” in relation to development and investment projects in Saramaka territory

23. The second issue addressed by the State, pertaining to the determination of the beneficiaries of a “just compensation”¹⁶ for development and investment projects in Saramaka territory, is closely related to the previous issue and is also addressed in the Judgment.

[...]

25. Thus, the determination of those beneficiaries must be made in consultation with the Saramaka people, and not unilaterally by the State. In any case, as the representatives mentioned in their written submissions, “these matters can be discussed and addressed during the consultations and process of reaching agreement on the legislative and administrative measures required to give effect to, inter alia, the benefit sharing requirement.”

26. Furthermore, regarding the State’s concern that there may be internal divisions among the Saramaka as to who can benefit from development projects, the Court observes that, pursuant to paragraph 164 of the Judgment, in the event that any internal conflict arises between members of the Saramaka community regarding this issue, it “must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case.”

27. Consequently, the Tribunal reiterates that all issues related to the consultation process with the Saramaka people, as well as those concerning the beneficiaries of the “just compensation” that must be shared, must be determined and resolved by the Saramaka people in accordance with their traditional customs and norms, and as ordered by the Court in its Judgment.

16 In paragraph 138 of the Judgment the Court declared that the “concept of benefit-sharing, which can be found in various international instruments regarding indigenous and tribal peoples’ rights,[...] can be said to be inherent to the right of compensation recognized under Article 21.2 of the Convention [...].” Case of the Saramaka People, *supra* note 1, para. 138.

V. *PRIOR ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS*

[...]

b) Prior environmental and social impact assessments (ESIAs)

40. To respond with greater precision to the State's concerns related to the prior environmental and social impact assessments ordered in the Judgment, the Court will further elaborate upon this safeguard.²² ESIAs serve to assess the possible damage or impact a proposed development or investment project may have on the property in question and on the community. The purpose of ESIAs is not only to have some objective measure of such possible impact on the land and the people, but also, as stated in paragraph 133 of the Judgment, to "ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily".

41. In order to comply with the Court's orders, the ESIAs must conform to the relevant international standards and best practices,²³ and must respect the Saramaka people's traditions and culture. In conjunction with said standards and best practices, the Judgment established that the ESIAs must be completed prior to the granting of the concession, as one of the objectives for requiring such studies is to guarantee the Saramaka's right to be informed about all the proposed projects in their territory. Hence, the State's obligation to supervise the ESIAs coincides with its duty to guarantee the effective participation of the

22 The ninth Operative Paragraph of the Judgment indicates that the "State shall ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people, in the terms of paragraphs 129, 133, 143, 146, 148, 155, 158, and 194(e) of [the] Judgment." Case of the Saramaka People, supra note 1, Operative Paragraph 9.

23 One of the most comprehensive and used standards for ESIAs in the context of indigenous and tribal peoples is known as the Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, which can be found at www.cbd.int/doc/publications/akwe-brochure-pdf.

Saramaka people in the process of granting concessions. Furthermore, the ESIA's must be undertaken by independent and technically capable entities, with the State's supervision. Finally, one of the factors the environmental and social impact assessment should address is the cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people.

c) Acceptable level of impact

42. In response to the State's question as to what is an acceptable level of impact, as demonstrated through ESIA's, that would permit the State to grant a concession, the Court observes that what constitutes an acceptable level of impact may differ in each case. Nonetheless, the guiding principle with which to analyze the results of ESIA's should be that the level of impact does not deny the ability of the members of the Saramaka people to survive as a tribal people (...).

[...]

VI. CONCESSIONS IN THE TERRITORY OF THE SARAMAKA PEOPLE

[...]

51. The Judgment addressed the issue of concessions in the context of proposed development, investment, exploration or extraction plans within Saramaka territory. In the footnote accompanying the three safeguards stated in paragraph 129 of the Judgment, the Tribunal specified that by (...) "development or investment plan" the Court means any proposed activity that may affect the integrity of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.

[...]

54. The Tribunal did not specifically address other types of development or investment activities within or that affect Saramaka territory. Nonetheless, the Tribunal reiterates that, in the process of issuing concessions within or that affect Saramaka territory, or any other indigenous or tribal territory, the State has a duty to comply with its obligations under the American Convention as interpreted by the Court in its jurisprudence, particularly

in light of the Case of the Saramaka People and other cases involving indigenous and tribal peoples' land rights.

[...]

VIII. OPERATIVE PARAGRAPHS

66. Therefore,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

pursuant to Article 67 of the American Convention on Human Rights and Articles 29.3 and 59 of the Rules of Procedure,

DECIDES:

unanimously,

1. To declare admissible the State's request for interpretation of the Judgment on preliminary objections, merits, reparations, and costs issued on November 28, 2007 in the Case of the Saramaka People, pursuant to paragraph 10 of the present Judgment.
2. To determine the scope of the content of Operative Paragraphs 5 through 9 of the Judgment on preliminary objections, merits, reparations, and costs issued on November 28, 2007 in the Case of the Saramaka People, pursuant to chapters IV, V, VI and VII of the present Judgment.
3. To request the Registrar to notify the present Judgment to the State of Suriname, the Inter-American Commission on Human Rights, and the representatives of the victims.

*Inter-American Court
of Human Rights*

Chitay Nech et al. v. Guatemala

*Preliminary Objections, Merits,
Reparations and Costs*

*Judgment of
May 25, 2010*



[...]

I. INTRODUCTION OF THE CASE AND OBJECT OF THE CONTROVERSY

[...]

2. The petition deals with the alleged forced disappearance of the Mayan indigenous political leader Kaqchikel, Florencio Chitay Nech (hereinafter “Florencio Chitay” or “Mr. Chitay Nech”), which occurred as of April 1, 1981, in Guatemala City, and the ensuing lack of due diligence in the fact-finding investigation, as well as the denial of justice to the detriment of his next of kin. Said disappearance was allegedly executed by armed men exiting a vehicle. Mr. Chitay Nech opposed resistance until one of the men pointed the barrel of a gun at his son, who was a minor, Estermerio Chitay Rodríguez (hereinafter “Estermerio Chitay” or “Estermerio”) who was with him, and therefore he quit resisting and got into the vehicle. According to the petition, a claim was filed this same day before the National Police – for which no action was taken. On October 12, 2004, a habeas corpus appeal was filed, which was declared inadmissible. At a later date, on March 2, 2009, the Executive Director of the Presidential Commission Coordinator of Executive Policy in Human Rights Matters (hereinafter “COPREDEH”) presented before the Public Prosecutor an accusation and formal claim for the forced disappearance of Mr. Chitay Nech. Notwithstanding, according to that alleged, the facts have not been investigated and those responsible have not been prosecuted nor punished after 29 years since the forced disappearance of Florencio Chitay Nech, and his whereabouts are still unknown.

[...]

VIII. FORCED DISAPPEARANCE OF FLORENCIO CHITAY NECH (ARTICLES 7, 5, 4, 3, AND 23 OF THE AMERICAN CONVENTION, IN ACCORDANCE WITH ARTICLE 1.1 OF THE CONVENTION, AND ARTICLES I, II, AND III OF THE INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS)

[...]

A. Forced Disappearance: Articles 7, 5, 4, and 3 (Rights to Personal Liberty, Humane Treatment [Personal Integrity] and Juridical Personality) of the American Convention

[...]

113. (...) with the harassment and later disappearance of Florencio Chitay Nech, not only was the exercise of his political right shattered during the period of his charge, but he was also prevented from fulfilling a mandate and a vocation within the process of formation of community leaders. Likewise, the community was deprived of the representation of one of its leaders in the various forums of its social structure, and principally in access to the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State.

114. In this sense, the Court has acknowledged that the State shall guarantee that “the members of the indigenous and ethnic communities (...) are able to participate in the making of decisions regarding matters and policies that affect or may affect their rights and the development of such communities, in a manner that they can integrate themselves into the State institutions and organs and participate in a direct manner proportional to their population in the leadership of public affairs (...) and in accordance with their values, traditions, customs and forms of organization.”¹¹⁸ The contrary affects the lack of representation in the institutions charged with adopting policies and programs that could affect their development.¹¹⁹

115. The Court notices that in the development of the represented political participation, those elected exercise their charge by mandate or designation¹²⁰ and in representation

118 Case Yatama V. Nicaragua, Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of June of 2005. Series C No. 127, para. 225.

119 Cf. Case Yatama V. Nicaragua, Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of June of 2005. Series C No. 127, para. 227.

120 The Court has established that “the right to have access of public duties in general conditions of equality protects the access, in a direct manner, the participation in design, implementation, development, and execution of state policy via public functions. It is understood that these general conditions of equality are directed both to access and public functions by popular vote as well as by designation.” Case Yatama V. Nicaragua, Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of June of 2005. Series C No. 127, para. 200.

of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as in the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right.

116. In the present case, Florencio Chitay Nech was deliberately obstructed, by the structure of the State, from participating in his democratic exercise in representation of his community, which according to their vision and tradition was elected to serve and contribute to the construction of their free development.¹²¹ Likewise, the Tribunal notices that it is unreasonable that while the indigenous population is one of the majoritarian populations in Guatemala, their indigenous representation from leaders such Florencio Chitay Nech was shattered.

117. Therefore, the State did not fulfill its duty to respect and guarantee the political rights of Florencio Chitay Nech, given that due to his forced disappearance, configured as a selective disappearance, he was deprived from the exercise of the right to political participation in representation of his community, recognized in Article 23.1, subparagraph a) of the American Convention.

[...]

IX. FORCED DISPLACEMENT (ARTICLE 22), RIGHTS OF THE FAMILY (ARTICLE 17) AND CHILDREN (ARTICLE 19), IN RELATION TO ARTICLE 1.1 OF THE AMERICAN CONVENTION

[...]

2. The forced displacement, the disintegration of the Chitay Rodriguez family and the effects on the cultural life of the indigenous children

A. The forced displacement of the Chitay Rodriguez family

[...]

121 Cf. Case Yatama V. Nicaragua, Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of June of 2005. Series C No. 127, paras. 225, 226 and 227.

139. Article 22.1 of the Convention recognizes the freedom of movement and residence.¹⁴⁸ In this sense, the Court has established in other cases¹⁴⁹ that this Article also protects the right to not be displaced forcibly within the territory of a State Party.

[...]

142. On the other hand, this Tribunal has signaled that the freedom of movement and residence may be vulnerable to restrictions de facto if the State has not established the conditions nor foreseen the means that would permit it to be exercised,¹⁵⁵ for example when a person is a victim of threats and harassments and the State does not provide the necessary guarantees so that they can move and reside freely in the territory where these actions took place, including when the threats and harassments come from non-state actors.¹⁵⁶

[...]

145. (...) this Tribunal finds that the forced disappearance affected the members of the Chitay Rodriguez family in a particularly grave manner due to their connection with the Mayan indigenous group. As recognized by the expert witness Rosalina Tuyuc, the energetic connection with the land has a fundamental importance in the Mayan vision, for which the abandonment of the community not only was made material for the families that had to flee, but also signified a greater cultural and spiritual loss. (...)

146. Also, the displacement of the next of kin of Florencio Chitay Nech out of his community provoked a rupture with his cultural identity, which signified the total eradication

148 Regarding Article 22.1 of the Convention, it established that “[e]very person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.”

149 Cf. Case of the Mapiripan Massacre V. Colombia, Merits, Reparations and Costs. Judgment of 15 of September of 2005. Series C No. 134, para. 188, and Case of the Ituango Massacre V. Colombia, Preliminary Exception, Merits, Reparations and Costs. Judgment of 1 of July of 2006. Series C No. 148, para. 207.

155 Cf. Case of the Moiwana Community V. Suriname, Preliminary Exceptions, Merits, Reparations and Costs. Judgment 15 of June of 2005. Series C No. 124, paras. 119 and 120; Case of the Mapiripan Massacre V. Colombia, Merits, Reparations and Costs. Judgment of 15 of September of 2005. Series C No. 134, para. 170, and Case Valle Jaramillo V. Colombia. Merits, Reparations and Costs. Judgment of 27 of November of 2008. Series C No. 192, para. 139.

156 Cf. Case Valle Jaramillo V. Colombia, supra note 155, para. 139.

of any reference to the life that he had before the persecution, including his culture, language and his ancestral past.¹⁵⁹

147. Consequently, conforming to the constant jurisprudence on indigenous matters, through which the relationship of the indigenous groups with their territory has been recognized as crucial for their cultural structures and their ethnic and material survival,¹⁶⁰ the Tribunal considers that the forced displacement of the indigenous peoples out of their community or from their members can place them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups,¹⁶¹ for which it is indispensable that the States adopt specific measures of protection¹⁶² considering the particularities of the indigenous peoples, as well as their customary law, values, uses, and customs,¹⁶³ in order to prevent and revert the effects of said situation.

159 According to the representatives, the Chitay Rodriguez siblings were obligated to not use their father's last name and to identify themselves using their mothers last name, Rodriguez, and to leave their Mayan cultural heritage unattended, so as to maintain their father's memory alive and accomplish his wishes.

160 The Court has determined that the culture of the members of the indigenous communities corresponds to a particular form of life, of being, seeing, and acting in the world, constituted from their close link with their traditional lands and natural resources, not only because they provide their means of subsistence, but also because they constitute an element part of their cosmovision, religiosity and, therefore, of their cultural identity. Cf. Case Yakyé Axa Indigenous Community V. Paraguay, Judgment of Merits, Reparations and Costs of 17 of June of 2005, para. 135; Case Sawhoyamaya Indigenous Community V. Paraguay, Judgment of 29 of March of 2006, para. 118.

161 Cf. Order 004/009 rendered on 26 of January of 2009, Constitutional Court of Colombia, part 4, page 11. Available at <http://www.acnur.org/biblioteca/pdf/6981.pdf>.

162 Cf. Human Rights Commission, Guiding Principles on Internal Displacement of the United Nations, E/CN.4/1998/53/Add.2 of 11 of February of 1998, p. 5. Annex. Introduction: Reach and Purpose. Numeral 2. Available at <http://www.hchr.org.co/documentoseReports/documentos/html/Reports/onu/resdi/E-CN-4-1998-53-ADD-2.html>. Said principles have been recognized by the international community. See also, United Nations, General Assembly, Protection and assistance for internally displaced, A/RES/64/162, of 17 of March of 2010, p.1. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/471/58/PDF/N0947158.pdf?OpenElement>; Principle 9.

163 Cf. Case Yakyé Axa Indigenous Community V. Paraguay, supra note 160, para. 63; Case Sawhoyamaya Indigenous Community V. Paraguay, Merits, Reparations and Costs. Judgment of 29 of March of 2006. Series C No. 146, para. 83, and Case of Saramaka People V. Suriname. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 28 of November of 2007. Series C No. 172, para. 178.

[...]

149. (...) this Tribunal reaffirms that the obligation of guarantee for the States to protect the rights of displaced persons carries with it not only the duty to adopt measures of prevention, but also to carry out an effective investigation of the supposed violation of those rights¹⁶⁷ and to provide the necessary conditions for a dignified and safe return¹⁶⁸ to their habitual place of residence or voluntary resettlement in another place in the country. As such, their full participation in the planification and manner in which they should return or be reintegrated, should be guaranteed.¹⁶⁹

150. Therefore, if Guatemala has not restricted the freedom of movement and residence of the members of the nuclear family of Florencio Chitay Nech in a formal manner, the Court finds that in this case, said freedom is limited by a grave de facto restriction, that originates with the threats and harassments that have provoked their splitting up, as well as the well-founded fear generated by all that occurred to their father, other family members, and the members of the community, combined with the lack of an investigation and procedure of those responsible for the facts, which have kept them away from their community. The State has not complied neither with its duty to guarantee this right, nor has it established the conditions or foreseen the means that could permit those members of the Chitay Rodriguez family to return in a safe and dignified manner to their commu-

167 Cf. Human Rights Council, Report presented by the representative of the General Secretariat on the human rights of internally displaced persons, Walter Kalin. A/HRC/13/21/Add.3, p. 4. II.4. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-21-Add.3.pdf>, para. 69; African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009, Article 3.1g and h, and article 7.4. Available at <http://www.unhcr.org/4ae9bede9.html>; Cf. Council of Europe, Committee of Ministers, Recommendation Rec(2006)6 to member states on internally displaced persons, 5 April, 2006, para. 5. Available at <https://wcd.coe.int/ViewDoc.jsp?id=987573&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>; Moreover, the Rome Statute, criminalizes the forced move of the population, which can constitute crimes against humanity (Article 7.1d) or war crimes (Article 8.2.a.vii, b.viii, and e.viii. Statute of the International Criminal Court (Rome Statute), Document of the UN A/CONF.183/9, July 17, 1998.

