

# **Inter-American Court of Human Rights**

## **Case of the Yakye Axa Indigenous Community v. Paraguay**

### **Judgment of June 17, 2005 (Merits, Reparations and Costs)**

In the case of the Yakye Axa Indigenous Community,

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

Sergio García Ramírez, President;  
Alirio Abreu Burelli, Vice-President;  
Oliver Jackman, Judge;  
Antônio A. Cançado Trindade, Judge;  
Cecilia Medina Quiroga, Judge;  
Manuel E. Ventura Robles, Judge;  
Diego García-Sayán, Judge, and  
Ramón Fogel Pedroso, Judge *ad hoc*;

also present,

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

pursuant to Articles 29, 31, 56, 57 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")<sup>1</sup>, and to Articles 63(2) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), issues the instant Judgment.

#### **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.

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<sup>1</sup> The instant Judgment is issued under the provisions of the Rules of Procedure adopted by the Inter-American Court of Human Rights during its XLIX Regular Session by means of the November 24, 2000 Ruling, which entered into force on June 1, 2001, and to the partial amendment adopted by the Court during its LXI Regular Session by means of the November 25, 2003 Ruling, in force since January 1, 2004.

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.

3. Due to the above, the Commission asked the Court to order the State to take certain steps as reparation and to reimburse costs and expenses.

## **II JURISDICTION**

4. The Inter-American Court has jurisdiction to hear the instant case, pursuant to Articles 62 and 63(1) of the American Convention, because Paraguay has been a State Party to the Convention since August 24, 1989, and it acknowledged the adjudicatory jurisdiction of the Court on March 26, 1993.

## **III PROCEEDING WITH THE COMMISSION**

5. On January 10, 2000, the non-governmental organizations "Tierraviva a los Pueblos Indígenas del Chaco paraguayo" (hereinafter "Tierraviva") and the Center for Justice and International Law (hereinafter "CEJIL") submitted to the Inter-American Commission a complaint on the alleged violation by Paraguay of the right embodied in Article 25 of the American Convention, in combination with the obligations set forth in Articles 1(1) and 2 of that Convention, to the detriment of the members of the Yakye Axa Indigenous Community.

6. On February 27, 2002, during its 114th Regular Session, the Commission adopted Admissibility Report No. 2/02, in which it found the case to be admissible, and made itself available to the parties for a friendly settlement.

7. On October 24, 2002, during its 116th Regular Session, the Commission, after analyzing the position of the parties and deeming the friendly settlement stage ended, adopted Report on the Merits No. 67/02, pursuant to the provisions of Article 50 of the Convention. In said report, the Commission recommended that Paraguay:

1. Take such measures as may be necessary, as soon as possible, to make effective the right of the Yakye Axa Indigenous Community of the Enxet-Lengua People and its

members to ownership and possession of its ancestral territory, ordering the delimitation, demarcation and granting of title deed to its lands, in accordance with their customary law, values, practices, and customs.

2. Guarantee the exercise of their traditional subsistence activities by the members of the Community.

3. Take such measures as may be necessary to put an end to the state of nutritional, medical, and sanitary emergency of the Community.

4. Take such measures as may be necessary to protect the habitat claimed by the Community, as long as the granting of title deed to their ancestral territory in favor of the Indigenous Community is pending.

5. Establish an effective and simple remedy for the protection of the right of the Indigenous Peoples of Paraguay to claim and have access to their traditional territories.

6. Make reparations, both at the individual and communal level, for the consequences of the violation of the rights listed.

7. Take such measures as may be necessary to avoid similar facts in the future, in accordance with the duty of prevention and guarantee with regard to the basic rights recognized in the American Convention.

8. On November 18, 2002 the Commission forwarded the aforementioned report to the State and granted it two months time, from the date it was sent, to report on the steps taken to comply with its recommendations. On that same date the Commission, in compliance with Article 43(3) of its Rules of Procedure, notified Tierraviva and CEJIL that it had adopted Report on the Merits No. 67/02 and had forwarded it to the State, and ask them to state their position, within one month's time, with regard to filing the case before the Court.

9. On February 19, 2003, after an extension granted, the State sent its reply to the recommendations made by the Commission in Report on the Merits No. 67/02. After analyzing the State's reply to the aforementioned recommendations, the Commission decided to file the instant case before the Inter-American Court.

#### **IV PROCEEDING BEFORE THE COURT**

10. On March 17, 2003 the Inter-American Commission filed the application before the Court, attaching documentary evidence to it and offering witnesses and expert witnesses. Pursuant to Article 22 of the Rules of Procedure, the Commission appointed as its delegates José Zalaquett and Santiago Canton, and as advisors Isabel Madariaga, Ariel Dulitzky and Ignacio Álvarez. Also, pursuant to Article 33 of the Rules of Procedure, the Commission reported that the alleged victims would be represented by CEJIL and Tierraviva (hereinafter "the representatives"). On April 11, 2003 the Secretariat of the Court (hereinafter "the Secretariat"), after a preliminary examination by the President of the Court (hereinafter "the President"), sent a notification to the State with the application and its annexes, and informed the State of the deadlines for its reply and to appoint its representatives in the proceeding. On that same day the Secretariat, under instructions by the President, informed the State of its right to appoint an *ad hoc* Judge to participate in the hearing of the case. Likewise, on April 10, 2003, the Secretariat, pursuant to the provisions of Article 35(1)e of the Rules of Procedure, sent a notification with the application to the representatives, and informed them that they had 30 days to submit their brief with pleadings, motions and evidence.

11. On May 22, 2003, after an extension granted, the representatives filed their brief with pleadings, motions and evidence (hereinafter "brief with pleadings and motions"), to which they attached documentary evidence, and they offered witnesses and expert witnesses.

12. On May 23, 2003 the State appointed Oscar Martínez Pérez as its Agent, and Mario Sandoval as Deputy Agent. It also appointed Ramón Fogel Pedroso as Judge *ad hoc*. On July 23, 2003, after an extension granted, the State submitted its brief with the reply to the application and observations on the brief with pleadings and motions (hereinafter "reply to the application"), to which it attached documentary evidence, and offered witnesses and expert witnesses.

13. On December 10, 2004 the Secretariat, under instructions by the President, asked the Inter-American Commission, the representatives, and Paraguay to send the final lists of witnesses and expert witnesses offered by each of them.

14. On January 31, 2005 the President issued an Order, in which he summoned the parties to a public hearing that would be held at the seat of the Court, beginning on March 4, 2005, to hear their final oral pleadings on the merits, reparations, and costs; the testimony of Esteban López, Tomás Galeano, Inocencia Gómez, Stephen William Kidd and Rodrigo Villagra Carron, offered by the Inter-American Commission and by the representatives; the expert opinion of Bartomeu Melia i Lliteres, offered by the Commission and by the representatives, and the expert testimony of Pablo Balmaceda, offered by the representatives. In this Order, the President also ordered submission as affidavits of the testimony of Albino Fernández, offered by the Commission and by the representatives; of the testimony of Oscar Centurión, Teresa Vargas and Pedro Martínez, offered by the State; of the expert opinions of Enrique Castillo, José Antonio Aylwin Oyarzún and José Alberto Braunstein, offered by the Commission and by the representatives, and of the expert opinions of Fulvia Esther Prieto, Bernardo Jaquet and César Escobar Cattebecke, offered by the State. In this Order, the President also informed the parties that they had until April 4, 2005 to submit their final written pleadings on the merits, reparations, and costs.

15. On February 12, 14 and 15, 2005 the Commission and the representatives filed the affidavits of statements by the witnesses and expert witnesses offered by them. On February 22, 2005 the State forwarded the affidavits of two witnesses and two expert witnesses, in response to said Order by the President (*supra* para. 14).

16. On February 25, 2005 the State reported that it had decided to "desist from offering Teresa Vargas and expert witness Esther Prieto, the former because she did not appear before the Head Notary Public [Escribano Mayor] of the Government within the term allotted, and the latter because for personal reasons she decided not to participate."

17. On February 28, 2005 the representatives pointed out that the reason given by the State to waive the testimony by Teresa Vargas was "insufficient", for which reason they asked the Inter-American Court to order the State to expand on the reasons for said waiver. The representatives said that they had no objections regarding the waiver by Paraguay of the expert opinion of Fulvia Esther Prieto.

18. On February 29, 2005 the State submitted a note in which it requested that Oscar Centurión be included as a witness at the public hearing summoned by the

Court. On that same day the Secretariat, under instructions by the Full Court, informed the State that it did not deem it “necessary to hear a new statement by Oscar Centurión, for which reason it [...] reject[ed] the State’s request, deeming it untimely and unnecessary in the instant case.”

19. On March 1, 2005 the Organización Nacional Indígena de Colombia (ONIC) filed an *amicus curiae* brief in the instant case.

20. On March 2, 2005 the State filed the affidavit of witness Teresa Vargas and explained the reasons why said testimony had not been submitted to the Court before the deadline. That same day the Secretariat, under instructions by the President, asked the Commission and the representatives to submit their comments on the statement by Teresa Vargas. In said note, the Secretariat pointed out that “the Court will assess the admissibility of said statement at the appropriate time.”

21. On March 4 and 5, 2005, at the public hearing on the merits, reparations, and costs, the Court heard the statements of the witnesses and the expert opinions offered by the parties. The Court also heard the final oral pleadings of the Commission, of the representatives, and of the State. During said hearing, expert witness Bartomeu Meliá i Lliteres and the State submitted various documents.

There appeared before the Court:

on behalf of the Inter-American Commission:

Isabel Madariaga, advisor;  
 Víctor H. Madrigal Borloz, advisor;  
 Lilly Ching, advisor, and  
 Juan Pablo Albán, advisor.

on behalf of the representatives:

Andrés Dejesús Ramírez, representative;  
 Oscar Ayala Amarilla, representative;  
 Viviana Krsticevic, representative;  
 Tatiana Rincón, representative, and  
 Liliana Tojo, representative.

on behalf of the State:

Oscar Martínez Pérez, Agent;  
 Edgar Taboada, advisor;  
 Felipe Mendoza, advisor, and  
 Julio Duarte Van Humbeck, advisor.

witnesses offered by the Commission and by the representatives:

Esteban López,  
 Tomás Galeano,  
 Inocencia Gómez,  
 Stephen William Kidd, and  
 Rodrigo Villagra Carron.

Expert witness offered by the Commission and the representatives:

Bartomeu Melia i Lliteres.

expert witness offered by the representatives:

Pablo Balmaceda.

22. On March 9, 2005 the Commission and the representatives filed their observations on the testimony of Teresa Vargas and asked the Court to take it into account.

23. On March 15, 2005 the Secretariat, under instructions by the President, asked the representatives and the State to forward several documents as evidence to facilitate adjudication of the case, pursuant to Article 45(1) of the Rules of Procedure.

24. On April 4, 2005 the Commission, the representatives and the State filed, respectively, their final written pleadings on the merits, reparations, and costs. In addition to their final written pleadings, the representatives attached annexes as documentary evidence.

25. On April 15, 2005 the representatives of the alleged victims submitted part of "the documents that had been requested [from them] as evidence to facilitate adjudication of the case," in connection with the instant case. The representatives also submitted their clarifications regarding the evidence to facilitate adjudication of the case requested by the Secretariat, which they had not been able to send.

26. On April 22, 2005 the State requested an extension of the deadline to submit the evidence to facilitate adjudication of the case and it challenged the documentation submitted by the representatives as evidence to facilitate adjudication, as well as the documents on costs and expenses filed by the latter together with their final written pleadings (*supra* paras. 24 and 25).

27. On May 4, 17 and 20, 2005 the State forwarded part of the documents requested as evidence to facilitate adjudication of the case, pursuant to Article 45(1) of the Rules of Procedure of the Court (*supra* para. 23).

## **V EVIDENCE**

28. Before examining the evidence offered, the Court, in light of Articles 44 and 45 of the Rules of Procedure, will refer to certain aspects of its jurisprudence that pertain to this case.

29. The principle of the presence of both parties to an action, which respects the principle of the rights of the parties to defense, applies in probatory matters. Article 44 of the Rules of Procedure reflects this principle, as regards the appropriate time for evidence to be offered for there to be equality among the parties.<sup>2</sup>

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<sup>2</sup> See *Case of Caesar*. Judgment of March 11, 2005. Series C No. 123, para. 41; *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120, para. 31, and *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 62.

30. According to the practice of the Court, at the outset of each procedural stage the parties must state what evidence they will offer, on the first opportunity granted to them to submit their position in writing. Furthermore, the Court or its President, exercising the discretionary authority set forth in Article 45 of its Rules of Procedure, may request additional evidence from the parties to facilitate adjudication of the case, without this constituting a new opportunity for them to expand or complement their pleadings, unless the Court explicitly authorizes this.<sup>3</sup>

31. The Court has pointed out, regarding the process of receiving and assessing the evidence, that the procedures followed before it are not subject to the same formalities as domestic legal proceedings, and that inclusion of specific items in the body of evidence must be done paying special attention to the circumstances of the specific case and taking into account the limits imposed by respect for legal certainty and for procedural balance among the parties. The Court has also taken into account that international jurisprudence, bearing in mind that international courts have the authority to assess and appraise the evidence according to the rules of competent analysis, has not rigidly established the *quantum* of evidence required as grounds to substantiate a decision. This criterion applies to international human rights courts, which have broad authority to appraise the evidence tendered before them regarding the pertinent facts, in accordance with the rules of logic and based on experience.<sup>4</sup>

32. Based on the above, the Court will now examine and appraise the documentary evidence submitted by the Commission, the representatives and the State at various procedural moments or as evidence to facilitate adjudication of the case, requested by the Court, as well as the expert opinions and testimony rendered before the Court during the public hearing, all of which constitutes the body of evidence in the instant case. For this, the Court will apply the principles of competent analysis, within the respective legal framework.

#### A) DOCUMENTARY EVIDENCE

33. The Inter-American Commission submitted documentary evidence when it filed the application (*supra* para. 10).<sup>5</sup>

34. The representatives submitted several annexes as documentary evidence, together with the brief with pleadings and motions and the final written pleadings (*supra* paras. 11 and 24).<sup>6</sup>

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<sup>3</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 32; *Case of Lori Berenson Mejía*, *supra* note 2, para. 63; and *Case of Molina Theissen. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 22.

<sup>4</sup> See *Case of Caesar*, *supra* note 2, para. 42; *Case of the Serrano Cruz sisters*, *supra* note 2, para. 33, and *Case of Lori Berenson Mejía*, *supra* note 2, para. 64.

<sup>5</sup> See file with appendixes to the application, appendixes 1 to 37, volumes 1 to 1552.

<sup>6</sup> See file with appendixes to the brief with pleadings and motions, appendixes 1 to 10, volumes 1555 to 3568 and file with appendixes to the final written pleadings, volumes 480 to 783.

35. The State submitted documentary evidence when it filed its reply to the application and during public hearing in the instant case (*supra* paras. 12 and 21).<sup>7</sup>

36. Bartomeu Melia i Lliteres, expert witness offered by the Commission and the representatives, submitted documents when he made his statement before the Inter-American Court at the public hearing in the instant case.<sup>8</sup> (*supra* para. 21)

37. The representatives and the State sent part of the documents requested as evidence to facilitate adjudication of the case (*supra* paras. 25 and 27)

38. The Commission, the representatives (*supra* para. 15) and the State (*supra* paras. 15 and 20) sent the statements made as affidavits in response to the January 31, 2005 Order of the President (*supra* para. 14). The Court will now summarize the significant parts of said statements.

**a. Statement by Albino Fernández, alleged victim**

He is a member of the Yakye Axa Indigenous Community and he currently lives at said Community, on the route between Pozo Colorado and Concepción. He has been a teacher at the Community's school since 1994.

When the struggle for the land began, he also began the struggle to establish a school in the Community, which was recognized by the State as an "Indigenous School," with an allocation for payment of a teacher in 1996. This school is located within the current settlement of the Yakye Axa Community and there are 57 boys and girls regularly enrolled at this school. However, some children drop out of school because they become ill or because they have no food or water and cannot endure studying. Others have no clothes or shoes and are ashamed to attend classes under those circumstances. The parents of most of the boys and girls have no jobs. Furthermore, the members of the community cannot farm because their current settlement is on a fringe of land that the authorities classify as a "public road" and also because they have been forbidden from hunting, gathering firewood and water from their lands. The parents and the teacher suffer for this reason.

The little house where the school operates is made with palm leaves, has a sod floor, two blackboards and chairs with desks. This house is also the chapel. Due to its conditions and structure, the school is especially affected during the rainy season.

The material used in the school is provided by the Governor's Office and by the Instituto Paraguayo del Indígena. This material is insufficient for the school year, so the members of the Community seek additional material by means of donations. The booklets and textbooks are provided by the Office of the Supervisor of Indigenous Education of the Ministry of Education, and they are in Spanish and

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<sup>7</sup> See file with appendixes to the reply to the application, appendixes 1 to 14, volumes 3569 to 3751; file with documents submitted during the public hearing held on March 4 and 5, 2005, volumes 396 to 479; file with proceedings on the merits, reparations, and costs, Volume IV, volumes 887 to 897 and 905 to 907; book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002, and book entitled "II Censo Nacional Indígena de población y viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002.

<sup>8</sup> See file with appendixes submitted by expert witness Bartomeu Melia i Lliteres during the public hearing held on March 4 and 5, 2005, volumes 1 to 395.



Guaraní. They are not given texts in their language (enxet), and therefore they cannot teach it to the children who go to the school, and this endangers its transmission.

Elderly men and women transmit values and practices of their own culture. The witness explains to the boys and girls when there are celebrations and traditional themes and regarding their ancestors, such as the Weykeneten festivity (celebrated at the time of the first menstruation of a girl or of puberty, usually at age 15).

The danger of losing their language, their values and traditions is also associated with the fact that the parents alternate their lives on the estates, where they interact socially with Paraguayans who speak Spanish and Guaraní. The celebrations at the Community settlement cannot be carried out fully in accordance with tradition. For example, they lack the food they would use at the celebrations, which they would produce on their lands. All this is because the Yakye Axa Community is not allowed access to their lands and to their habitat.

The witness has seen acts of violence suffered by the community: attacks with firearms in August 2000 and threats made by hooded men who planted a cross in the community settlement, slaughtered some hens, and said that this would happen to their leaders. The Community lives in fear and sadness. Its member families are not at peace for lack of land and having to live alongside a road, where vehicles go by at high speeds and there is a danger of accidents, such as the one suffered in October 2004 by two young members of the Community. One of these youths, Wilfredo Gómez Fernández, died, and the other, Arsenio Ramos, lost a leg.

Two of the witnesses' children, Mauro who was two years old and Fidelina who was one year old, died due to the conditions in which they lived alongside the road, without even a health post or promoter.

Due to lack of land, deaths are a very bad thing for the Community. Deaths make the families, due to their beliefs, have to leave their house to move away from "the presence" of the deceased beloved one. When his mother died, the witness took apart his house and built another one nearby. Their ancestors' cemetery is in the lands of Yakye Axa, east of the main buildings of Loma Verde estate. If they recover their lands, they will continue burying their dead there.

To change and improve their situation, they need their lands. Without their lands, the teacher suffers, the boys and girls suffer, and their parents suffer.

#### **b. Statement by Enrique Castillo, expert witness**

The Paraguayan National Constitution, adopted on June 20, 1992, establishes that Paraguay is a multicultural State under the rule of law. Being a multicultural State places Paraguay in an advanced position in terms of Ibero-American law, as in addition to acknowledging the indigenous component of its social structure, this means that indigenous customary law is recognized by Paraguay's legal system. In this regard, chapter V of the Constitution defines a special legal system that applies exclusively to the indigenous peoples of Paraguay, recognizing a number of specific rights, guarantees and freedoms that acknowledge the cultural identity and the situation of inequality of those peoples. Article 64 of the National Constitution embodies the right of the indigenous communities to collective or communal

ownership of the land that is their traditional habitat, which must be sufficient in terms of extent and quality to allow the community to live in accordance with its traditional manner of life. That provision places the State under the obligation to acquire those lands and transfer them to the Community free of cost, after making sure that said lands are the traditional habitat of the indigenous nation. The traditional habitat, in addition to being the traditional place of settlement of the indigenous people, must have ecological and environmental conditions that are in accordance with the community's traditional manner of life. Likewise, Paraguay has implemented legislation that develops the right of indigenous people embodied in the Constitution and establishes procedures to be followed for land allocation, acknowledgment of leaders, and acknowledgment of legal status as an indigenous community.

The procedure to legalize lands of indigenous communities, although it has yielded positive results in cases in which the estate owners have been willing to negotiate the transfer of property of the land they claim, has been patently ineffective in cases in which the landowners have been unwilling to do so. It is enough for any estate owner, in face of claims regarding indigenous rights to his land, to argue that it is under rational use. This is a problem of legal architecture, of lack of legal procedures with the authority to make indigenous rights effective. In this regard, all material rights of indigenous communities to their lands, embodied in a progressive manner by the Paraguayan legal system, are insufficiently concrete due to lack of a basic component of any legal provision: its operational or procedural nature, to translate the abstract provision into a practical reality, in an efficient and operational manner. Furthermore, allocation of funds to INDI has been insufficient for implementation of public policies to benefit the indigenous communities.

**c. Statement by Antonio Aylwin Oyarzún, expert witness**

International and comparative jurisprudence and doctrine have addressed the issue of indigenous peoples' rights to their territories. In this regard, they have developed the concept of "indigenous territory," which refers not only to material aspects, linked to physical spaces that belonged to their ancestors, and to resources in those areas, but also to non-material –political, symbolic, and cultural- components. They have also recognized that ancestral indigenous occupation and use of land, territory, and natural resources gives rise to an "original indigenous entitlement" to them, which is prior to that of the States and to the process of colonization and, therefore, it cannot be unilaterally extinguished without the indigenous peoples' consent. This concept has major implications in terms of comparative law, enabling acknowledgment and demarcation by the States of the indigenous peoples' lands, territories, and resources, even if there are other deeds granted by the former.

Chapter V of Paraguay's 1992 Political Constitution focuses on Indigenous Peoples. These provisions are more favorable, in several respects, for indigenous peoples' rights to their lands, territories, and natural resources than international human rights instruments regarding this subject matter, as they are in accordance with evolution of international jurisprudence and doctrine. Thus, the Paraguayan constitutional legal order constitutes an appropriate framework for protection of indigenous peoples. However, as in many States, difficulties for actual exercise of rights embodied in the Constitution derive primarily from lack of public policies to make said human rights effective.

**d. Statement by José Alberto Braunstein, expert witness**

The indigenous peoples of the Gran Chaco are a heterogeneous group of approximately fifty people whose apparent unity derives from their asymmetrical relationship with society as a whole. It is an Amerindian population estimated at two hundred and sixty thousand individuals who speak seventeen different recognized languages, associated with six linguistic groups. The current situation of the indigenous peoples of the Chaco is very dynamic.

When one refers to the indigenous peoples of the Chaco, one speaks of territorial, linguistic and historical units that before the breakdown of ties due to effective occupation of the territory by the Paraguayan State, effectively were societies with a political structure, social control and their own organization, different from those of any other society. In other words, historically each of those peoples had independent sets of social rules, leaderships and social control systems, and the descendants of their members today are aware of their shared, exclusive history. Within each of these systems of social rules, the legal persons subject to them were, rather than individuals, bands conceived as families. Therefore, the modern communities, which are the sedentary expression of traditional bands, should be considered legal persons if one of the objectives is to respect the categories of the original systems of social rules. The specific case is that of the Chanawatsan people, that is, the indigenous groups that speak a dialect of enxet (lengua), who lived near the Paraguay River, facing the city of Concepción, and who were traditional hunter gatherers.

With regard to possession of indigenous land, it is necessary to point out that the way it is adopted differs considerably from how it is regulated in legal codes and, therefore, the signs that identify said act are also different. Occupation is expressed in a different manner and is not always evident due to the cultural mode of production that does not include the practice of massively transforming nature, due to the noteworthy adjustment to the environment attained by these peoples in the course of many generations. Despite the subtlety of the signs of possession, sites periodically settled, watering places, water deposits, hunting territories, gathering or fishing areas, almost imperceptible cemeteries, and so forth, are an indelible part of the historical memory of these peoples. This historical memory, inseparably associated with geography, is the main sign of traditional possession.

The relationship of the indigenous peoples with the land they inhabit is such that a severing of that relationship entails the certain risk of an irreparable ethnic and cultural loss, with the subsequent gap in diversity that would result from it.

Mobile hunter-gatherers covered their territory using nature insofar as the resources of each annual cycle and cultural technology allowed them to take advantage of it. Thus, traditional production activities followed a rhythm due to seasonal conditions and to what existed at specific times in various parts of the territory occupied by each people. Use of their territory by the indigenous peoples is not at all haphazard or sporadic if one views it from the standpoint of the internal logic of each culture. The territory, all the space used by the band and in which it moved, was ultimately a vast dwelling which an enormous family used completely in the course of an annual cycle.