168 Cf. Recommendation Rec (2006)6 of the Committee of Ministers to the member States on Internally Displaced Persons, supra note 167 para. 12; AG/RES. 2508 (XXXIX-O/09) "Internally Displaced," Approved by the fourth plenary session, on 4 of June of 2009, operative paragraph 2 (available at: www.oas.org/dil/esp/AG-RES_2508-2009.doc).

169 Cf. Guiding Principles on Internal Displacement, supra note 167, Principle 28.

nity,¹⁷⁰ with respect to which they have an important cultural link. Finally, the State has not granted an integral reparation that restitutes the vulnerable rights and guarantees, among other things, guarantees of non-repetition of such situation.

151. In conclusion of the foregoing, this Tribunal considers that the forced disappearance has been maintained since the recognition of the adjudicatory Jurisdiction of the Court effectuated on March 9, 1987. As a consequence, the Court considers that the State has not guaranteed to the members of the Chitay Rodríguez family their right of movement and residence for which it is responsible for the violation of Article 22 of the American Convention, in relation to Article 1.1 of the same, to the detriment of Encarnación, Pedro, Estermerio, Eliseo, and María Rosaura, all with the last name of Chitay Rodríguez.

B. The impacts on the Chitay Rodríguez family and on the cultural life of the indigenous children.

[...]

B.1 The disintegration of the Chitay Rodríguez family

156. Article 17 of the American Convention recognizes that the family is the natural and fundamental element of the society and has the right to protection from the society and the State. The protection of the family and its members is guaranteed also in Article 11.2 of the Convention that encompasses the prohibition of arbitrary or abusive interferences with the family,¹⁷¹ as well as by Article 19, that determines the protection of the rights of the child by the family, society, and State.¹⁷²

170 Cf. Case of the Moiwana Community V. Suriname, Preliminary Exceptions, Merits, Reparations and Costs. Judgment 15 of June of 2005. Series C No. 124, para. 120, and Case of the Mapiripan Massacre V. Colombia, Merits, Reparations and Costs. Judgment of 15 of September of 2005. Series C No. 134, para. 170.

171 The Court has established that “[a]rticle 11 of the Convention prohibits all arbitrary or abusive intervention in the private life of persons, enunciating several aspects of it, such as the private life of their families, their domicile, or their mail.” Cf. Case Tristán Donoso V. Panamá. Preliminary Exception, Merits, Reparations and Costs. Judgment of 27 of January of 2008. Series C No. 192, para. 55, and Case Escher et. al. V. Brasil, . Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 6 of July of 2009, para. 113.

172 Cf. General Observation No. 19, General comments adopted by the Human Rights Commission, Article 23 –the family. 39^o period of sessions, U.N. Doc. HRI/GEN/1/Rev.7 of 27 of July of 1990, para. 1.

157. Due to the importance of the right to the protection of the family, the Court has established that the State is obligated to favor the development and strengthening of the familial nucleus¹⁷³ and that the separation of the children from the family constitutes, under certain circumstances, a violation of their right to family recognized in Article 17 of the American Convention.¹⁷⁴ In this way, “[t]he child has the right to live with his/her family, called to satisfy their material, psychological, and emotional needs. The right of each person to receive protection against arbitrary and illegal interferences with the family forms a part, implicitly, of the right to the protection of the family and the child.”¹⁷⁵

158. In this regard, the Court, in the Consultative Opinion No. 17 relating to the Legal Condition and Human Rights of Children, recognized that the mutual enjoyment of the coexistence between parents and children constitutes a fundamental element in the life of the family,¹⁷⁶ and it observed that the European Court has established that the objective of Article 8 of the European Convention on Human Rights is not only to preserve the individual against arbitrary interferences of the public authorities,¹⁷⁷ but that, in addition, this Article imposes positive obligations on the State in favor of the effective respect to family life.¹⁷⁸

173 Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, of 28 of August of 2002, para. 66.

174 Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, of 28 of August of 2002, paras. 71 and 72, and Case of the Dos Erres Massacre Vs Guatemala, Preliminary Exception, Merits, Reparations and Costs. Judgment of 24 of November of 2009. Series C No. 211, para. 188.

175 Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, of 28 of August of 2002, para. 71, and Case of the Dos Erres Massacre Vs Guatemala, *supra* note 174, para. 189.

176 Juridical Condition and Human Rights of the Child. Advisory Opinion, OC-17/02, of 28 of August of 2002, para. 72. Cf. Eur. Court H.R., Case of Buchberger v. Austria, Judgment of 20 December 2001, para. 35, Eur. Court H.R., Case of T and K v. Finland, Judgment of 12 July 2001, para. 151, Eur. Court H.R. Case of Elsholz v. Germany, Judgment of 13 July 2000, para. 43, Eur. Court H.R., Case of Bronda v. Italy, Judgment of 9 June 1998, Reports 1998 a IV, para. 51, and Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996 a IV, para. 52.

177 Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion, OC-17/02, of 28 of August of 2002, para. 72.

178 Cf. Case Dos Erres Massacre V. Guatemala, *supra* note 174, para. 189. Cf. Eur. Court H.R., Case of Olsson v. Sweden, judgment of March 24, 1988, Series A, n. 130, para. 81.

159. In the present case, the Court also recognizes the special significance that the co-existence of the family has in the context of an indigenous family, which is not limited to the familial nucleus but also includes the distinct generations that make up the family and includes the community of which the family forms a part. (...).

160. Also, she signaled that the disappearance of the father or the mother not only signified a change in the roles in the sense that the surviving father has to assume the role of the mother and of the father at the same time, but that above all, this impeded the parents transmitting their knowledge in an oral manner, conforming to the traditions of the Mayan family. (...).

[...]

162. The Court takes into account that the forced disappearance had as its purpose to punish not only the victim but also his community and his family (...). In the present case, the Tribunal considers that, the forced disappearance of Florencio Chitay Nech aggravated the situation of displacement and the cultural uproot that the family suffered. In this way, the disintegration of their land affected the members of the Chitay Rodriguez family in a particularly grave manner due to their condition as Mayan indigenous persons.

163. Due to the prior considerations and the assent by the State, the Court finds that there was a direct effect on the members of the Chitay Rodriguez family due to the constant threats and persecutions that they suffered, the displacement of which they were the victims, the uproot from of their community, the fragmentation of their familial nucleus, and the loss of the essential figure of their father that they suffered through the disappearance of Florencio Chitay Nech, which was aggravated in the cultural context of this case, and subsisted after March 9, 1987, constituting a lack of fulfillment on the part of the State of its obligation to protect each person against arbitrary or illegal interferences against their family. Consequently, the Court considers that the State is responsible for the violation of the right of the protection of the family recognized in Article 17 of the Convention, in relation to Article 1.1 of the same, to the detriment of Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez.

B.2 The right to cultural life of indigenous children

164. Article 19 of the American Convention establishes that “[e]ach child has the right to the measures of protection that their condition as a minor child requires from their

family, from society, and from the State.” According to the criteria of the Court, “this disposition must be understood as an additional and complementary right that the treaty establishes that for them to have physical and emotional development they need special protection.”¹⁷⁹ So the State must assume a special position of guarantor with greater care and responsibility, and must take measures especially oriented in the principle of the best interest of the child.¹⁸⁰ This principle is founded “in the dignity itself of the human being, in the characteristics themselves of children, and the need to provide the means of development for them, taking full advantage of their potential.”¹⁸¹ In this sense, the State must give special attention to the needs and to the rights of children, in consideration of their particular condition of vulnerability.¹⁸²

165. The Court has affirmed repeatedly that both the American Convention as well as the Convention on the Rights of the Child form part of the international corpus juris of protection of children,¹⁸³ and in various contentious cases has defined the content and

179 Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, of 28 of August of 2002, paras. 53, 54 and 60; Case “Juvenile Reeducation Institute” V. Paraguay. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 2 of September of 2004. Series C No. 112, para. 147; Case González et al. (“Cotton Fields”) V. México, Preliminary Exception, Merits, Reparations and Costs. Judgment of 16 of November of 2009. Series C No. 205, para. 408, and Case of the Dos Erres Massacre v. Guatemala, supra note 174, para. 184.

180 Cf. Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, of 28 of August of 2002, paras. 56 and 60; Case Bulacio V. Argentina, Merits, Reparations and Costs. Judgment of 18 of September of 2003. Series C No. 100, paras. 126 and 134; Case Sawhoyamaya Indigenous Community V. Paraguay, Merits, Reparations and Costs. Judgment of 29 of March of 2006. Series C No. 146, para. 177, and Case Servellón García V. Honduras, Merits, Reparations and Costs. Judgment of 21 of September of 2006. Series C No. 152, para. 116.

181 Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, of 28 of August of 2002, para. 56; Cf. Case Masacre of Mapiripán V. Colombia, Merits, Reparations and Costs. Judgment of 15 of September of 2005. Series C No. 134, para. 152, and Case Masacres of Ituango V. Colombia, Preliminary Exception, Merits, Reparations and Costs. Judgment of 1 of July of 2006. Series C No. 148, para. 244.

182 Case Dos Erres Massacre V. Guatemala, supra note 174, para. 184.

183 Cf. Case of the “Children of the Street” (Villagrán Morales et. al.) V. Guatemala. Merits. Judgment of 19 of November of 1999. Series C No. 63. paras. 194 and 196; Case of the Gómez Paquiyauri Brothers V. Perú. Merits, Reparations and Costs. Judgment of 8 of July of 2004. Series C No. 110, para. 166, and Case “Juvenile Reeducation Institute” V. Paraguay, supra note 179, para. 148.

scope of the state obligations that derive from Article 19 of the American Convention in light of the rules of the Convention on the Rights of the Child.¹⁸⁴

166. Taking into account that highlighted, it is evident that the measures of protection that the State must adopt vary in accordance with the particular circumstances of the case and of the personal condition of the children. The Tribunal makes note that in the present case, at the moment that the State recognized the contentious jurisdiction of the Court, on March 9, 1987, the alleged victims, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez, kaqchikel Mayan indigenous persons, they were 15, 10, and 7 years old, respectively, and therefore, were still children.

167. The Court observes that due to the context of familial disintegration previously accredited, this had repercussions, in an accentuated manner, on the condition of the children. Due to the particularities of the case sub judice, the Court finds it important to note the special measures of protection that the States must adopt in favor of indigenous children. The Court deems that a State, in addition to the obligations which must be guaranteed to all persons under its jurisdiction, must also comply with an additional and complementary obligation defined in Article 30¹⁸⁵ of the Convention on the Rights of the Child,¹⁸⁶ which gives content to Article 19 of the American Convention and consists

184 Cf. Case of los "Children of the Street" (Villagrán Morales et. al.) V. Guatemala. Merits, supra note 183, paras. 194 a 196; Case "Juvenile Reeducation Institute" V. Paraguay, supra note 179, para. 161, and Case of the Gómez Paquiyauri Brothers V. Perú, supra note 183, paras. 167 and 168.

185 Article 30 states that "[i]n those States in which ethnic, religious or linguistic minorities exist, a child who pertains to this community or is indigenus, shall not be denied their corresponding rights, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." This disposition originates from Article 27 of the International Covenant on Civil and Political Rights, adopted by the General Assembly during Order 2200 A (XXI), 16 of December of 1966, which recognizes this right of minorities without mentioning indigenous persons explicitly. Article 27 of the ICCPR establishes: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

186 Convention on the Rights of the Child, A.G. res. 44/25, anexo, 44 U.N. GAOR Supp. (No. 49) p. 167, UN Doc. A/44/49 (1989), came into force on September 2, 1990. The State of Guatemala signed said Convention on January 26, 1990 and ratified it on June 6, 1990.

of the obligation to promote and protect the rights of indigenous children to live in accordance with their own culture, religion, and language.¹⁸⁷

168. In its General Observation No. 11, the Committee on Rights of the Child has considered that “[t]he effective exercise of the rights of indigenous children to culture, religion, and language constitute essential foundations of a culturally-diverse State,”¹⁸⁸ and that this right constitutes an important recognition of the traditions and collective values of indigenous cultures.¹⁸⁹ Also, taking into consideration the deep material and spiritual

187 The Convention on the Rights of the Child, aside from Article 30, contains various provisions that highlight the importance of the Convention on the Rights of the Child, moreover Article 30, contains various provisions that highlight the importance to the cultural life of the rights of the indigenous child for their development and formation. In this sense, the Preamble states: “States Party to the present Convention, [...] [...] [t]aking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.” Article 2, subsection 1 establishes the obligation of the State to assure the application of the rights established in the Convention, without distinction, by “ethnic origin.” In the same sense, Article 17 subsection d states that: “the States shall [...] [e]ncourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.” Article 20, subsection 3 determines that, when children are deprived of their family environment, the State has to adopt special measures and in considering them, “[...] due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” In this same line, Article 29 subsection 1 states that “ En la misma línea, el artículo 29 inciso 1 señala que “States Parties agree that the education of the child shall be directed to [t]he development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; [as well as t]he preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.” Lastly, Article 31 determines that: “States Parties recognize the right of the child to [...] participate freely in cultural life and the arts. [...] States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”

188 Cf. U.N. Committee on the Rights of the Child. General Observation N° 11 (2009). The indigenous children and their rights due to the convention, February 12, 2009, par. 82.

189 Cf. Observación General No. 11 (2009), supra note 188, para. 16. Cf. U.N. Committee on the Rights of the Child. General Observation N° 11 (2009). The indigenous children and their rights due to the convention, February 12, 2009, par. 16

relationship of the indigenous peoples with their traditional lands (supra para. 145), this Tribunal finds that within the general obligation of States to promote and protect the cultural diversity of indigenous persons, there is also a special obligation to guarantee the right to cultural life of indigenous children.

169. In this sense, the expert witness Rosalina Tuyuc described the sufferings of the members of the indigenous communities that had to leave, and in particular the cultural and spiritual loss that the displaced indigenous children suffered, as well as the impossibility for them to receive an oral education (supra paras. 159 and 160). Additionally, taking into account that the development of the child is a holistic concept that covers physical, mental, spiritual, moral, psychological and social development,¹⁹⁰ the Court finds that for the full and harmonious development of their personality, the indigenous children in agreement with their world vision, preferably require to grow and be raised within their natural and cultural environment, particularly because they possess a distinctive identity that roots them with their land, culture, religion, and language.

170. Therefore, because the then indigenous children Eliseo, Estermerio, and María Rosaura, all of the last name Chitay Rodriguez, were deprived of their right to cultural life, this Court considers that the State is responsible for the violation of Articles 19 of the American Convention, in relation with Article 1.1 of the same, to their detriment.

[...]

XII. REPARATIONS (APPLICATION OF ARTICLE 63.1 OF THE CONVENTION)

[...]

C. Measures of Satisfaction, Rehabilitation, and Guarantee of Non-Repitition

[...]

190 Cf. U.N. Committee on the Rights of the Child. General Observation N° 5 of November 27, 2003, paragraph 12. This concept of holistic development has been accepted in earlier Jurisprudence of the Court. See, Case of Juvenile Reeducation Institute V. Paraguay, para. 161.

C.1 Satisfaction

a) *Publication of the Judgment and Radio Transmission*

[...]

245. As it has done before,²⁵⁸ the Tribunal takes into account the requests of the representatives, as well as the fact that the next of kin of the victims belong to the Mayan people and that their native language is Kaqchikel, a reason why it deems appropriate that the State gives publicity, through a radio station of ample coverage in the Department of Chimaltenango, the official summary of the Judgment rendered by the Court. The foregoing, shall be done in Spanish and Mayan Kaqchikel, and for that purpose, the State shall make the corresponding interpretation. The broadcast shall be carried out every first Sunday of the month on at least 4 occasions. For this, the State has the term of one year, after the notification of the present Judgment.

b) *Public act of acknowledgement of international liability*

[...]

248. In that regard, the Tribunal positively assesses that the State implement mechanisms to dignify the victims of the internal armed conflict. Nevertheless, this Tribunal deems it necessary for the State to carry out a public act of acknowledgement of responsibility for the facts of the present case as reparation to memory of Florencio Chitay Nech, which should be carried out in both Spanish and kaqchikel. In such act, reference should be made to the human rights violations declared in the present Judgment. Likewise, it should be carried out through a public ceremony in presence of high ranking State officials, and the next of kin of Mr. Chitay Nec. The State and the next of kin of Mr. Chitay Nech and/or their representatives should agree upon the modality of fulfillment of the public act of acknowledgement, as well as the specifics required, such as the place and the date in which it shall be carried out.²⁵⁹

258 Cf. Case Tiu Tojin V. Guatemala, Merits, Reparations and Costs. Judgment of 26 of November of 2008. Series C No. 190, para. 108.

259 Cf. Case Radilla Pacheco V. México, Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of November of 2009. Series C No. 209, para. 353, and Case Dos Erres Massacre V. Guatemala, supra note 174, para. 262.

[...]

XIII. OPERATIVE PARAGRAPHS

297. Therefore,

THE COURT

DECIDES,

[...]

AND DECLARES,

unanimously, that,

11. This Judgment constitutes, per se, a form of reparation.

[...]

14. The State shall publish, once in the Official Gazette and in another newspaper with national circulation, (...) as well as the operative paragraphs of the Judgment. The State must transmit the official summary via radio each first Sunday of the month on at least four occasion. The foregoing, should be carried out in Spanish and in Mayan kaqchikel. In addition, the State must public the entire Judgment on the official web site of the State, (...).

15. The State must carry out a public act of recognition of responsibility in relation to the facts of the present case and apology in memory of Florencio Chitay Nech, in which reference must be made to the human rights violations declared in the present Judgment, in the presence of high ranking State officials and the next of kin of Mr. Chitay Nech. Said act must be carried out in Spanish and in Mayan kaqchikel, (...).

16. The State must name a recognized street in San Martín Jilotepeque with the name of Florencio Chitay Nech and place a commemorative plaque with his name that makes reference to his activities, (...).

17. The State must offer psychological and/or psychiatric attention to the victims declared in the present Judgment if they request it, immediately and in an adequate and effective manner, through specialized public health institutions, to the victims declared in this Judgment whom request it, (...).

18. The State must pay the fixed quantities (...) as compensation for pecuniary and non-pecuniary damages and the reimbursement of the costs and expenses, (...), within a time period of one year, beginning from the notification of the present Judgment, (...).

19. The State shall submit, within one year from the date of notification of this Judgment and for the purpose of its supervision, a report on the measures adopted in compliance with the Judgment. The Court shall close the instant case once the State has fully complied with the provisions established herein.

*Inter-American Court
of Human Rights*

*Xákmok Kásek Indigenous Community
v. Paraguay*

Merits, Reparations and Costs

*Judgment of
August 24, 2010*



[...]

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

[...]

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."

[...]

VI. RIGHT TO COMMUNAL PROPERTY, JUDICIAL GUARANTEES, AND JUDICIAL PROTECTION (ARTICLES 21.1, 8.1 AND 25.1 OF THE AMERICAN CONVENTION)

[...]

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

100 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs. Judgment of June 17, 2005. Series C No. 125, para. 137; Case of the Sawhoyamaya Indigenous Community v. Paraguay, Merits, reparations and costs. Judgment of March 29, 2006. Series C No. 146, 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. 88.

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

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

[...]

2.1. *Matters relating to the lands claimed*

2.1.1. *Traditional nature of the lands claimed*

[...]

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 Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 100, para. 118, and Case of the Saramaka People v. Suriname, *supra* note 100, para. 90.

102 Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 101, para. 149; Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 100, para. 120, and Case of the Saramaka People v. Suriname, *supra* note 100, para. 89.

103 Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 100, para. 120.

107. The Court (...) 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 Kuñatai* or *Makha Mompema* 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

[...]

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

125 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 100, paras. 131; Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra note 100, para. 128, and Case of the Saramaka People v. Suriname, supra note 100, para. 89.

126 Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 151, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra note 100, para. 128.

127 Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 151, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra note 100, 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 100, para. 215, and Case of the Saramaka People v. Suriname, supra note 100, 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 Sawhoyamaya Indigenous Community v. Paraguay, supra note 100, para. 128.

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 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

130 Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 100, paras. 128 to 130.

131 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, *supra* note 100, paras. 138 to 139, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 100, para. 129.

132 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, *supra* note 100, paras. 135 to 149, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 100, paras. 127 and 130.

133 Cf. Articles 24, 25, 26, and 27 of Law 904/81 Statute of the Indigenous Communities of December 18, 1981 (file of appendices to the application, appendix 7, 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 100, paras. 131, 135 and 137, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 100, paras. 127 and 131.

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 (...). 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 (...).

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.

135 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, *supra* note 100, para. 154, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 100, paras. 131 to 132.

136 Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 100, para. 132.

137 Cf. CEADUC Anthropological Report, 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, folio 741.

138 Testimony of Gerardo Larrosa before notary public on March 25, 2010 (merits file, tome II, folios 604 to 609), folio 605.

139 Cf. Testimony of Gerardo Larrosa, *supra* note 138, folio 607, and testimony of Maximiliano Ruíz, provided during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru,

140 Cf. Testimony of Maximiliano Ruíz, *supra* note 139.

[...]

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

[...]

157. (...) 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 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 (...).

[...]

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

[...]

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

179 Cf. *mutatis mutandis*, Case of the Saramaka People v. Suriname, *supra* note 100, para. 129.

187 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, *supra* note 100, para. 135; Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 100, para. 118, and Case of the Saramaka People v. Suriname, *supra* note 100, para. 120.

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 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

[...]

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 (...).

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.

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

189 Testimony of Rodrigo Villagra Carron, provided during the public hearing on April 14, 2010, during the forty-first special session held in Lima, Peru.

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.

VII. RIGHT TO LIFE (ARTICLE 4.1 OF THE AMERICAN CONVENTION)

[...]

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

196 Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs. Judgment of January 31, 2006. Series C No. 140, para. 124, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra note 100, para. 155.

197 Cf. Case of the Pueblo Bello Massacre, supra note 196, paras. 123 and 124, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra note 100, 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(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), folios 791 to 794.

199 Cf. Report on the expanded on-site visit on September 22, 1992, supra note 198, folios 883 and 884).

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

[...]

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

[...]

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 per person to

200 Communication of the Community addressed to the IBR President of November 11, 1993, (file of appendices to the application, attachment 5, folio 2351).

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.

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]

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 139.

216 Cf. Testimony of Maximiliano Ruíz, *supra* note 139.

they were forbidden to grow crops [and hunt]”²¹⁷ (...). 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

198. The Court recognizes that, in compliance with Decree No. 1830, the State made at least eight deliveries of food²²¹ 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 sustainability²²³ 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

[...]

217 Cf. CEADUC Anthropological Report, *supra* note 137, folio 1740. See also: testimony of Tomás Dermott before notary public (merits file, tome II, folio 597); testimony of Marcelino López, before to notary public (pleadings and motions brief, merits file, tome II) folio 585; testimony of Gerardo Larrosa, *supra* note 138, folio 605, and testimony of Maximiliano Ruíz, *supra* note 139.

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.

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).

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 (...).

1.3. Health

[...]

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.

1.4. Education

[...]

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

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

236 Cf. Testimony of Gerardo Larrosa, *supra* note 138, folio 606.

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.

to ensure that the education is culturally acceptable from an ethnically differentiated perspective.²⁵³

[...]

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 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.

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

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

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, before to notary public (pleadings and motions brief, merits file, tome II), 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.

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.

[...]

X. RIGHTS OF THE CHILD (ARTICLE 19 OF THE AMERICAN 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

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, Preliminary objection, merits, reparations and costs. Judgment of November 24, 2009. Series C No. 211, para. 184, and Case of Chitay Nech et al. v. Guatemala, Preliminary objections, merits, reparations, and costs. Judgment of May 25, 2010. Series C No. 212, 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 286, para. 184, 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. 408.

288 Case of the “Dos Erres” Massacre v. Guatemala, supra note 286, para. 184, and Case of Chitay Nech et al. v. Guatemala, supra note 286, para. 164.

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 (...). 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 (...). 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 (...) 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 Child²⁹¹ establishes an additional and complementary obligation that gives content to Article 19 of the 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

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.

292 Cf. Case of Chitay Nech et al. v. Guatemala, *supra* note 286, para. 167.

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)

[...]

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

293 Cf. Case of Chitay Nech et al. v. Guatemala, supra note 286, para. 168.

298 Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 100, para. 63; Case of the Saramaka People v. Suriname, supra note 100, para. 178, and Case of Tiu Tojin 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 of September 17, 2003. Series to No. 18, para. 103.

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[.]In 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 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.

300 Cf. Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03, of September 17, 2003. Series to No. 18, 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, of January 19, 1984. Series A No. 4, 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.

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)

[...]

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 (...).

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 Mompema* (today *Retiro Kuñatai*). 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 (...), 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.

[...]

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.

[...]

3. Measures of Satisfaction

3.1 *Public act of acknowledgement of international responsibility*

[...]

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

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 286, para. 261, and Case of Manuel Cepeda Vargas v. Colombia, Preliminary objections, merits and reparations. Judgment of May 26, 2010. Series C No. 213, para. 222.

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*

[...]

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 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

[...]

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

307 Cf. Case of Yatama v. Nicaragua, *supra* note 297, para. 253; Case of Tiu Tojín v. Guatemala, Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127, para. 108, and Case of Chitay Nech et al. v. Guatemala, *supra* note 286, para. 245.

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

[...]

306. Lastly, given the difficulties that the members of the Community have to access health clinics (...), 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

[...]

5.3. 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

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).

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, 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 (...).

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.

[...]

6. Compensation

[...]

6.2. *Non-pecuniary damage*

309 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. 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, Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 339.

310 Cf. Case of Almonacid Arellano et al. v. Chile, Preliminary objection, merits, reparations and costs. Judgment of September 26, 2006. Series C No. 154, 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, Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 339.

[...]

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 (...). 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.

[...]

XIII. OPERATIVE PARAGRAPHS

337. Therefore,

314 Case of the Yakye Axa Indigenous Community v. Paraguay, *supra* note 100, 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 100, paras. 201 and 202.

THE COURT

DECIDES,

[...]

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, (...).
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, (...).
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 (...).
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, (...).
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 the manner and within the time indicated (...).
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 (...).
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 (...).
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, (...).
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, (...).
24. The State must implement, within one year of notification of this judgment at most, a registration and documentation program, (...).
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, (...).
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, (...).
27. The State must, within two years of notification of this judgment, pay the amounts established (...) as compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expenses, as appropriate, (...).
28. The State must establish a community development fund (...), and set up a committee to operate the fund, (...).
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.

[...]

*Inter-American Court of
Human Rights*

*Kichwa Indigenous People
of Sarayaku v. Ecuador*

Merits and Reparations

*Judgment of
June 27, 2012*



[...]

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

[...]

2. According to the Commission, this case concerns, among other matters, the granting by the State of a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku (hereinafter “the Sarayaku People” or “the People” or “Sarayaku”) in the 1990s, without previously consulting them and without obtaining their consent. Thus, the company began the exploration phase, and even introduced high-powered explosives in several places on indigenous territory, thereby creating an alleged situation of risk for the population because, for a time, this prevented them from seeking means of subsistence and limited their rights to freedom of movement and to cultural expression. In addition, this case relates to the alleged lack of judicial protection and the failure to observe judicial guarantees.

[...]

VIII. MERITS

VIII.1. RIGHTS TO CONSULTATION AND TO INDIGENOUS COMMUNAL PROPERTY

[...]

B. The obligation to guarantee the right to consultation in relation to the rights to indigenous communal property and cultural identity of the Sarayaku People

B.1 The right to communal indigenous property

145. Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these.¹⁵⁶ The indigenous peoples have a

156 Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 148, and Case of the Xákmok Kásek Indigenous Community v. Paraguay, para. 85. Also, Inter-American Commission, Follow-up Report

community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community.¹⁵⁷ These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.¹⁵⁸

146. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.¹⁵⁹

147. Furthermore, lack of access to their territories may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities;¹⁶⁰ or from having access to their traditional health systems and other socio-cultural functions, thereby exposing them to poor or inhuman living con-

– Access to justice and Social Inclusion: The road towards strengthening democracy in Bolivia Doc. OAS/Ser/LV/II.135, Doc. 40, August 7, 2009, para. 156.

157 Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 140, and Case of the Xákmok Kásek Indigenous Community v. Paraguay paras. 85 to 87.

158 Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay, para. 120, and Case of the Xákmok Kásek Indigenous Community v. Paraguay, para. 87.

159 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs, paras. 124, 135 and 137, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, paras. 118 and 121.

160 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs, para 164.

ditions and to increased vulnerability to diseases and epidemics, and subjecting them to situations of extreme vulnerability that can lead to the violation of various human rights, as well as causing them suffering and jeopardizing the preservation of their way of life, customs and language.¹⁶¹

B.2 The special relationship of the Sarayaku People with their territory

148. In order to determine the existence of a relationship between indigenous peoples and communities and their traditional lands, the Court has established: i) that this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and ii) that the relationship with the land must be possible. The ways in which this relationship is expressed may include traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or gathering; use of natural resources associated with their customs or other elements characteristic of their culture.¹⁶² The second element implies that Community members are not prevented, for reasons beyond their control, from carrying out those activities that reveal the enduring nature of their relationship with their traditional lands.¹⁶³

149. In this case, the Court notes that there is no doubt regarding the Sarayaku People's communal ownership of their territory, which is exercised in a time-honored and ancestral manner. This was expressly recognized by the State by the award made on May 12, 1992 (...).

[...]

155. The proven and undisputed facts in this case allow the Court to consider that the Kichwa People of Sarayaku have a profound and special relationship with their ancestral territory, which is not limited to ensuring their subsistence, but rather encompasses their own worldview and cultural and spiritual identity.

[...]

161 Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay, paras. 73.61 to 73.74, and Case of the Xákmok Kasek Indigenous Community v. Paraguay, paras. 205, 207 and 208.

162 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs, para. 154, and Case of the Xákmok Kásek Indigenous People v. Paraguay, para. 113.

163 Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay, para. 132, and Case of the Xákmok Kásek Indigenous People v. Paraguay, para. 113.

B.4 *The State's obligation to guarantee the right to consultation of the Sarayaku People*

159. The Court observes that, in general, the close relationship between the indigenous communities and their land has an essential component, which is their cultural identity based on their specific worldviews, which, as distinct social and political actors in multicultural societies, must receive particular recognition and respect in a democratic society. Respect for the right to consultation of indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity (...), which must be assured, in particular, in a pluralistic, multicultural and democratic society.¹⁷⁷

160. Based on all the above, one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is established in ILO Convention No. 169, and other complementary international instruments.¹⁷⁸

177 In this regard, for example, in its Judgment C-169/01, the Constitutional Court of Colombia declared: "The Court has already stated that "pluralism establishes the conditions to ensure that the axiological content of constitutional democracy has a place in democracy and a democratic foundation. In sum, the free and popular choice of the best values is justified formally by the possibility of choosing other values without restriction and substantively by the reality of a higher ethic". (Judgment C-089/94 *ibid.*). The same judgment indicated that the democratization of the State and society prescribed by the Constitution is related to a progressive effort of historical construction, during which it is essential that the public domain, and with this the political system, are open to constant recognition of new social actors. Consequently, it is only possible to speak of a true, representative and participative democracy when the formal and substantive composition of the system maintains an adequate correlation to the diverse forces of which society is composed, and allows all of them to participate in the adoption of decisions that concern them. This is particularly important in a social rule of law, which presupposes the existence of a profound interrelationship between the traditionally separate concepts of "State" and "Civil Society," and which seeks to overcome the traditional notion of democracy, seen simply as formal government of the majority, in order to better adapt it to the reality and include within the public debate, as active subjects, different social groups, minorities or those in the process of consolidation, thereby fostering their participation in decision-making processes at all levels.

178 Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, para. 134. Also see ILO Convention No. 169, articles 6 and 17, and the United Nations Declaration on the Rights of Indigenous Peoples, Articles 19, 30(2), 32(2) and 38.

161. On other occasions,¹⁷⁹ this Court has indicated that human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions. This evolutionary interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties. Thus, the Court has stated that, when interpreting a treaty, it is necessary to take into account not only the agreements and instruments formally related to it (Article 31.2 of the Vienna Convention), but also the system of which it forms part (Article 31.3 of this instrument).¹⁸⁰ This Court has also considered that it could “address the interpretation of a treaty provided it is directly related to the protection of human rights in a Member State of the inter-American system,”¹⁸¹ even if that instrument does not belong to the same regional system of protection.¹⁸² Thus, the Court has interpreted Article 21 of the Convention in the light of domestic law concerning the rights of

179 Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/97 of November 14, 1997. Series A No. 15, para. 114, Case of the “Street Children” (Villagrán Morales et al.), Merits, para. 193, and Case of the Gómez Paquiyauri Brothers. Merits, reparations and costs, Judgment of July 8, 2004. Series C No 110, para. 165.

180 Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, para. 113; Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala, Merits, paras 192 and 193, and Case of Bueno Alves v. Argentina. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 164, para. 78.

181 “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 21; Interpretation of the American Declaration on Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 44, and Juridical Status and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 22.