Indigenous peoples' relationship with the land also has non-utilitarian aspects. The cosmological spheres of the people of Chaco are ruled by "lords" ["señores"] of the

entities that constitute them, often species or groups of animals or plants. These "lords" symbolize the totality and somehow represent the potency of the respective species or group. These "lords" cause personality disorders or illnesses, as well as environmental catastrophes or difficult situations. The "shamans" of El Chaco develop ecstasis to communicate with them and attempt to negotiate the therapy or the goodwill of these beings according to the needs of those who resort to them. Shaman, folk doctor, magician or sorcerer may be synonymous in the Gran Chaco. This is so because from a functional standpoint the shaman is a folk doctor, an agent of healthcare, a doctor in charge of helping people maintain balance with life; from a religious standpoint, shamans are brokers with powerful beings who interact with men, and from the perspective of the structure of society, the shaman, whose position is unique and necessary, often leads one of the social orders of the indigenous peoples of the Chaco.

The indigenous peoples of the Chaco believe that the compassion for men among those beings makes them allow productive activities in the areas over which they rule, and also grant the means for their subsistence. This manner of thought can be summarized in the axiom "living with nature," contrary to the one that prevails in our culture, in which the economic good is partly identified with control over nature, summarized in the expression "live off nature".

In the 19th century, when Argentina, Bolivia and Paraguay became independent countries, most of the region of the Chaco, in the midst of the three fledgling States, had not been occupied by white men. After the war of 1870, there was a period of major land speculation, during which the area where the Lengua indigenous people lived became private property, and Paraguay's leather tanning industry was established there.

Regarding the establishment of religious missions, the expert witness noted that religion and teaching of Christian beliefs was present from the outset of conquest to trigger processes of change and assimilation of indigenous peoples to Western culture. Since the late 19th century, the Anglicans began to establish several missions. W.B. Grubb established the Makxlawaya mission among the Lengua indigenous people in the Paraguayan Chaco.

However, the processes that most deeply affected the cultures of the Gran Chaco were in connection with participation of the indigenous peoples in the market. Said processes were seasonal or permanent migrations associated with the establishment of sedentary settlements, both giving rise to it and resulting from it, as their natural conclusion.

Effective original dispossession caused by the historical institutional act of physical occupation of the territory has hidden the presence of dispossessed legal persons and awareness of the extent and limits of their previous territories. Clearly, due to the nature of occupation and possession of the land by indigenous peoples of the Chaco, these legal persons subject to the law are social groups with sovereign occupation of certain geographical areas. Such is the case of the current Yakye Axa Community, the sedentary expression of one of the bands of the Chanawatsan people.

**e. Statement by Teresa de Jesús Vargas, witness**

The witness is very familiar with the process of territorial claims by the Yakye Axa Community before the Instituto Paraguayo del Indígena, as well as the efforts by said institution to directly assist the members of the Community, because she was a member of the Board of the Instituto Paraguayo del Indígena from 1999 to 2003. Said efforts were unsuccessful. At the time, the Instituto Paraguayo del Indígena reached an agreement with the Community to begin the process of recovery of 7,900 hectares; however, said request was rejected by the Paraguayan Parliament.

The witness added that the Yakye Axa Community was traditionally established in the region that they claim as their lands. The Community left their land due to circumstances of survival and was moved to the colony at El Estribo. Some time later, due to living conditions in that place, the Community decided to return to their traditional lands. When they learned that there was legislation favorable to the right to recover their lands, the members of that Community “voluntarily returned and began the process of furthering their claim.”

**f. Statement by Oscar Centurión, witness**

The witness is the current chairperson of the Board of Directors of the Instituto Paraguayo del Indígena. He explained that the group of families that now constitute the Yakye Axa Indigenous Community originally were part of the Community of El Estribo, from which they separated, regrouping and establishing the Yakye Axa Community, in accordance with the provisions of Law No. 904/81 on the Statute of Indigenous Communities. At that time, the Community began the process of claiming their ancestral lands, which constitute a fully productive cattle ranch.

As Chairperson of the Board of Directors of the Instituto Paraguayo del Indígena, he contacted all the members of the Yakye Axa Community, to obtain their consent to seek an alternative solution to the claim on their traditional lands. For this, they requested additional budgetary resources to fund the purchase of a property that could satisfy the requirements of the members of the Community, who were open to exploring this option. Unfortunately, despite the efforts made by the Government, the proposal was rejected by the Senate. Another time, they consulted with the members of the Yakye Axa Community the possibility of purchasing 25,000 hectares near the area they claimed; however, the members of the Community rejected this possibility because said area was being claimed by another neighboring indigenous community. However, the Instituto Paraguayo del Indígena plans to continue seeking a solution to the Community’s land claim and funds to purchase land for this purpose.

The Instituto Paraguayo del Indígena has established an action plan to provide food and health care to the members of the Community and has provided assistance in accordance with the possibilities of said institution.

**g. Statement by Pedro Martínez González, expert witness**

The expert witness is familiar with the Yakye Axa Indigenous Community, its leaders and its legal representatives. Through the Instituto Paraguayo del Indígena he has taken steps to address the healthcare needs of the members of said Community; specifically, he has provided primary medical assistance to them.

**h. Statement by César Escobar Catebecke, expert witness**

He described the medical infrastructure available to the Paraguayan population in general and specifically to the indigenous population of El Chaco, as well as the healthcare provided by the State to the indigenous communities and their additional benefits.

The expert witness believes that the death of an individual due to diseases such as heart failure, tuberculosis, dysentery, tetanus, cachexia, meningitis, bronchitis or suffocation cannot be attributed to the State, as said diseases are common among the inhabitants of the area, whether they are Latin or Mennonite, and the State takes preventive steps to avoid such diseases among the communities.

*B) TESTIMONY*

39. On March 4 and 5, 2005, at a public hearing, the Court heard the statements of the witnesses and expert witnesses offered by the Inter-American Commission and by the representatives (*supra* para. 21). The Court will now summarize the significant parts of said testimony.

**a. Esteban López, alleged victim and leader of the Yakye Axa Community**

He is a member and a leader of the Yakye Axa Community and a member of the Enxet Sur indigenous people of the Paraguayan Chaco. His mother tongue is the enxet and he also speaks Guaraní and Spanish. He was born on Estancia Loma Porá, located approximately 45 kilometers from Yakye Axa, because after the death of his father, most of his family went there, "in accordance with the culture of the indigenous people." Nevertheless, his relatives and his grandparents were part of the Yakye Axa family. The witness arrived at Estancia Loma Verde (Yakye Axa) when he was 14 years old and he worked there, among other things, as a tractor driver, cutting posts, and setting up wire fences.

In 1980, the members of the Yakye Axa Community had no possibility other than being employees of the private firm that was located at Loma Verde estate. The Anglican church told them that they were being "exploited" and that they did not deserve to "continue living under those conditions." Between 1984 and 1985 the Anglican church promised the members of the Community that they would receive new, appropriate lands, and they decided to leave their land in Yakye Axa and go to Estancia El Estribo. There, the members of the Community also lived under precarious conditions, without food and water. Likewise, the Community lost several boys and girls, youths and women. The witness lost two children. For this reason, they decided to talk with those who left Yakye Axa to find a way to claim the land of their ancestors. At that time, all the members of the Community decided to return to Yakye Axa, through an agreement or consensus, in which they also appointed their leaders.

In 1993, the Yakye Axa Community began to take a number of legal steps before the Instituto Paraguayo del Indígena and the Instituto de Bienestar Rural in connection with their land claim; however, they have received no answer to said claim.

In 1994, three families that were part of the Community were still at Loma Verde as employees. In 1996, most members of the Community attempted to return to Yakye Axa, but they were not allowed to enter. Therefore, the members decided to

establish themselves alongside the public road, facing the land of Loma Verde estate, which is the land that "belonged to their ancestors and was lost."

Yakye Axa is a sacred place where their ancestors lived. The witness recalls that 47 persons died and were buried there.

Living conditions of the members of the Yakye Axa Community at the place where they currently live are difficult. The settlement is surrounded by cattle ranchers' land, which they are not allowed to enter. They cannot hunt freely, they have problems finding food and "protecting themselves in the country to avoid conflicts with the white persons." The men of the Community cannot feed their children regularly. The witness has to go elsewhere to obtain water and food for the boys and girls. Most members of the Community are jobless.

The State supplies some food to the Community. During drought periods, those supplies arrive twice a month, but they only last six days.

After beginning the process of claiming their lands, the Community has constantly been threatened by the owners of the lands they claim or by persons hired by them. One night, three individuals wearing long clothes, like those of a priest, entered the Community with firearms, shooting at each house. The men planted a cross in the Community settlement and hung a slaughtered hen. When they left, they said they would do the same to the members of the indigenous Community. Although these facts were reported to the Paraguayan authorities, there have been no results.

While the land claim was being processed, the witness regularly visited the Instituto Paraguayo del Indígena to request food supplies, medicine, and any other assistance, and he personally contacted both the President of that Institute and other officials. Sometimes they received aid from INDI, other times they did not.

In September 2001 the witness was subjected to pressure to accept an offer of 30,000 hectares of land. Due to that pressure, the witness wanted to resign as leader, but the majority of members of the Community did not allow him to do so. The members of the Community met, and most of them did not accept the offer, but others did, so the witness signed certain documents, feeling very nervous.

The Community also received other offers of land. Twice, the Instituto Paraguayo del Indígena offered them 25,000 hectares. However, since another indigenous community had previously requested that land, and the Yakye Axa Community did not reach an agreement with them, they did not accept that offer. It was better to turn down the offer and leave them in peace. Another time, the Community rejected an expropriation of 15,000 hectares on the land of the Chanawatsan, in Naranjatý, of which they were to receive 7,500 hectares, because they were "notified with no prior consultation."

**b. Tomás Galeano, alleged victim and leader of the Yakye Axa Community**

His ethnic group is the Enxet. He is the chief of the Yakye Axa Community, as his ancestors were. He was born and raised in Yakye Axa, where his parents lived before.

At first, the estate was called Loma Verde. It was a small estate, and there was a diverse population of Paraguayan creoles and indigenous community members. At that time, the Paraguayan creoles and indigenous community members lived together in harmony, one could see the peacefulness and the expression of love. Relations with the first owner of Estancia Loma Verde were fine, but there were several changes in ownership of the estate, and suddenly there was a change of attitude of the estate owner regarding the Community, and this change was not readily compatible with the way the members of the Community lived. The members of the Community, who are Enxet, did not want to leave Yakye Axa, because there they had the wealth and resources of the forest and of the ponds.

The witness does not know why his group left Yakye Axa. One day, suddenly, several vehicles arrived and they were told that they had to climb onto them. They were taken to the English mission, Makxlawaya, and then to El Estribo. At El Estribo they lived peacefully, but the pastors did not like them to practice their cultural festivities; then the witness, as head of the group, decided to leave with other members of the Community and return to Yakye Axa, because that is where they could develop a positive group relationship and continue their cultural festivities without bothering the parents who did not like their culture. At Yakye Axa they would have everything their culture needed to hold cultural festivities.

The cultural festivity of the Yakye Axa Community consists of harmony and tranquility. In the Community there are individuals, the 'shamans', who cure those who are ill and protect their people; for this reason, their children and grandchildren used to be quite well. For this, they need their territory to continue living in accordance with their culture.

They left El Estribo with the hope of immediately recovering the land, but this was not the case. Therefore they remained at "the place of Yakye Axa" to live together. Currently, the members of the Community live alongside a road, because the owner of the estate does not allow them to enter and they have nowhere else to go. They do not plan to go anywhere other than Yakye Axa. They think about those who were buried there, those who were born and those who grew up in that place, and for this reason they remain in Yakye Axa.

For the Community, "Yakye Axa" means the place where their ancestors lived and moved about. It is the land that belongs to them, that is, the place that is adapted to their reality as indigenous community members. If they live in their territory, they will feel no fear, because they will be completely free; that is why they request the land and the territory, for sake of tranquility.

His people are in very bad conditions where the Community is currently located. There is no food for the children, sometimes there is nothing to eat all day. It is very difficult to hunt, as they are not allowed to enter the estate that is alongside the settlement, for which reason they have to make long trips to other estates in the area.

The witness hopes to receive, clear, sincere, and honest information, as well as support for them to receive their lands for sake of their children's and grandchildren's tranquility.

**c. Inocencia Gómez, alleged victim**



She is a member of the Enxet indigenous people. Her parents were from Yakye Axa; however, the witness was born at Estancia Ledesma, next to Yakye Axa, after her father went there to work. She lived at Estancia Ledesma until she was five years old, and then she returned to Yakye Axa. She speaks Enxet and Guaraní.

At Yakye Axa her parents lived quite well, hunting peacefully. However, there was a change of estate owner and in how the people were treated. The people "were no longer comfortable there," so they left Yakye Axa. Another group of families remained because they did not want to leave Yakye Axa.

Currently, the Yakye Axa Community lives alongside the road, due to all the difficulties they have faced at that place; they have neither good food nor medical care. The rains affect their dwellings, and there is nothing they can do; they cannot take a child to the bathroom or cook. In those cases, the women usually go out to the road to protect the children, and at nighttime they enter the house again to sleep.

The witness has six children. To feed them, she leaves her house every day at 4:00 a.m. to work at Estancia Maroma. There she works at various domestic chores. Together with the other women of the Community, they leave the settlement to seek food for the children every day, because they receive no support. In 2003 the State sent food to the Community "almost twice."

The Community has a small school, but the teacher cannot continue teaching the children because they have no food. They also have a shaman among them, who is the father of the witness.

The Yakye Axa Community has also suffered due to the death of their relatives. Since they settled alongside the route, two youths have died due to road accidents. When there is an emergency because of an illness, the members of the Community usually act in search of a solution to the ill person's problem. To take those who are ill to Concepción or Asunción, they have to pay. Once in a while they find people who support them.

In 2004, the children were only vaccinated once. The physician who visits the Community does not take the medicine they require. Since the Community settled alongside the route, three children have died due to lack of medical care. The children died from vomiting with diarrhea or with sore throats. Those children were buried alongside the road. When a member of the Community dies, there is no option other than burying their remains in someone else's pasture, "because they are not from that place."

Her husband walks several hours to be able to hunt animals. When he arrives at the place, he stays and sleeps there. If her husband returns and brings food, the witness, as a woman, rests.

At Loma Verde estate, an individual was stationed as the place's 'matador', who walks alongside the wire fence with a shotgun, threatening the children and women, because he is under orders to not allow anyone to enter for firewood or water. The witness is the only one who can "approach the man", when necessary, to clarify something, for which reason she has also been threatened.

The Community is waiting for the land to be returned to them, to work and cultivate. The witness hopes that her children may have their own land, to live in peace.

**d. Stephen William Kidd, witness**

He went to Paraguay in 1984 to work on an Anglican Church project for indigenous settlements. He lived in Paraguay until 1996, with Enxet communities.

In the 19th century, the lands of the Paraguayan Chaco were sold by the State on the London exchange to mostly British businessmen. Around 1886, the British Consul in Paraguay approached an Anglican mission, the South American Mission, to request support for "pacification of the indigenous peoples" of the Chaco, to facilitate entry of the British businessmen into the area. In 1907, the Anglicans established several missions in the lands purchased in the Chaco. However, in the 1950s they sold most of their land and retained only a very small part in Makxlawaya, which was the Anglican center of the whole area.

Until 1979 the Church had a more spiritual mission in the Chaco. Afterwards, given the seriousness of the living conditions of the indigenous community members who had no land, it decided to set up a development project known as "La Herencia" ["The Heritage"], with the aim of purchasing land for the indigenous people's settlement.

La Herencia was a comprehensive development project that included agricultural, health and educational assistance. Three landholdings were purchased within the framework of the project. In 1980, it purchased the land in Sombrero Piri; in 1982, La Patria, and in 1984, El Estribo.

The land at El Estribo was purchased in the Mennonite area, in the territory of the Northern Enxet, north of the Anglican area. These ten thousand hectares were acquired thinking only of the Makxlawaya community, which at the time amounted to 1,700 individuals. However, other indigenous communities living on estates such as Loma Verde, Maroma, Loma Porá, and Ledesma heard that there was the possibility of going to El Estribo, and they decided to go. Thus, the people of Loma Verde constituted a community within El Estribo.

Clearly the indigenous people have always wanted to live on the lands where they, their parents and their grandparents were born. In the early 1980s, the indigenous people of the area lived under very bad conditions on the estates. When the Anglican Church came and offered them land, which seemed like "the land of honey," with food and tools, many chose to go and flee the haciendas to establish the new colony, without realizing that their economic situation would not really improve.

Due to conditions on the new lands, the members of the indigenous community who moved to these settlements could not live there all the time; they had to seek work with the Mennonites or return to the estates. This turned these settlements into convenient labor camps for all the landowners in the area.

Once they learned about the existence of Law No. 904/81, the Anglican Church attempted to change its policy regarding the territorial problem of the indigenous communities. Therefore, they set up a small team with an attorney to support several indigenous claims in the area of the Enxet and Sanapaná. This team began

to visit the communities to explain that they had the right to claim their lands, and practically every community decided to explore the possibility of claiming them.

In 1993, most members of the Yakye Axa Community decided to claim their lands. Also, in 1996 Tomás Galeano, with a small group of members of the Community, returned to Loma Verde estate. At that time several indigenous families lived in Estancia Loma Verde; however, the group led by Tomás Galeano was unable to enter, for which reason they were forced to establish their settlement alongside a public road, facing said estate. Several months later, spontaneously, almost all the Community decide to settle alongside the public road. The members of the Community did not receive external support to move there, but rather paid for this themselves. The Yakye Axa Community chose the land they wanted to claim on their own, where their settlement had been, where they, their parents and their grandparents were born.

The Yakye Axa Community is a longstanding community. After they left El Estribo, the members of that Community visited Estancia Loma Verde, stayed there several weeks, fishing and hunting. The members of the Yakye Axa Community always spoke sadly of the fact that they had left their land to settle on the land at El Estribo, which was actually not good for anything, much less for agriculture.

**e. Rodrigo Villagra Carrón, witness**

In 1993, the Yakye Axa Community began to claim its lands before the Instituto Paraguayo del Indígena and the Instituto de Bienestar Rural. At that time, the Community requested 15,000 hectares in the area of its traditional habitat, which includes the Loma Verde, Ledesma, and Maroma estates. Subsequently, this claim focused on the complete surface of Loma Verde estate, 18,000 hectares. In 1997, the Instituto Paraguayo del Indígena requested the drafting of an anthropological report that subsequently corroborated that the area claimed by the Community constituted its traditional habitat. That same year, the Instituto de Bienestar Rural conducted a visual inspection that declared that the land claimed was under rational use, for which reason it transferred the file to the Instituto Paraguayo del Indígena. The Instituto Paraguayo del Indígena raised the possibility of expropriation of those lands, arguing that they are part of the Community's traditional habitat and that this right can be exercised by other than private individuals, as the Community is prior to establishment of the State.

In 2000, there were hearings for a friendly settlement between the Yakye Axa Community and the owners of the land; however, the latter refused to sell it. The Community requested expropriation of Estancia Loma Verde. That same year a bill was submitted to expropriate the 18,000 hectares of Estancia Loma Verde, which was ultimately rejected by the congressional committees that dealt with the agrarian reform, for which reason the bill was not discussed in the plenary.

Subsequently, the Executive submitted another expropriation bill to the Senate, which discussed it and finally decided to reject it.

In 1993 the Yakye Axa Community asked the Instituto Paraguayo del Indígena to acknowledge its leaders. The State took three years to grant said acknowledgment, while this could have been done in a few months. In 1998, the Community requested its legal status and the Instituto Paraguayo del Indígena only granted it in 2001.

In response to a request by the Community, the legal bodies with authority over the administrative process heard a request for precautionary measures as an incidental proceeding. Said measures were granted by the first instance, but subsequently lifted by the judge in response to an appeal by the landowners. Lifting of said measures was upheld by the Supreme Court of Justice. The Instituto Paraguayo del Indígena also submitted a request for provisional measures to protect the area claimed while Congress decided on the expropriation request. When Congress rejected the aforementioned bill, the judge lifted the measures, deeming that there was no longer a main proceeding that could enable their continuation.

The offer made several times by the State for settlement of the members of the Yakye Axa Community on alternative lands has been rejected primarily because those offers affected other indigenous communities and peoples, and in many cases the resettlement would be definitive rather than temporary. Furthermore, said offers did not mean that there were sufficient funds to buy the lands, and there had been no prior consultation with the Community.

**f. Bartomeu Melia i Lliteres, expert witness**

Until 1883, after Paraguay's great war against Argentina, Brazil and Uruguay, the only population of the Chaco region was indigenous. Existence of these indigenous peoples of the Chaco, in terms of their land rights, was never acknowledged. The members of the indigenous communities simply became day laborers and employees of the new landowners. At that time, the Paraguayan government was extremely weak, having to pay debts for the war it had lost, for which reason it was in no position to ensure citizens' rights.

Although many indigenous peoples in Paraguay currently have lands, and others are still processing their land claims, it can be said that they absolutely lost their territories. Loss of their territories entails denial of cultural space. For example, the Guaraní say that "their land is not their land" but rather "the place where we are what we are." This means that "the land is our culture," in other words, that the concept of culture is closely associated with the land.

In the case of the Yakye Axa Community one might say that not having territory and having remained alongside the road for over ten years would prove that it is possible to survive without a territory. However, in terms of their collective imagination the members of this Community live on the land that they claim, and this is what allows them, for example, to remain very faithful to their autochthonous language.

The problem of loss of land by the indigenous peoples is a cultural matter. Although Paraguay's Constitution recognizes that these indigenous societies are prior to the establishment of the State, it does not comprehend that their territories are also prior to the State. It is easy to accept that their language, their political organization, and so forth are prior to establishment of the State, but not that their lands are too.

To solve conflicts such as the one in this case, serious anthropological studies should be conducted to establish which are the traditional territories of the indigenous communities, or at least certain core areas of those territories. At the same time, it would be necessary to develop a land registration study of the Chaco, which has not

been done to date. There is also a need to study possibilities of land expropriation, together with compensation for effective improvements to the property.

**g. Pablo Balmaceda Rodríguez, expert witness**

He has provided medical care to the Yakye Axa Community since 2000. Since then, he visits the Community every two or three months.

The purpose of his expert opinion was to corroborate, with reliable studies, the situation of the Yakye Axa Community, as well as to establish what caused the death of several members of said Community since they settled on a public road to claim their traditional lands.

Blood tests and fecal samples were taken from the members of the Community. These studies demonstrated that the members of the Yakye Axa Community suffer significant levels of parasitism and anemia. Samples were also taken of the water used by the Community. It was found that the Community has a single source of water which is not suitable for drinking, which is a water deposit or 'tajamar'. This deposit is roughly sixty by forty meters, and its purpose is to store rainwater. This deposit is on the other side of the fence that borders the land that they claim, for which reason the members of the Community have to enter furtively to obtain water for their personal hygiene and for their own use. The water is exposed to contact with wild animals and with animals raised on the estate.

The huts where the inhabitants of this community live are very precarious. They are built with a material that is abundant in the area, a palm with which they make the walls and roof. These dwellings are so precarious that when it rains, everything is flooded, including the rooms in which they live in overcrowded conditions. Due to the characteristics of the land in the Chaco, the water is not readily absorbed by the land, so all that water remains there without running off. Furthermore, there is not a single latrine in the community, for them to relieve themselves, for which reason they use the plants in the area. Therefore, rainwater floods the whole area and carries with it the fecal matter to the dwellings and the little school. The Community's situation of extreme poverty and abandonment is disastrous. There is no need to be an expert to corroborate all these circumstances.

The next of kin of deceased individuals were interviewed to establish the probable cause of the deaths that took place in this community in recent years. It was very difficult and required much patience and trust by the inhabitants of Yakye Axa to talk about the cause of the deaths of their next of kin. Since there is no record of said deaths, it was difficult to establish the exact dates when they died. Furthermore, for members of Enxet indigenous groups it is not easy to discuss the memory of those who died, due to the special relationship they have with death, for which reason a major psychological effort was required for them to accept questions about the deceased.

Once the interviewees felt trust and began to talk about the symptoms observed before their children, siblings or parents died, the expert witness believes that he was able to establish the cause of said deaths with a high degree of certainty.

In most cases, those who died received no prior medical care. The two persons who reached the hospital were diagnosed and sent back home, because the physicians decided that nothing could be done.

Based on what the mother told him, he established that several children died of bronchitis or bronchopneumonia. The symptoms described by the mothers fit this diagnosis perfectly: the children were coughing, had a high fever, and found it difficult to breathe, and they died without medical care or medicine. The interviewees also stated that during the dry season the children died of diarrhea, and that is precisely the season for said illnesses. These creatures died with all the symptoms of diarrhea: fever, constant diarrhea, sometimes with blood, and vomiting. There were also cases of adults who died for lack of appropriate and timely medical care and for lack of food.

The Yakye Axa Indigenous Community is in a completely abandoned state. There is no health post or community clinic, and there are no health promoters. The Community's settlement is 356 kilometers from the capital and 70 kilometers from the nearest hospital. The closest regional hospital is 225 kilometers away, very close to Asunción, for which reason it is easier for the members of the Community to go to the capital, where they might obtain financial support. They must obtain exoneration of payment of the appointment and of the studies to be carried out, as well as donation of the medicine. The members of the Yakye Axa Community have no money to cover their travel expenses, for which reason it is impossible to receive this medical care. Furthermore, the State does not provide any special transportation for the members of the community to receive those services. They use public transportation, which is deficient.