182 Cf. Juridical Status and Human Rights of the Child, para. 22. See also The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, para. 109, and “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), paras. 14, 32 and 38. Furthermore, “no good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system.” “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), para. 48, and Juridical Status and Human Rights of the Child, para. 22.

members of the indigenous and tribal peoples in cases involving Nicaragua,¹⁸³ Paraguay¹⁸⁴ and Suriname,¹⁸⁵ for example, also taking into account ILO Convention No 169.¹⁸⁶

162. In this regard, the reiterated case law of this Court since the Case of the Yakye Axa Indigenous People v. Paraguay, is applicable to this case: Given that the instant case concerns the rights of members of an indigenous community, the Court finds it appropriate to recall that, under Articles 24 (Right to Equal Protection) and 1.1 (Obligation to Respect Rights) of the American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of those individuals who are not subject to their jurisdiction. However, it is necessary to emphasize that in order to ensure those rights effectively, when interpreting and applying their domestic law, the States must take into account the particular characteristics that distinguish the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as indeed it will in the instant case, to assess the scope and content of the articles of the American Convention that the Commission and the representatives claim were violated by the State.¹⁸⁷

163. ILO Convention No. 169 concerning Indigenous and Tribal Peoples of 1989 applies, inter alia, to “the tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations,”¹⁸⁸ and for whom States “shall have the responsibility of developing, with the participation of the peoples concerned, coordinated and systematic

183 Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, paras. 148 to 153.

184 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs, paras. 138 and 139, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, paras. 122 and 123, and Case of the Xákmok Kásek Indigenous Community v. Paraguay, para. 143.

185 Cf. Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs, paras. 106 and 117, and Case of the Moiwana Community v. Suriname, Preliminary objections, merits, reparations and costs, para. 86.39 to 86.41.

186 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs, paras. 125 to 130; Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs, paras. 93 and 94, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, paras. 117.

187 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs, para. 51, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, paras. 59-60.

188 ILO. Convention No. 169, article 1.1.a.

actions to protect the rights of these peoples and to guarantee respect for their integrity.”¹⁸⁹ Articles 13 to 19 of this Convention refer to the rights of those populations to their land and territories,” and Articles 6, 15, 17, 22, 27 and 28 regulate the different situations in which prior, free and informed consultations should be applied in cases where measures are contemplated that affect them.

164. Several Member States of the Organization of American States have incorporated these standards in their domestic laws and through their highest courts. (...).

165. (...) nowadays the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are about to be affected is an obligation that has been clearly recognized. Such processes must respect the particular consultation system of each people or community, so that it can be understood as an appropriate and effective interaction with State authorities, political and social actors and interested third parties.

166. The obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative measure that may affect their rights, as recognized under domestic and international law, as well as the obligation to guarantee the rights of indigenous peoples to participate in decisions on matters that concern their interests, is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1.1). This entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights.²¹⁶ This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards.²¹⁷ Thus, States must

189 ILO. Convention No. 169, article 2.

216 Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166, and Case of the Barrios Family v. Venezuela. Merits, reparations and costs. Judgment of November 24, 2011. Series C No. 237, para. 47.

217 In that regard, article 6.1 of ILO Convention No. 169 states that “[i]n applying the provisions of this Convention, governments shall: a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly [and] b) establish means by which the peoples concerned can freely participate, [...] at all levels of decision-making in elective institutions and administrative and other bodies responsible for

incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.

167. Given that the State must guarantee these rights to consultation and participation at all stages of the planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival as a people, these dialogue and consensus-building processes must be conducted from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. In this regard, the State must ensure that the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests. Therefore, as applicable, the State must also carry out the tasks of inspection and supervision of their application and, when pertinent, deploy effective means to safeguard those rights through the corresponding judicial organs.²¹⁸

[...]

171. The effective protection of indigenous communal property, in the terms of Article 21 of the Convention in relation to Articles 1.1 and 2 of this instrument, imposes on States the positive obligation to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied. Thus, in keeping with Article 29.b) of the Convention, the provisions of Article 21 of this instrument must be interpreted in conjunction with other rights recognized by the State in its domestic laws or in other relevant international norms.²²³ Under international law, indigenous people cannot be denied the

policies and programs which concern them." In addition, Article 36.2 of the United Nations Declaration on the Rights of Indigenous Peoples establishes that "States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right." Article 38 of this instrument establishes that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

218 Cf. Articles 6, 15, 17.2, 22.3, 27.3, and 28 of ILO Convention No. 169, and articles 15.2, 17.2, 19, 30.2, 32.2, 36.2 and 38 of the United Nations Declaration on the Rights of Indigenous Peoples.

223 For example, Ecuador had ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Thus, under Article 1 common to both

right to enjoy their own culture, which consists of way of life strongly associated with the land and the use of its natural resources.²²⁴

[...]

B.5 Application of the right to consultation of the Sarayaku People in this case

177. The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community.²³⁶ Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.

agreements, indigenous peoples may "pursue their economic, social and cultural development" and "freely dispose of their natural wealth and resources" so that they are not "deprived of their own means of subsistence." Similarly, see *Case of the Saramaka People v. Suriname*, Preliminary objections, merits, reparations and costs, paras. 93 to 95. See also *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, para. 37, and *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, paras. 113 to 115 (supporting an interpretation of international human rights instruments that takes into consideration the progressive development of the corpus juris of international human rights over time and its current status).

224 Cf. *Case of the Saramaka People v. Suriname*, Preliminary objections, merits, reparations and costs, paras. 91, 92, 94 and 95. See also *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 149.

236 Cf. *Case of the Saramaka People v. Suriname*, Preliminary objections, merits, reparations and costs, para. 134.

178. Thus, it is necessary to determine the manner and sense in which the State had an obligation to guarantee the Sarayaku People's right to consultation and whether the actions of the concessionaire company, which the State described as forms of "socialization" or attempts to reach an "understanding," satisfy the minimum standards and essential requirements of a valid consultation process with indigenous communities and peoples in relation to their rights to communal property and cultural identity. To this end, the Court must analyze the facts, recapitulating some of the essential elements of the right to consultation, taking into account inter-American case law and norms, State practice, and the evolution of international law. This analysis will be made as follows: a) the prior nature of the consultation; b) good faith and the aim of reaching an agreement; c) appropriate and accessible consultation; d) the environmental impact assessment, and e) informed consultation.

179. It should be clarified that it is the obligation of the State – and not of the indigenous peoples – to prove that all aspects of the right to prior consultation were effectively guaranteed in this specific case.

a) Consultation must be carried out in advance

180. Regarding the moment at which the consultation should be carried out, article 15(2) of ILO Convention No. 169 indicates that "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any program for the exploration or exploitation of such resources on their lands." On this point, this Court has observed that consultation should take place, in accordance with the inherent traditions of the indigenous people, during the first stages of the development or investment plan and not only when it is necessary to obtain the community's approval, if appropriate, because prior notice allows sufficient time for an internal discussion within the community to provide an appropriate answer to the State.²³⁷

237 Cf. Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs para. 134. Similarly, article 32.2 of the United Nations Declaration on the Rights of Indigenous Peoples stipulates that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, use or exploitation of mineral, water or other resources". United Nations Declaration on the Rights of Indigenous Peoples, article 32.2. See also expert opinion of Rodolfo Stavenhagen of June 24, 2011 (File of affidavits of the Representatives of the Presumed victims, tome 19, folio 10130).

181. In this regard, when examining a complaint that alleged non-observance of ILO Convention No. 169 by Colombia, the ILO Committee of Experts established that the requirement of prior consultation means that this must take place before taking the measure or implementing the project that may affect the communities, including legislative measures, and that the affected communities must be involved in the process as soon as possible.²³⁸ In the case of consultation prior to the adoption of a legislative measure, the indigenous peoples must be consulted in advance during all stages of the process of the producing the legislation, and these consultations must not be restricted to proposals.²³⁹

[...]

b) Good faith and the aim of reaching an agreement

185. According to the provisions of ILO Convention No. 169, consultations must be “carried out [...] in good faith and in a manner appropriate to the circumstances, with the aim of reaching an agreement or obtaining consent regarding the proposed measures.”²⁴²

238 Cf. Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT), GB.276/17/1; GB.282/14/3 (1999), para. 90. Similarly, ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Individual Observation concerning Convention No. 169, Argentina, 2005, para. 8. Also, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, of October 5, 2009, A/HRC/12/34/Add.6, Appendix A, paras. 18 and 19.

239 Cf. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 20.

242 ILO Convention No. 169, art. 6.2. Similarly, see *Case of the Saramaka People v. Suriname*, Preliminary objections, merits, reparations and costs para. 134. For its part, the Universal Declaration states that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them [...].” United Nations Declaration on the Rights of Indigenous Peoples (articles 19 and 32.2)

186. In addition, the consultation must not only serve as a mere formality, but rather it must be conceived as “a true instrument for participation,”²⁴³ “which should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between the parties.”²⁴⁴ Thus, it is an inherent part of every consultation with indigenous communities that “a climate of mutual trust be established,”²⁴⁵ and good faith requires the absence of any form of coercion by the State or by agents or third parties acting with its authority or acquiescence. Furthermore, consultation in good faith is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community, all of which are contrary to international standards. (...).

243 Report of the Committee set up examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Federal District Engineers Union (SENGE/DF), 2006, GB.295/17; GB.304/14/7, para. 42.

244 ILO, CEACR, Individual Observation concerning Convention No. 169, Bolivia, 2005. See United Nations, Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3, 17 February 2005. In this report, the Permanent Forum on Indigenous Issues established that informed consent: “should imply that information is provided that covers (at least) the following aspects: a. The nature, size, pace, reversibility and scope of any proposed project or activity; b. The reason(s) for or purpose(s) of the project and/or activity; c. The duration of the above; d. The locality of areas that will be affected; e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); g. Procedures that the project may entail.” Individual Observation concerning Convention No. 169, Bolivia, 2005. See United Nations, Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3, February 17, 2005. See also, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, paras. 21 and 23.

245 Report of the Committee set up examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Federation of Rural and Urban Workers (FTCC), GB.294/17/1; GB.299/6/1 (2005), para. 53. See also, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 25.

187. It should be emphasized that the obligation to consult is the responsibility of the State;²⁴⁸ therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted.²⁴⁹

[...]

c) Adequate and accessible consultation

201. This Court has established in other cases that consultations with indigenous peoples must be undertaken using culturally appropriate procedures; in other words, in keeping with their own traditions.²⁶³ For its part, ILO Convention No. 169 provides that “governments shall (...) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions,”²⁶⁴ and take “measures [...] to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means,” taking into account their linguistic diversity, particularly in those areas where the official language is not spoken by a majority of the indigenous population.²⁶⁵

248 ILO Convention No. 169, Article 6; United Nations Declaration on the rights of indigenous peoples, Article 19; Case of the Indigenous People of Saramaka v. Suriname, Preliminary objections, merits, reparations and costs, paras. 102, 129 and 131. See also, affidavit provided by Rodolfo Stavenhagen on June 24, 2011 (file of affidavits of the representatives of the presumed victims, tome 19, folio 10131).

249 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, A/HRC/12/34 of 14 July 2009, paras. 53 to 55.

263 Cf. *mutatis mutandi*, Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs, para. 130

264 ILO Convention No. 169, article 6.1.a. Similarly, article 30.2 of the United Nations Declaration of the Rights of Indigenous Peoples stipulates that “States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.”

265 Cf. ILO Convention No. 169, article 12. For its part, the United Nations Declaration of the Rights of Indigenous Peoples establishes in Article 36.2 that “States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.”

202. Similarly, the ILO Committee of Experts on the Application of Conventions and Recommendations has indicated that the expression “appropriate procedures” should be understood with reference to the purpose of the consultation, and that therefore there is no single model for an appropriate procedure, which should “take into account the national circumstances and those of the indigenous peoples, as well as [, contextually,] the nature of the measures under consultation.”²⁶⁶ Thus, such procedures must include, in keeping with systematic and pre-established criteria, the different forms of indigenous organization, provided these respond to the internal processes of these peoples.²⁶⁷ Ap-

266 ILO, Report of the Committee set up examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Federal District Engineers Union (SENGE/DF), GB.295/17; GB.304/14/7 (2006), para. 42. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has added that “international standards do not impose pre-established criteria for creating bodies and mechanisms to implement the requirement of consultation, which must respond to the particular characteristics and constitutional systems of each country. However, it can be understood that the gradual establishment of such bodies and mechanisms is one of the duties derived from the ratification of Convention No. 169 and other international norms, taking into account the minimum requirements of good faith, adaptation and representation mentioned previously. Where such mechanisms do not formally exist, transitory or ad hoc mechanisms must be adopted with a view to the effective exercise of indigenous consultations” (para. 37). Furthermore, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples stated that the “appropriate nature of the consultation with indigenous communities through their representative institutions does not respond to a univocal formula but depends to a great extent on the scope or sphere of the specific measure which is the object and ultimate goal of the consultation.” Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 28

267 Report of the Committee set up examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Authentic Workers Front (FAT) GB.283/17/1 (2001), para. 109. Similarly, the Report of UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, states that “[i]n light of these essential criteria of representativeness, it can be stated that they: i) are contextually dependent on the scope of the measures to be consulted; ii) must abide by systematic and pre-established criteria; iii) must include different forms of indigenous organization, provided that these are consistent with the internal processes of these peoples; and iv) based on principles of proportionality and non-discrimination, must respond to a range of identity, geographic and gender perspectives.” Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 31

propriateness also implies that the consultation has a temporal dimension, which again depends on the specific circumstances of the proposed action, taking into account respect for indigenous forms of decision-making.²⁶⁸ (...)

[...]

d) Environmental Impact Assessment

204. In relation to the obligation to conduct environmental impact assessments, article 7.3 of ILO Convention No. 169 states that “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.”

205. Conducting such studies constitutes a safeguard to guarantee that the constraints imposed on the indigenous or tribal communities with regard to their right to property when concessions are granted within their territory do not entail a denial of their survival as a people (...). Thus, the Court has established that the State must guarantee that no concession will be granted within the territory of an indigenous community unless and until independent and technically competent bodies, under the supervision of the State, have made a prior environmental and social impact assessment.²⁷¹ The Court has also determined that environmental impact assessments “serve to evaluate the possible damage or impact that a proposed development or investment project may have on the property

268 Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Unitary Workers Union (CUT), GB.276/17/1; GB.282/14/3 (1999), para 79. Similarly, see the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, October 5, 2009, A/HRC/12/34/Add.6, Appendix A, para. 33. In addition, “the time required by the country’s indigenous communities to carry out their decision making processes and to participate effectively in the decisions taken in a manner adapted to their cultural and social models must be taken into consideration. [...] if this is not taken into account, it will be impossible to comply with the fundamental requirements of prior consultation and participation.”

271 Cf. *Mutatis mutandi*, Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs, para. 130.

and community in question. Their purpose is not [only] to have some objective measure of the possible impact on the land and the people, but also (...) to ensure that the members of the community (...) are aware of the potential risks, including the environmental and health risks," so that they can decide whether to accept the proposed development or investment plan "knowingly and voluntarily."²⁷²

206. In addition, the Court has established that environmental impact assessments must be made in conformity with the relevant international standards and best practices;²⁷³ respect the indigenous peoples' traditions and culture, and be completed before the concession is granted, since one of the objectives of requiring such studies is to guarantee the right of the indigenous people to be informed about all proposed projects on their territory.²⁷⁴ Therefore, the State's obligation to supervise the environmental impact assessment is consistent with its obligation to guarantee the effective participation of the indigenous people in the process of granting concessions. The Court also indicated that one of the points that should be addressed in the environmental and social impact assessment is the cumulative impact of existing and proposed projects.²⁷⁵

207. In this case, the Court observes that the environmental impact plan: a) was prepared without the participation of the Sarayaku People; b) was implemented by a private entity subcontracted by the oil company, without any evidence that it had subsequently been subject to strict control by State monitoring agencies, and c) did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People. Therefore, the Court concludes that the environmental impact plan was not implemented in accordance with its case law or the relevant international standards.

e) The consultation must be informed

208. As indicated previously, the consultation must be informed, in the sense that the indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks. Thus, prior consultation requires that the State receive and provide information, and involves constant communication between the parties. (...).

272 Cf. Case of the Saramaka People v. Suriname. Interpretation of judgment, para. 40.

273 Cf. Case of the Saramaka People v. Suriname. Interpretation of judgment, footnote 23.

274 Cf. Case of the Saramaka People v. Suriname. Interpretation of judgment, para. 41.

275 Cf. Case of the Saramaka People v. Suriname. Interpretation of judgment, para 41.

[...]

211. In conclusion, the Court has verified that the State did not conduct an appropriate and effective process that would guarantee the right to consultation of the Sarayaku People before undertaking or authorizing the program of exploration or exploitation of resources on their territory. As analyzed by the Court, the oil company's actions have not complied with the minimum requirements of a prior consultation. In short, the Sarayaku People were not consulted by the State before the company carried out oil exploration activities, planted explosives or adversely affected sites of special cultural value. All this was acknowledged by the State and, in any case, has been verified by the Court from the evidence submitted.

B.6 The rights to consultation and to communal property in relation to the right to cultural identity

212. Regarding the above, the Court has recognized that “[disregard for the ancestral right of indigenous communities over their territories could affect other basic rights, such as the right to cultural identity and the very survival of indigenous communities and their members.”²⁷⁸ Given that the effective enjoyment and exercise of the right to communal ownership of the land “guarantees that indigenous communities conserve their heritage,²⁷⁹ States must respect that special relationship in order to guarantee their social, cultural and economic survival.²⁸⁰ Moreover, the close relationship that exists between indigenous peoples and their land and their traditions, customs, languages, arts, rituals, knowledge and other aspects of their identity has been recognized, noting that “[b]ased on their environment, their integration with nature and their history, the members of indigenous communities transmit this non-material cultural heritage from one generation to the next, and it is constantly recreated by the members of the indigenous groups and communities.”²⁸¹

213. Under the principle of non-discrimination established in Article 1.1 of the Convention, recognition of the right to cultural identity is an ingredient and a crosscutting means

278 Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs. para. 147. See also General Assembly, Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen. A/HRC/6/15, of 15 November 2007, para. 43.

279 Cf. Case of the Yakye Axa Indigenous Community. Merits, reparations and costs. para. 146.

280 Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, para. 91.

281 Cf. Case of the Yakye Axa Indigenous Community. Merits, reparations and costs, para. 154.

of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29.b thereof, also by domestic law.

214. In this regard, Principle 22 of the Rio Declaration on Environment and Development has recognized that: Indigenous people and their communities, as well as other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

215. Two international instruments are particularly relevant to the recognition of the right to cultural identity of indigenous peoples: ILO Convention No. 169 on indigenous and tribal rights²⁸² and the United Nations Declaration on the Rights of Indigenous Peoples.²⁸³ Various international instruments of UNESCO also address the right to culture and cultural identity.²⁸⁴

282 Article 2.2.b: "Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action [...] Such action shall include measures for (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions." Article 4.1: "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned." Article 5: "In applying the provisions of this Convention: a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; b) the integrity of the values, practices and institutions of these peoples shall be respected."

283 A/Res/61/295, 10 December 2007, UN General Assembly Resolution 61/295. Article 8.1 "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." Article 8.2: "States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities [...]." Article 11: "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures [...]." Article 12.1: "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites [...]."

284 Cf. UNESCO Universal Declaration on Cultural Diversity, 2001; UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it; Declaration of Mexico on cultural poli-

216. For their part, both the African Commission on Human and Peoples' Rights, in cases alleging the violation of Articles 17.2 and 17.3 of the African Charter on Human and Peoples' Rights,²⁸⁵ and the Committee on Economic, Social and Cultural Rights (CESCR)²⁸⁶ and, to some extent, the European Court of Human Rights in cases re-

cies, World Conference on Cultural Policies; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. In addition, see UNESCO conventions and recommendations relating to culture or cultural identity that mention indigenous peoples: Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005.

285 In Communication No. 276/2003, the African Commission on Human and Peoples' Rights declared: "protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity. [... The Commission] notes that Article 17 of the [African] Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus takes culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics (para. 241). It also observed: "By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent state have created a major threat to the Endorois pastoralist way of life." The African Commission also indicated that the State "has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions." Considering that "the Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake," the African Commission concluded that the State had violated Articles 17.2 and 17.3 of the Charter, finding that "the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory" (paras. 250 and 251).

286 "The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, wellbeing and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must

garding minorities,²⁸⁷ have referred to the right to cultural identity and the collective dimension of the cultural life of native, indigenous, tribal and minority peoples and communities.

217. The Court considers that the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society.²⁸⁸ This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization. Similarly, ILO Convention No. 169 recognizes the aspirations of indigenous peoples to "exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."²⁸⁹

therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories." Economic and Social Council, *E/C.12/GC/21/Rev.1*, para. 36.

287 In the Case of *Chapman v. the United Kingdom* (No. 27238/95 ECHR 2001-I), the Court acknowledged that Article 8 protects the right of a minority ("Gypsy") to maintain its identity (para. 93). In the Case of *Gorzelik and others v. Poland* (No. 44158/98, para. 92, February 17, 2004), the European Court observed that the need to protect cultural identity is also important for the proper functioning of a democracy. References to all the cases mentioned in this paragraph are found in "Cultural Rights in the case-law of the European Court of Human Rights," Research division ECHR, January 2011, pp. 9 to 12.

288 The 2007 United Nations Declaration on the Rights of Indigenous Peoples, widely accepted with the adhesion of 143 States (including Ecuador), includes the right of these Peoples to freely determine their political situation, to freely pursue their economic, social and cultural development, to participate in the adoption of decisions that affect them, and to participate fully, if they so wish, in the political, economic, social and cultural life of the State (Articles 3, 4, 5, 18, 19, 20, 23, 32, 33 and 34). In the specific case of Ecuador, the recognition of this right is so clear that, today, the 2008 Constitution itself recognizes the right to self-determination in different ways, among others, by declaring that all indigenous communes, communities, peoples and nations have the right to "maintain, develop and strengthen their identity, sense of belonging, ancestral traditions and forms of social organization and, to that end, the Constitution guarantees the respect and promotion of the customs and identities of indigenous peoples in all aspects of life," and in the case of the "peoples living in voluntary isolation," the State "shall adopt measures to guarantee their lives, ensure respect for their self-determination and their wish to remain in isolation and protect the observance of their rights."

289 ILO Convention No. 169. Fifth preambular paragraph.

[...]

219. Given the importance that sites of symbolic value have for the cultural identity of the Sarayaku People and their worldview, as a collective entity, several of the statements and expert opinions provided during the proceedings indicate the strong bond that exists between the elements of nature and culture, on the one hand, and each member of the People's sense of being, on the other. This also highlights the profound impact on the social and spiritual relationships that members of the community may have with the different elements of the natural world that surrounds them, when these are destroyed or harmed.

220. The Court considers that the failure to consult the Sarayaku People affected their cultural identity, since there is no doubt that the intervention in and destruction of their cultural heritage entailed a significant lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great concern, sadness and suffering among them.

B.7 Obligation to adopt provisions of domestic law

221. The Court recalls that Article 2 of the Convention requires the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms protected by the Convention.²⁹³ In other words, the States not only have the positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights established in the Convention, but must also avoid enacting laws that prevent the free exercise of those rights, and ensure that laws that protect these rights are not annulled or amended.²⁹⁴ In sum, "the State has the obligation to adopt the necessary measures to make the exercise of the rights and freedoms recognized by the Convention effective."²⁹⁵

[...]

293 Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs. Judgment of January 29, 1997. Series C No. 12, para. 50, and Case of Chocrón Chocrón v. Venezuela, Preliminary objection, merits, reparations and costs. Judgment of July 1, 2011. Series C No. 227, para 140.

294 Cf. Case of Chocrón Chocrón v. Venezuela, para. 140, and Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 207

295 Cf. Case of the Massacre of Las Dos Erres v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of November 24, 2009. Series C No. 211, para. 240.

B.10 Conclusion

231. On previous occasions, in cases concerning indigenous and tribal communities or peoples, the Court has declared violations to the detriment of the members of indigenous or tribal communities and peoples.³⁰⁰ However, international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples.³⁰¹ In view of the fact that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated in this Judgment should be understood from that collective perspective.

300 Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; *Case of the Moiwana Community v. Suriname*, Preliminary objections, merits, reparations and costs; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, reparations and costs; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*; *Case of the Saramaka People v. Suriname*, Preliminary objections, merits, reparations and costs, and *Case of the Xákmok Kásek Indigenous People v. Paraguay*.

301 Thus, for example, Article 1 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples establishes that: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." Article 3.1 of ILO Convention No. 169 states that: "Indigenous and tribal peoples shall enjoy the full measure of 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." Similarly, the Committee on Economic, Social and Cultural Rights, in General Comment No. 17 of November 2005, expressly stated that the right to benefit from the protection of the moral and material interests resulting from scientific, literary or artistic production also applies to indigenous peoples as collective subjects and not only to their members as individuals (paras. 7, 8 and 32). Subsequently, in General Comment No. 21 of 2009, the Committee interpreted that the expression "everyone" in Article 15.1.a) of the Convention "may denote both the individual and the collective subject. 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 a group" (para. 8). In addition, other regional protection instruments, such as the 1986 African Charter on Human and Peoples' Rights, have established special protection for certain rights of tribal peoples based on the exercise of collective rights. See, inter alia, the African Charter on Human and Peoples' Rights: Article 20 which protects the right to life and self-determination of peoples; Article 21 which protects the right to freely dispose of their land and natural resources, and Article 22 which guarantees the right to development.

232. The State, by failing to consult the Sarayaku People on the execution of a project that would have a direct impact on their territory, failed to comply with its obligations, under the principles of international law and its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity. Consequently, the Court finds that the State is responsible for the violation of the right to communal property of the Sarayaku People recognized in Article 21 of the Convention, in relation to the right to cultural identity, in the terms of Articles 1.1 and 1.2 of this instrument.

[...]

*IX. REPARATIONS (APPLICATION OF ARTICLE 63.1 OF THE AMERICAN CONVENTION)*³³⁵

[...]

B.2 Guarantees of non-repetition

a) Due prior consultation

[...]

299. (...) in the present case, the Court has determined that the State is responsible for the violation of the right to communal property of the Sarayaku People, because it failed to guarantee their right to consultation adequately. Consequently, as a guarantee of non-repetition, the Court stipulates that, in the event that the State should seek to carry out activities or projects for the exploration or extraction of natural resources, or any type of investment or development plans that could eventually have an impact on the Sarayaku

335 Article 63.1 of the American Convention states: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

territory or affect essential aspects of their worldview or their life and cultural identity, the Sarayaku People shall be previously, adequately and effectively consulted, in full compliance with the relevant international standards.

300. In this regard, the Court recalls that the processes of participation and prior consultation must be conducted in good faith at all the preparation and planning stages of any project of this nature. Moreover, in keeping with the international standards applicable in such cases, the State must truly ensure that any plan or project that involves, or could potentially affect the ancestral territory, includes prior comprehensive studies on the environmental or social impact, prepared by independent, technically qualified entities, with the active participation of the indigenous communities concerned.

b) Regulation of prior consultation in domestic law

301. Regarding domestic laws that recognize the right to prior, free and informed consultation, the Court has already observed that, in the evolution of the international *corpus juris*, the 2008 Ecuadorian Constitution is one of the most advanced in the world in this area. However, the Court has also noted that the right to prior consultation has not been sufficiently and adequately regulated through appropriate norms for its practical implementation. Thus, under Article 2 of the American Convention, the State must adopt, within a reasonable time, any legislative, administrative or other type of measures that may be necessary to implement effectively the right to prior consultation of the indigenous and tribal peoples and communities, and amend those measures that prevent its full and free exercise and, to this end, the State must ensure the participation of the communities themselves.

c) Training of State officials on the rights of indigenous peoples

302. In this case, the Court has determined that the violations of the rights to prior consultation and cultural identity of the Sarayaku People resulted from the acts and omissions of different officials and institutions that failed to guarantee those rights. The State must implement, within a reasonable time and with the corresponding budgetary allocation, mandatory programs or courses that include modules on the domestic and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as others whose functions involve relations with indigenous peoples, as part of the general and continuing training of officials in the respective institutions, at all hierarchical levels.

B.3 Measures of satisfaction

a) Public act of acknowledgment of international responsibility

[...]

305. Although, in this case, the State has already acknowledged its responsibility on Sarayaku territory, as it has in other cases³⁵⁰ and in order to repair the damage caused to the Sarayaku People by the violation of their rights, the Court finds that the State must organize a public act to acknowledge its international responsibility for the violations declared in this Judgment. The determination of the place and method of carrying out this act must be previously consulted and agreed with the People. The act must take place in a public ceremony, in the presence of senior State officials and the members of the People, in the Kichwa and Spanish languages, and must be widely publicized in the media. The State has one year from notification of the Judgment to comply with this measure.

b) Publication and broadcasting of the judgment

[...]

308. Furthermore, the Court considers it appropriate that the State publicize, through a radio station with widespread coverage in the southeastern Amazonian region, the official summary of the Judgment, in Spanish, Kichwa and other indigenous languages of this subregion, with the relevant translation. The radio broadcast must be made on the first Sunday of the month, on at least four occasions. The State has one year from notification of this Judgment to comply with this measure.

C. Compensation for pecuniary and non-pecuniary damage

C.1 Pecuniary damage

[...]

350 Cf. Case of Cantoral Benavides v. Peru. Reparations and costs. Judgment of December 3, 2001. Series C No. 88, para. 81, and Case of Atala Riffo and daughters, para. 263. See also Case of the Moiwana Community, Preliminary objections, merits, reparations and costs, paras. 216 and 217 and Case of the Xákmok Kásek Indigenous People v. Paraguay, para. 297.

b) Considerations of the Court

[...]

315. The Court underlines that the probative elements submitted are not sufficient or specific enough to determine the loss of earnings by members of the Sarayaku People owing to the suspension of their activities during some periods, and for the interruption of the growing and sale of farm products, and for the alleged costs incurred to supplement their diet because of the food shortages during some periods, or for the impact on community tourism. In addition, the Court notes that there is a significant variation in the amounts requested for pecuniary damage in the pleadings and motions brief and in the final written arguments submitted by the representatives. Although this is understandable owing to the difference in the number of families indicated initially, and the number that resulted from the census conducted in Sarayaku, the differences in the criteria used by the representatives to calculate the pecuniary damage are not clear. However, in the circumstances of this case, it is reasonable to presume that these events led to a series of expenses and loss of earnings, which the members of the Sarayaku People had to assume; in addition, their ability to use and enjoy the resources on their territory was affected, particularly due to their restricted access to areas used for hunting, fishing and general subsistence. Moreover, owing to the location and way of life of the Sarayaku People, the difficulty in proving these losses and the pecuniary damage is comprehensible.

316. Also, although no supporting vouchers were presented, it is reasonable to assume that the actions and efforts undertaken by members of the People generated costs that should be considered as consequential damage, particularly with regard to the actions or measures taken to hold meetings with the different public authorities and other communities, to which their leaders or members have had to travel. Based on the foregoing, the Court determines, in equity, compensation for the pecuniary damage, taking into account that: i) members of the Sarayaku People incurred expenses to take measures at the domestic level to demand the protection of their rights; ii) their territory and natural resources were damaged, and iii) the financial situation of the People was affected by the suspension of production activities during certain periods.

317. Consequently, the Court establishes the sum of US\$ 90,000.00 (ninety thousand United States dollars) as compensation for pecuniary damage. This sum must be paid to the Association of the Sarayaku People (*Tayjasaruta*) within one year of notification of this

Judgment, so that the People may decide, in accordance with its own decision-making mechanisms and institutions, how to invest the money, among other aspects, for the implementation of educational, cultural, food security, health and eco-tourism development projects or other community infrastructure or projects of collective interest that the People considers a priority.

C.2 *Non-pecuniary damage*

[...]

b) Considerations of the Court

322. When declaring the violations of the rights to communal property and consultation, the Court took into account the serious impacts suffered by the People owing to their profound social and spiritual relationship with their territory and, in particular, the destruction of part of the forest and certain places of great symbolic value.

323. Bearing in mind the compensation ordered by the Court in other cases, and based on the circumstances of this case, the suffering caused to the People and to their cultural identity, the impact on their territory, particularly due to the presence of explosives, as well as the changes caused in their living conditions and way of life and the other non-pecuniary damage they suffered owing to the violations declared in this Judgment, the Court finds it pertinent to establish, in equity, the sum of US\$1,250,000.00 (one million, two hundred and fifty thousand United States dollars) for the Sarayaku People as compensation for non-pecuniary damage. This amount must be paid to the Association of Sarayaku People (*Tayjasaruta*), within one year of notification of this Judgment, so that the money may be invested as the People see fit, in accordance with its own decision-making mechanisms and institutions, among other aspects, for the implementation of educational, cultural, food security, health care and eco-tourism development projects or other community infrastructure projects or projects of collective interest that the People considers a priority.

[...]

X. *OPERATIVE PARAGRAPHS*

341. Therefore,

THE COURT

DECLARES:

Unanimously, that:

[...]

2. The State is responsible for the violation of the rights to consultation, to indigenous communal property, and to cultural identity, in the terms of Article 21 of the American Convention, in relation to Articles 1.1 and 2 thereof, to the detriment of the Kichwa Indigenous People of Sarayaku, (...).

[...]

AND ORDERS:

Unanimously, that:

1. This Judgment constitutes *per se* a form of reparation.
2. The State must neutralize, deactivate and, if applicable, remove all pentolite left on the surface and buried in the territory of the Sarayaku People, based on a consultation process with the People, (...).
3. The State must consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory, or any investment or development plan of any other type that could involve a potential impact on their territory, (...).
4. The State must adopt necessary the legislative, administrative or any other type of measures to give full effect, within a reasonable time, to the right to prior consultation of the indigenous and tribal peoples and communities and to amend those that prevent its free and full exercise and, to this end, must ensure the participation of the communities themselves, (...).