Currently, the nutritional conditions of the children of the Community are very precarious. Malnutrition of children is evident. The children's hair is discolored and their stomach is enlarged, their height is not in accordance with their age. This in turn has negative consequences, such as difficulty learning and in terms of intellectual development. This could be corrected insofar as deworming therapy and adequate, permanent feeding begins as soon as possible.

Land is essential for the indigenous communities. On the land, the members of the Yakye Axa Community can improve their dwellings, have clean water supply, and request support to develop the land.

### C) APPRAISAL OF THE EVIDENCE

#### *Appraisal of the documentary evidence*

40. In this case, as in others,<sup>9</sup> the Court accepts the evidentiary value of the documents submitted by the parties at the appropriate procedural moment, or as evidence to facilitate adjudication of the case pursuant to Article 45(2) of its Rules of Procedure, which were neither challenged nor disputed, and whose authenticity was not questioned.

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<sup>9</sup> See *Case of Caesar*, *supra* note 2, para. 46; *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 37, and *Case of Lori Berenson Mejía*, *supra* note 2, para. 77.

41. On the other hand, the Court, pursuant to Article 44 of the Rules of Procedure, accepts the evidence submitted by the representatives regarding the supervening facts after the application was submitted (*supra* para. 24).<sup>10</sup>

42. Likewise, the Court deems that the documents submitted by the representatives together with their final written pleadings, with regard to costs and expenses (*supra* para. 24), are useful, and they will be assessed taking into account the observations made by the State (*supra* para. 26).

43. With regard to the testimony and expert opinions submitted in writing by means of affidavits before a notary public by the witnesses and expert witnesses offered by the Commission and the representatives and by the State (*supra* paras. 38.a, 38.b, 38.c, 38.d, 38.e, 38.f, 38.g and 38.h), in accordance with the Order issued by the President on January 31, 2005, the Court admits them insofar as they are in accordance with the object defined in said Order and assesses them in the context of the body of evidence, applying the rules of competent analysis and taking into account the observations submitted by the parties (*supra* para. 22). In this regard, the statement by Albino Fernández, since he is one of the alleged victims and has a direct interest in this case, cannot be appraised in an isolated manner, but rather in the context of all the evidence in the proceeding. As this Court has stated before, regarding both the merits and reparations, the statements of the alleged victims, as well as those of their next of kin, are useful insofar as they can provide more information on the alleged violations that may have taken place and regarding their consequences.<sup>11</sup>

44. The Court deems that the documents submitted by the State during the public hearing of the instant case (*supra* para. 21) are useful to reach a decision in the instant case, together with the documents submitted by expert witness Bartomeu Meliá i Lliteres (*supra* para. 21), especially because they were neither challenged nor disputed, and their authenticity or truthfulness was not questioned, for which reason this Court includes them in the body of evidence, pursuant to Article 45(1) of the Rules of Procedure.

45. The State objected to "the 'unilateral statement' of Esteban López, issued before a notary public, with regard to 'certification' of the demise of the individuals in whose name he claims compensation," which was forwarded by the representatives as part of the evidence to facilitate adjudication of the case (*supra* para. 26). This Court deems that said statement is useful and will appraise it in the context of the body of evidence, applying the rules of competent analysis and taking into account the observations made by the State. Therefore, it adds that statement to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure.

46. Finally, with regard to the press clippings submitted by the parties, this Court has deemed that even though they do not constitute documentary evidence proper, they may be appraised insofar as they reflect publicly known facts, statements made

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<sup>10</sup> See *Case of De La Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 58; *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 128; and *Case of Bulacio*. Judgment of September 18 2003, Series C No. 100, para. 57.

<sup>11</sup> See *Case of Caesar*, *supra* note 2, para. 47; *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 40; and *Case of Lori Berenson Mejía*, *supra* note 2, para. 78.

by officials of the State, or they corroborate aspects pertaining to the instant case.<sup>12</sup>

*Assessment of the Testimony and Expert Opinions*

47. With regard to the statements rendered by the witnesses offered by the Commission, the representatives and the State in the instant case (*supra* para. 39(a), 39(b), 39(c), 39(d), 39(e), 39(f) and 39(g)), the Court admits them insofar as they are in accordance with the object of the examination established by the President in his January 31, 2005 Order (*supra* para. 14) and gives them evidentiary value.

48. In this regard, this Court deems that the testimony of Esteban López, Tomás Galeano and Inocencia Gómez (*supra* para. 39(a), 39(b) and 39(c)), since they are alleged victims and have a direct interest in this case, cannot be assessed in an isolated manner, but rather in the context of all the evidence in the proceeding. For the reasons already stated by the Court (*supra* para. 43), said testimony is useful in the instant case.<sup>13</sup>

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49. For the aforementioned reasons, the Court will appraise the evidentiary value of the documents, statements, and expert opinions submitted in writing or rendered before the Court. The evidence submitted during the proceeding has been integrated into a single body of evidence, which is considered as a whole.<sup>14</sup>

**VI  
PROVEN FACTS**

50. After examining the documentary evidence, the statements of the witnesses, the expert opinions of the expert witnesses, as well as the statements by the Inter-American Commission, the representatives and the State in the course of the instant proceeding, this Court deems the following facts proven:

*a) Background:*

i. The Yakye Axa Indigenous Community

50.1. The Yakye Axa Community ("Isla de Palmas") is an indigenous community that is part of the Southern Lengua Enxet people.<sup>15</sup> The Southern Lengua Enxet, like

<sup>12</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 43; *Case of Lori Berenson Mejía*, *supra* note 2, para. 80, and *Case of De La Cruz Flores*, *supra* note 10, para. 70.

<sup>13</sup> See *Case of Caesar*, *supra* note 2, para. 47, *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 45, and *Case of Lori Berenson Mejía*, *supra* note 2, para. 78.

<sup>14</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 46; *Case of Lori Berenson Mejía*, *supra* note 2, para. 87, and *Case of Carpio Nicolle et al.*. Judgment of November 22, 2004. Series C. No. 117, para. 75.

<sup>15</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277); book entitled "II Censo Nacional Indígena de población y viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the



the Northern Lengua Enxet, Sanapaná, Toba, Angaité, Toba Maskoy, and Guaná, are part of the Lengua-Maskoy (Enhelt-Enenlhet) linguistic family, and they have traditionally lived in the Paraguayan Chaco.<sup>16</sup>

50.2. The Southern Lengua Enxet people, in turn, have been subdivided in various groups, among which the Chanawatsan (“those of the Paraguay river”) stand out.<sup>17</sup> Before the non-indigenous occupation of the Paraguayan Chaco, which took place in the late 19th and early 20th century,<sup>18</sup> the Chanawatsan occupied the territory of the western bank of the Paraguay river in the area of Concepción (Náwátsam) up to seventy kilometers inland within the Chaco.<sup>19</sup> The Yakye Axa Community is the sedentary expression of one of the Chanawatsan bands.<sup>20</sup>

50.3. The economy of the Southern Lengua Enxet is primarily based on hunting, gathering, and fishing. They also farm plots and raise cattle, sheep, and goats.<sup>21</sup> Traditionally, the Southern Lengua Enxet people and its subgroups moved around their territory making use of nature insofar as allowed by the seasonal conditions and their technological culture; this made them shift from one place to another and

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public hearing held on March 4 and 5, 2005, pages 22 and 658); book entitled “Atlas de las Comunidades Indígenas en el Paraguay”, Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404); testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and expert opinion of Bartomeu Meliá i Lliteres rendered before the Inter-American Court on March 4, 2005.

<sup>16</sup> See book entitled “II Censo Nacional Indígena de población y viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales”, Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, page 22); article entitled “Las lenguas indígenas en el Paraguay. Una visión desde el Censo 2002”. Bartomeu Meliá i Lliteres. (documents submitted during the public hearing held on March 4 and 5, 2005, volume 07), and anthropological report on the “Yakye Axa” (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica “Nuestra Señora de la Asunción” (file with appendixes to the application, appendix 9, volumes 1272 to 1277).

<sup>17</sup> See Enxet Sur Dictionary. First Draft, Winter 2001. Paraguayan Anglican Church (file with appendixes to the brief with pleadings and motions, appendix 4 d), volumes 1889 to 1903); statement by Alberto Braunstein rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 700 to 712); testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>18</sup> See statement by Alberto Braunstein rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 700 to 712), and expert opinion of Bartomeu Meliá i Lliteres rendered before the Inter-American Court during the public hearing held on April 4, 2005.

<sup>19</sup> See Enxet Sur Dictionary. First Draft, Winter 2001. Paraguayan Anglican Church (file with appendixes to the brief with pleadings and motions, appendix 4.d, volumes 1889 to 1903), and testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>20</sup> See statement by Alberto Braunstein rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 700 to 712).

<sup>21</sup> See anthropological report on the “Yakye Axa” (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica “Nuestra Señora de la Asunción” (file with appendixes to the application, appendix 9, volumes 1272 to 1277), and book entitled “Atlas de las Comunidades Indígenas en el Paraguay”, Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404).

occupy a very extensive territory. The Yakye Axa Community is this type of traditional society of hunter-gatherers.<sup>22</sup>

50.4. Traditional occupation of territory by the indigenous peoples of the Chaco is reflected primarily in the names given to specific places within that territory, such as periodical settlement sites, water deposits, lakes, small forest areas, palm tree areas, 'espatillares,' gathering and fishing areas, cemeteries, and so forth. These geographical points are retained in the historical memory of indigenous peoples such as the Southern Lengua Enxet.<sup>23</sup>

50.5. The lands now claimed by the Yakye Axa Indigenous Community as part of their traditional territory are in the area previously occupied by the Chanawatsan. In their land claim the Community has stated that it includes what are known as the Loma Verde, Maroma, and Ledesma estates.<sup>24</sup>

50.6. According to the anthropological report prepared for the instant case (*infra* para. 50.35), within Estancia Loma Verde, specifically, there are several places with names that remain in the memory of the members of the Yakye Axa Community, including:

Enmakxa Yaktépa (the squash place), Xakma Páye (the place with many mosquitos), Xakma Yawhan (the place with many wasps), Yexnakxa Xenaj Apkátek (the place of the hanging deer head), Yexnaka Xápen (de place of the hanging rhea), Yakye Axa (the palm tree area), Apmésamakxa Yátey Apketkok (the place where the kid was burned).<sup>25</sup>

50.7. According to the 2002 census, the Yakye Axa Community is constituted by 319 individuals, grouped into roughly 90 families.<sup>26</sup>

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<sup>22</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277), statement by Alberto Braunstein rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 700 to 712); testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>23</sup> See statement by Alberto Braunstein rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 700 to 712); testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005, and anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277).

<sup>24</sup> See letter by Tomás Galeano on October 5, 1993 addressed to the president of the Instituto de Bienestar Rural (file with appendixes of the application, appendix 4, volumes 488 to 496).

<sup>25</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277).

<sup>26</sup> See census of the Yakye Axa Indigenous Community (file with appendixes to the application, appendix 5, volumes 1250 to 1257), and book entitled "II Censo Nacional Indígena de población y viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, page 658).

50.8. Since 1996, part of the Yakye Axa Community settled alongside the route between Pozo Colorado and Concepción in the Presidente Hayes Department, facing the barbed wire fence of Estancia Loma Verde.<sup>27</sup> A number of families ranging from 28 to 57 are living there.<sup>28</sup> The rest of the members of the Yakye Axa Community remain in several villages: 20 de Enero, Alegre, Karanda, San Carlos, Para Todo 'i, La Madrina, and Santa Fe of Estancia El Estribo or spread out in other estates of the Presidente Hayes Department in the Paraguayan Chaco, such as Makxlawaya, Naranjito, Espinillo, Concepción, La Palma-Loma Plata, Nueva Vida, Para Todo, Campo Largo, Lolita, Santa Ana, La Victoria, Paz del Chaco, among others.<sup>29</sup>

50.9. The mother tongue of the members of the Yakye Axa Community is Southern Enxet. Some also speak Guaraní, western Guaraní and Spanish.<sup>30</sup>

ii. History of the non-indigenous occupation of the territory claimed by the Yakye Axa Community

50.10. Toward the end of the 19th century, large parts of the Paraguayan Chaco were sold through the London stock exchange. At that same time and as a consequence of purchase of those lands by British entrepreneurs, the Anglican Church began to establish several missions in the area. In 1907 W.B. Grubb founded the Makxlawaya Mission within the territory of the Lengua indigenous people (Enlhet Norte and Enxet Sur) with the aim of beginning their evangelization and "pacification".<sup>31</sup>

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<sup>27</sup> See census of the Yakye Axa Indigenous Community (file with appendixes to the application, appendix 5, volumes 1250 to 1257), book entitled "II Censo Nacional Indígena de población y viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, page 658); book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404); testimony of Estaban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and statement by Albino Fernández rendered before a notary public on February 10, 2005.

<sup>28</sup> See census of the Yakye Axa Indigenous Community (file with appendixes to the application, appendix 5, volumes 1250 to 1257), and book entitled "II Censo Nacional Indígena de población y viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, page 658), and book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404).

<sup>29</sup> See census of the Yakye Axa Indigenous Community (file with appendixes to the application, appendix 5, volumes 1250 to 1257).

<sup>30</sup> See book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404); testimony of Estaban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>31</sup> See statement by Alberto Braunstein rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 700 to 712), and testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005.

50.11. Also, the first livestock estate in the area was established at a place known as Alwáta Etkok; it was managed by the *Chaco Indian Association*, which in turn was managed by the Anglican Church. Said estate was known as *The Pass* and today it is known as Estancia Maroma. The indigenous people who inhabited these lands were employed on that same estate. The Loma Verde and Ledesma estates, were established several years later, and the indigenous people of the area worked on them.<sup>32</sup>

iii. Resettlement on Estancia El Estribo

50.12. In 1979, the Anglican Church began a comprehensive development program for the indigenous communities settled at Makxlawaya, known as "La Herencia" ["The Heritage"] Program. This project included purchase of land for new indigenous settlements, supplying agricultural, public health and educational support. Between 1980 and 1985, in the framework of this project, they purchased three areas, encompassing the Sombrero Piri, La Patria and El Estribo estates.<sup>33</sup>

50.13. After the purchase of Estancia El Estribo, the Anglican Church fostered resettlement of the indigenous groups from Makxlawaya on the new estate. In early 1986, the members of the Yakye Axa Indigenous Community moved to El Estribo due to their very bad living conditions on Estancia Loma Verde, where the men either received no wages or these were very low, the women were sexually exploited by Paraguayan workers, and they did not have enough food or health services.<sup>34</sup>

50.14. Estancia El Estribo is in an area of Mennonite colonies, far from the place of residence of those who would move there. Furthermore, the natural environment and resources of the estate, which are typical of the northern Chaco, are different from those of the place of origin of these indigenous groups.<sup>35</sup>

50.15. Resettlement on Estancia El Estribo did not improve living conditions of the members of the Community. The area of the estate is 25,000 hectares and the population was over 3,000. Crop yields were low, there were no animals to hunt in

<sup>32</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277); testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005, and expert opinion of Bartomeu Melia i Lliteres rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>33</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277), and testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>34</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277); assessment report on "La Herencia" program prepared by the Paraguayan Anglican Church, 1985/1986 (file with appendixes to the application, appendix 33, volumes 1488 to 1486), and testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>35</sup> See assessment report on "La Herencia" program prepared by the Paraguayan Anglican Church, 1985/1986 (file with appendixes to the application, appendix 33, volumes 1488 to 1486), and testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005.

the area, and domestic animals died, for which reason they had to seek work outside the estate. Lack of water and food caused the death of many children, youths and elderly persons. Since Estancia El Estribo was the main settlement of the indigenous communities of Makxlawaya, the members of the Yakye Axa Community were marginalized and could not conduct their cultural practices freely.<sup>36</sup>

50.16. In 1993 the members of the Community decided to begin taking steps to claim the lands that they consider their traditional habitat. For this, they appointed Tomás Galeano and Esteban López as their leaders.<sup>37</sup>

*b) Actions by the Yakye Axa Indigenous Community to claim and protect their lands, traditional territory and natural resources under domestic venue*

i. Before Administrative Bodies

Acknowledgment of leaders

50.17. On August 15, 1993 the members of the Yakye Axa Indigenous Community asked the Instituto Paraguayo del Indígena (hereinafter "INDI") to acknowledge Tomás Galeano and Esteban López as leaders of said Community and to list them in the National Registry of Indigenous Communities pursuant to Law No. 904/81 that established the Statute of Indigenous Communities (hereinafter "Law No. 904/81")<sup>38</sup>.

50.18. On September 18, 1996 the President of the Board of Directors of the INDI issued a decision "recognizing Tomás Galeano Benítez and Esteban López Domínguez as leaders of the Enxet 'Yakye Axa' Indigenous Community, established in the Pozo Colorado district of the Presidente Hayes Department, who as such will legally represent the Community," and to include the content of the decision in the Registry of Indigenous Communities.<sup>39</sup>

Acknowledgment of legal status of the Yakye Axa Indigenous Community

50.19. On May 21, 1998 Esteban López, Community leader, began the process before INDI to attain acknowledgment of the legal status of the Yakye Axa

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<sup>36</sup> See anthropological report on the "Yakye Axa" (Loma Verde) Community of the Enxet-Lengua people. Anthropological Studies Center at Universidad Católica "Nuestra Señora de la Asunción" (file with appendixes to the application, appendix 9, volumes 1272 to 1277); testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>37</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>38</sup> See request filed on August 15, 1993 by the members of the Yakye Axa Indigenous Community before the Instituto Paraguayo del Indígena (file with appendixes to the application, appendix 15, volumes 1332 to 1334).

<sup>39</sup> See decision No. 334/96 of the President of the Board of Directors of the Instituto Paraguayo del Indígena on September 18, 1996 (file with appendixes to the application, appendix 15, volume 1335).

Community.<sup>40</sup> As part of this process, on November 5, 1999 Esteban López formally asked the INDI to acknowledge the legal status of said Community, “constituted by 56 families, settled alongside the road between Pozo Colorado and Concepción, near Km. 82, facing [its] traditional lands, claimed in administrative file” No. 7261/93 of the Instituto de Bienestar Rural (hereinafter the “IBR”).<sup>41</sup> The leaders of the Community reiterated this request before the INDI several times.<sup>42</sup>

50.20. On May 10, 2001 the Board of Directors of the INDI issued decision No. 18/2001, in which it decided “to approve the request for acknowledgment of legal status” of the Yakye Axa Indigenous Community, forwarding the records of the proceeding to the Ministry of Education and Culture to complete the process for the respective presidential decree.<sup>43</sup>

50.21. On October 25, 2001 the General Director of the Legal Department of the Ministry of Education and Culture recommended that the Ministry acknowledge the legal status of the indigenous Community, through the appropriate legal procedure, as it met the legal requirements for this purpose.<sup>44</sup>

50.22. On December 10, 2001 the President of Paraguay issued Decree No. 15.628, acknowledging the legal status the Yakye Axa Indigenous Community.<sup>45</sup>

#### Clai regarding the territory

50.23. At the time of the facts, the procedure to address land tenure problems in Paraguay was an administrative one, under the responsibility of the IBR.<sup>46</sup>

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<sup>40</sup> See request for “commissioning of official for attainment of legal status” submitted by the Yakye Axa Indigenous Community before the Instituto Paraguayo del Indígena on May 21, 1998 (file with appendixes to the reply to the application, appendix 10, volume 3617), and receipt No. 76 of the filing system of the Instituto Paraguayo del Indígena on May 25, 1998 (file with appendixes to the reply to the application, appendix 10, volume 3616).

<sup>41</sup> See request submitted by Esteban López before the Instituto Paraguayo del Indígena on November 5, 1999 (file with appendixes to the reply to the application, appendix 10, volume 3620).

<sup>42</sup> See request submitted by Esteban López before the Instituto Paraguayo del Indígena on February 3, 2000 (file with appendixes to the reply to the application, appendix 10, volume 3629); request submitted by Esteban López and Tomás Galeano before the Instituto Paraguayo del Indígena on March 24, 2000 (file with appendixes to the reply to the application, appendix 10, volumes 3632 to 3639), and request submitted by Mirta Pereira Giménez before the Instituto Paraguayo del Indígena on October 20, 2000 (file with appendixes to the reply to the application, appendix 10, volume 3631).

<sup>43</sup> See decision No. 18/2001 issued by the Board of Directors of the Instituto Paraguayo del Indígena on May 10, 2001 (file with appendixes to the reply to the application, appendix 10, volume 3645).

<sup>44</sup> See ruling No. 304 issued by the General Director of the Legal Department of the Ministry of Education and Culture of Paraguay on October 25, 2001 (file with appendixes to the reply to the application, appendix 10, volume 3647).

<sup>45</sup> See Presidential decree No. 15.628 issued on December 10, 2001 (file with appendixes to the application, appendix 15, volume 1336).

<sup>46</sup> See law No. 854/63 establishing the Agrarian Statute on March 29, 1963, and statement by Enrique Castillo rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 647 to 664).

Indigenous territorial issues are processed before the INDI and the IBR, which always act within the administrative sphere.<sup>47</sup>

50.24. On October 5, 1993 Tomás Galeano, as Community leader, submitted a note to the IBR, in which he stated the wish of the Yakye Axa Indigenous Community to return to their traditional territory, located "in the area of the Loma Verde, Ledesma and Maroma estates" in the Pozo Colorado district, Presidente Hayes Department, and requested "legalization" of at least 15,000 hectares for the Community within said estates. Together with said note, he submitted a census of the Community, which established that at the time it had 221 members, grouped into 57 families.<sup>48</sup>

50.25. On March 3, 1994 the President of the IBR asked the INDI for its "cooperation to provide to th[at] Institute the background regarding the legal status, or if not the acknowledgment of the leaders, anthropological report, and any other information on the Yakye Axa Indigenous Community".<sup>49</sup> Due to lack of response by the INDI, the IBR reiterated this request on June 23, 1995<sup>50</sup> and on April 30, 1996.<sup>51</sup>

50.26. On December 22, 1993 the leaders of the Community, through their lawyers, asked the IBR for a visual inspection of the Loma Verde and Maroma estates, which would be part of the territory claimed.<sup>52</sup> This request was repeated several times before the IBR.<sup>53</sup>

50.27. On April 7, 1994 the División de Campos Comunes y Asuntos Colectivos of the IBR suggested to the President of said institution that he order the visual inspection of the area requested by the Yakye Axa Community.<sup>54</sup>

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<sup>47</sup> See law No. 904/81 establishing the Statute of the Indigenous Communities on December 18, 1981, and statement by Enrique Castillo rendered before a notary public on February 11, 2005 (file on the merits, reparations, and costs, Volume III, volumes 647 to 664).

<sup>48</sup> See request submitted by Tomás Galeano before the Instituto de Bienestar Rural on October 5, 1993 (file with appendixes to the application, appendix 4, volumes 488 to 496).

<sup>49</sup> See note No. 16 by the President of the Instituto de Bienestar Rural to the President of the Instituto Paraguayo del Indígena on March 3 (file with appendixes to the application, appendix 4, volume 507).

<sup>50</sup> See note No. 281 by the Secretary General of the Instituto de Bienestar Rural to the President of the Instituto Paraguayo del Indígena on June 23, 1995 (file with appendixes to the application, appendix 4, volume 527).

<sup>51</sup> See note No. 141 by the Secretary General of the Instituto de Bienestar Rural to the President of the Instituto Paraguayo del Indígena on April 30, 1996 (file with appendixes to the application, appendix 4, volume 548).

<sup>52</sup> See request submitted by the Yakye Axa Community before the President of the Instituto de Bienestar Rural on December 22, 1993 (file with appendixes of the application, appendix 4, volume 500).

<sup>53</sup> See request submitted by the Yakye Axa Community before the President of the Instituto de Bienestar Rural on March 17, 1994 (file with appendixes to the application, appendix 4, volume 508); request submitted by the Yakye Axa Community before the President of the Instituto de Bienestar Rural on April 4, 1995 (file with appendixes to the application, appendix 4, volume 524); request submitted by the Yakye Axa Community before the President of the Instituto de Bienestar Rural on October 20, 1995 (file with appendixes to the application, appendix 4, volume 535), and request submitted by the Yakye Axa Community before the President of the Instituto de Bienestar Rural on November 7, 1995 (file with appendixes to the application, appendix 4, volume 538).

<sup>54</sup> See report No. 221 of the División de Campos Comunes y Asuntos Colectivos of the Instituto de Bienestar Rural on April 7, 1994 (file with appendixes to the application, appendix 4, volume 510).

50.28. On February 8, 1995 the leaders of the Community, through their attorneys, asked the IBR to "call on the owners of the lands requested [...] to make an offer for the sale of their lands, as well as to state the name of the place to be sold, its area, and any other information to seek a solution to the overdue problem of lack of land."<sup>55</sup>

50.29. On May 9, 1995<sup>56</sup> and on July 6 of that same year,<sup>57</sup> the legal department of the IBR suggested to the President of said institution that he grant the visual inspection requested by the leaders of the Yakye Axa Community, which had not been conducted for "lack of budgetary items," to order the commissioning of an IBR official to the place, and to notify the INDI. On December 11, 1995, the INDI informed the IBR that it had commissioned one of its officials to participate in this visual inspection.<sup>58</sup>

50.30. On May 27, 1996 the President of the IBR notified the persons identified by the leaders of the Yakye Axa Community as owners of the Loma Verde and Maroma estates, regarding the claim to lands encompassing said estates, processed under administrative file No. 7261/93.<sup>59</sup> On June 13 of that same year the Torocay S.A. firm, which rented said estates, stated its domicile for notifications and explained that the owners of said property were "Florida Agricultural Corporation", "Livestock Capital Group INC." and "Agricultural Development INC."<sup>60</sup>

50.31. On July 25, 1996 the IBR ordered a visual inspection of the property claimed by the Indigenous Community, a report on the situation of those immovables, and a census of its occupants. For this, it appointed an IBR official, who would be accompanied by a representative of the INDI<sup>61</sup> (*supra* para. 50.29). Said report was submitted on October 15, 1996.<sup>62</sup>

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<sup>55</sup> See request submitted by the Yakye Axa Community before the President of the Instituto de Bienestar Rural on February 8, 1995 (file with appendixes to the application, appendix 4, volume 516).

<sup>56</sup> See report No. 1825 issued by the legal department of the Instituto de Bienestar Rural on May 9, 1995 (file with appendixes to the application, appendix 4, volume 526).

<sup>57</sup> See report No. 4516 issued by the legal department of the Instituto de Bienestar Rural on July 6, 1995 (file with appendixes to the application, appendix 4, volume 531).

<sup>58</sup> See note P.C No. 605/95 addressed by the President of the Instituto Paraguayo del Indígena to the President of the Instituto de Bienestar Rural on December 11, 1995 (file with appendixes to the application, appendix 4, volume 534).

<sup>59</sup> See note S.G. No. 187 by the Secretary General of the Instituto de Bienestar Rural to Oscar Carissimo Netto on May 27, 1996 (file with appendixes to the application, appendix 4, volume 547).

<sup>60</sup> See note addressed by Carlos Sacco Rodríguez, attorney for the Torocay S.A. firm, to the Secretary General of the Instituto de Bienestar Rural on June 13, 1996 (file with appendixes to the application, appendix 4, volume 549).

<sup>61</sup> See decision No. 694 issued by the President of the Instituto de Bienestar Rural on July 25, 1996 (file with appendixes to the application, appendix 4, volume 555).

<sup>62</sup> See visual inspection report submitted by Román R. León Silva, official commissioned by the Instituto de Bienestar Rural, and Claudio I. Miltos A., official commissioned by the Instituto Paraguayo del Indígena, to the President of the Instituto de Bienestar Rural on October 15, 1995 (file with appendixes to the application, appendix 4, volumes 556 to 579).



50.32. On April 24, 1997 the IBR sent the INDI the original of administrative file No. 7261/93 regarding the Yakye Axa Indigenous Community, with the aim of once again (*supra* para. 50.25) asking said institution for a report on the land claim of the Community, as well as whether they “do or do not have any anthropological report on the petitioners, especially regarding the territories of their traditional habitat that are affected.”<sup>63</sup>

50.33. On May 28, 1997 the INDI asked the attorneys of the Yakye Axa Community to state, with technical clarity, the location of the 15,000 hectare area claimed and its relation to the farms affected, with the aim of continuing the respective administrative proceedings.<sup>64</sup> That same day the INDI asked the Centro de Estudios Antropológicos of Universidad Católica “Nuestra Señora de la Asunción” for “its cooperation to generate a technical-anthropological report on the Yakye Axa Community.”<sup>65</sup>

50.34. On June 3, 1997 Esteban López, leader of the Yakye Axa Indigenous Community, in compliance with the order by the INDI (*supra* para. 50.33), submitted information on the location of the territory claimed and the farms it encompasses. In said note, Mr. López stated that the claim regarding part of their traditional territory included 18,188 hectares.<sup>66</sup> Subsequently the attorneys for the Community submitted expert reports with technical precision regarding location of the territory claimed.<sup>67</sup>

50.35. On December 16, 1997 the Centro de Estudios Antropológicos of Universidad Católica “Nuestra Señora de la Asunción” submitted the anthropological report (*supra* para. 50.33).<sup>68</sup> Said report was challenged on April 13, 1998 by the firms that owned the estates claimed by the Yakye Axa Community.<sup>69</sup> In the briefs submitted

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<sup>63</sup> See note S.G. No. 210 by the Secretary General of the Instituto de Bienestar Rural to the President of the Instituto Paraguayo del Indígena on April 24, 1997 (file with appendixes to the application, appendix 4, volume 639).

<sup>64</sup> See note P.C. No. 298 addressed by the President of the Instituto Paraguayo del Indígena to the non-governmental organization Tierraviva on May 28, 1997 ( file with appendixes to the application, appendix 4, volume 642).

<sup>65</sup> See note P.C. No. 299 addressed by the President of the Instituto Paraguayo del Indígena to the Centro de Estudios Antropológico of Universidad Católica “Nuestra Señora of the Asunción” on May 28, 1997 (file with appendixes to the application, appendix 4, volume 643).

<sup>66</sup> See note addressed by Esteban López to the President of the Instituto Paraguayo del Indígena on June 3, 1997 (file with appendixes to the application, appendix 4, volume 644).

<sup>67</sup> See expert report on the location of the Loma Verde estate, signed by Humberto Ricardo Gómez (file with appendixes to the application, appendix 4, volumes 649 to 651); expert report on the location of the Esperanza estate signed by Humberto Ricardo Gómez (file with appendixes to the application, volumes 652 to 653), and expert report on the location of the La Sirena estate, signed by Humberto Ricardo Gómez (file with appendixes to the application, appendix 4, volumes 654 to 656).

<sup>68</sup> See note addressed by the Secretary of the Centro de Estudios Antropológicos of Universidad “Nuestra Señora of the Asunción” to the President of the Instituto Paraguayo del Indígena on December 16, 1997 (file with appendixes to the application, appendix 4, volume 678), and anthropological report on the Yakye Axa (Loma Verde) Community of the Enxet-Lengua people, prepared by Miguel Chase-Sardi, Coordinator of the Centro de Estudios Antropológicos of Universidad “Nuestra Señora of the Asunción” (file with appendixes to the application, appendix 4, volumes 679 to 683).

<sup>69</sup> See note addressed by the legal representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on April 13, 1998 (file with appendixes to the application, appendix 4, volumes 756 to 777).

before the INDI on April 22 and 28, 1998, said firms also stated that they were not interested in negotiating sale of the property affected by the territorial claim of the Yakye Axa Community and they asked that the request for expropriation made by the Community be dismissed and that the file be sent to the IBR.<sup>70</sup>

50.36. On May 21, 1998 the legal department of the INDI recommended that the file be forwarded to the IBR to exhaust the proceedings pending before that institution, during which "the members of the indigenous community interested in claiming land must decide (if they have the right to do so) whether to resort to another instance to attain their purpose."<sup>71</sup> The INDI followed this recommendation and on May 26, 1998 it forwarded administrative file No. 7261/93 to the IBR.<sup>72</sup>

50.37. On July 3, 1998 the legal department of the IBR decided that "analysis of the records and especially of the anthropological report [...] indicate that the LOMA VERDE estate constitutes the TRADITIONAL HABITAT of the petitioners; with regard to the other areas affected by the claim there is no indication, and pursuant to Art[icle] 62 of the N[ational] C[onstitution], the existence of the indigenous peoples as cultural groups prior to the establishment and organization of the Paraguayan State has been acknowledged; this indicates that the right of the indigenous people to possession of the land is prior and therefore superior to the Institution of Private Property; therefore, in case of conflict of the right over an area of land held by the indigenous people and the right of the owner, constitutionally the right of the Indigenous Community must prevail. [...] D]espite the aforementioned circumstances, the owners affected by the claim have refused a negotiated settlement and since the property is under rational use, in view of the provisions of the Agrarian Statute, the Instituto de Bienestar Rural cannot request expropriation of said property, for which reason a decision should be issued to this effect [...]"<sup>73</sup> (highlighted in the original text).

50.38. On September 8, 1998 the IBR issued ruling No. 755, in which it decided:

1. To declare that the real estate belonging to Estancia Maroma S.R.L and Compañía Sociedad en Comandita por Acciones (Farm No.2985-Chaco) and Loma Verde (Farms Nos. 15,179, 15,180 and 759-Chaco), Presidente Hayes Department, is under rational use, in light of the provisions of Articles 3d and 158 of Law 854/63 "Which establishes the Agrarian Stature," and based on the report submitted by the Inter-institutional committee set up by Presidential order No. 694/96, the conclusion of which, in this regard, is transcribed in the preamble to the instant ruling.

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<sup>70</sup> See brief submitted by the legal representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., before the Instituto Paraguayo del Indígena on April 22, 1998 (file with appendixes to the application, appendix 4, volumes 785 to 786) and brief submitted by the legal representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., before the President of the Instituto Paraguayo del Indígena on April 28, 1998 (file with appendixes to the application, appendix 4, volumes 791 to 793).

<sup>71</sup> See report No. 52/98 issued by the legal department of the Instituto Paraguayo del Indígena on May 21, 1998 (file with appendixes to the application, appendix 4, volumes 799 and 800).

<sup>72</sup> See note S.G. No. 5/98 addressed by the General Secretariat of the Instituto Paraguayo del Indígena to the President of the Instituto de Bienestar Rural on May 26, 1998 (file with appendixes to the application, appendix 4, volume 802).

<sup>73</sup> See report No. 1031 issued by the legal department of the Instituto de Bienestar Rural on July 3, 1998 (file with appendixes to the application, appendix 4, volume 822).

2. The IBR may review the decision set forth in the previous Article, insofar as there is evidence that said property is no longer under productive permanent use or if new circumstances arise that make it appropriate, in accordance with the law, to do so.
3. To forward the instant file to the Instituto Paraguayo del Indígena (INDI) for it to be studied in the broader framework of Law 904/81 Statute of the Indigenous Communities the application of which falls under that body's sphere of competence.<sup>74</sup>

50.39. On September 28, 1998 the IBR forwarded administrative file No. 7261/93 to the INDI.<sup>75</sup>

50.40. On October 26, 1998 the legal department of the INDI stated that "the instant file [must be] analyzed in the broader framework of Law [No.] 904/81 and [that] without setting aside the right to private property, it [should] facilitate by all legal means a fair agreement with the owners, to recover the natural habitat for the indigenous people as soon as possible."<sup>76</sup> A new visual inspection of Loma Verde estate took place on November 17, 1998, and participants included the members of the Board of Directors of the INDI, Emilio Caballero and Andrés Chemehi, who submitted a report to the President of the Council, on February 9, 1999. Together with this report, they submitted a census of the members of the Community who were living alongside the road to Pozo Colorado, and several pictures of the estates they visited.<sup>77</sup> This report was challenged by "Florida Agricultural Corporation", "Livestock Capital Group INC" and "Agricultural Development INC", who also recused Emilio Caballero.<sup>78</sup>

50.41. On November 26, 1998, through their attorney, said firms submitted a brief in which, *inter alia*, they complained of "the attitude of certain members of the Yakye Axa Indigenous Community at the time of the visual inspection" of their estates and they rejected "any new dialogue with the members of that indigenous Community or their representatives, bearing in mind that the position of both parties is fully stated in [...] the records."<sup>79</sup>

50.42. On August 18, 1999 the legal department of the INDI issued opinion No. 33/99, in which it recommended that a ruling be issued as follows:

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<sup>74</sup> See decision No. 755 issued by the Board of the Instituto de Bienestar Rural on September 8, 1998 (file with appendixes to the application, appendix 4, volumes 826, 827 and 829).

<sup>75</sup> See note A. No. 323 addressed by the President of the Instituto de Bienestar Rural to the President of the Instituto Paraguayo del Indígena on September 28, 1998 (file with appendixes to the application, appendix 4, volume 834).

<sup>76</sup> See report No. 122 issued by the legal department of the Instituto Paraguayo del Indígena on October 26, 1998 (file with appendixes to the application, appendix 4, volume 838).

<sup>77</sup> See visual inspection report prepared by Emilio Caballero and Andrés Chemehi, members of the Board of Directors of the Instituto Paraguayo del Indígena on February 9, 1999 (file with appendixes to the application, appendix 4, volumes 864 to 874).

<sup>78</sup> See recusation brief submitted by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc. against Emilio Caballero, member of the Board of Directors of the Instituto Paraguayo del Indígena, April 2000 (file with appendixes to the application, appendix 4, volumes 958 to 968).

<sup>79</sup> See note addressed by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on November 26, 1998 (file with appendixes to the application, appendix 4, volumes 848 to 856).

1. Exhausting conciliation procedures for the owners of the land affected to offer the sale of at least the amount of land required for the INDI to satisfy the needs for an indigenous habitat in the place called Estancia Loma Verde, located at Km. 60 of the Concepción-Pozo Colorado road.
2. Based on the administrative and technical background, on the rulings of the Instituto de Bienestar Rural and on the pertinent court rulings with regard to this dispute, to declare the Yakye Axa Community to be in an emergency situation and to begin as soon as possible steps to find and purchase other land, if the landowners definitely refuse to sell; for this, a technical committee must be set up.<sup>80</sup>

50.43. On December 29, 2000 the INDI sent a note to the representative of "Florida Agricultural Corporation", "Livestock Capital Group INC" and "Agricultural Development INC", asking him to submit "an offer for the sale of 15,000 hectares of the property of [said] firms [...] claimed by the Enxet-Lengua people."<sup>81</sup> It was not possible to deliver said note to the addressee.

50.44. On August 23, September 8 and 22, October 7, and December 3, 1999, and on February 29 and March 28, 2000, "Florida Agricultural Corporation", "Livestock Capital Group INC" and "Agricultural Development INC", through their attorney, reiterated that they were not interested in negotiating the sale of land and they asked INDI for a ruling on this matter.<sup>82</sup>

50.45. In face of the above, the attorneys for the Yakye Axa Community asked the INDI to rule "in favor of the claim by the Yakye Axa Community, finding the lands that it requested to be part of their ancestral habitat, subject to return by the State via expropriation, without detriment to the Community's right to fair compensation."<sup>83</sup>

50.46. On May 23, 2000 the INDI sent to the IBR administrative file No. 7261/93, pertaining to the territorial claim of the Yakye Axa Community, pursuant to the

<sup>80</sup> See report No. 33 issued by the legal department of the Instituto Paraguayo del Indígena on August 18, 1999 (file with appendixes to the application, appendix 4, volumes 1092 to 1096).

<sup>81</sup> See note P.C. No. 500/99 addressed by the President of the Instituto Paraguayo del Indígena to the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., on December 29, 1999 (file with appendixes to the application, appendix 4, volume 1117).

<sup>82</sup> See brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on October 7, 1999 (file with appendixes, appendix 4, volumes 1114 to 1115); brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on September 22, 1999 (file with appendixes to the application, appendix 4, volumes 1106 to 1111); brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on September 8, 1999 (file with appendixes to the application, appendix 4, volumes 1102 to 1103); brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on August 23, 1999 (file with appendixes to the application, appendix 4, volume 1099); brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on February 29, 2000 (file with appendixes to the application, appendix 4, volumes 899 to 900); brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the President of the Instituto Paraguayo del Indígena on December 3, 1999 (file with appendixes to the application, appendix 4, volumes 888 to 896), and brief by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the Board of the Instituto Paraguayo del Indígena on March 28, 2000 (file with appendixes to the application, appendix 4, volumes 913 to 914).

<sup>83</sup> See note addressed by the Yakye Axa Community to the President of the Instituto Paraguayo del Indígena on April 12, 2000 (file with appendixes to the application, appendix 4, volumes 921 to 930).

decision of the Board of Directors of the INDI during its regular meeting on May 17, 2000, and in response to a request by the firms that owned the real estate claimed by the Community.<sup>84</sup>

50.47. On June 5, 2000 the legal department of the IBR ruled that the file should be sent once again to the INDI, as "the records show that the INDI has reached no decision and has returned the records without specifying the procedure to be followed." The legal department also underlined that the IBR asked the INDI to "[s]tate whether the indigenous people DO OR DO NOT HAVE A RIGHT TO THE LAND THEY CLAIM" (highlighted in the original text) and that it "[r]enew direct negotiation or recommend expropriation if appropriate."<sup>85</sup> For the aforementioned purpose, on June 8, 2000 the IBR returned administrative file No. 7261/93 to the INDI.<sup>86</sup>

50.48. On June 14, 2000 the Yakye Axa Community, through its attorneys, asked the INDI to forward administrative file No. 7261/93 both to the legal department and to that institute's Socio-Anthropological department, for them to issue their opinion on the issues raised by the IBR.<sup>87</sup> (*supra* para. 50.47)

50.49. On August 8, 2000 the President of the Board of Directors of the INDI issued a ruling in which he decided, among other things, to "once again forward file No. 7261/93 to the Instituto de Bienestar Rural (IBR), providing information on the content of Opinion No. 33/99 [*supra* para. 50.42] of this Institution's legal department, attaching a certified copy of that Opinion and ending the administrative procedure with regard to the instant file, at said Institution."<sup>88</sup>

50.50. In face of the above, the Yakye Axa Community, through its attorneys, filed a request for review of this ruling, and this remedy was rejected on August 28, 2000 by the President of the Board of Directors of the INDI.<sup>89</sup>

50.51. On September 13, 2000 the Board of Directors of the INDI annulled said decision of the President of the Council and asked the IBR to forward administrative file No. 7261/93<sup>90</sup> (*supra* para. 50.49). On October 10, 2000 the legal department of

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<sup>84</sup> See note P.C. No. 348/00 addressed by the President of the Instituto Paraguayo del Indígena to the President of the Instituto de Bienestar Rural on May 23, 2000 (file with appendixes to the application, appendix 4, volume 1126).

<sup>85</sup> See report No. 737 issued by the legal department of the Instituto de Bienestar Rural on June 5, 2000 (file with appendixes to the application, appendix 4, volume 1127).

<sup>86</sup> See note S.G. No. 269 by the Secretary General of the Instituto de Bienestar Rural to the General Secretariat of the Instituto Paraguayo del Indígena on June 9, 2000 (file with appendixes to the application, appendix 4, volume 1132).

<sup>87</sup> See note addressed by the Yakye Axa Community to the President of the Instituto Paraguayo del Indígena on June 14, 2000 (file with appendixes to the application, appendix 4, volume 1133).

<sup>88</sup> See ruling P.C. No. 363/00 issued by the President of the Instituto Paraguayo del Indígena on August 8, 2000 (file with appendixes to the application, appendix 4, volumes 1138 to 1143).

<sup>89</sup> See ruling P.C. No. 407/00 issued by the President of the Instituto Paraguayo del Indígena on August 28, 2000 (file with appendixes to the application, appendix 4, volumes 1157 to 1160).

<sup>90</sup> See decision No. 37/2000 issued by the Board of Directors of the Instituto Paraguayo del Indígena on September 13, 2000 (file with appendixes to the application, appendix 4, volumes 1164 to 1165).

the IBR made a recommendation to the President of the IBR to forward said administrative file to INDI, for them to study and consider it, within the broad framework of the provisions of Law No. 904/81.<sup>91</sup>

50.52. A decision of the President of the Board of Directors of the INDI on October 3, 2001 entrusted Teresa Vargas, a member of this Board of Directors, and Oscar Centurión, advisor to the President of the INDI, with the task of making the necessary preparations to request expropriation of an area of land for the Yakye Axa Community.<sup>92</sup> Said persons visited the Yakye Axa Community, met with its leaders, and agreed that they would take steps to claim 7,901 hectares within the area claimed for the definitive settlement of the Indigenous Community.<sup>93</sup>

50.53. On November 2, 2001 the Board of Directors of the INDI decided "to ask the Legislative[,], through [the] Executive Branch, to expropriate farms Nos. 15,180 and 15,181 of the property located in the Pozo Colorado District, Presidente Hayes Department, encompassing 7,901 hectares".<sup>94</sup> On November 15, 2001 the legal department of the IBR issued an opinion that, since the INDI had decided to request expropriation of farms No. 15,180 and 15,181 in favor of the Yakye Axa Indigenous Community, "the procedure at the Instituto de Bienestar Rural was finished and therefore these records must be shelved."<sup>95</sup> On November 14, 2001 the Secretary General of the IBR ordered the file shelved "awaiting the interested party."<sup>96</sup>

ii. Before the Legislative

50.54. On September 14, 2000 Tomás Galeano and Esteban López, leaders of the Yakye Axa Community, filed before the President of Congress a request for drafting of a bill to expropriate the land claimed, with the respective motivation.<sup>97</sup>

50.55. On that same day, members of Congress Sonia de León and Rafael Filizzola Serra stated their willingness to "take upon themselves" the expropriation bill "THAT DECLARES FARMS 15,179, 15,180 AND 15,181 OF THE POZO COLORADO DISTRICT, PRESIDENTE HAYES DEPARTMENT, WHICH BELONG TO LIVESTOCK CAPITAL GROUP, FLORIDA AGRICULTURAL CORPORATION, AND AGRICULTURAL DEVELOPMENT INC.,

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<sup>91</sup> See report No. 1350 issued by the legal department of the Instituto de Bienestar Rural on October 10, 2000 (file with appendixes to the application, appendix 4, volume 1166).

<sup>92</sup> See ruling P.C. No. 802/001 issued by the President of the Instituto Paraguayo del Indígena on October 3, 2001 (file with appendixes of the application, appendix 4, volume 1235).

<sup>93</sup> See report on the trip to the Yakye Axa Indigenous Community on October 30, 2001 (file with appendixes to the application, appendix 4, volume 1236), and note submitted by Tomás Galeano and Esteban López, leaders of the Yakye Axa Community, before the Instituto Paraguayo del Indígena on October 18, 2001 (file with appendixes to the application, appendix 4, volume 1238).

<sup>94</sup> See decision No. 49/2001 issued by the Board of Directors of the Instituto Paraguayo del Indígena on November 2, 2001 (file with appendixes to the application, appendix 4, volume 1240).

<sup>95</sup> See report No. 1025 issued by the legal department of the Instituto de Bienestar Rural on November 15, 2001 (file with appendixes to the application, appendix 4, volume 1243).

<sup>96</sup> See official letter sent by the Secretary General of the Instituto de Bienestar Rural on December 14, 2001 (file with appendixes to the application, appendix 4, volume 1247).

<sup>97</sup> See note addressed by Tomás Galeano and Esteban López, leaders of the Yakye Axa Indigenous Community, to the President of Congress on September 14, 2000 (file with appendixes to the application, appendix 4, volumes 1317 to 1326).

RESPECTIVELY, TO BE OF SOCIAL INTEREST AND EXPROPRIATES THEM IN FAVOR OF THE INSTITUTO PARAGUAYO DEL INDÍGENA, FOR SUBSEQUENT TRANSFER TO THE YAKYE AXA INDIGENOUS COMMUNITY OF THE ENXET LENGUA PEOPLE” (highlighted in the original), and asked that it be “forwarded to the respective committees for the procedure set forth in the National Constitution and in the congressional rules of procedure.”<sup>98</sup>

50.56. The legislative Committee on Human Rights and Indigenous Affairs<sup>99</sup> and the Committee on Rural Welfare<sup>100</sup> recommended that Congress reject said expropriation bill. On November 16, 2000, members of Congress Sonia de León and Rafael Filizzola Serra also asked the congressional President to withdraw said expropriation bill from Congress in view of the fact that “the Inter-American Commission on Human Rights [decided] to intervene in this matter and the State [...] has agreed to seek a friendly settlement.”<sup>101</sup>

50.57. On November 28, 2000 Congress issued resolution No. 544, in which it decided to withdraw the expropriation bill.<sup>102</sup>

50.58. On January 30, 2002 the President of Paraguay and the Minister of Education and Culture of Paraguay submitted to the Senate a new expropriation bill that “DECLARED A PART OF THE PROPERTY OF AGRICULTURAL DEVELOPMENT INC., SEAT OF THE INDIGENOUS COMMUNITY KNOWN AS ENXET (Lengua-Maskoy) ‘YAKIE AXA’, OF THE VILLA HAYES DISTRICT OF PRESIDENTE HAYES DEPARTMENT, TO BE OF SOCIAL INTEREST AND EXPROPRIATES IT, IN FAVOR OF THE INSTITUTO PARAGUAYO DEL INDÍGENA”<sup>103</sup>(highlighted in the original).

50.59. on June 19, 2002 the Senate Committee on Agrarian Reform and Rural Welfare recommended adoption of said expropriation bill and requested its discussion by the plenary (*supra* para. 50.58).<sup>104</sup> On June 27, 2002 the Senate discussed and voted on the expropriation bill submitted by the Executive. The bill was ultimately

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<sup>98</sup> See note addressed by members of Congress Sonia de León and Rafael Filizzola Serra to congressman Cándido Vera Bejarano, President of Congress, on September 14, 2000 (file with appendixes to the application, appendix 13, volumes 1315 to 1316).

<sup>99</sup> See note D.C.DD.HH.N0 03/00 addressed by the legislative Committee on Human Rights and Indigenous Affairs to Congress on November 1, 2000 (file with appendixes to the application, appendix 16, volume 1337).

<sup>100</sup> See report CBR/365 issued by the legislative Committee on Rural Welfare on November 8, 2000 (file with appendixes to the application, appendix 17, volume 1338).