5. The State must implement, within a reasonable time and with the respective budgetary allocations, mandatory training programs or courses that include modules on the national and international standards concerning the human rights of indigenous peoples and communities, for military, police and judicial officials, as well as other officials whose functions involve relations with indigenous peoples, (...).

[...]

*Human Rights
Committee*

Francis Hopu v. France

Communication No. 549/1993

*Views adopted on
29 July 1997*



1. The authors of the communication are Francis Hopu and Tepoaitu Bessert, both ethnic Polynesians and inhabitants of Tahiti, French Polynesia. They claim to be victims of violations by France of articles 2, paragraphs 1 and 3. a), 14, 17, paragraph 1, 23, paragraph 1, and 27 of the International Covenant on Civil and Political Rights. (...)

THE FACTS AS SUBMITTED BY THE AUTHORS

2.1 The authors are the descendants of the owners of a land tract (approximately 4.5 hectares) called Tetaitapu, in Nuuroa, on the island of Tahiti. They argue that their ancestors were dispossessed of their property by *jugement de licitation* of the *Tribunal Civil d'instance* of Papeete on 6 October 1961. Under the terms of the judgment, ownership of the land was awarded to the *Société hôtelière du Pacifique sud* (SHPS). Since the year 1988, the Territory of Polynesia is the sole shareholder of this company.

2.2 In 1990, the SHPS leased the land to the *Société d'étude et de promotion hôtelière*, which in turn subleased it to the *Société hôtelière RIVNAC*. RIVNAC seeks to begin construction work on a luxury hotel complex on the site, which borders a lagoon, as soon as possible. Some preliminary work - such as the felling of some trees, cleaning the site of shrubs, fencing off of the ground - has been carried out.

2.3 The authors and other descendants of the owners of the land peacefully occupied the site in July 1992, in protest against the planned construction of the hotel complex. They contend that the land and the lagoon bordering it represent an important place in their history, their culture and their life. They add that the land encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground and provides the means of subsistence for some thirty families living next to the lagoon.

2.4 On 30 July 1992, RIVNAC seized the *Tribunal de première instance* of Papeete with a request for an interim injunction; this request was granted on the same day, when the authors and occupants of the site were ordered to leave the ground immediately and to pay 30,000 FPC (Francs Pacifique) to RIVNAC. On 29 April 1993, the Court of Appeal of Papeete confirmed the injunction and reiterated that the occupants had to leave the site immediately. The authors were notified of the possibility to appeal to the Court of Cassation within one month of the notification of the order. Apparently, they have not done so.

2.5 The authors contend that the pursuit of the construction work would destroy their traditional burial ground and ruinously affect their fishing activities. They add that their

expulsion from the land is now imminent, and that the High Commissioner of the Republic, who represents France in Polynesia, will soon resort to police force to evacuate the land and to make the start of the construction work possible. In this context, the authors note that the local press reported that up to 350 police officers (including CRS - *Corps républicain de sécurité*) have been flown into Tahiti for that purpose. The authors therefore ask the Committee to request interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

THE COMPLAINT

3.1 The authors allege a violation of article 2, paragraph 3.a), *juncto* 14, paragraph 1, on the ground that they have not been able to petition lawfully established courts for an effective remedy. In this connection, they note that land claims and disputes in Tahiti were traditionally settled by indigenous tribunals ("*tribunaux indigènes*"), and that the jurisdiction of these tribunals was recognized by France when Tahiti came under French sovereignty in 1880. However, it is submitted that since 1936, when the so-called High Court of Tahiti ceased to function, the State party has failed to take appropriate measures to keep these indigenous tribunals in operation; as a result, the authors submit, land claims have been haphazardly and unlawfully adjudicated by civil and administrative tribunals.

3.2 The authors further claim a violation of articles 17, paragraph 1, and 23, paragraph 1, on the ground that their forceful removal from the disputed site and the realization of the hotel complex would entail the destruction of the burial ground, where members of their family are said to be buried, and because such removal would interfere with their private and their family lives.

3.3 The authors claim to be victims of a violation of article 2, paragraph 1. They contend that Polynesians are not protected by laws and regulations (such as articles R 361. 1) and 361. 2) of the *Code des Communes*, concerning cemeteries, as well as legislation concerning natural sites and archaeological excavations) which have been issued for the *territoire métropolitain* and which are said to govern the protection of burial grounds. They thus claim to be victims of discrimination.

3.4 Finally, the authors claim a violation of article 27 of the Covenant, since they are denied the right to enjoy their own culture.

[...]

EXAMINATION OF THE MERITS

10.1 The Human Rights Committee has examined the present communication in the light of all the information presented to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that they were denied access to an independent and impartial tribunal, in violation of article 14, paragraph 1. In this context, they claim that the only tribunals that could have had competence to adjudicate land disputes in French Polynesia are indigenous tribunals and that these tribunals ought to have been made available to them. The Committee observes that the authors could have brought their case before a French tribunal, but that they deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation. The Committee observes that the dispute over ownership of the land was disposed of by the Tribunal of Papeete in 1961 and that the decision was not appealed by the previous owners. No further step was made by the authors to challenge the ownership of the land, nor its use, except by peaceful occupation. In these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 1.

10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question predate the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of

Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

10.4 As set out in paragraph 7.3 of the decision of 30 October 1995, the Committee has further considered the authors' claim of discrimination, in violation of article 26 of the Covenant, on account of the alleged absence of specific legal protection of burial grounds in French Polynesia. The Committee has noted the State party's challenge to the admissibility of this claim, as well as the subsidiary detailed arguments relating to its merits.

10.5 On the basis of the information placed before it by the State party and the authors, the Committee is not in a position to determine whether or not there has been an independent violation of article 26 in the circumstances of the instant communication.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

12. The Human Rights Committee is of the view that the authors are entitled, under article 2, paragraph 3.a), of the Covenant, to an appropriate remedy. The State party is under an obligation to protect the authors' rights effectively and to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

*Human Rights
Committee*

Poma Poma v. Peru

Communication No. 1457/2006

*Views adopted on
27 March 2009*



[...]

1. The author of the communication, dated 28 December 2004, is Ángela Poma Poma, a Peruvian citizen born in 1950. She claims to be a victim of a violation by Peru of article 1, paragraph 2; article 2, paragraph 3.a); article 14, paragraph 1; and article 17 of the Covenant. The Optional Protocol entered into force for the State party on 3 January 1981. The author is represented by counsel, Tomás Alarcón.

FACTUAL BACKGROUND

2.1 The author and her children are the owners of the “Parco-Viluyo” alpaca farm, situated in the district of Palca, in the province and region of Tacna. They raise alpacas, llamas and other smaller animals, and this activity is their only means of subsistence. The farm is situated on the Andean altiplano at 4,000 metres above sea level, where there are only grasslands for grazing and underground springs that bring water to the highland wetlands. The farm covers over 350 hectares of pasture land, and part of it is a wetland area that runs along the former course of the river Uchusuma, which supports more than eight families.

2.2 In the 1950s, the Government of Peru diverted the course of the river Uchusuma, a measure which deprived the wetlands situated on the author’s farm of the surface water that sustained the pastures where her animals grazed. Nevertheless, the wetlands continued to receive groundwater that came from the Patajpujo area, which is upstream of the farm. However, in the 1970s the Government drilled wells (known as the Ayro wells) to draw groundwater in Patajpujo, which considerably reduced the water supply to the pastures and to areas where water was drawn for human and animal consumption. The author claims that this caused the gradual drying out of the wetlands where llama-raising is practised in accordance with the traditional customs of the affected families, who are descendants of the Aymara people, and which has been part of their way of life for thousands of years.

2.3 In the 1980s, the State party continued its project to divert water from the Andes to the Pacific coast in order to provide water for the city of Tacna. In the early 1990s, the Government approved a new project entitled the Special Tacna Project (Proyecto Especial Tacna (PET)), under the supervision of the National Institute for Development (INADE). This project involved the construction of 12 new wells in the Ayro region, and a plan to build a further 50 wells subsequently. The author observes that this measure accelerated the drainage and degradation of 10,000 hectares of the Aymaras’ pastures and caused

the death of large quantities of livestock. The work was carried out despite the fact that no decision had been taken to approve an environmental impact assessment, which is required under article 5 of the Code on the Environment and Natural Resources. In addition, the wells were not registered in the Water Resources Register kept by the National Institute of Natural Resources (INRENA).

2.4 In 1994 various members of the Aymara community held demonstrations in the Ayro region, which were broken up by the police and armed forces. The author contends that the leader of the community, Juan Cruz Quispe, who prevented the construction of the 50 wells planned under PET, was murdered in the Palca district and that his death was never investigated.

2.5 According to the author, following a series of protests by the indigenous community, including a collective complaint addressed to the Government on 14 December 1997, 6 of the 12 wells built in Ayro were closed down, including well No. 6, which was believed to be especially harmful to the interests of the indigenous community. This well was transferred to the Empresa Prestadora de Servicios de Saneamiento de Tacna, or EPS Tacna, part of the municipal administration.

2.6 The case file contains a copy of a letter from INADE dated 31 May 1999 addressed to INRENA, which is part of the Ministry of Agriculture, as a result of an enquiry from a member of Congress. It indicates that EPS Tacna, in agreement with the former ONERN (now INRENA), had carried out an environmental impact study which had concluded that the foreseeable overall environmental impact was moderate, and that the quantity of underground water resources to be withdrawn would be less than the calculated renewable reserves as established in hydrogeological studies.

[...]

THE COMPLAINT

3.1 The author alleges that the State party violated article 1, paragraph 2, because the diversion of groundwater from her land has destroyed the ecosystem of the altiplano and caused the degradation of the land and the drying out of the wetlands. As a result, thousands of head of livestock have died and the community's only means of survival - grazing and raising llamas and alpacas - has collapsed, leaving them in poverty. The community has therefore been deprived of its livelihood.

3.2 The author also claims that she was deprived of the right to an effective remedy, in violation of article 2, paragraph 3.a), of the Covenant. By requiring the submission of an official report before the judge can open proceedings, the State becomes both judge and party and expresses a view on whether or not an offence has been committed before the court itself does so. She also complains that the Criminal Code contains no provision for the offence of dispossession of waters used by indigenous people for their traditional activities, and states that she has exhausted domestic remedies.

3.3 The author alleges that the facts described constitute of an official report before the judge can open proceedings, the State becomes both judge and party and expresses a view on whether or not an offence has been committed before the court itself does so. She also complains that the Criminal Code contains no provision for the offence of dispossession of waters used by indigenous people for their traditional activities, and states that she has exhausted domestic remedies. interference in the life and activities of her family, in violation of article 17 of the Covenant. The lack of water has seriously affected their only means of subsistence, that is, alpaca- and llama-grazing and raising. The State party cannot oblige them to change their way of family life or to engage in an activity that is not their own, or interfere with their desire to continue to live on their traditional lands. Their private and family life consists of their customs, social relations, the Aymara language and methods of grazing and caring for animals. This has all been affected by the diversion of water.

3.4 She maintains that the political and judicial authorities did not take into account the arguments put forward by the community and its representatives because they are indigenous people, thereby violating their right to equality before the courts under article 14, paragraph 1.

[...]

CONSIDERATION OF THE MERITS

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol. The issue it must clarify is whether the water diversion operations which caused degradation of the author's land violated her rights under article 27 of the Covenant.

7.2 The Committee recalls its general comment No. 23, according to which article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant. Certain of the aspects of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of the members of indigenous communities which constitute a minority. This general comment also points out, with regard to the exercise of the cultural rights protected under article 27, that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.

7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.⁴ In the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child. The author herself is engaged in this activity.

7.4 The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.⁵

4 Lubicon Lake Band v. Canada, *op. cit.*, para. 32.2.

5 Communications Nos. 511/1992 and 1023/2001, *Länsman v. Finland*, Views adopted on 26 October 1994 and 15 April 2005 respectively.

7.5 In the present case, the question is whether the consequences of the water diversion authorized by the State party as far as llama-raising is concerned are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs. In this connection the Committee takes note of the author's allegations that thousands of head of livestock died because of the degradation of 10,000 hectares of Aymara pasture land - degradation caused as a direct result of the implementation of the Special Tacna Project during the 1990s - and that it has ruined her way of life and the economy of the community, forcing its members to abandon their land and their traditional economic activity. The Committee observes that those statements have not been challenged by the State party, which has done no more than justify the alleged legality of the construction of the Special Tacna Project wells.

7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

7.7 In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells. Moreover, the State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant.

7.8 With regard to the author's allegations relating to article 2, paragraph 3.a), the Committee takes note of the case referred by the author to the Tacna Prosecutor No. 1

and the Senior Prosecutor. It observes that, although the author filed a complaint against the EPS Tacna company, the competent criminal court did not allow the case to open because of a procedural error, namely the alleged lack of a report that the authorities themselves were supposed to submit. In the particular circumstances, the Committee considers that the State party has denied the author the right to an effective remedy for the violation of her rights recognized in the Covenant, as provided for in article 2, paragraph 3.a), read in conjunction with article 27.

7.9 In light of the above findings, the Committee does not consider it necessary to deal with the author's complaint of a violation of article 17.

8. In light of the above, the Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 27 and article 2, paragraph 3 (a), read in conjunction with article 27.

9. In accordance with article 2, paragraph 3.a), of the Covenant, the State party is required to provide the author an effective remedy and reparation measures that are commensurate with the harm sustained. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Peru recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is requested to publish the Committee's Views.

*African Commission on
Human and People's Rights*

Ogoni v. Nigeria

Communication No. 155/96

*Decision of
27 May 2002*



[...]

SUMMARY OF FACTS

1. The communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
2. The communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
3. The communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. The communication contains a memo from the Rivers State Internal Security Task Force, calling for 'ruthless military operations'.
4. The communication alleges that the government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The government has withheld from Ogoni communities information on the dangers created by oil activities. Ogoni communities have not been involved in the decisions affecting the development of Ogoniland.
5. The government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has

also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.

6. The communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.

7. The communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.

8. The Nigerian Army has admitted its role in the ruthless operations which have left thousands of villagers homeless. The admission is recorded in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which has devoted itself to the suppression of the Ogoni campaign. One such memo calls for "ruthless military operations" and "wasting operations coupled with psychological tactics of displacement". At a public meeting recorded on video, Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops, how unarmed villagers running from the troops were shot from behind, and the homes of suspected MOSOP activists were ransacked and destroyed. He stated his commitment to rid the communities of members and supporters of MOSOP.

9. The communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to

their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities.

COMPLAINT

10. The communication alleges violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.

[...]

MERITS

43. The present communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the complaint, it would be proper to establish what is generally expected of governments under the [African] Charter and more specifically vis-à-vis the rights themselves.

44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.³

45. At a primary level, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.⁴ With respect to socio

3. See generally, Asbjørn Eide, "Economic, Social and Cultural Rights As Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social, and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers, 1995, pp. 21-40.

4. Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Rajja Hanski and Markku Suksi (eds.), *Second Revised Edition, An Introduction to the International Protection of Human Rights: A Textbook*, 1999, p. 31.

economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights- related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

46. At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies.⁵ This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. (...) This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.

47. The last layer of obligation requires the State to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. (...)

48. Thus, States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1) stipulates exemplarily that States “undertake to take steps (...) by all appropriate means, including particularly the adoption of legislative measures.” Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below.

[...]

52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and

5. Drzewicki, *ibid.*

other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16 (3)[sic]⁹ already noted obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the state for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.¹⁰

53. Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

54. We now examine the conduct of the Government of Nigeria in relation to Article 16 and Article 24 of the African Charter. Undoubtedly and admittedly, the Government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

[...]

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that

9. Editor's note: Article 16 has only two subsections, the Article referenced here should be Article 24

10. See Scott Leckie "The Right to Housing" in Eide, Krause and Rosas, op. cit.

may be perpetrated by private parties (see *Union des jeunes avocats c/Chad*¹²). This duty calls for positive action on [the] part of governments in fulfilling their obligation under human rights instruments. (...).

58. The [African] Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

[...]

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. (...).

61. (...) The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.¹⁵ Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.¹⁶ (...).

12. Communication 74/92 Commission Nationale des Droits de l'Homme et des Libertés/Chad.

15. Scott Leckie, "The Right to Housing" in Eide, Krause and Rosas, *op cit.*, 107-123, at p. 113.

16. *Ibid*, pp. 113-114.

62. The protection of the rights guaranteed in Articles 14, 16 and 18(1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni people, the Government of Nigeria has failed to fulfil these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.

63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term “forced evictions” by the Committee on Economic Social and Cultural Rights which defines this term as “the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”¹⁷. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths.... Evictions break up families and increase existing levels of homelessness.¹⁸ In this regard, General Comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats” (...). The conduct of the Nigerian Government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.

[...]