<sup>101</sup> See note addressed by members of Congress Rafael Filizzola Serra and Sonia de León to the President of Congress on November 16, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, volume 3163).

<sup>102</sup> See report No. 544 issued by Congress on November 28, 2000 (file with appendixes to the application, appendix 18, volume 1339).

<sup>103</sup> See note No. 639 addressed by the President of the Republic of Paraguay, Luis Ángel González Macchi, to the Legislative on January 30, 2002 (file with appendixes to the application, appendix 14, volumes 1327 to 1331).

<sup>104</sup> See report No. 40 2001/2002 issued by the Senate Committee on Agrarian Reform and Rural Welfare on June 19, 2002 (file with evidence to facilitate adjudication of the case submitted by the State, volume 3088).

rejected and shelved.<sup>105</sup>

50.60. On October 30, 2003 the Senate adopted the bill "THAT DECLARES AN AREA OF LAND IDENTIFIED AS PART OF FARM No. 1,012 OF THE PRESIDENTE HAYES DEPARTMENT TO BE OF SOCIAL INTEREST AND TRANSFERS OWNERSHIP FREE OF CHARGE FROM THE MINISTRY OF NATIONAL DEFENSE OF THE PARAGUAYAN STATE TO THE INSTITUTO PARAGUAYO OF THE INDIGENA (INDI) AND OF THE INSTITUTO DE BIENESTAR RURAL (IBR), FOR PURPOSES OF AGRARIAN REFORM, TO GRANT IT AT NO COST TO THE EMHA SOLYAKTEKTAMA (NARANJATY) AND YAKYE AXA COMMUNITIES OF THE ENXET-LENGUA PEOPLE."<sup>106</sup> (highlighted in the original)

50.61. The leaders of the Yakye Axa Community rejected the offer to grant them the land included in said bill (*supra* para. 50.60), because there had been no prior consultation or agreement with the members of the Community.<sup>107</sup> Said lands were granted only to the Emha Solyaktama (Naranjaty) indigenous Community, by means of Law No. 2,425, adopted by the Legislative on August 9, 2004.<sup>108</sup>

iii. Before the Judiciary

Amparo remedy

50.62. On March 3, 1997 the attorney for the Yakye Axa Indigenous Community filed an amparo remedy against the firm TOROCAY S.A. AGROPECUERIA Y FORESTAL AND/OR Estancia Loma Verde, which had rented the land claimed by said Community, invoking the National Constitution, as well as the provisions of Article 14 of law 234/93 that ratified International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (hereinafter "ILO Agreement No. 169") in favor of the members of said Indigenous Community. In this regard, he argued that "since October 1996 the members of the indigenous community have not been allowed to enter the lands that are part of the Loma Verde estate[, that] they are constantly harassed by [the] staff of said estate" and by members of the police force of the Río Verde district, and that on December 23, 1996 Esteban López, leader of the Community, was forced to leave the wooded area by shots fired by staff of the estate, and the same happened to another member of the Community, Daniel Ciriaco. Therefore, he alleged that the members of the Yakye Axa Community have been "arbitrarily denied the possibility of hunting and fishing in the wooded areas of Loma Verde estate that is the traditional habitat of the Enxet-Lengua People" and that their situation "is anguishing due to the impossibility of obtaining sufficient food for their [sur]vival". He also asked that an order be issued "as an urgent precautionary measure, until there is a ruling on the amparo

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<sup>105</sup> See daily meeting log of the Senate for June 27, 2002 (file with evidence to facilitate adjudication of the case submitted by the State, volumes 3135 to 3145), and decision No. 1.066 issued by the Senate on June 27, 2002 (file with appendixes to the application, appendix 19, volume 1340).

<sup>106</sup> See law adopted by the Senate on October 30, 2003 (file with merits, reparations, and costs, Volume IV, volumes 896 to 897).

<sup>107</sup> See testimony of Esteban López rendered before the Inter-American Court of Human Rights during the public hearing held on March 4, 2005, and testimony of Rodrigo Villagra rendered before the Inter-American Court of Human Rights during the public hearing held on March 4, 2005.

<sup>108</sup> See law No. 2425 adopted by the Legislative on August 9, 2004 (file with evidence to facilitate adjudication of the case submitted by the State, Volume I, volume 1091).



remedy, immediately lifting the prohibition in force on Loma Verde estate for the members of the indigenous Community to hunt and fish for subsistence purposes in the area of said estate.”<sup>109</sup>

50.63. On April 17, 1997 the Civil and Commercial Trial Court, tenth rotation, Secretariat No. 19, decided that “the amparo remedy IS NOT IN ORDER” (highlighted in the original). The court deemed that said application should be dismissed “because the term allotted to submit it had expired.”<sup>110</sup>

50.64. This decision was upheld on May 28, 1997 by the Civil and Commercial Appellate Court, Fifth Chamber;<sup>111</sup> and on July 1, 1999 by the Constitutional Court of the Supreme Court of Justice of Paraguay.<sup>112</sup>

Precautionary Measures to restrain innovation and register the complaint

- Requested by the attorneys of the Yakye Axa Community

50.65. On October 13, 1997 the attorney for the Yakye Axa Community requested, on the basis of Article 2 of Law No. 43/89 on Indigenous Settlements (hereinafter “Law No. 43/89”), a measure to restrain alteration and register the complaint in connection with “the lands that constitute the traditional settlements of the Community.”<sup>113</sup>

50.66. On November 26, 1997 the Trial court for Civil, Commercial, Labor affairs and Protection of Minors at Concepción ordered the measure to restrain alteration and register the complaint regarding said real estate.<sup>114</sup>

50.67. With regard to the above, the legal representative of Livestock Capital Group INC, Agricultural Development INC and Florida Agricultural Corporation filed a motion to lift the precautionary measures.

50.68. On April 27, 1998 the Judge of the Trial Court regarding Civil, Commercial, Labor Affairs and Protection of Minors, at Concepción accepted said request by means of interlocutory order No. 173, and decided to lift the previous order to restrain alteration of the situation and register the complaint, deeming, among other

<sup>109</sup> See brief to file an amparo remedy submitted by the Yakye Axa Indigenous Community on March 3, 1997 (file with appendixes to the application, appendix 20, volumes 1341 to 1343).

<sup>110</sup> See ruling No. 275 issued by the Civil and Commercial Trial Court, tenth rotation, Secretariat No. 19 on April 17, 1997 (file with appendixes to the application, appendix 10, volumes 1281 to 1287).

<sup>111</sup> See decision and ruling No. 30 issued by the Civil and Commercial Appellate Court, Fifth Chamber, on May 28, 1997 (file with appendixes to the application, appendix 10, volumes 1288 to 1289).

<sup>112</sup> See decision and ruling No. 365 issued by the Supreme Court of Justice of Paraguay on July 1, 1999 (file with appendixes to the application, appendix 22, volumes 1348 to 1350).

<sup>113</sup> See request for measure to restrain alteration and register the complaint submitted by the Yakye Axa Community before the Trial court for Civil, Commercial, Labor affairs and Protection of Minors at Concepción on October 13, 1997 (file with appendixes to the application, appendix 23, volumes 1351 to 1353).

<sup>114</sup> See interlocutory order No. 413 issued by the Trial court for Civil, Commercial, Labor affairs and Protection of Minors at Concepción on November 26, 1997 (file with appendixes to the application, appendix 23, volume 1354).

reasons, that "it is not possible to assert that the property affected by the precautionary measures is part of the settlement" of the Community.<sup>115</sup>

50.69. The legal representative of the Yakye Axa Community filed an appeal against interlocutory order No. 173 mentioned in the previous paragraph.<sup>116</sup>

50.70. On June 9, 1998 the Appellate Court regarding Civil, Commercial, Labor and Correctional Affairs and Protection of Minors, at Concepción, upheld the order against which the appeal had been filed and that had lifted the precautionary measures.<sup>117</sup>

50.71. On June 29, 1998 the attorney for the Yakye Axa Community filed a constitutional motion before the Constitutional Chamber of the Supreme Court of Justice against said interlocutory order by the Appellate Court<sup>118</sup> (*supra* para. 50.70). Likewise, on March 9, 1999 he filed a brief in which he complained of intensive land clearing, building and excavation in the property affected as a consequence" of the constitutional motion filed, for which reason he requested protective measures.<sup>119</sup>

50.72. On June 28, 1999 the Constitutional Chamber of the Supreme Court of Justice decided that the request for protective measures made by the attorney for the Community was not in order<sup>120</sup> and it subsequently declared termination of the action with regard to the constitutional motion.<sup>121</sup>

- Requested by the INDI

50.73. On April 24, 2002 the INDI asked the courts to order precautionary measures to restrain alteration of the situation and to register the complaint, with regard to the real estate that the Executive had requested the Legislative, on January 30, 2002, to expropriate<sup>122</sup> (*supra* para. 50.58).

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<sup>115</sup> See interlocutory order No. 173 issued by the Trial court for Civil, Commercial, Labor affairs and Protection of Minors at Concepción on April 27, 1998 (file with appendixes to the application, appendix 23, volumes 1358 to 1363).

<sup>116</sup> See brief stating the grounds for the appeal submitted by the Yakye Axa Indigenous Community on May 13, 1998 (file with appendixes to the application, appendix 23, volumes 1364 to 1367).

<sup>117</sup> See interlocutory order No. 78 issued by the Appellate Court for Civil, Commercial, Labor, Criminal, Reformatory Matters and Protection of Minors at Concepción on June 9, 1998 (file with appendixes to the application, appendix 23, volumes 1369 to 1374).

<sup>118</sup> See constitutional motion brief filed by the Yakye Axa Community before the Supreme Court of Justice of Paraguay on June 29, 1998 (file with appendixes to the application, appendix 23, volumes 1375 to 1378).

<sup>119</sup> See complaint regarding new facts, statement and request for the court to order an urgent measure, submitted by the Yakye Axa Community before the Supreme Court of Justice on March 9, 1999 (file with appendixes to the application, appendix 23, volumes 1379 to 1381).

<sup>120</sup> See interlocutory order No. 795 issued by the Supreme Court of Justice of Paraguay on June 28, 1999 (file with appendixes to the application, appendix 25, volumes 1383 to 1384).

<sup>121</sup> See interlocutory order No. 375 issued by the Supreme Court of Justice of Paraguay on April 10, 2000 (file with appendixes to the application, appendix 24, volume 1382).

<sup>122</sup> See brief requesting precautionary measures to restrain alteration of the situation and register the complaint filed by the Instituto Paraguayo del Indígena on April 24, 2002 (file with evidence to facilitate adjudication of the case submitted by the State, Volume I, volumes 807 to 811).

50.74. On May 13, 2002 the Civil and Commercial Trial Court, Third Rotation, ordered the precautionary measures that had been requested and registry of the restraint on de jure and de facto alteration of the situation, as well as registry of the complaint regarding the aforementioned real estate.<sup>123</sup>

50.75. On August 23, 2002 the Judge lifted the precautionary measures once the expropriation bill was rejected by the Senate on June 27, 2002 (*supra* para. 50.59).<sup>124</sup>

#### Complaints before the Public Prosecutor's Office

50.76. On March 11, 1999 the attorney for the Community filed a complaint before the Public Prosecutor's Office for the "extensive land clearing, building and excavation within the territory claimed by the Yakye Axa Indigenous Community, known as Estancia Loma Verde".<sup>125</sup>

50.77. On March 16, 1999 officials of the Public Prosecutor's Office visited the Loma Verde estate to corroborate the complaint, but they were not received by the staff of the firm Torokay SA.<sup>126</sup> The agents of the Public Prosecutor's Office visited various parts of the farm and pointed out that: "there is no indiscriminate land clearing [...] and there would be no harm to the ecosystem."<sup>127</sup>

#### *c) Actions requested against the Yakye Axa Indigenous Community*

##### *i. Before the INDI*

50.78. On April 22, 1998 "Florida Agricultural Corporation", "Livestock Capital Group INC" and "Agricultural Development INC", through their attorney, file a complaint before the INDI against the members of the Yakye Axa Community for having "begun systematic incursions into [their] property" and asked that the Chief of the National Police in the Villa Hayes Department be ordered to supply the police staff required to protect said real estate.<sup>128</sup> The file processed before the INDI and the

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<sup>123</sup> See order for precautionary measures by the Trial Court for Civil and Commercial Affairs, Third Rotation, on May 13, 2002 (file with evidence to facilitate adjudication of the case submitted by the State, Volume I, volume 815).

<sup>124</sup> See certificate of notification of the lifting of the precautionary measures to restrain alteration of the situation and register the complaint issued by the Judge of the Trial Court regarding Civil and Commercial Affairs, Third Rotation, on August 23, 2002 (file with evidence to facilitate adjudication of the case submitted by the State, Volume I, volume 936).

<sup>125</sup> See complaint regarding deforestation submitted by the Yakye Axa Community on March 11, 1999 (file with appendixes to the application, appendix 26, volumes 1385 to 1387).

<sup>126</sup> See report on the trip to the Yakye Axa Community prepared by the Public Prosecutor's Office on March 18, 1999 (file with appendixes to the application, appendix 27, volume 1388).

<sup>127</sup> See report on the alleged land clearing and sale of logs, to the detriment of the habitat of the Yakye Axa Community, prepared by the Public Prosecutor's Office on March 16, 1999 (file with appendixes to the application, appendix 28, volumes 1389 to 1390).

<sup>128</sup> See note addressed by the representative of Florida Agricultural Corporation, Livestock Capital Group Inc. and Agricultural Development Inc., to the Instituto Paraguayo del Indígena on April 22, 1998 (file with appendixes to the application, appendix 4, volumes 785 to 786).

IBR does not elucidate what was done with this complaint.

ii. Before the Judiciary

50.79. On March 16, 1999 the legal representative of Livestock Capital Group INC, which is registered as one of the owners of Loma Verde estate, filed a complaint against unnamed members of the Yakye Axa Community, for allegedly committing the crimes of invasion of others' property, grave coercion, and theft.<sup>129</sup> On March 17 of this year the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción decided to open the respective pretrial proceedings "to establish and corroborate the fact alleged and who is responsible." By this ruling, the Judge summoned Tomás Galeano and Esteban López to provide informative statements. In this ruling, the Judge also informed the representative of the Public Prosecutor's Office, but he did not notify the leaders of the Community of the opening of pretrial proceedings against the members of the Indigenous Community.<sup>130</sup> On March 22, 1999 the legal representative of said firm filed a formal criminal complaint for the alleged crimes of invasion of others' property, grave coercion, and theft, against unnamed members of the Yakye Axa Indigenous Community.<sup>131</sup> That same day, the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción admitted the criminal complaint and ratified the summons of Tomás Galeano and Esteban López to render informative statements.<sup>132</sup> Subsequently, Basilio Fernández, Artemio Roa and Marcos Vera, employees of Estancia Loma Verde, were also summoned to render informative statements.<sup>133</sup>

50.80. On April 28, 1999 Tomás Galeano and Esteban López rendered informative statements before said Court.<sup>134</sup>

50.81. On May 3, 1999 Oscar Ayala Amarilla asked to intervene as agent

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<sup>129</sup> See complaint filed by the representative of Livestock Capital Group Inc., before the Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción against the members of the Yakye Axa Community on March 16, 1999 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1323 to 1330).

<sup>130</sup> See order issued by the Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción on March 17, 1999 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1336 to 1337).

<sup>131</sup> See criminal complaint filed by the representative of Livestock Capital Group Inc., before the Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción on March 22, 1999 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1439 to 1446).

<sup>132</sup> See order issued by the Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción on March 22, 1999 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volume 1447).

<sup>133</sup> See certificate of notification dated April 8, 1999, addressed to Basilio Fernández, Artemio Roa and Marcos Vera (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volume 1457).

<sup>134</sup> See transcripts of the informative statement rendered on April 28, 1999 by Tomás Galeano and Esteban López before the Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1473 to 1481 and 1485 to 1489).

["representante convencional"] for the Yakye Axa Indigenous Community.<sup>135</sup> On May 5 of that year, the Judge decided to "acknowledge the petitioner as representative, with his domicile in the place stated," and ordered photocopies of the records and an official letter to INDI for it to report whether the Yakye Axa Community is registered in said institution and who are its representatives.<sup>136</sup> That same day the private accuser objected to participation of Oscar Ayala Amarilla as agent for the Community, and the judge therefore decided to revoke "by reversing his decision in the exercise of his prerogative the order issued on that date [...] as regards photocopies of these records, until INDI replies."<sup>137</sup>

50.82. On June 17, 1999 several members of the Community were summoned to render informative statements before the Judge who was hearing the case.<sup>138</sup> However, the records of the proceeding before said trial court do not show whether these persons appeared before the Judge to render said informative statements.

50.83. On July 21, 2000, the private accuser complained that "in the framework of an agreement with the Servicio Nacional de Promoción Profesional (SNPP), the members [of the Yakye Axa Community] received a first group of 50 boxes for beekeeping," which were located within the Loma Verde estate, "about 150 meters south of the road between Concepción and Pozo Colorado."<sup>139</sup> That same day, the Judge ordered a judicial inspection at said Loma Verde estate, to corroborate the facts stated in the complaint.<sup>140</sup>

50.84. On July 24, 2000 the Judge hearing the case went to Loma Verde estate and corroborated the existence of three beekeeping boxes within said property, for which reason he ordered their confiscation and deposit in said court.<sup>141</sup>

50.85. On August 30, 2000 the Judge hearing the case ordered as a precautionary measure "prohibition for the indigenous community members living on the

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<sup>135</sup> See request for participation of the agent for the Community and copy of proceedings of May 3, 1999 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volume 1495).

<sup>136</sup> See order of May 5, 1999 issued by Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volume 1496).

<sup>137</sup> See order of May 5, 1999 issued by the Judge of the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volume 1503).

<sup>138</sup> See certificates of notification on June 17, 1999 to Daniel Ciriaco, Pedro García, Raimundo Galarza, César Chávez Fernández, Daniel González, Pablino Chávez, Juan Torales, Alejandro Álvarez, Clarita Galarza, Celso Flores, Venancio Flores, Silvio Ramón, Marciano Solano, Basilio Martínez, Albino Fernández, Marcial Chico Ávalos, Anuncio Gómez, Cirilo Gómez, Marcos Yegros, Zacarias Flores, Dionisio Flores and Elias Ávalos (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1502 to 1579).

<sup>139</sup> See complaint filed on July 21, 2000 by Daniel Sosa, attorney for the private accuser (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1702 to 1705).

<sup>140</sup> See ruling issued by the Criminal Trial Judge of Concepción on July 21, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volume 1706).

<sup>141</sup> See visual inspection record prepared by the Criminal Trial Judge of Concepción on July 24, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume II, volumes 1709 to 1710).

Concepción-Pozo Colorado road, led by Tomas Galeano and Esteban López, to enter the property of the 'Loma Verde' estate, and ordering them to abstain from hunting, cutting trees or carrying out other activities inside that estate." He also ordered the members of the Yakye Axa Community "to abstain from consuming water from the deposit where they do so within said property."<sup>142</sup>

50.86. On September 5 and 11, 2000, Oscar Ayala Amarilla reiterated his request to intervene as agent in the criminal proceeding begun against the members of the Yakye Axa Community.<sup>143</sup> However, on September 11, 2000 the Judge ruled that said request to intervene in that criminal case was not in order, pursuant to Article 117 and other consistent provisions of the 1890 Criminal Procedures Code, still in force. In this regard, he asserted that Oscar Ayala Amarilla should submit his request to intervene as agent for the Community before the INDI. The Judge also ordered that an official letter be sent to the INDI for this institution to report on the list of non-governmental organizations registered before it, and which are linked to the Yakye Axa Indigenous Community.<sup>144</sup> On September 15, 2000, Oscar Ayala Amarilla filed an appeal against said decision,<sup>145</sup> which the judge hearing the case ruled was not in order on September 18 of that same year.<sup>146</sup>

50.87. In the framework of this criminal proceeding, on August 29, 2001 the Criminal Trial Judge ordered the eviction of the Community from the public domain strip where it was established and the dismantling of their dwellings.<sup>147</sup>

50.88. On September 14, 2001 Aurelio R. Sosa Mendoza and Higinio Lovera Sosota, acting on behalf and as representatives of the INDI, requested authorization to legally intervene in the criminal proceeding, to undertake the defense of the accused.<sup>148</sup> In a ruling that same day, the Judge hearing the case accepted said legal intervention.<sup>149</sup>

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<sup>142</sup> See order issued by the Criminal Trial Judge of Concepción on August 30, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1784).

<sup>143</sup> See request to intervene and authenticated photocopies submitted by Oscar Ayala Amarilla on September 5, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1798), and reiteration of request to intervene and authenticated photocopies submitted by Oscar Ayala Amarilla on September 11, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1801).

<sup>144</sup> See order issued by the Criminal Trial Judge of Concepción on September 11, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1797).

<sup>145</sup> See appeal submitted by Oscar Ayala Amarilla on September 15, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1817).

<sup>146</sup> See order issued by the Criminal Trial Judge of Concepción on September 18, 2000 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1818).

<sup>147</sup> See order issued by the Criminal Trial Judge of Concepción on August 29, 2001 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1933).

<sup>148</sup> See request to legally intervene submitted by officials of the Instituto Paraguayo del Indígena on September 14, 2001 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volumes 1952 to 1953).

<sup>149</sup> See order issued by the Criminal Trial Judge of Concepción on September 14, 2001 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1954).

50.89. The INDI filed an appeal and a motion for review against the court order of August 29, 2001 to evict the Community (*supra* para. 50.87). The Judge hearing the case ruled that said remedies were not in order.<sup>150</sup> In face of this situation, on September 26, 2001 the Inter-American Commission recommended that the State adopt precautionary measures in favor of the Yakye Axa Community to suspend execution of said court order.<sup>151</sup> To date, the State has not executed the eviction order.

50.90. The file of the instant case before the Inter-American Court does not indicate the current status of this criminal proceeding.

iii. Threats

50.91 The members of the Yakye Axa Community have suffered constant threats and harassment during the time since they settled alongside the public road between Pozo Colorado and Concepción. In view of these facts, the members of the Community filed complaints before various State agencies, but there is no indication of any type of investigation having begun.<sup>152</sup>

d) *Living conditions of the members of the Yakye Axa Indigenous Community*

50.92. In 1996 a number of members of the Yakye Axa Community decided to leave El Estribo estate and return to the lands claimed as part of their ancestral territory, awaiting a ruling of INDI on their case. They have not been allowed to enter said lands, for which reason they decided to settle alongside the road between Pozo Colorado and Concepción, in the Presidente Hayes Department<sup>153</sup> (*supra* para. 50.8).

50.93. The destitute living conditions of the members of the Yakye Axa Community who have settled alongside the public road are extreme.<sup>154</sup> The members of this

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<sup>150</sup> See order issued by the Criminal Trial Judge of Concepción on September 18, 2001 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 1956); interlocutory appeal and appeal for reconsideration with a supplementary appeal submitted by the Instituto Paraguayo del Indígena on September 19, 2001 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volumes 2000 to 2001), and order issued by the Criminal Trial Judge of Concepción on September 19, 2001 (file with evidence to facilitate adjudication of the case submitted by the State, Volume III, volume 2002).

<sup>151</sup> See note regarding precautionary measures addressed by the Inter-American Commission to the State on September 26, 2001 (file with appendixes to the application, appendix 3, volumes 408 to 410).

<sup>152</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and statement by Albino Fernández rendered before a notary public on February 10, 2005 (file on the merits, reparations, and costs, Volume III, volume 637).

<sup>153</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005, testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Stephen William Kidd rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>154</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005, testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005.

Community cannot cultivate or practice their traditional subsistence activities in the area of settlement. Furthermore, they are not allowed to enter the lands they claim to be traditionally theirs, to hunt wild animals, fish, gather fruit, honey and water, among others. To obtain food, the men in the Community have to make long trips to hunt and fish in other areas.<sup>155</sup> This situation is worsened by the fact that few members of the Community have jobs or any type of income,<sup>156</sup> for which reason their source of food has depended primarily on the goodwill of State agencies and private institutions.<sup>157</sup>

50.94. In this settlement, the members of the Yakye Axa Community do not have minimum basic services. The dwellings are precariously built with Karanda'y, a type of palm in the Chaco region, and tin roofing or pieces of plastic, for which reason they are especially affected by seasonal changes. Each dwelling has on average five inhabitants. They have no electricity, they use firewood to cook, and they light the place with candles and oil lamps.<sup>158</sup>

50.95. The members of the Community have no access to clean water and the most reliable source of water is that collected during rainfall. The water they regularly use comes from deposits ("tajamares") located in the lands they claim; however, it is used both for human consumption and for personal hygiene and it is not protected from contact with animals.<sup>159</sup>

50.96. At this settlement, the members of the Community have no toilets or sanitary facilities of any sort (latrines or septic tanks), for which reason they use the open fields for their physiological needs, which makes the hygienic conditions of the settlement very deficient.<sup>160</sup>

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<sup>155</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>156</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, and book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404).

<sup>157</sup> See vouchers of purchase and delivery of food to the Yakye Axa Community (file with appendixes to the application, appendix 3, volumes 144 to 179); vouchers of purchase and delivery of food to the Yakye Axa Community by the representatives (file with appendixes to the final written pleadings, volumes 480 to 783); testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>158</sup> See expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005; public health medical report on the Yakye Axa Community prepared by Pablo Balmaceda (file with appendixes to the brief with pleadings and motions, appendix 1, volumes 1555 to 1563), and book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404).

<sup>159</sup> See expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005; public health medical report on the Yakye Axa Community prepared by Pablo Balmaceda (file with appendixes to the brief with pleadings and motions, appendix 1, volumes 1555 to 1563), and testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>160</sup> See public health medical report on the Yakye Axa Community prepared by Pablo Balmaceda (file with appendixes to the brief with pleadings and motions, appendix 1, volumes 1555 to 1563), and expert



50.97. As a consequence of these conditions, the members of the Indigenous Community who are in this settlement suffer malnutrition, anemia, and widespread parasitism.<sup>161</sup>

50.98. The hospital that is closest to the area of settlement of the Yakye Axa Community is roughly 70 kilometers away. To reach the regional hospital for the President Hayes Department, the members of the Community have to travel over 200 kilometers and they have no special transportation for this, and public transportation is scarce and inadequate. The Community has no health center or post, and it is not visited regularly by health promoters.<sup>162</sup>

50.99. Currently the Yakye Axa Community has a school with a regular attendance of 57 boys and girls. However, given the characteristics of the Community's current settlement, the school's structure is not adequate and it does not have sufficient materials and facilities, which are provided mainly by State. The health, nutrition and clothing conditions of the boys and girls of the Community severely affect their attendance and their performance in class.<sup>163</sup>

50.100. The precarious living conditions of the members of the Yakye Axa Community settled alongside the road from Pozo Colorado to Concepción were acknowledged on June 23, 1999 by the President of the Republic of Paraguay, who issued Decree No. 3789 that declared a state of emergency regarding the Yakye Axa and Sawhoyamaya indigenous Communities, of the Enxet-Lengua People. The presidential decree acknowledged that the Yakye Axa Community lacked "access to the traditional means of subsistence associated with their cultural identity, because the owners do not allow them to enter the habitat that they claim as part of their traditional territory;" and it ordered the INDI "together with the Ministries of the Interior and of Public Health and Social Welfare to carry out the necessary actions to immediately provide medical care and food to the families of said communities, during the time required by the judicial proceedings regarding legislation in connection with the land claimed as part of their traditional habitat."<sup>164</sup>

50.101. Esteban López visited the INDI on a regular basis to request food, medicine,

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opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>161</sup> See public health medical report on the Yakye Axa Community prepared by Pablo Balmaceda (file with appendixes to the brief with pleadings and motions, appendix 1, volumes 1555 to 1563), and expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>162</sup> See public health medical report on the Yakye Axa Community prepared by Pablo Balmaceda (file with appendixes to the brief with pleadings and motions, appendix 1, volumes 1555 to 1563); expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005, and book entitled "Atlas de las Comunidades Indígenas en el Paraguay", Presidency of the Republic, Technical Planning Secretariat. Paraguay, 2002 (file with documents submitted during the public hearing held on March 4 and 5, 2005, Volume II, page 404).

<sup>163</sup> See statement by Albino Fernández rendered before a notary public on February 10, 2005 (file on the merits, reparations, and costs, Volume III, volume 637), and testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>164</sup> See Presidential decree No. 3789 of June 23, 1999 (file with appendixes to the application, appendix 10, volumes 1278 to 1280).

and any other type of support, which was sometimes granted.<sup>165</sup>

50.102. On February 18, 2000, officials of the INDI visited the settlement of the Yakye Axa and Sawhoyamaxa Communities to “gather data.” During this visit, according to the report prepared by those officials, they verified “the precariousness of their means due to the impossibility of entering the territory they claim to carry out their traditional practices, such as hunting, fishing, and gathering[, as well] as the scarcity of drinking water due to the protracted drought caused by lack of rainfall in the area.” With regard to education, they were able to establish that they “have precarious schools, up to 6th grade, with items provided by the Ministry of Education, for which they require school supplies.”<sup>166</sup>

50.103. In March 2000 the State, through the INDI and in compliance with presidential decree No. 3789/99 (*supra* para. 50.100), delivered to the Yakye Axa Community food, school supplies (notebooks, rulers, pencils, erasers, white chalk, dictionaries, and books) and medicine to treat frequent ailments such as skin problems, bronchial and stomach problems, headaches, fever, and anemia. An official of the Registry Office issued birth certificates for school-age children and others who required them.<sup>167</sup>

50.104. Likewise, in September and November 2001 and in January, April, July and September 2002 the State, through the INDI, delivered food supplies to the Yakye Axa Community in compliance with Presidential Decree No. 3789 (*supra* para. 50.100). The food supplies delivered have usually been rice, noodles, cookies, “yerba común,” oil, flour, beans, cornmeal, salt, sugar, meat, and soap.<sup>168</sup>

50.105. In July 2002 the State, through the Ministry of Public Health and Social Welfare, provided medical care to the members of the Yakye Axa Community. Medical care included vaccination of 84 individuals (M.E.F -15 to 49 years old- D.T. or T.T; D.P.T – under one year old-; Sabin- under one year old-; against measles-one year old-; D.P.T- reinforcement from one to four years; and Sabin and against measles- reinforcement-), medical supplies (vaginal ovule, Paracetamol drops and ferrous sulphate), educational lecture, immunization, IRA and personal hygiene. The service was provided by four professional nurses, a nurse’s aide, and eight nursing students.<sup>169</sup>

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<sup>165</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005, and statement by Oscar Centurión rendered before a notary public on February 22, 2005 (file on the merits, reparations, and costs, Volume III, volumes 781 to 787).

<sup>166</sup> See report prepared by Claudio Miltos and Augusto Ortigoza, officials of the Instituto Paraguayo del Indígena, on February 25, 2000 (file with appendixes to the application, appendix 3, volumes 188 to 190).

<sup>167</sup> See report prepared by Claudio Miltos, official of the Instituto Paraguayo del Indígena, on March 30, 2000 (file with appendixes to the application, appendix 3, volumes 180 to 184).

<sup>168</sup> See vouchers of purchase and delivery of food to the Yakye Axa Community (file with appendixes to the application, appendix 3, volumes 144 to 179).

<sup>169</sup> See report prepared by the Ministry of Public Health and Social Welfare on the visit to the Yakye Axa Community and the medical care provided on August 2, 2000 (file with appendixes to the application, appendix 3, volumes 147 to 148).

e) *Pecuniary and non-pecuniary damage suffered by the members of the Yakye Axa Indigenous Community*

50.106. The members of the Yakye Axa Community and their leaders incurred a number of expenses in connection with the steps taken for their land claims. While these steps are not specifically judicial or administrative, they have caused pecuniary damage to the members of the Community.<sup>170</sup>

50.107. The members of the Community have received support from the non-governmental organization Tierra Viva in terms of health and food, and also from other private individuals.<sup>171</sup>

50.108. Lack of guarantees regarding the right to communal property has kept the members of the Community in a state of fear, unrest, and concern. This situation has made them vulnerable to the threats and harassments of others, which together with lack of protection by the State has led to feelings of anguish and powerlessness among the members of the Yakye Axa Community.<sup>172</sup>

50.109. The very bad living conditions of the members of the Community settled alongside the public road have caused them non-pecuniary damage.<sup>173</sup>

50.110. The health of the members of the Yakye Axa Community, specifically the children and the elderly, has suffered severely due to their living conditions.<sup>174</sup>

50.111. Due to lack of community land, the members of the Yakye Axa Community have been unable to carry out their traditional ceremonies or their traditional subsistence activities. Continuity of their culture has also suffered due to the death

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<sup>170</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>171</sup> See expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005, and copies of invoices regarding the purchase of food and medicine for the Yakye Axa Community (file with appendixes to the final written of the representatives, volumes 480 to 783).

<sup>172</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005, and testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005.

<sup>173</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and statement by Albino Fernández rendered before a notary public on February 10, 2005 (file on the merits, reparations, and costs. Volume III, volume 637).

<sup>174</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005; statement by Albino Fernández rendered before a notary public on February 10, 2005 (file on the merits, reparations, and costs, Volume III, volume 637), public health medical report on the Yakye Axa Community prepared by Pablo Balmaceda (file with appendixes to the brief with pleadings and motions, appendix 1, volumes 1555 to 1563), and expert opinion of Pablo Balmaceda rendered before the Inter-American Court during the public hearing held on March 4, 2005.

of elderly individuals, who are mainly in charge of oral cultural transmission.<sup>175</sup>

## **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**

### *Pleadings of the Commission*

52. As regards Articles 8 and 25 of the American Convention, the Commission alleged that:

- a) in light of Articles 25 and 8(1) of the American Convention, as well as of the provisions of ILO Convention No. 169, ratified by Paraguay on August 10, 1993, the State has the obligation to provide the Yakye Axa Indigenous Community with an effective remedy for their territorial claim, to ensure that the Community is heard with due guarantees, and to establish a reasonable term to ensure the rights and obligations under its jurisdiction;
- b) non-existence of an effective remedy against the violations of basic rights recognized by the Convention constitutes in itself an abridgment of this treaty by the State Party in which there is such a situation;
- c) in 1993 the Yakye Axa Indigenous Community began the procedure to recover the ancestral territory that it claims; however, to date there has been no definitive and satisfactory solution to that claim. As part of said procedure, the Community fulfilled the requirements imposed by Paraguay for recognition of its leaders and to obtain legal status, waited for them and filed

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<sup>175</sup> See testimony of Esteban López rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Tomás Galeano rendered before the Inter-American Court during the public hearing held on March 4, 2005; testimony of Inocencia Gómez rendered before the Inter-American Court during the public hearing held on March 4, 2005, and statement by Albino Fernández rendered before a notary public on February 10, 2005 (file on the merits, reparations, and costs, Volume III, volume 637).

the respective remedies in accordance with the applicable Paraguayan laws regarding indigenous peoples' claims to their traditional lands;

d) the argument made by the State in the sense that the Yakye Axa Indigenous Community exists since the Executive granted it legal status is contrary to Paraguayan domestic legislation, which acknowledges the existence of indigenous peoples prior to establishment of the State itself. Recognition of legal status is merely a way to effect the transfer of lands claimed by specific indigenous communities;

e) the administrative remedy foreseen to solve the land claim by the Yakye Axa Indigenous Community, in accordance with the procedure set forth in Law No. 904/81, has not been effective to attain a definitive solution to the Community's land claim. Likewise, the steps taken by the Community in 2000 and by the Executive itself in 2002 before the Paraguayan Legislative, by submitting bills for expropriation of the area claimed, have not been effective either;

f) Paraguayan legislation does not include an effective legal remedy to protect the legitimate territorial claims of the indigenous peoples of Paraguay. If steps taken before the Executive (territorial claim) or before the Legislative (expropriation) are not effective, those affected, in this case the Yakye Axa Community and its members, have no effective legal remedy to exercise their rights, and

g) Ineffectiveness of those procedures has meant, specifically, that the State has not ensured the right of the Yakye Axa Community to ownership of its ancestral territory.

*Pleadings of the representatives*

53. With regard to Articles 8 and 25 of the Convention, the representatives alleged that:

a) In the domestic proceeding to recover ancestral territory, begun by the Yakye Axa Community before the Paraguayan authorities, the principle of a reasonable term, embodied in Article 8(1) of the Convention, was not respected. Registration of the leaders of the Yakye Axa Community took three years, while the term allowed for this registration, pursuant to the provisions of Article 12 of Law No. 904/81, is 30 days. Complexity was, in this case, minimal, and the legal representatives of the Community attached to the registration request the documents required by domestic legislation. Recognition of the legal status the Yakye Axa Community also took three years to become effective. The Community made the request before the INDI on May 21, 1998, but legal status was only granted on December 10, 2001. This act of recognition of legal status is only a requirement to make the title to ancestral land that belongs to the indigenous communities effective, and it is not a requirement to declare the existence of the communities or to begin the procedure to claim their ancestral lands;

b) the request to recover ancestral territory was submitted by the Community on October 13, 1993 and to date, almost twelve years after it was submitted, the State has not given a definitive answer to the Community's

claim. The acknowledged complexity of the case does not justify the procedure taking so many years;

c) the delay of almost twelve years in the administrative procedure is not due to the complexity of the matter, but rather to lack of application of appropriate criteria, by the State, to restore the ancestral territory claimed by the Yakye Axa Community;

d) in the criminal proceeding begun on March 17, 1999 against the members of the Yakye Axa Community for allegedly invading private property, for grave coercion and for theft, they were not allowed to appoint an attorney and they were unable to exercise their right to defense, which constitutes a violation of paragraphs d) and e) of Article 8(2) of the Convention. Likewise, the State has not taken steps to investigate and punish, if appropriate, the judges or other judicial officials involved in this proceeding;

e) Paraguay has not ensured the Yakye Axa Community and its members an effective remedy to protect them against acts that abridge their rights or an appropriate procedure to solve their claim to traditional territory and, thus, to protect their right to property and to possession of that property;

f) Paraguayan domestic legislation establishes as the only procedure to be followed by the indigenous communities to grant them their lands, the one set forth in Law No. 904/81. This law in fact removes the issue of collective ownership of land by the indigenous peoples from regular venue. The Yakye Axa Community began the procedure to claim its traditional territory in October 1993. This procedure was exhausted, in all its stages, without any results to date;

g) on March 3, 1997 the Yakye Axa Community filed an amparo remedy to protect their right to hunt, fish and gather fruit in their ancestral territory, which was rejected by the trial and appellate courts due to a matter of form. Thus, the Yakye Axa Community was deprived of a legal decision to protect its right to subsistence. Likewise, the constitutional motion filed before the Supreme Court of Justice against the decisions that rejected the amparo remedy was decided unfavorably and with unjustified delay, and

h) lack of an effective remedy to protect those rights under domestic legislation in an effective manner has meant, for the Yakye Axa Community, deprivation of the use and enjoyment, freely and fully, of their ancestral land and of their traditional territory and habitat. It has also made it impossible for the Yakye Axa Community and its members to freely and fully enjoy the right to live in decent conditions and to give meaning to their existence. Insofar as this took place, the State abridged Article 2 of the American Convention to the detriment of the members of the Yakye Axa Community.

### *Pleadings of the State*

54. The State, in turn, alleged that:

a) It has not abridged Articles 8 and 25 of the American Convention to the detriment of the Yakye Axa Community and its members. The legal and procedural mechanisms set forth in the law as part of the materialization of

human rights are in full force for their use in search of justice. The State cannot substitute the will of the parties in the process of legally claiming their rights nor can it instruct private parties regarding the suitable legal means to claim their rights;

b) in the instant case the land claim was processed before the agency in charge of administration of said resources, which constitutes evidence of exercise of guarantees and of the administrative protection set forth in Paraguayan legislation. Administrative Law allows all types of petitions for the specialized institutions to issue rulings by means of decrees, orders, ordinances, and so forth. It is also possible to appeal these rulings by means of the body established by law in each case, and subsequently before the Administrative Law Court;

c) the representatives of the Community did not state and defend their legitimate rights in the most appropriate way before domestic bodies. The actions undertaken were inappropriate, untimely, or negligent. The amparo remedy filed in this case was rejected by two instances because it was time-barred, the precautionary measures were revoked because the Judge deemed that they would make it impossible for the property claimed to continue being rationally used by its owners, and the constitutional motion was found to be discontinued, that is, the legal action lapsed for lack of procedural initiative of the interested party;

d) according to domestic law and domestic justice, the Yakye Axa Community had neither possession nor ownership of the land they claim. The Community did not even have the minimum number of members required by law to have access to and justify an ancestral property regarding the rights that domestic legislation acknowledges and protects in the case of private property, whose owners, in accordance with administrative and judicial procedures, have defended these rights and have attained judicial protection under domestic venue;

e) the members of the Community have sought to assert a historically recognized possession that legally has, nevertheless, been stated inappropriately. The members of the Yakye Axa Community have been manipulated to obtain rights that the State explicitly acknowledges but that must be asserted on reasonable legal grounds and factual background;

f) the right to ancestral property should have been discussed in a regular trial, to establish the paramount right claimed. If they had resorted to the appropriate procedure, the result would have established a legal precedent for similar cases of land claims by indigenous communities;

g) the fact that the lands were under rational use, which was the basis for rejection of the expropriation requested by the Executive, was never disputed under administrative law jurisdiction;

h) there is no provision that denies or forbids asking the Legislative, once again, to expropriate a property claimed by the Community or any other property, especially bearing in mind that the refusal to expropriate took place in a previous legislative period;

i) there has not been a delay of more than ten years in the land claim procedure, since the Community received legal status on December 10, 2001. The legal status granted to the Community by Decree No. 15.228 is what gives it the right to the claims it is entitled to as an indigenous people, bearing in mind that the indigenous property provided for in the Constitution and the laws in force in Paraguay is communal, rather than individual;

j) in all domestic proceedings in this case there has been full participation of the attorneys of the alleged victims, they have had access to all legal and procedural mechanisms to attain their rights, and they have ultimately received guarantees of enforcement of the decisions, which unfortunately, due to insuperable procedural errors, were adverse;

k) the domestic legal provisions in Paraguay on indigenous peoples are diverse and numerous. They are necessarily complemented by those in force for the rest of the population, which are also part of the set of laws in force. It is true that procedural legislation and legislation on the substantive issues is neither definitive nor conclusive, but that is because the laws are neither eternal nor unchanging, but rather dependent on the requirements of historical social circumstances and the needs of the citizens;

l) The 1992 Constitution that is in force, ILO Convention No. 169, Law No. 1863/02 on the Agrarian Statute, Law No. 904/81, the General Law on Education, No. 1.264/98, and the Criminal Procedures Code, among other provisions, demonstrate the efforts that are being made to adjust legislation in terms of participatory and democratic parameters that restated national objectives in view of comprehensive development goals of the citizenry in general and of specific collectivities, such as the indigenous peoples, and

m) Legislation in force regarding access to land is perfectible and therefore requires a special provision to address the situation entailed by acknowledgment of the right to traditional indigenous property vis-à-vis the right of the current owners of private property. In this regard, there is a need to implement legislation for an effective and rapid remedy that can be applied in said situations of conflicting rights.

### *Considerations of the Court*

55. Article 8 of the American Convention provides that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]



d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; [...]

56. Article 25 of the Convention provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by th[e] Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

57. Article 1(1) of the Convention provides that

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

58. Article 2 of the Convention establishes that

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

59. The Commission and the representatives allege, as a basic point, the ineffectiveness of the procedures established by Paraguayan legislation to respond to claims to ancestral territory and to give effect to the right to property of the members of the Yakye Axa Indigenous Community, despite multiple steps taken by

the latter since 1993. The representatives add that the remedies filed, to ensure daily subsistence of the alleged victims through their traditional methods of hunting, fishing, and gathering, have been ineffective.

60. The State, in turn, basically argues that it has fulfilled its constitutional and legal obligations to ensure and facilitate to the members of the Community access to administrative mechanisms in the process of claiming their rights to communal landholding, but its administrative institutions have faced difficulties to effectively respond to the claim by the members of the Indigenous Community due to the complexity of the case.

61. The Court has pointed out, in connection with Article 25 of the Convention, that

the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it.<sup>176</sup>

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.<sup>177</sup> 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.<sup>178</sup>

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).

64. In the instant case, the analysis regarding Articles 8 and 25 of the Convention must be approached from two angles: a) it is necessary to analyze whether or not there is an effective procedure to respond to the territorial claims of indigenous peoples with the characteristics that have been mentioned; and b) it is necessary to establish whether the criminal proceeding against the members of the Community, before the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción, respected the guarantees embodied in Article 8(2) of the American Convention.

*a) Existence of an effective procedure for indigenous land claims*

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<sup>176</sup> See *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, para. 113; *Case of Ivcher Bronstein*. Judgment of February 6, 2001. Series C No. 74, para. 136, and *Case of Cantoral Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 164.

<sup>177</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, 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.

<sup>178</sup> See *Case of Baena Ricardo*. Judgment of February 2, 2001. Series C No. 72, para. 127.

65. In its analysis of the administrative proceeding for indigenous land claims in the instant case, the Court will first examine the formal existence of a recourse to enable indigenous land claim requests. Second, the Court will address the effectiveness of said recourse, which involves an examination, *inter alia*, of respect for the principle of reasonable term. For this, the Court reiterates that to establish reasonable term in a proceeding it is necessary to take into account three aspects: a) complexity of the matter, b) procedural initiative of the interested party and c) conduct of the judicial authorities.<sup>179</sup>

66. In view of the above, the Court will analyze the various stages of the administrative proceeding in the instant case, that is: i) the process of recognition of the leaders of the Yakye Axa Community; ii) the process of recognition of the legal status of said Community; and iii) effectiveness of said land claim process.

i. Process of recognition of the leadership

67. With regard to recognition of the leaders, Article 12 of Law No. 904/81 provides that

[t]he leaders will legally represent their community. Appointment of the leaders will be reported to the Instituto [Paraguayo del Indígena], which will recognize that appointment within thirty days from the date of said report and will record that appointment in the National Registry of Indigenous Communities.

68. The Court has established that on August 15, 1993 the members of the Yakye Axa Community asked the INDI to recognize Tomás Galeano and Esteban López as leaders of the Community and include them in the National Registry of Indigenous Communities (*supra* para. 50.17); it was not until September 18, 1996 that the President of the Board of Directors of the INDI issued a ruling in which he accepted said request (*supra* para. 50.18).

69. The period of three years, one month and three days to decide on a request whose complexity was minimal, when the legal term is thirty days, disregards the principle of reasonable term.

ii. Process of recognition of legal status

70. The pertinent provisions of Law No. 904/81 set forth that:

Article 9.- The request for recognition of legal status will be submitted to the Instituto Paraguayo del Indígena by the leaders of the Community, with the following data:

- a) name of the Community; list of the families and their members, stating their age, marital status and sex;
- b) geographical location of the Community if it is permanent, or of the sites where it is frequently located, if its location is not permanent; and
- c) the names of the leaders of the Community and justification of their authority.

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<sup>179</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 67; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 175, and *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 141.

Article 10.- The Institute, within no more than thirty days, will request recognition of the legal status before the Executive, through the Ministry of National Defense.

Article 11.- The Institute will record the Decree that recognizes the legal status of an Indigenous Community in the National Registry of Communities and will issue an authenticated copy to the interested parties.

Article 20.- Once the legal status of an indigenous Community has been recognized, it will receive the land free of cost, undivided and unencumbered, and the deed will be recorded in the Agrarian Registry, General Property Registry and National Registry of Indigenous Communities. The title deed transferring ownership will be prepared in accordance with the provisions of Article 17 of this Law.

Article 27.- Once the legal status of an indigenous Community has been recognized, the State will transfer the appropriate real estate for its benefit, in the manner set forth in Article 19.

71. The Court has established that steps began to be taken before the INDI on May 21, 1998 for recognition of the legal status of the Yakye Axa Community (*supra* para. 50.19).

72. The decree that recognized the legal status of the Community was issued on December 10, 2001, that is, three years, six months and 19 days later (*supra* para. 50.22).

73. The Court deems that the complexity of this proceeding was minimal and that the State has not justified said delay; therefore, the Court finds it to be disproportionate.

### iii. Administrative procedure for land claims

74. Article 64 of the Paraguayan Constitution establishes that

[i]ndigenous peoples have the right to communal ownership of the land, of a sufficient extent and of sufficient quality for conservation and development of their own manner of life. The State will provide these lands to them free of cost, and these will be non-encumberable, untransferable, inextinguishable, and they cannot serve as guarantees for contractual obligations or be rented; also, they will not be subject to taxation.

Indigenous peoples may not be moved or removed from their habitat without their explicit consent.

75. Law No. 904/81 establishes the procedure to follow to claim private lands. The pertinent provisions state that:

Article 24.- Requests regarding private lands for settlement of indigenous communities will be made by the community itself, or by any indigenous community member or any promoter of indigenous cultures with legal status, directly before the I.B.R. or through the Institute.

Article 25.- The request will include the same requirements set forth in Article 22, para. a) including the name and surname of the owners of the property occupied by the indigenous community members. The procedure will be the one set forth in that same article.

Article 26.- In cases of expropriation, the procedure and compensation in accordance with the Constitution and the Law and resources for payment of compensation will be provided for in the General National Budget.

76. This type of proceedings has the same requirements as under Article 22 of that same Law, to claim public lands. Article 22 provides that

[t]he following procedure will be followed for establishment of indigenous communities on public lands:

- a) Report by the Institute to the I.B.R. on the existence of an indigenous Community, stating its number of members, location, time they have been there, crops and improvements to the land, area effectively occupied and that claimed additionally to fulfill their economic needs and expansion;
- b) Location of the land in the I.B.R. land registry within twenty days of the date when it was filed;
- c) Visual inspection by the I.B.R. within thirty days of when the property was located in the land registry, including submission of the report before that deadline;
- d) Measurement and demarcation of the area by the I.B.R. within sixty days of when the official in charge of the visual inspection submits his report;
- e) Approval of the measurement within thirty days of the date when it was submitted; and
- f) I.B.R. decision, with a previous favorable recommendation by the Institute, to authorize settlement of the indigenous Community.

77. The expropriation procedure, in turn, is regulated by Law No. 854/63 that established the Agrarian Statute, modified by Article 67 of Law No. 352/94 on Protected Wildlife Areas, as follows:

Article 146. – The following private property lands are declared to be of interest for public purposes and subject to expropriation:

- a) Those that are not rationally used and are appropriate to establish agricultural settlements;

[...]