65 The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. (...).

17 See General Comment No.7 (1997) on the right to adequate housing (Article 11(1)): Forced Evictions.

18 Ibid, p. 113.

[...]

68. (...) Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. (...).

*African Commission on
Human and People's Rights*

Endorois v. Kenya

Communication No. 276/2003

*Decision of
25 November 2009*



SUMMARY OF ALLEGED FACTS

1. The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE - which submitted an amicus curiae brief) on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.

2. The Complainants allege that the Government of Kenya in violation of the African Charter on Human and Peoples' Rights (hereinafter the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

3. The Complainants state that the Endorois are a community of approximately 60,000 people¹ who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The Complainants allege that since 1978 the Endorois have been denied access to their land.

[...]

6. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The

1 The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.

Complainants state that Lake Bogoria is central to the Endorois religious and traditional practices. They state that the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The Complainants claim that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Monchongoi* forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

[...]

17. The Complainants claim that at present the Endorois live in a number of locations on the periphery of the reserve – that the Endorois are not only being forced from fertile lands to semi-arid areas, but have also been divided as a community and displaced from their traditional and ancestral lands. The Complainants claim that for the Endorois, access to the Lake Bogoria region, is a right for the community and the Government of Kenya continues to deny the community effective participation in decisions affecting their own land, in violation of their right to development.

[...]

19. The Complainants allege that the Government's decision to gazette Endorois traditional land as a game reserve, which in turn denies the Endorois access to the area, has jeopardized the community's pastoral enterprise and imperilled its cultural integrity. The Complainants also claim that 30 years after the evictions began, the Endorois still do not have full and fair compensation for the loss of their land and their rights on to it. They further allege that the process of evicting them from their traditional land not only violates Endorois community property rights, but spiritual, cultural and economic ties to the land are severed.

20. The Complainants allege that the Endorois have no say in the management of their ancestral land. The Endorois Welfare Committee, which is the representative body of the Endorois community, has been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. This failure to register the Endorois Welfare

* N. of the E.: the correct name is Mochongoi forest

Committee, according to the Complainants, has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the community. The Complainants further submit that the denial of domestic legal title to their traditional land, the removal of the community from their ancestral home and the severe restrictions placed on access to the Lake Bogoria region today, together with a lack of adequate compensation, amount to a serious violation of the African Charter. The Complainants state that the Endorois community claims these violations both for themselves as a people and on behalf of all the individuals affected.

[...]

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

22. The Complainants seek a declaration that the Republic of Kenya is in violation of Articles 8, 14, 17, 21 and 22 of the African Charter. The Complainants are also seeking:

Restitution of their land, with legal title and clear demarcation. Compensation to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

[...]

MERITS

Complainants' Submission on the Merits

[...]

72. The Complainants argue that the Endorois have always been the bona fide owners of the land around Lake Bogoria⁴. They argue that the Endorois' concept of land did not conceive the loss of land without conquest. They argue that as a pastoralist community, the Endorois' concept of "ownership" of their land has not been one of ownership by paper. The Complainants state that the Endorois community have always understood

4 Op cit, paras 3, 4 and 5 of this Communication, where the Complainants advance arguments to prove ownership of their land.

the land in question to be “Endorois” land, belonging to the community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices. Other communities would, for instance, ask permission to bring their animals to the area.⁵

73. They also argue that the Endorois have always considered themselves to be a distinct community. They argue that historically the Endorois are a pastoral community, almost solely dependent on livestock. Their practice of pastoralism has consisted of grazing their animals (cattle, goats, sheep) in the lowlands around Lake Bogoria in the rainy season, and turning to the Monchongoi Forest during the dry season. They claim that the Endorois have traditionally relied on beekeeping for honey and that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. They argue that Lake Bogoria is also the centre of the community's religious and traditional practices: around the lake are found the community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region.

74. The Complainants argue that the Endorois believe that spirits of all former Endorois, no matter where they are buried, live on in the Lake. Annual festivals at the lake took place with the participation of Endorois from the whole region. They say that Monchongoi* forest is considered the birthplace of the Endorois people and the settlement of the first Endorois community. They also state that the Endorois community's leadership is traditionally based on elders. Though under the British colonial administration, chiefs were appointed, this did not continue after Kenyan independence. They state that more recently, the community formed the Endorois Welfare Committee (EWC) to represent its interests. (...)

75. The Complainants argue that the Endorois are a ‘people’, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Complainants argue that the African Commission has affirmed the rights of “peoples” to bring claims under the African Charter in the case of Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria (the Ogoni Case) stating: “The African Charter in Articles 20 through 24 clearly provides for peoples’ to retain rights as peoples’, that is, as collectives. The importance of community and collective identity in African culture is recognised throughout the African Charter.”⁶ They further argue that the African

5 Op cit, paras 3, 4 and 5.

Commission noted that when there is a large number of individual victims, it may be impractical for each individual Complainant to go before domestic courts. In such situations, as was with the Ogoni case, the African Commission can adjudicate the rights of a people as a collective. They therefore argue that the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

[...]

DECISION ON MERITS

144. The present communication alleges that the Respondent State has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from their ancestral land, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.

[...]

147. Before responding to the above questions, the African Commission notes that the concepts of "peoples" and "indigenous peoples / communities" are contested terms.⁴⁶ As far as "indigenous peoples" are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances. The relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of "peoples." The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of "people(s)."⁴⁷ In its Report of the Working Group of Experts on Indigenous

6 The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96, (2001), para. 40.

46 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on "Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/Add.3, 26 February 2007: "Mission to Kenya" from 4 to 14 December 2006, at p. 9.

47 See the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, The Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rpt. Rpt (II)), p.4.

Populations/Communities,⁴⁸ the African Commission describes its dilemma of defining the concept of “peoples” in the following terms:

Despite its mandate to interpret all provisions of the African Charter as per Article 45(3), the African Commission initially shied away from interpreting the concept of ‘peoples’. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESR do not define ‘peoples.’ It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding Article 17 make reference to “every individual.” Article 18 serves as a break by referring to the family. Articles 19 to 24 make specific reference to “all peoples.”

148. The African Commission, nevertheless, notes that while the terms ‘peoples’ and ‘indigenous community’ arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

[...]

150. The African Commission also notes that the African Charter, in Articles 20 through 4, provides for peoples to retain rights as peoples, that is, as collectives.⁵² The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.⁵³ These are: the occupa-

48 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

52 See *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*. (SERAC and CESR) or *The Ogoni case 2001*. African Commission on Human and Peoples’ Rights, Decision 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria* (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, 2001-2002.

53 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

tion and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. The Working Group also demarcated some of the shared characteristics of African indigenous groups:

(...) first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists...

(...) A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.⁵⁴

151. The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as “peoples”, viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognise the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.⁵⁵

152. As far as the present matter is concerned, the African Commission is also enjoined under Article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter.⁵⁶ It takes note of the working definition proposed by the UN Working Group on Indigenous Populations:

(...) that indigenous peoples are (...) those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral

54 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

55 Ibid.

56 See Article 60 of the African Charter.

*territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*⁵⁷

153. But this working definition should be read in conjunction with the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, which is the basis of its 'definition' of indigenous populations.⁵⁸ Similarly it notes that the International Labour Organisation has proffered a definition of indigenous peoples in Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries:⁵⁹

*Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*⁶⁰

154. The African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims. In terms of ILO Convention 169, even though many African countries have not signed and ratified the said Convention, and like the UN Working Groups' conceptualisation of the term, the African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture. In that regard, the African Commission notes the observation of the UN Special Rapporteur, where he states that in Kenya indigenous populations/communities include pastoralist communities such as the Endorois,⁶¹ Borana,

57 Jose Martinez Cobo (1986), Special Rapporteur, Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4.

58 The UN Working Group widens the analysis beyond the African historical experience and also raises the slightly controversial issue of "first or original occupant" of territory, which is not always relevant to Africa.

59 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72. ILO Official Bull. 59, entered into force Sept. 5, 1991, Article 1(1)(b).

60 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72. ILO Official Bull. 59, entered into force Sept. 5, 1991, Article 1(1)(b).

61 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit.*, *Supra* n. 47 – Emphasis added.

Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. The UN Special Rapporteur further observed that the Endorois community have lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973.⁶²

155. In the present communication the African Commission wishes to emphasise that the Charter recognises the rights of peoples.⁶³ The Complainants argue that the Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Respondent State disagrees.⁶⁴ The African Commission notes that the Constitution of Kenya, though incorporating the principle of non-discrimination and guaranteeing civil and political rights, does not recognise economic, social and cultural rights as such, as well as group rights. It further notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognised as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.

156. After studying all the submissions of the Complainants and the Respondent State, the African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands - Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi* Forest are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.

62 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit.*, *supra* note 47.

63 The Commission has affirmed the right of peoples to bring claims under the African Charter. See the case of *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*. Here the Commission stated: "The African Charter, in its Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives."

64 The Commission has also noted that where there is a large number of victims, it may be impractical for each individual complainant to go before domestic courts. In such situations, as in the Ogoni case, the Commission can adjudicate the rights of a people as a collective. Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

157. In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples.⁶⁵ The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous.⁶⁶ The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as ‘peoples’ is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems.⁶⁷ The African Commission further notes that the Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples’ self-identification is an important ingredient to the concept of peoples’ rights as laid out in the Charter. It agrees that the alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.⁶⁸

158. Furthermore, in drawing inspiration from international law on human and peoples’ rights, the African Commission notes that the IACtHR has dealt with cases of self-identification where Afro- descendent communities were living in a collective manner,

65 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth Session, 2003).

66 See Rodolfo Stavenhagen (2002), Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 53.

67 See also Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth Session, 1990), U.N. Doc. A/45/18 at 79 (1991). “The Committee”, in General Recommendation VIII stated that membership in a group, “shall, if no justification exists to the contrary, be based upon self- identification by the individual concerned”.

68 See Rodolfo Stavenhagen (2002), Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, U.N. Commission on Human Rights, UN Doc. E/CN.4/2002/97, (2002) at para. 100, where he argues that self-identification is a key criterion for determining who is indeed indigenous.

and had, for over 2-3 centuries, developed an ancestral link to their land. Moreover, the way of life of these communities depended heavily on the traditional use of their land, as did their cultural and spiritual survival due to the existence of ancestral graves on these lands.⁶⁹

159. The African Commission notes that while it has already accepted the existence of indigenous peoples in Africa through its WGIP reports, and through the adoption of its Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, it notes the fact that the Inter-American Court has not hesitated in granting the collective rights protection to groups beyond the “narrow/aboriginal/pre- Colombian” understanding of indigenous peoples traditionally adopted in the Americas. In that regard, the African Commission notes two relevant decisions from the IACtHR: *Moiwana v. Suriname*⁷⁰ and *Saramaka v. Suriname*. The *Saramaka* case is of particular relevance to the *Endorois* case, given the views expressed by the Respondent State during the oral hearings on the Merits.⁷¹

69 Op. cit, *infra* n. 71.

70 See *Moiwana Village v Suriname*, Judgment of June 15, 2005. Series C No. 124, paras 85 and 134-135. On 29 November 1986, the Suriname army attacked the N'djuka Maroon village of *Moiwana* and massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack fled into the surrounding forest, and then into exile or internal displacement. On 12 November 1987, almost a year later, Suriname simultaneously ratified the American Convention on Human Rights and recognized the jurisdiction of the Inter-American Court of Human Rights (IACtHR). Almost ten years later, on 27 June 1997, a petition was filed with the Inter-American Commission on Human Rights (IACmHR) and later on lodged with the IACtHR. The Commission stated that, while the attack itself predated Suriname's ratification of the American Convention and its recognition of the Court's jurisdiction, the alleged denial of justice and displacement of the *Moiwana* community occurring subsequent to the attack comprise the subject matter of the application. In this case the IACtHR recognised collective land rights, despite being an Afro-descendent community (i.e. not a traditional pre-Colombian / 'autochthonous' understanding of indigenes in the Americas).

71 The Respondent State during the oral hearings at the 40th Ordinary Session in Banjul, The Gambia, stated that: (a) the *Endorois* do not deserve special treatment since they are no different from the other *Tungen* sub-group, and that (b) inclusion of some of the members of the *Endorois* in “modern society” has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct legal personality (c) representation of the *Endorois* by the *Endorois* Welfare Council is allegedly not legitimate. See Inter-American Commission on Human Rights (IACHmR), Report No.9/06 *The Twelve Saramaka Clans (Los) v Suriname* (March 2, 2006) ; Inter-American Court of Human Rights (IACtHR), *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007) at paras 80-84.

[...]

162. (...) In the case of the Endorois, the African Commission is of the view that the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the State. The Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community.

From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of 'distinctiveness.' The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands.

[...]

165. Before deciding whether the Respondent State has indeed violated Article 8 of the Charter, the Commission wishes to establish whether the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and international law. In that regard, the African Commission notes the observation of the HRC in paragraph 164 (above). It is of the view that freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb.⁷³ The African Commission notes its own observation in *Free Legal Assistance Group v. Zaire*, that it has held that the right to freedom of conscience allows for individuals or groups to worship or assemble in connection with a religion or

73 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Thirty-sixth session, 1981), U.N. GA Res. 36/55.

belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.⁷⁴

166. This Commission is aware that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion. The Endorois' cultural and religious practices are centred around Lake Bogoria and are of prime significance to all Endorois. During oral testimony, and indeed in the Complainants' written submission, this Commission's attention was drawn to the fact that religious sites are situated around Lake Bogoria, where the Endorois pray and where religious ceremonies regularly take place. It takes into cognisance that Endorois' ancestors are buried near the lake, and has already above, Lake Bogoria is considered the spiritual home of all Endorois, living and dead.

167. It further notes that one of the beliefs of the Endorois is that their Great Ancestor, Dorios, came from the Heavens and settled in the Mochongoi Forest.⁷⁵ It notes the Complainants' arguments, which have not been contested by the Respondent State that the Endorois believe that each season the water of the Lake turns red and the hot springs emit a strong odour, signalling a time that the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the Lake.

168. From the above analysis, the African Commission is of the view that the Endorois spiritual beliefs and ceremonial practices constitute a religion under the African Charter.

[...]

172. The African Commission agrees that in some situations it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right. It notes the recommendation of the HRC that limitations may be applied only for those purposes for which they were prescribed and must be directly

74 See *Free Legal Assistance Group v. Zaire*, African Commission on Human and Peoples Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 45. See also the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-sixth session, 1981), U.N. GA Res. 36/55.

75 See paras 73 and 74.

related and proportionate to the specific need on which they are predicated.⁷⁸ The *raison d'être* for a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois, must be based on exceptionally good reasons, and it is for the Respondent State to prove that such interference is not only proportionate to the specific need on which they are predicated, but is also reasonable. In the case of *Amnesty International v. Sudan*, the African Commission stated that a wide-ranging ban on Christian associations was "disproportionate to the measures required by the government to maintain public order, security, and safety." The African Commission further went on to state that any restrictions placed on the rights to practice one's religion should be negligible. In the above mentioned case, the African Commission decided that complete and total expulsion from the land for religious ceremonies is not minimal.⁷⁹

173. The African Commission is of the view that denying the Endorois access to the Lake is a restriction on their freedom to practice their religion, a restriction not necessitated by any significant public security interest or other justification. The African Commission is also not convinced that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection. The African Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.

(...) The African Commission therefore finds against the Respondent State a violation of Article 8 of the African Charter. The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the Respondent State interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the community to maintain religious practices central to their culture and religion.

78 Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRN GEN1\Rev.1 (1994), 35, para. 8.

79 The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v. Zambia*, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter ... and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. See *Amnesty International v. Sudan* (1999), paras. 82 and 80.

*(...) The African Commission is of the view that the limitations placed on the State's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in Amnesty International v. Zambia, where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter ... and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter."*⁸⁰

[...]

ALLEGED VIOLATION OF ARTICLE 14

[...]

187. The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems. Common problems faced by indigenous groups include the lack of "formal" title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This, they argue, has led to many cases of displacement from a people's historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities. The African Commission notes that its Working Group on Indigenous Populations/Communities has recognised that some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs.⁸⁹ The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.

80 Amnesty International v. Zambia, African Commission on Human and Peoples' Rights, Communication No. 212/98 (1999).

89 See Report of the African Commission's Working Group of Experts, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session (2005).

188. The case of *Doğan and others v. Turkey*⁹⁰ is instructive in the instant Communication. Although the Applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that:

*[T]he notion 'possessions' in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision.*⁹¹

189. Although they did not have registered property, they either had their own houses constructed on the land of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The Court further noted that the Applicants had unchallenged rights over the common land in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.

190. The African Commission also notes the observation of the IActHR in the seminal case of *The Mayagna (Sumo) Awas Tingni v. Nicaragua*,⁹² that the Inter- American Convention protected property rights in a sense which include the rights of members of the indigenous communities within the framework of communal property and argued that possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.