- e) The lands necessary to establish Protected Wildlife Areas and Indigenous Settlements;

Article 147.- Before requesting expropriation, the Instituto de Bienestar Rural may, within its financial possibilities or the availability of land, offer to purchase from or exchange with the owner the property affected for public purposes.

Article 148.- Whether it decides to expropriate or to buy or exchange, the Instituto de Bienestar Rural will carry out the following prior actions:

- a) Notify the owner;
- b) Verify that the land, its location and agricultural conditions are appropriate for agricultural settlement;
- c) Corroborate the existence and significance of the social problem in the area involved;
- d) Call on the owner of the property to state, within a peremptory ninety-day deadline, his willingness to sell it directly to the occupants or to establish a settlement there, in accordance with the conditions set forth in this law.

[...]

Article 150. – As an outcome of the steps set forth in Article 148, the Executive, upon a request by the Instituto de Bienestar Rural, may decree expropriation of the land based on the constitutional determination included in this law.

78. In the instant case there is a disagreement between the parties regarding the date when the land claim procedure began. On the one hand, the Inter-American Commission and the representatives argue that the procedure began on October 5, 1993, with the note addressed by Tomás Galeano, leader of the Community, to the IBR, in which he stated the interest of the Yakye Axa Indigenous Community in returning to their traditional territory and requested “legalization” of at least 15,000 hectares. On the other hand, the State argues that the steps that can be considered valid to obtain communal land ownership are those subsequent to December 10, 2001, when the Yakye Axa Community attained recognition of its legal status.

79. Article 62 of the Paraguayan Constitution establishes that

[t]his Constitution recognizes the existence of the indigenous peoples, defined as cultural groups prior to the establishment and organization of the Paraguayan State.

80. The pertinent provisions of Law No. 904/81, in turn, state that:

Article 7.- The State recognizes the legal existence of the indigenous communities, and will grant them legal status in accordance with the provisions of this law.

Article 8.- The legal status of the indigenous communities that have existed since before the enactment of this law and those constituted by indigenous families regrouping in communities to obtain the benefits set forth in it will be recognized.

81. Based on said Articles, obtaining legal status is indispensable for the transfer of the land, but not to begin the land claim procedure.

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 (*supra* para. 50.24).

85. 11 years, 8 months and 12 days have passed between that date and when the instant Judgment is issued, and still there has been no definitive solution to the claim made by the members of the Yakye Axa Community. This has been so, despite the fact that Article 4 of Law No. 43/89 establishes that

[d]uring the administrative and judicial proceeding set forth in Article 2, the Instituto Paraguayo del Indígena (INDI) and the Instituto de Bienestar Rural (IBR) must propose definitive solutions to the settlements of the indigenous communities in accordance with Law No. 854/63, Agrarian Statute, and Law No. 604/81, Statute of the Indigenous Communities, proposing expropriation pursuant to Article 1 of Law No. 1372/88 when a solution has not been reached by the ways foreseen.

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 trial.<sup>180</sup> 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.

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. The IBR in fact asked the INDI a number of times to submit any information they had on the Yakye Axa Community, (*supra* paras. 50.25 y 50.32) and this institution did not comply with that request. The INDI waited until May 28, 1997 to request the location of the land claimed and to establish its relation with the farms involved, and the technical-anthropological report on the Yakye Axa Community (*supra* para. 50.33). The attorneys for the Community asked the IBR to conduct a visual inspection of the land claimed (*supra* para. 50.26), which was not ordered until July 25, 1996 (*supra* para. 50.31). The IBR only issued ruling No. 755 on September 8, 1998, decreeing that the land claimed was under rational use. The administrative file was sent from the IBR to the INDI and vice versa several times, without giving the Community a definitive answer, and the INDI only decided on November 2, 2001, to ask the Legislative, through the Executive, to expropriate part of the land claimed (*supra* para. 50.53).

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.

90. On the other hand, the State has argued that the representatives never resorted to the administrative law venue to deny that the land was under rational use, and that the interested party never filed a regular lawsuit to establish which right was paramount, whether traditional communal ownership of the land or private property.

91. In this regard, the Court deems that said pleading by the State includes aspects pertaining to non-exhaustion of domestic remedies. In accordance with this

<sup>180</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 69; *Case of Ricardo Canese*, *supra* note 179, para. 142, and *Case of the 19 Tradesmen*, *supra* note 177, para. 191.

Court's *jurisprudence constante*, at this stage of the proceeding it is not possible to discuss matters that should have been addressed in previous stages and regarding which there has been a tacit waiver by the State of the objection of non-exhaustion of domestic remedies.<sup>181</sup>

92. Regarding the effectiveness of the administrative proceeding for the communities to claim land, expert witness Enrique Castillo stated that the proceeding has yielded positive results in cases in which the landowners have been willing to negotiate transfer of ownership of the land claimed, but it has been clearly ineffective in cases in which negotiations with the owners have not been feasible (*supra* para. 38.b).

93. The State itself, in its reply to the application, pointed out that

the legal system for protection of indigenous rights regarding their traditional lands is effective to attain a favorable response to the requests, insofar as there are no other rights also protected by the Constitution, international treaties and the legislation in force [...]

94. The State also asserted that “[d]omestic legislation does not encompass a means to acquire the right to property based on a historical right” and added that “while there is a generic recognition of the traditional ownership right of indigenous peoples to their land[,] it is necessary for them to actually possess it and live as a community on that land.”

95. In this regard, Article 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

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<sup>181</sup> See *Case of the Serrano Cruz Sisters. Preliminary Objections*. Judgment of November 23, 2004. Series C No. 118, para. 135; *Case of Tibi, supra* note 179, para. 49, and *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, para. 81.



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.

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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.<sup>182</sup>

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.<sup>183</sup>

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 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

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<sup>182</sup> See *Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 176, para. 135; *Case of Ivcher Bronstein*, *supra* note 176, para. 135, and *Case of the "Street Children" (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 237.

<sup>183</sup> See *Case of Caesar*, *supra* note 2, para. 93.

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.

*b) Criminal proceeding against members of the Community*

106. The representatives alleged that the proceeding against unnamed members of the Yakye Axa Indigenous Community for the crimes of invasion of property, grave coercion and theft, before the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción (*supra* paras. 50.79 to 50.90), was conducted without due procedural guarantees, as the members of the Community were not allowed to appoint a defense attorney and were unable to exercise their right to defense, which did not allow them to exercise other rights such as prior and detailed communication of the charges and the right to examine and to offer witnesses and expert witnesses.

107. The State, in turn, asserted that it granted full participation of the attorneys for the alleged victims and all procedural and legal mechanisms to attain their rights.

108. With regard to judicial or procedural guarantees embodied in Article 8 of the Convention, this Court has stated that the proceeding must comply with all formalities "designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof"<sup>184</sup>, in other words, the "conditions necessary to ensure the adequate representation or management of the interests or claims of those whose rights or obligations are under judicial consideration".<sup>185</sup>

109. The Court has established that "[i]n order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine domestic proceedings",<sup>186</sup> to determine whether they are compatible with the American Convention. In light of the above, it is necessary to consider the domestic proceedings as a whole, including the decisions of appellate courts. The role of the international Court is to establish whether the procedure as a whole, including admission of evidence, was in accordance with the Convention.<sup>187</sup>

110. Given the specific characteristics of the case and the nature of the alleged abridgments asserted by the representatives, as well as the pleadings of the State,

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<sup>184</sup> See *Case of Lori Berenson*, *supra* note 2, para. 132; *Case of Herrera Ulloa*, *supra* note 181, para. 147, and *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 118.

<sup>185</sup> See *Case of Lori Berenson*, *supra* note 2, para. 132; *Case of Herrera Ulloa*, *supra* note 181, para. 147, and *Case of Maritza Urrutia*, *supra* note 184, para. 118.

<sup>186</sup> See *Case of Lori Berenson*, *supra* note 2, para. 133; *Case of Herrera Ulloa*, *supra* note 181, para. 146, and *Case of Myrna Mack Chang*, *supra* note 10, para. 200.

<sup>187</sup> See *Case of Lori Berenson*, *supra* note 2, para. 133; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 120, and *Case of Bámaca Velásquez*, Judgment of November 25, 2000. Series C No. 70, para. 189.

the Court will now examine as a whole the domestic court proceedings in the criminal proceeding before the Trial Court for Criminal Matters and Correctional Affairs for Minors of the Judicial Circumscription of Concepción, to establish whether said proceedings were in accordance with the provisions of Article 8 of the Convention.

111. Article 16 of the Paraguayan Constitution of 1992 establishes that

[d]efense of individuals and their rights in trials is inviolable. Every person has the right to be tried by independent and impartial judges having jurisdiction.

112. Likewise, Article 17 of said Constitution provides that:

In criminal proceedings, or in any other proceedings that may lead to penalty or punishment, every person has the right:

[...]

5. to legally defend himself personally or through defense attorneys chosen by himself;

6. for the State to provide defense counsel at no cost, if he does not have the financial means to pay for this;

7. to be informed previously and in a detailed manner of the charges, and to have copies, means and the necessary time to prepare his defense, with free communication;

8. to offer, submit, control, and challenge evidence;

[...]

10. to have access, personally or through his defense attorney, to the court records, which in no case may be secret for them. [...]

113. Article 11 of the 1890 Criminal Procedures Code, applied in this case, provided that

[d]efense of the person on trial and of the rights of the accused is inviolable. The accused may defend themselves personally or by means of trustworthy persons appointed by them. Failing that, the Judge will appoint defense counsel for them.

114. Despite the aforementioned provisions, the members of the Yakye Axa Community were represented by a defense counsel two years and six months after the proceeding began.

115. As has been shown, the criminal proceeding against unnamed members of the Yakye Axa Community began on March 16, 1999 with the complaint filed by the legal representative of Livestock Capital Group Inc (*supra* para. 50.79). On March 22, 1999 the Judge opened the preliminary proceedings. On May 3, 1999 the leaders of the Community, recognized as such by the INDI, appointed an attorney to represent them in said criminal proceeding, which was initially accepted by the Judge hearing the case. However, in view of the opposition of the plaintiff, the Judge revoked his previous decision and did not authorize photocopies for the attorney representing the Community (*supra* para. 50.81). On September 5 and 11, 2000 the attorney for the Community once again asked to intervene in the criminal proceeding and requested photocopies of the court records up to that date. On September of that year, the Judge ruled that the request to intervene was "out of order". On September 15, 2000 the attorney for the Community filed an appeal against the ruling that rejected his participation, and this appeal was turned down by the Judge on September 18, 2000 (*supra* para. 50.86).

116. During said criminal proceeding several steps were taken to gather evidence, including statements by witnesses, collecting data on the members of the Community, inspections at the place where the facts took place (*supra* paras. 50.80, 50.82 and 50.83). Provisional measures were also granted in favor of the plaintiff,

forbidding entry of the members of the Community to the territory of Estancia Loma Verde (*supra* para. 50.85); several beekeeping boxes that belonged to the Community were seized (*supra* para. 50.84), and an order was issued to remove the Community's dwellings (*supra* para. 50.87). All these steps were taken without hearing the members of the Yakye Axa Community and without their participation through an attorney of their choice. Also, the members of the Community were unable to submit evidence in their defense and to examine the witnesses offered by the other party. This defenselessness of the members of the Community continued until September 14, 2001, when the Judge accepted participation of the INDI as representative of the Yakye Axa Community (*supra* para. 50.88). According to the file in the instant case, the criminal proceeding did not go beyond the preliminary proceedings.

117. The Court deems, as it has found previously,<sup>188</sup> that lack of a defense counsel constitutes a violation of the right to fair trial embodied in Article 8 of the American Convention. Likewise, the Inter-American Court has pointed out that the accused has the right, so as to exercise his defense,<sup>189</sup> to examine the witnesses testifying against or for him, as well as to offer the testimony of individuals who may shed light on the facts.<sup>190</sup>

118. Therefore, this Court deems that in the instant case the State violated the right of the members of the Yakye Axa Community to be represented by a defense counsel chosen by them.

119. For the aforementioned reasons, the Court deems that Paraguay abridged the rights embodied in Articles 8(1), 8(2)(d), 8(2)(e), 8(2)(f) and 25 of the American Convention, in combination with Articles 1(1) and 2 of that same Convention, to the detriment of the members of the Yakye Axa Indigenous Community.

**IX**  
**VIOLATION OF ARTICLE 21 OF THE AMERICAN CONVENTION**  
**(RIGHT TO PROPERTY)**  
**IN COMBINATION WITH ARTICLES 1(1) AND 2 OF THAT SAME CONVENTION**

*Pleadings of the Commission*

120. With regard to Article 21 of the Convention, the Commission alleged that:

a) the right to property embodied in the American Convention cannot be interpreted in isolation, but rather taking into account the overall legal system in which it exists, bearing in mind both domestic and international law, in light of Article 29 of the Convention. In this regard, and in a situation that also involved claims of indigenous peoples to ancestral lands, the Inter-American Court, by means of an evolutionary interpretation of Article 21 of the

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<sup>188</sup> See *Case of Tibi*, *supra* note 179, para. 194.

<sup>189</sup> See *Case of Lori Berenson*, *supra* note 2, para. 184, and *Case of Castillo Petruzzi et al.*. Judgment of May 30, 1999. Series C No. 52, para. 154

<sup>190</sup> See *Case of Lori Berenson*, *supra* note 2, para. 185; *Case of Ricardo Canese*, *supra* note 179, para. 166, and *Case of Castillo Petruzzi et al.*, *supra* note 189, para. 155.

Convention, deemed that said Article protects the rights of the members of the indigenous communities in the context of communal ownership;

b) while the legislation in force in Paraguay establishes a favorable legal framework for the indigenous peoples, it is insufficient for due protection of their rights if it does not go hand in hand with policies and actions by the State to ensure application of and effective compliance with the provisions which the State itself has, in a sovereign manner, undertaken to apply;

c) protection of the right of indigenous peoples to their ancestral territory is an especially important matter, as its enjoyment involves not only protection of an economic unity but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land;

d) in 1993 the Yakye Axa Community began to take the steps set forth in Paraguayan legislation to claim at least part of its ancestral territory. It has been twelve years since then, and the Community still cannot enjoy the lands they claim;

e) in this case all steps were taken to find a "definitive solution" to Community's claim. That solution involved at least two paths. The first was direct purchase of the land claimed, to subsequently transfer its ownership to the Community that requested it, and the second one, if the direct purchase of the land claimed was not completed successfully, to request expropriation of that property. The Executive did, in fact, attempt both paths through INDI and the President of the Republic himself, although said efforts were unsuccessful. The Legislative has rejected the claim alleging "rational use of the land claimed;"

f) the land claimed by the Yakye Axa Indigenous Community is part of their traditional habitat or ancestral territory, as the State itself acknowledged. The Court should protect the Community's right to live in said territory, a right that is embodied in and protected by Article 21 of the Convention and by Paraguay's own domestic legislation;

g) the territory they claim is a sacred place, the only place where they will be completely free because it is the land that belongs to them, the place where they can recover their shared existence, culture, and joy;

h) occupation of a territory by an indigenous Community or people according to Paraguayan law is not limited to the mere nucleus of indigenous housing. Rather, the territory includes a physical area constituted by a core area of dwellings, natural resources, crops, plantations and their milieu, linked insofar as possible to their cultural tradition;

i) it has been proven that the Yakye Axa Community is a hunting and gathering community, for which reason the area transferred must be sufficient for conservation of their form of life, to ensure their cultural and economic viability, as well as their own expansion, and

j) the State has not guaranteed the property right of the Yakye Axa Indigenous Community of the Enxet-Lengua People and its members to their

ancestral territory, depriving them not only of material possession of their territory but also of the basic foundation for the development of their culture, their spiritual life, their wholeness and their economic survival.

*Pleadings of the representatives*

121. With regard to Article 21 of the Convention, the representatives alleged that:

a) it includes the right of indigenous communities and peoples to communal ownership of ancestrally inhabited lands, lands that include their traditional habitat, that is, the habitat the members of these communities have humanized and in which they have shifted around, and with regard to which they have ties of belonging. In these lands the indigenous communities and peoples, by the very fact of their existence, have the right to live freely;

b) acknowledgment of the right to live in the land of their forbears and in the habitat that was humanized by indigenous communities and peoples, in accordance with their own manner of life, entails adoption, in Paraguay's domestic legal system, of a concept of land property right that is different from the general concept of the right to private property. In accordance with this concept, the land becomes once again a source of the indigenous communities' and peoples' life and culture. This, in turn, entails adopting criteria to assess land use that are different from those applied in private law and in agrarian law itself;

c) the Paraguayan National Constitution acknowledges the right of indigenous peoples, as cultural groups prior to establishment of the State, to live on their ancestral lands and in their respective habitat. The Constitution is complemented by ILO Convention No. 169, included in Paraguayan domestic legislation by means of Law No. 234 of 1993. Thus, ILO Convention No. 169, under the terms of Article 29(b) of the Convention, establishes the scope given by Paraguayan legislation to the right to property, and also places the State under the obligation to protect the right to communal property;

d) the right of the indigenous communities to collective ownership of their traditional lands is reflected, among other things, in the obligation of the State to delimit, demarcate and issue title deeds to the territory of the respective communities. Likewise, the State has the obligation to return to the indigenous communities and peoples their ancestral lands and their habitat, as well as to protect them from third parties who seek to disturb their possession or carry out acts against their wholeness, regarding the existence, value, use or enjoyment of the lands located in the geographical areas where the members of the Community live and conduct their activities;

e) the obligation of the States to restore the lands of the indigenous communities must be fulfilled in accordance with the latter's customary law, values, practices, and customs;

f) in the process of claiming the Community's ancestral lands before the IBR and before the INDI, the State has acknowledged and identified the territory that must be demarcated and delimited and regarding which a title deed must

be issued in favor of the Yakye Axa Community. This territory constitutes the ancestral land of the Community. However, despite this explicit acknowledgment, the State has not ensured the right of the Yakye Axa Community to communal possession and ownership of their ancestral land;

g) what the Yakye Axa Community is claiming is the ancestral land that historically belongs to it and on which the permanence and identity of the Community as such depends. In this regard, the Community has proven with its history (reflected in the testimony of its members and in the anthropological expert reports) and with the customs that guide the way it identifies its land, that the right to communal property existed before they were deprived of it, and that several families of the Community were forced to move to the Colony at "El Estribo". Displacement of the Community to this Colony, due to extremely precarious and poor conditions, has not annulled that right. This is the aspect of the right to communal property whose protection is demanded in the framework of the American Convention, interpreted in light of ILO Convention No. 169 and the obligations recognized in Paraguay's own Constitution, and this is the aspect of the right that has not been guaranteed by the State;

h) the right to ancestral lands prevails, in this regard, in the framework of the American Convention and in Paraguayan constitutional order, over the right to private property. This right enjoys a preferential position vis-à-vis the right to property in general, in view of the set of rights that, in the specific situation of the Yakye Axa Community, are closely linked to guaranteeing said right: the right to life, the right to ethnic identity, the right to culture and to recreate it, the right to survive as an integrated indigenous Community;

i) the impossibility of restoring the ancestral lands of the Yakye Axa Community due to "rational use" by the current owners of the land claimed is an erroneous argument. In the instant case, the State has applied to ancestral lands criteria for assessment of land use in non-indigenous rural agrarian law, despite having adopted ILO Convention No. 169 in its domestic legal system and despite the explicit reference to that Convention in Law No. 904/81, and

j) the American Convention establishes guidelines to define permissible restrictions to rights, as follows: a) it must be a legally adopted measure, b) it must be necessary (and not only useful or reasonable) and c) it must be done to attain a legitimate objective in a democratic society in accordance with the provisions of the Convention. In the instant case, the decision reached is not a necessary measure because it is possible to financially compensate the current owners, it is not the least restrictive measure regarding rights, since sacrificing the Yakye Axa Community's right to own its ancestral land to protect a specific concept of productivity of private property involves sacrificing the very existence of the Community, and it does not ensure the social interest in a democratic and pluralist society in the framework of the Convention.

### *Pleadings of the State*

122. With regard to Article 21 of the Convention, the State alleged that:

- a) the instrument for acknowledgment of the adjudicatory jurisdiction of the Inter-American Court is sufficiently clear when it establishes that the facts to be heard by this Court, in light of the Convention, must be subsequent to ratification, which took place on March 11, 1993. Therefore, the historical arguments (colonial and post-colonial) brought up by the applicant party in the instant case are out of order;
- b) it has not violated the right of the Yakye Axa Community to communal property. It recognizes their right to ancestral lands, which encompass a substantial part of the vast territory of the Chaco and include a geographical area much broader than the space claimed in Estancia Loma Verde, and in this regard it has been acting diligently to expedite matters to this end;
- c) according to the final report of the 3d National Indigenous Population and Housing Census in 2002, the Yakye Axa Community is part of the Lengua-Maskoy linguistic community, which calls itself Enxet-Sur. If the members of this Indigenous Community were ever on the farm that they now claim, Loma Verde estate, it was individually as day laborers. It has been proven, in fact, that most of the indigenous population identified as day laborers on said estate were born in various places. Their forebears probably lived and migrated internally in a vast territory in the Central Chaco, which includes said estate, as well as other estates with various farms, which makes the radicalization of the request to expropriate Loma Verde estate incomprehensible in legal and rational terms;
- d) the Yakye Axa Community has no ownership or possession of the land they claim. Their claims are based on ancestral rights of their forebears, documented only by the anthropological report prepared by anthropologist Miguel Chase Sardi, who in a previous work on indigenous communities in Paraguay does not refer to the property or possession of lands claimed by the Yakye Axa Community;
- e) under Paraguayan law it is not possible to acquire ownership rights merely by justifying that some time in the past the forebears occupied this or that geographical area;
- f) the right to ancestral lands must go hand in hand with possession of the area claimed. While the Executive has acknowledged that the traditional territory of the indigenous population identified as Enxet-Lengua had its traditional habitat in the area of the Paraguayan Chaco, this does not mean that by its mere will it would dispossess those who own the real estate in accordance with domestic legislation. In this regard, it is the Judiciary that has competence to hear cases regarding conflicts over the paramount right. In this case, the Judiciary has ruled that it is not possible to deprive the landowners of the possibility of exercising their legal rights. The Legislative has also rejected the expropriation that had been requested, due to proof that the land claimed is under rational use;
- g) it has guaranteed access of the Indigenous Community to all available legal means to exercise the right to property, and if said right has not been satisfied to date, this is due to factual and legal situations that have not been



resolved under domestic venue, without this constituting an obstruction or denial of rights;

h) it has offered the Yakye Axa Community temporary location alternatives, while they negotiate a solution to the substantive issue, but this was not possible to the intransigence of the representatives and the insistence of the members of the Community in remaining alongside the public road. The INDI has also offered the Community, as an alternative solution to this conflictive case, a 25,000 hectare property in an area where a major group of Enxet-Lengua People have settled. However, this offer, initially accepted by the indigenous leaders, was turned down the following day at a meeting with the representatives of the Community;

i) with the aim of ending the litigation, the leaders of the Yakye Axa Indigenous Community have expressed their willingness to reach an agreement regarding several offers made by the State for their definitive settlement. However, the representatives have continued demanding 18,000 hectares on the Loma Verde estate, for which reason they have substituted the will of the Community, which is willing to consider an alternative solution in accordance with its claims under the law;

j) it did not intervene in the migration of the Yakye Axa Community toward the "Anglican zone", as it is called, or specifically to "El Estribo" estate;

k) the right to communal land embodied in the Paraguayan National Constitution protects collectivities constituted by individuals sharing the same culture, in the understanding that the latter will continue on the basis of socio-cultural exchange among its members. Paraguayan legislation regulates the amount of land for an organized community with legal status, which in the case of the western Chaco region is a minimum of 100 hectares per family;

l) domestic administrative institutions have found it difficult to effectively respond to the claim by the Yakye Axa Community, due to the complex situation of conflicting rights, between the institution of private property rights and the right to communal property of indigenous lands, both protected by the Constitution and by international human rights law, and

m) it is willing to find a solution to the problem of access to communal land for the Community in the framework of the Constitution, of the American Convention, of ILO Convention No. 169, exhausting all domestic means available, such as negotiation with the owners, a possible expropriation request, or location on land with the necessary area and quality for them to carry out their traditional activities, all the more so bearing in mind that said Community is not rooted in any specific area, but rather considers a vast part of the Paraguayan Chaco to be its territory.

### *Considerations of the Court*

123. Article 21 of the American Convention provides that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

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,<sup>191</sup> 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).

125. Previously this Court<sup>192</sup> as well as the European Court of Human Rights<sup>193</sup> 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).<sup>194</sup>

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

<sup>191</sup> See *Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 176, para. 148.

<sup>192</sup> 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 176, 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.

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

<sup>194</sup> See *Case of Tibi*, *supra* note 179, 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 191, para. 113.

the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.<sup>195</sup>

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.<sup>196</sup>

132. In this regard, witness Albino Fernández, a teacher and member of the Yakye Axa Community, explained in his affidavit statement that

[w]e conduct our celebrations in the Community, but not in our lands, we cannot fully follow the tradition, we cannot make the celebrations complete.