191. In the opinion of the African Commission, the Respondent State has an obligation under Article 14 of the African Charter not only to respect the 'right to property', but also to protect that right. In 'the Mauritania Cases',⁹³ the African Commission concluded that the confiscation and pillaging of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in Article 14. Similarly, in *The Ogoni*

90 *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

91 *Doğan and Others v. Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), para. 138-139.

92 *The Awas Tingni Case* (2001), paras. 140(b) and 151.

93 African Commission on Human and Peoples' Rights, Communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98.

case 2001⁹⁴ the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14.⁹⁵

[...]

199. The African Commission is of the view that even though the Constitution of Kenya provides that Trust Land may be alienated and that the Trust Land Act provides comprehensive procedure for the assessment of compensation, the Endorois property rights have been encroached upon, in particular by the expropriation and the effective denial of ownership of their land. It agrees with the Complainants that the Endorois were never given the full title to the land they had in practice before the British colonial administration. Their land was instead made subject to a trust, which gave them beneficial title, but denied them actual title. The African Commission further agrees that though for a decade they were able to exercise their traditional rights without restriction, the trust land system has proved inadequate to protect their rights.

200. The African Commission also notes the views expressed by the Committee on Economic, Social and Cultural Rights which has provided a legal test for forced removal from lands which is traditionally claimed by a group of people as their property. In its 'General Comment No. 4' it states that "instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law."¹⁰³

94 African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, done at the 31st Ordinary Session of the African Commission held from 2 to 16 May 2002 in Pretoria, South Africa.

95 African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights – Nigeria (27 May 2002) (citing Committee on Economic, Social and Cultural Rights, General Comment No. 7, The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions, para. 4, U.N. Doc. E/C.12/1997/4 (1997)).

103 Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para. 18, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

This view has also been reaffirmed by the United Nations Commission on Human Rights which states that forced evictions are a gross violations of human rights, and in particular the right to adequate housing.¹⁰⁴ The African Commission also notes General Comment No. 7 requiring States Parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.¹⁰⁵

[...]

204. The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights. The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.¹⁰⁸

205. The Inter-American Court jurisprudence also makes it clear that mere access or de facto ownership of land is not compatible with principles of international law. Only de jure ownership can guarantee indigenous peoples' effective protection.¹⁰⁹

[...]

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of

104 See, Commission on Human Rights resolution 1993/77, UN Doc. E/C.4/RES/1993/77 (1993); Commission on Human Rights Resolution 2004/28, UN Doc. E/C.4/RES/2004/28 (2004).

105 See Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), para. 14, U.N. Doc. E/1998/22, annex IV at 113 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

108 See Articles 8(2) (b), 10, 25, 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples.

109 Para 110 of the Saramaka case.

indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.

210. That such encroachment has taken place could be seen by the Endorois' inability, after being evicted from their ancestral land, to have free access to religious sites and their traditional land to graze their cattle. The African Commission is aware that access roads, gates, game lodges and a hotel have all been built on the ancestral land of the Endorois community around Lake Bogoria and imminent mining operations also threatens to cause irreparable damage to the land. The African Commission has also been notified that the Respondent State is engaged in the demarcation and sale of parts of Endorois historic lands to third parties.

211. The African Commission is aware that encroachment in itself is not a violation of Article 14 of the Charter, as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted - 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'. The African Commission will now assess whether an encroachment 'in the interest of public need' is indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. The African Commission agrees with the Complainants that the test laid out in Article 14 of the Charter is conjunctive, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community and was carried out in accordance with appropriate laws.

212. The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:

*Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.*¹¹⁶

213. Limitations on rights, such as the limitation allowed in Article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that "... the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow."¹¹⁷ The African Commission also notes the decisive case of *Handyside v. United Kingdom*, where the ECHR stated that any condition or restriction imposed upon a right must be "proportionate to the legitimate aim pursued."¹¹⁸

214. The African Commission is of the view that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.

215. It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the Government in a way that respected their property rights, even if a Game Reserve was being created. In that regard, the African Commission notes its own conclusion in the Constitutional Rights Project Case, where it says that "a

116 Nazila Ghanea and Alexandra Xanthaki (2005) (eds). 'Indigenous Peoples' Right to Land and Natural Resources' in Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.

117 Constitutional Rights Project, *Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999), para. 42 (hereinafter *The Constitutional Rights Project Case 1999*).

118 *Handyside v. United Kingdom*, No. 5493/72, Series A.24 (7 December 1976), para. 49.

limitation may not erode a right such that the right itself becomes illusory.”¹¹⁹ At the point where such a right becomes illusory, the limitation cannot be considered proportionate, the limitation becomes a violation of the right. The African Commission agrees that the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to “the general interest of the community” or a “public need.”

[...]

218. The African Commission also notes that the ‘disproportionate’ nature of an encroachment on indigenous lands – therefore falling short of the test set out by the provisions of Article 14 of the African Charter – is to be considered an even greater violation of Article 14, when the displacement at hand was undertaken by force. Forced evictions, by their very definition, cannot be deemed to satisfy Article 14 of the Charter’s test of being done ‘in accordance with the law’. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected. The grave nature of forced evictions could amount to a gross violation of human rights. Indeed, the United Nations Commission on Human Rights, in Resolutions 1993/77 and 2004/28, has reaffirmed that forced evictions amount to a gross violations of human rights and in particular the right to adequate housing.”¹²⁰ Where such removal was forced, this would in itself suggest that the ‘proportionality’ test has not been satisfied.

[...]

226. In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property.

119 The Constitutional Rights Project Case, para. 42.

120 See United Nations Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/1993/RES/77 and United Nations Commission on Human Rights resolution 2004/28, UN Doc. E/CN.4/2004/RES/28. Both resolutions reaffirm that the practice of forced eviction is a gross violations of human rights and in particular the right to adequate housing.

227. In the Saramaka case, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory do not amount to a denial of their survival as a tribal people, the Court stated that the State must abide by the following three safeguards: first, ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; second, guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; third, ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

228. In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environment and social impact assessment was not carried out. The absence of these three elements of the 'test' is tantamount to a violation of Article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.

[...]

231. The African Commission is of the view that the Respondent State did not pay the prompt, full compensation as required by the Constitution. It is of the view that Kenyan law has not been complied with and that though some members of the Endorois community accepted limited monetary compensation that did not mean that they accepted it as full compensation, or indeed that they accepted the loss of their land.

232. The African Commission notes the observations of the United Nations Declaration on the Rights of Indigenous Peoples, which, amongst other provisions for restitutions and compensations, states:

Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed

*consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.*¹²⁷

[...]

236. It seems also to the African Commission that the amount of £30 as compensation for one's ancestral home land flies in the face of common sense and fairness.

237. The African Commission notes the detailed recommendations regarding compensation payable to displaced or evicted persons developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹³¹ These recommendations, which have been considered and applied by the European Court of Human Rights,¹³² set out the following principles for compensation on loss of land: Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them. These recommendations could be followed if the Respondent State is interested in giving a fair compensation to the Endorois.

238. Taking all the submissions of both parties, the African Commission agrees with the Complainants that the Property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law. Accordingly, the African Commission finds for the Complainants that the Endorois as a distinct people have suffered a violation of Article 14 of the Charter.

127 Declaration on the Rights of Indigenous Peoples, preambular para. 5, E/CN.4/Sub.2/1994/2/Add.1 (1994).

131 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Guidelines on International Events and Forced Evictions (Forty-seventh session, 1995), UN Doc. E/CN.4/Sub.2/1995/13. 17 July 1995, para. 16(b) and (e)

132 *Doğan v. Turkey* (2004), para. 154.

ALLEGED VIOLATION OF ARTICLE 17(2) AND 17(3)

239. The Complainants allege that the Endorois' cultural rights have been violated on two counts: first, the community has faced systematic restrictions on access to cultural sites and, second, that the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

[...]

241. The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Both the Complainants and the Respondent State seem to agree on that. It notes that Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics.¹³³

242. The African Commission notes that the preamble of the African Charter acknowledges that "civil and political rights cannot be dissociated from economic, social and cultural rights ... social, cultural rights are a guarantee for the enjoyment of civil and political rights", ideas which influenced the 1976 African Cultural Charter which in its preamble highlights "the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas."¹³⁴ Article 3 of the same Charter states that culture is a source of mutual enrichment for various communities.¹³⁵

133 Rachel Murray and Steven Wheatley (2003) 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, 25, p. 224.

134 African Cultural Charter (1976), para 6 of the Preamble.

135 *Ibid.* Article 3.

243. This Commission also notes the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Committee observes that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”¹³⁶

244. The African Commission notes that a common theme that usually runs through the debate about culture and its violation is the association with one’s ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has observed that dispossession of land and its resources is “a major human rights problem for indigenous peoples.”¹³⁷ It further notes that a Report from the Working Group has also emphasized that dispossession “threatens the economic, social and cultural survival of indigenous pastoralist and hunter-gatherer communities.”¹³⁸

245. In the case of indigenous communities in Kenya, the African Commission notes the critical ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Kenya’ that “*their livelihoods and cultures have been traditionally discriminated against and their lack of legal recognition and empowerment reflects their social, political and economic marginalization.*”¹³⁹ He also said that the principal human rights issues they face “*relate to the loss and environmental degradation of their land, traditional forests and natural resources, as a result of dispossession in colonial times and in the post-independence period. In recent decades, inappropriate development and conservationist policies have aggravated the violation of their economic, social and cultural rights.*”¹⁴⁰

136 Human Rights Committee, General Comment 23 (Fiftieth Session, 1994), U.N. Doc. CCPR/C/21Rev.1/Add5, (1994). Para. 7.

137 Report of the African Commission’s Working Group on Indigenous Populations/Committees (2003), p.20.

138 Ibid. p.20.

139 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, supra n. 47.

140 Ibid. Italics added for emphasis.

246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted Article 17(2) as requiring governments to take measures “aimed at the conservation, development and diffusion of culture,” such as promoting “cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; . . . promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population.”¹⁴¹

247. The African Commission’s WGIP has further highlighted the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

*Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.*¹⁴²

248. The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois,¹⁴³ but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social

141 Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989, ACHPR/RPT/2nd, Annex XII.

142 Report of the African Commission’s Working Group on Indigenous Populations/Committees (2005), p. 20. [Emphasis added]

143 See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, Article 4(e): Ensure that Indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, Article 15(3).

statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.¹⁴⁴

249. In its analysis of Article 17 of the African Charter, the African Commission is aware that unlike Articles 8 and 14, Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights. Thus, even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the Game Reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

[...]

251. By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and 17(3) of the Charter.

ALLEGED VIOLATION OF ARTICLE 21

252. The Complainants allege that the Endorois community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve.

[...]

144 See statement by Mr. Sha Zukang Under-Secretary General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People to the Third Committee of the General Assembly on the Item "Indigenous Issues" New York, 20 October 2008.

255. The African Commission notes that in The Ogoni case the right to natural resources contained within their traditional lands is also vested in the indigenous people, making it clear that a people inhabiting a specific region within a state could also claim under Article 21 of the African Charter.¹⁴⁵ The Respondent State does not give enough evidence to substantiate the claim that the Complainants have immensely benefited from the tourism and mineral prospecting activities.

256. The African Commission notes that proceeds from the Game Reserve have been used to finance a lot of useful projects, 'a fact' that the Complainants do not contest. The African Commission, however, refers to cases in the Inter-American Human Rights system to understand this area of the law. The American Convention does not have an equivalent of the African Charter's Article 21 on the Right to Natural Resources. It therefore reads the right to natural resources into the right to property (Article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The "test" in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous land.

[...]

268. (...) The African Commission is of the view the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State. Article 21(2) also concerns the obligations of a State Party to the African Charter in cases of a violation by spoliation, through provision for restitution and compensation. The Endorois have never received adequate compensation or restitution of their land. Accordingly, the Respondent State is found to have violated Article 21 of the Charter.

ALLEGED VIOLATION OF ARTICLE 22

269. The Complainants allege that the Endorois' right to development have been violated as a result of the Respondent State's creation of a Game Reserve and the Respondent State's failure to adequately involve the Endorois in the development process.

[...]

145 The Ogoni Case (2001), paras 56-58.

277. The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.¹⁵⁰

278. In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states "... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available". Freedom of choice must be present as a part of the right to development.¹⁵¹

279. The Endorois believe that they had no choice but to leave the Lake and when some of them tried to reoccupy their former land and houses they were met with violence and forced relocations. The Complainants argue this lack of choice directly contradicts the guarantees of the right to development. The African Commission also notes a Report produced for the UN Working Group on Indigenous Populations requiring that "indigenous peoples are not coerced, pressured or intimidated in their choices of development."¹⁵² Had the Respondent State allowed conditions to facilitate the right to development as in the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the Game Reserve. However, the forced evictions eliminated any choice as to where they would live.

150 Arjun Sengupta, "Development Cooperation and the Right to Development," Francois-Xavier Bagnoud Centre Working Paper No. 12, (2003), available at www.hsph.harvard.edu/xfbcenter/working_papers.htm. See also U.N. Declaration on the Right to Development, U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986), Article 2.3, which refers to "active, free and meaningful participation in development."

151 Arjun Sengupta, "The Right to Development as a Human Right," Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), page 8, available at http://www.hsph.harvard.edu/xfbcenter/working_papers.htm 2000.

152 Antoanella-Iulia Motoc and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14 (a).

280. The African Commission notes the Respondent State's submissions that the community is well represented in the decision making structure, but this is disputed by the Complainants. In paragraph 27 of the Complainants Merits brief, they allege that the Endorois have no say in the management of their ancestral land. The EWC, the representative body of the Endorois community, have been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. The Complainants further allege that the failure to register the EWC has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the community.

281. The African Commission notes that its own standards state that a Government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.¹⁵³ The African Commission agrees with the Complainants that the consultations that the Respondent State did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve.

282. Furthermore, the community representatives were in an unequal bargaining position, an accusation not denied or argued by the Respondent State, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community. It also agrees with the Complainants that the inadequacy of the consultation undertaken by the Respondent State is underscored by Endorois' actions after the creation of the Game Reserve. The Endorois believed, and continued to believe even after their eviction, that the Game Reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

153 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Twenty-eighth session, 2003). See also ILO Convention 169 which states: "Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

283. The African Commission wishes to draw the attention of the Respondent State that Article 2(3) of the UN Declaration on Development notes that the right to development includes “active, free and meaningful participation in development”.¹⁵⁴ The result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan Authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.

[...]

288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.¹⁵⁶ The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

289. Closely allied with the right to development is the issue of participation. The IActHR has stated that in ensuring the effective participation of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

290. In the instant Communication, even though the Respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle.

154 U.N. Declaration on the Right to Development, U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986), Article 2.3. (hereinafter Declaration on Development).

156 See, for example, the affidavit of Richard Yegon, one of the Elders of the Endorois community.

The African Commission agrees that the Complainants had a legitimate expectation that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.

291. Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

[...]

293. In this sense, it is important to note that the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that: “[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. (...) The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”¹⁵⁸ Consequently, the U.N. Special Rapporteur determined that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects.”¹⁵⁹

158 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 [Doc ONU E/ CN.4/2003/90].

159 The UNCERD has observed that “[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought”. Cf. UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty Second Session, 2003), U.N. Doc. CERD/C/62/CO/2, 2 June 2003, para. 16.

294. In relation to benefit sharing, the IActHR in the Saramaka case said that benefit sharing is vital both in relation to the right to development and by extension the right to own property. The right to development will be violated when the development in question decreases the well-being of the community. The African Commission similarly notes that the concept of benefit-sharing also serves as an important indicator of compliance for property rights; failure to duly compensate (even if the other criteria of legitimate aim and proportionality are satisfied) result in a violation of the right to property.

295. The African Commission further notes that in the 1990 'African Charter on Popular Participation in Development and Transformation' benefit sharing is key to the development process. In the present context of the Endorois, the right to obtain "just compensation" in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

296. In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories but also "that the equitable sharing of benefits to be derived from such exploitation be ensured." In the instant case, the Respondent State should ensure mutually acceptable benefit sharing. In this context, pursuant to the spirit of the African Charter benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community.

297. The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses - the actual loss in well-being and the denial of benefits accruing from the Game Reserve. Furthermore, the Endorois have faced a significant loss in choice since their eviction from

the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the Game Reserve.

298. The African Commission is of the view that the Respondent State bears the burden for creating conditions favourable to a people's development.¹⁶⁰ It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.

RECOMMENDATIONS

1. In view of the above, the African Commission finds that the Respondent State is in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter. The African Commission recommends that the Respondent State:

a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.

b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

[...]

d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

[...]

160 Declaration on the Right to Development, Article 3.

SUMMARIES DE JURISPRUDENCE
Indigenous Peoples

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