[...]

Our ancestors' cemetery, where the Community buried the elderly who lived and died there, is in our lands, in the Yakye Axa lands, east of the core area of Loma Verde estate. If we recover our lands, we will continue burying our dead there. To change and improve this situation as a whole, we need our lands. Without our lands the teacher suffers, the boys and girls suffer, and their parents suffer.

[...]

In our lands we could also preserve our language and our traditional culture and teach them at school.

133. Tomás Galeano, leader of the Community, in turn stated that:

we think of going to Yakye Axa because there we have everything, [...] according to our culture, the forest, the animals, there we can conduct our cultural festivity within the territory of Yakye Axa for this cultural practice.

134. In this regard, Tomás Galeano explained that

the festivity consists, our culture consists [of] harmony, tranquility. Also [...] this can include people who cure those who are sick, who cure their community, who protect their people, for that reason our children were very well before, and our grandchildren

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<sup>195</sup> *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 191, para. 115.*

<sup>196</sup> *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 176, para. 149.*

because there were many 'shamans' amongst us, that is why we need, we require our territory [...] to continue practicing our culture.

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 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"<sup>197</sup>.

138. The Paraguayan Constitution recognizes the cultural identity of the indigenous peoples and links it with their respective habitats, granting them, also, a number of specific rights, which provide a basis for this Court to define the scope of Article 21 of the Convention, as it has done in the previous paragraphs. The Constitution states:

Article 62 – REGARDING INDIGENOUS PEOPLES AND ETHNIC GROUPS

This Constitution recognizes the existence of the indigenous peoples, defined as cultural groups prior to the establishment and organization of the Paraguayan State.

Article 63 – REGARDING ETHNIC IDENTITY

The right of indigenous peoples to preserve and develop their ethnic identity in the respective habitat is recognized and guaranteed. They likewise have the right to freely apply their systems of political, social, economic, cultural, and religious organization, as well as to voluntarily submit to their customary rules regarding life within them, insofar as they are not contrary to the basic rights set forth in this Constitution. In cases of conflicting jurisdiction, indigenous customary law will be taken into account.

Article 64 – REGARDING COMMUNAL PROPERTY

Indigenous peoples have the right to communal landholding, with an area and quality sufficient for conservation and development of their specific form of life. The State will provide these lands free of cost, and they will be unencumberable, nonextinguishable, not subject to guaranteeing contractual obligations or to rental; they will also be tax-free.

Removal or transfer from their habitat without their explicit consent is forbidden.

Article 65 – REGARDING THE RIGHT TO PARTICIPATE

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<sup>197</sup> See *Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 176, para. 144, and *Case of Ivcher Bronstein*, *supra* note 176, para. 122.

Indigenous peoples' right to participate in the country's economic, social, political, and cultural life is guaranteed, in accordance with their customs, with this Constitution and with national legislation.

Article 66 – REGARDING EDUCATION AND ASSISTANCE

The State will respect the cultural specificities of the indigenous peoples, especially regarding formal education. It will also assist them to avoid demographic regression, pillage of their habitat, environmental contamination, economic exploitation, and cultural alienation.

139. Article 3 of Law No. 43/89, in turn, states that the settlement of the indigenous communities encompasses a "physical area including the nucleus of dwellings, natural resources, crops, plantations, and their milieu, linked inasmuch as possible to their cultural tradition [...]".

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 (*supra* para. 50.24) 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."

142. The State alleged that the right of the members of the Community to property has not become effective because their representatives have adopted an attitude that is "intransigent with regard to obtaining 18,000 [hectares] of Loma Verde estate" and because the Legislative "has relied on productivity or economic use of the land" as a criterion to reject expropriation of the territory claimed, and it is impossible for the State to confiscate land disregarding its current owners' right to property.

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.<sup>198</sup>

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.

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 (*supra* paras. 131, 135 and 139).

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.

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<sup>198</sup> See (*mutatis mutandi*) *Case of Ricardo Canese*, *supra* note 179, para. 96; *Case of Herrera Ulloa*, *supra* note 181, para. 127, and *Case of Ivcher Bronstein*, *supra* note 176, para. 155.

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.

152. In the instant case, there has been no agreement between the members of the Community and the State regarding the latter's offer of alternative lands. At the public hearing held by this Court, witness Esteban López stated that

[u]nfortunately for the Government I think that they have not worked as they should, legally, let us say, the Government of Paraguay can do what it wants, not consulting the indigenous peoples, we can clarify, because if Congress is interested in solving the problem, why do they not go to the Community, meet with the people, ask about this offer, explain that they have a place [...] seek a solution, you can agree, or disagree, but we received the notification without consultation, they sought to do this rapidly and then seeing the owners with a piece of paper in their hand, all night going around my house, [...] we must know, we must understand, that this is a violation, [...] if it had been the will of the State to find a way out, well, we would meet other times, reach an agreement, all of us sign, no problem, you cannot play with the indigenous community members [...].

We know the laws, for a good solution you have to consult with the indigenous peoples, the States, if there is an agreement with the Community I think the problem would be solved, but it is up to the groups, the members of the Community, but they should meet with the State, I don't know, every week, because as I was saying, I am expressing our struggle that we already stated is a sacred struggle, we have gone through difficult times and the struggle can't be sold just like that in a day or eight days, there has to be a dialog, it would take a long time.

153. It is necessary to recall that, based on Article 1(1) of the Convention, the State is under the obligation to respect the rights recognized in the Convention and to organize public authority to ensure free and full enjoyment of human rights by the persons under its jurisdiction.<sup>199</sup>

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.

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<sup>199</sup> See *Case of Juan Humberto Sánchez*, *supra* note 187, para. 142; *Case of Ivcher Bronstein*, *supra* note 176, para. 168, and *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No. 71, para. 109.

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**

*Pleadings of the Commission*

157. With regard to Article 4 of the Convention, the Commission alleged that:

a) the right to life is a basic human right, essential for enjoyment of the other human rights. This right encompasses not only the right of every human being not to be arbitrarily deprived of his or her life, but also the right not to be denied the conditions required to ensure a decent existence;

b) the State, by not ensuring the right of the Community to its ancestral territory, has failed to comply with its duty to guarantee the life of its members, as it has deprived the Community of its traditional means of subsistence, forcing it to survive under appalling conditions and leaving it at the mercy of State assistance;

c) in the instant case 57 families, members of the Yakye Axa Indigenous Community, have been living since 1996 in a place that is clearly inadequate to develop their lives under minimally decent conditions, waiting for the State to effectively guarantee their right to live in their ancestral territory and thus to not only carry out their traditional subsistence activities, but also preserve their cultural identity;

d) lack of an effective guarantee of the Community's right to property has placed its members in a situation of extreme vulnerability that has entailed the death of several of its members due to causes that could have been avoided with adequate food and medical care;

e) the situation of risk or vulnerability of the Yakye Axa Indigenous Community has been created by State negligence, a fact that has not been challenged; quite the contrary, the State itself declared a "state of emergency in the Community" in 1999. Said negligence took place in a context in which Paraguay has the obligation to ensure the conditions required for attainment of a decent life, a duty that is underlined by the commitment reflected in Article 26 of the American Convention, to take appropriate steps for complete realization of social rights. Nevertheless, by omission in its public health policies, the State diminished the enjoyment of basic public health, nutritional and housing conditions by the members of the Yakye Axa Community;

f) the decree that declared a state of emergency in the Community has not been made effective in an appropriate manner. Supply of food and medical care by the State for the members of the Yakye Axa Community has been clearly insufficient and irregular, and



g) there is a clear causal relationship between the State's omissions and acts and placing the Community in a situation in which the lives of its members are diminished or truncated in an arbitrary manner.

*Pleadings of the representatives*

158. With regard to Article 4 of the Convention, the representatives alleged that:

a) the right to life is a basic right, whose protection depends on realization of the other rights. In view of this, the States are under the obligation to ensure the establishment of conditions required for full enjoyment and exercise of that right. This entails positive protection measures by the State. Not taking such measures may create or foster conditions that lead to the death of individuals;

b) the State's duty to take positive measures is accentuated precisely in connection with protection of the lives of vulnerable and defenseless persons, who are at risk. To identify said measures, it is necessary to resort to Article 10(2) of the San Salvador Protocol, as a provision that sheds light on interpretation of the positive measures that the State was under the obligation to take to ensure, in this case, the right to life of the members of the Community who died alongside the road;

c) the situation of extreme vulnerability, defenselessness and risk of the Yakye Axa Community, insofar as it is relevant here, is due to the extremely precarious and poor material and economic living conditions, together with geographical and economic obstacles that hinder access to medical care;

d) the State is responsible, in the instant case, for violation of the right to life of the sixteen members of the Yakye Axa Community who have died in their current settlement due to the precarious medical-sanitary conditions and those regarding water and food, under which the Yakye Axa Community has had to live due to lack of an appropriate and timely response of the State to their claim for ancestral lands, and which furthermore could have been satisfied by the State in a timely and appropriate manner. Said deaths could have been avoided if the State had taken the positive protection measures required by the Community and by its members;

e) the right to life has also been abridged, to the detriment of the Community and of its members, by not allowing them to fully exercise the right to access to conditions that would enable each of them to live a decent life. The precarious material conditions and the poverty in which they live today explicitly reflect the lack of full and effective enjoyment of such basic rights as the right to health, the right to food and the right to education. This shortcoming does not allow the Community and its members to enjoy decent living conditions;

f) in light of ILO Convention No. 169, it is necessary to take into account that protection of the right to life and integrity of the indigenous peoples cannot be disassociated from protection of economic, social, and cultural rights. Guaranteeing said rights is a necessary condition to comply with the requirement of decent living conditions, without which it is difficult, if not impossible, to develop flourishing life aspirations;

g) the inadequate and insufficient manner in which said rights are fulfilled by the State worsens the vulnerability of the Community and impedes the development of their collective and individual life aspirations;

h) the State has also violated the right to life by not ensuring that the Community and its members are able to live in accordance with their specific manner of life, and to maintain and develop their spiritual and cultural life. Another essential component of the right to life is to give meaning to existence. Human beings live in the world in different ways. We establish relations with others and with things in the world in different ways. That distinctive way of being in the world, of living in the world, gives our lives a meaning, defines a horizon and a future. On this horizon and in this future it is possible to conceive and carry out life plans and aspirations. Without them, human beings' lives become empty;

i) the lands that have historically been inhabited by indigenous communities and peoples are not only their means of subsistence and livelihood, but also the basis of their very existence, the foundation on which they develop their identities and worldviews. In this regard, they are a component of their worldview and of their spirituality and religiosity. Thus, collective survival of indigenous communities and peoples, as a survival of life and of culture, is intimately linked to their land and territory;

j) the human, spiritual and cultural tie of the Yakye Axa Community and of its members with their ancestral land is deeply felt by them. The ancestral land of the Yakye Axa Community and the habitat that its members have humanized in this land, in which they have shifted around, molds their past, their present, and their future. It defines the identity of the Community and of its members and it represents the place where it is possible for them to imagine the realization of life aspirations that respect their cosmogony and their cultural practices. The Community's decision to settle alongside the road, next to their land, waiting to recover it, expresses, in the present time, what this land and this territory mean for the Yakye Axa Community and its members, and

k) the State has not ensured the Yakye Axa Community's return to their ancestral land and to their own territory and habitat. This has harmed the strong tie between the identity of the Community and of its members and their ancestral land. The State has insistently denied the identity of the Yakye Axa Community and its members, and has done so attempting to dilute it, first in the Enxet-Lengua people and then in the Chanawatsan subgroup. The State has also denied the Community's history and memory, as well as the special meaning of the relationship with their ancestral land and territory for its cosmogony and that of its members. Thus, the Paraguayan State has abridged the right of the Yakye Axa Community and of its members to have their own identity and cosmogony, and to that extent it has violated the right to life, to the detriment of the members of the Community.

#### *Pleadings of the State*

159. With regard to Article 4 of the Convention, the State alleged that:

a) respect for human life is in force in Paraguay, both in the law and in actual practice. The State has not breached the right to life by action or by omission in the instant case. It cannot be blamed for the demise or illness of individuals due to natural or fortuitous causes, unless there is proof of negligence in dealing with those specific cases by the public health authorities or by other authorities who were aware of the facts. It cannot be blamed, by omission or action, for the death by "suffocation" of a 70-year-old person or for the death of two 58- and 80-year-old persons due to heart failure;

b) with regard to the cause of death of certain members of the Yakye Axa Community, it is necessary to point out that they were not personally seen by expert witness Pablo Balmaceda. All the information on the death of these persons, whose existence has not been proven, was obtained supposedly through relatives, for which reason their statement is absolutely null;

c) the Yakye Axa Community, like all citizens, has access to a public health service with various health care assistance centers, health care posts, and regional hospitals, to which it is possible to go by means of public transportation, and where care is free of cost. It is the personal responsibility of the citizens to go to the health care centers, and in the case of indigenous communities, it is a shared responsibility with their leaders or chiefs to take those who are ill to the health care assistance centers or public hospitals or, at least, to inform the regional public health authorities or INDI of their situation;

d) at the place where the members of the Yakye Axa Community are currently located it is impossible to establish any form of medical and health care. When they settled alongside the route, the leaders of the Yakye Axa Community placed its members in extreme situations, remote from their traditional forms of subsistence. The Paraguayan State has also been required by the Commission, by means of precautionary measures that are still in force, to let the Yakye Axa Community remain alongside the public road, clearly violating legal and constitutional provisions that forbid this type of occupation. Thus, the members of the Yakye Axa Community are alongside the road by a decision, whether their own or induced by others, that cannot be attributed to the State, which has instead offered alternatives for resettlement;

e) it has provided food and healthcare assistance to the Yakye Axa Community periodically, in accordance with the Executive decree that declared a state of emergency in this Community, and

f) in this case there is no causal relationship "between the land and physical survival" and the alleged lack of preservation of the right to life. State agents never forced the indigenous community members to leave their lands; instead, they have made substantial efforts to seek other places within their ancestral territory, in the framework of ILO Convention No. 169.

#### *Considerations of the Court*

160. Article 4(1) of the Convention establishes that:

[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

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.<sup>200</sup> When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist.<sup>201</sup> Due to the basic nature of this right, approaches that 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.<sup>202</sup>

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 person<sup>203</sup> 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,<sup>204</sup> and the pertinent

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<sup>200</sup> 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*, *supra* note 10, para. 152, and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 182, para. 144.

<sup>201</sup> 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 10, para. 152, and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 182, para. 144.

<sup>202</sup> 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 10, para. 152, and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 182, para. 144.

<sup>203</sup> See *Case of the "Juvenile Reeducation Institute"*, *supra* note 200, para. 159.

<sup>204</sup> 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.

provisions ILO Convention No. 169.

164. In the chapter on proven facts (*supra* paras. 50.92 to 50.105) the Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land 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 (*supra* para. 39.a, 39.b and 39.c), 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 (*supra* para. 50.97). Furthermore, as has been proven in the instant case (*supra* paras. 50.98 and 50.99), 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.<sup>205</sup>

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 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

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<sup>205</sup> 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.

obtaining food and clean water.<sup>206</sup>

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 (*supra* para. 50.100).

169. The Court recognizes and appreciates the initiatives taken by Paraguay to provide food, medical-sanitary care and educational materials to the members of the Yakye Axa Community (*supra* paras. 50.100 to 50.105); however, it deems that said measures have not been sufficient or appropriate to correct their situation of vulnerability, given the special gravity of the instant case.

170. On the other hand, the State has argued that the members of the Yakye Axa Community are alongside the road due to "a decision of their own or induced" by their representatives and that cannot be attributed to the State, because it has, rather, offered alternative solutions for resettlement where it would be possible to provide some form of medical and sanitary care for the benefit of members of the Community, while a solution is found to their land claim.

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 (*supra* paras. 50.13 and 50.92 ). 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 (*supra* paras. 39.a and 50.61).

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 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.<sup>207</sup> In the instant case, the State has the obligation, *inter alia*, of providing for

<sup>206</sup> 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.

<sup>207</sup> 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*, *supra* note 10,

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.<sup>208</sup>

173. In this regard, witness Albino Fernández, teacher of the Community, stated that

[w]here the Community is located today is a strip of land that the authorities say is a public road and there it is not possible to cultivate, or to have animals to hunt. The Community has been forbidden to hunt, gather firewood and get water from its lands. For this reason, many of the children cannot go on studying. Many children lose the school year due to those conditions, because they have no food, no water, especially during drought periods, and because they are ill.

174. Pablo Balmaceda Rodríguez, expert witness in this case, in turn pointed out that

[w]hat we found is that the Community suffers from parasitism and anemia, and this, as I said at the outset, can be seen by the naked eye. When one arrives at the Community one sees the children's discolored hair and their enlarged stomachs, that is what one notes most. If one asks [...] their age [...] one can realize that their height is not what one imagines that an eight or ten year old child should have, and this is a disease [that] is known [...] as malignant tropical anemia, which is the lack of protein, a lack of protein that causes discoloring of the hair, enlargement of the stomach, and other consequences that are not so visible, such as retarded intellectual development [...] the consequence [for] these children [is that] they will not have the intellectual development they could have had with good nutrition since their early childhood.

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 (*supra* para. 50.111).

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 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

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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.

<sup>208</sup> 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.

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.

178. Based on the above, the Court finds that it does not have sufficient evidence to prove the violation of the right to life embodied in Article 4(1) of the American Convention on Human Rights, to the detriment of Griselda Flores, Alcides Morel Chávez, Mauro Fernández, N/N Sosa Chávez, Adolfo Ramírez, Isabel García de Ramírez, Justina Chávez, Ramón Chávez, N/N Morel Chávez, N/N Morel Chávez, Santiago Gómez, María Adela Flores Gómez, Severa Benítez Alvarenga, Ignacio Torales, Silvino Martínez Gómez, and Hilario Gómez, members of the Yakyé Axa Indigenous Community.

## **XI REPARATIONS APPLICATION OF ARTICLE 63(1)**

### *Obligation to provide reparations*

179. In accordance with the analysis in the previous chapters, the Court has found, based on the facts of the case, a violation of Article 4(1) of the American Convention, in combination with Article 1(1) of that same Convention, and of Articles 21, 8 and 25 of the American Convention, in combination with Articles 1(1) and 2 of that same Convention, to the detriment of the members of the Yakyé Axa Indigenous Community. The Court has established, several times, that any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations.<sup>209</sup> To this end, Article 63(1) of the American Convention establishes that:

[i]f the Court finds that there has been a violation of a right or freedom protected by th[e] 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.

180. As the Court has pointed out, Article 63(1) of the American Convention reflects a customary rule that constitutes one of the basic principles of contemporary International Law regarding the responsibility of States. Thus, when an unlawful act is attributable to a State, this immediately entails the latter's international responsibility for breaching that international rule, with the attendant duty of reparation and of making the consequences of the violation cease.<sup>210</sup>

181. Reparation of the damage caused by infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation. If this is not possible, the international tribunal must order a number of measures that, in addition to

<sup>209</sup> See *Case of Caesar*, *supra* note 2, para. 120; *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C No. 121, para. 86, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 133.

<sup>210</sup> See *Case of Caesar*, *supra* note 2, para. 121; *Case of Huilca Tecse*, *supra* note 209, para. 87, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 134.



ensuring respect for the rights abridged, redress the consequences caused by the infringements and order payment of compensation for the damage caused.<sup>211</sup> The obligation to provide reparations, which is regulated in all aspects (scope, nature, modes, and establishment of the beneficiaries) by International Law, cannot be modified by the State that is under this obligation, nor can it avoid complying with it, by invoking domestic legal provisions.<sup>212</sup>

182. Reparations, as the term suggests, consist of measures that tend to make the effects of the violations committed disappear. Their nature and their amount depend on the damage caused, both at the pecuniary and the non-pecuniary levels. Reparations should involve neither enrichment nor impoverishment of the victim or his successors.<sup>213</sup>

183. In accordance with the evidence gathered during the proceeding and in light of the criteria stated above, the Court will now analyze the claims submitted by the Commission and by the representatives as well as the State's considerations regarding reparations, to establish, first of all, who are the beneficiaries of the reparations, then to order measures of reparation for pecuniary and non-pecuniary damages, and finally, the matter of costs and expenses.

#### A) *BENEFICIARIES*

184. The Court will now summarize the pleadings of the Inter-American Commission, of the representatives and of the State regarding who should be considered beneficiaries of the reparations ordered by the Court.

##### *Pleadings of the Commission*

185. In this regard, the Commission alleged that:

- a) both the Yakye Axa Community and all its members are entitled to reparations in the instant case, since due to their own cultural identity they must be considered from a collective and individual perspective, and
- b) the members of the Yakye Axa Community are individually identified. However, said individual listing could vary, given the time passed since the processing of the instant case began.

##### *Pleadings of the representatives*

186. The representatives, in turn, alleged that:

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<sup>211</sup> See *Case of Caesar*, *supra* note 2, para. 122; *Case of Huilca Tecse*, *supra* note 209, para. 88, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 135.

<sup>212</sup> See *Case of Caesar*, *supra* note 2, para. 122; *Case of Huilca Tecse*, *supra* note 209, para. 88, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 135.

<sup>213</sup> See *Case of Caesar*, *supra* note 2, para. 123; *Case of Huilca Tecse*, *supra* note 209, para. 89, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 136.

a) the Yakye Axa Indigenous Community and its members, as victims in the instant case, must be considered beneficiaries of the reparations ordered by the Court;

b) the Yakye Axa Community is an organized indigenous Community, settled in a specific geographical place, whose members can be identified individually, according to the last family census conducted in 2002. Likewise, it is necessary to bear in mind that during these three years the number of members of the Community has varied, for which reason identification of those who were not included in the 2002 census can be certified for the Court by the authorities of the Indigenous Community, and

c) the sixteen persons who have died since the Community settled alongside the public road must, likewise, be considered beneficiaries of the reparations for violation of the right to life. When appropriate, the beneficiaries of the reparations ordered by the Court due to this abridgment will be the respective next of kin of the deceased.

*Pleadings of the State*

187. The State made no specific pleadings with regard to the beneficiaries of the reparations.

*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."<sup>214</sup>

189. Notwithstanding the above, 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*

*Pleadings of the Commission*

190. With regard to reparations for pecuniary damages, the Commission pointed out that to fairly and equitably determine consequential damages and "lost earnings" in the instant case, the Court should take into account the worldview of the Yakye Axa Community and the effect on the Community itself and on its members of being denied possession of their traditional habitat or ancestral territory and not being allowed to conduct their traditional subsistence activities. In this regard, the Commission asked the Court to set compensation for these damages in fairness.

*Pleadings of the representatives*

191. In this regard, the representatives pointed out that:

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<sup>214</sup> See *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 196, para. 86.

a) they endorse the requests made by the Commission in its application regarding the pecuniary damages (consequential damages and “lost earnings”), for which reason they asked that an amount be set in fairness to establish the amount of compensation for said damages, and

b) it is necessary to take into account the additional expenses incurred by the members of the Community and its leaders, regarding steps taken and trips they had to make, which do not relate to specifically judicial actions, but that have been necessary to demand justice.

#### *Pleadings of the State*

192. The State alleged that the damage and detriment that might have taken place in the instant case has not been claimed before the State’s judicial system, and it objected to admission of expenses allegedly incurred for the of the Yakye Axa Community, as the invoices and other vouchers for those expenses were not previously forwarded to the State, for which reason it has had no knowledge or control over them, and has not authorized them.

#### *Considerations of the Court*

193. Pecuniary damages involve loss of or detriment to the victims’ income, expenses incurred due to the facts, and pecuniary consequences that have a causal link with the *sub judice* case,<sup>215</sup> for which the Court, when it is appropriate, sets a compensation for the property-related consequences of the violations found. In the instant Judgment, to rule on the claims regarding pecuniary damages, the Court will take into account the body of evidence in this case, the jurisprudence of the Court itself, and the pleadings of the parties.

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 (*supra* para. 50.106). The Court deems that the State must grant compensation 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.<sup>216</sup> (*infra* para. 232)

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

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<sup>215</sup> See *Case of Huilca Tecse*, *supra* note 209, para. 93; *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 150, and *Case of the “Juvenile Reeducation Institute”*, *supra* note 200, para. 283.

<sup>216</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 152.

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*

*Pleadings of the Commission*

196. The Commission asked the Court to order the State to pay an amount defined in fairness as compensation for the non-pecuniary damage to the victims in the instant case. In this regard, the Commission alleged that:

- a) the State must pay the Yakye Axa Community and its members for the suffering, anguish and unworthy treatment to which they have been subjected during the years while they have awaited an effective response to their territorial claim. The members of the Yakye Axa Community have suffered rejection of their legitimate claim and have undergone constant pressure both by private citizens and by State agents seeking to force them to desist from their claim;
- b) it is necessary to consider the inhumane living conditions to which the members of the Community, including children, the elderly, and women, have been subjected due to lack of guarantees by the State regarding the Community's property rights to their ancestral territory. It is also necessary to take into account that the death of several members of the Community has affected both their next of kin and the Community itself, and
- c) the State must establish, taking into account the overall detriment to rights that has taken place, a special fund for reparations to fund educational and training programs, as well as psychological and medical care for the members of the Community, whose implementation will require prior consent of the interested parties, in accordance with their practices and customs.

*Pleadings of the representatives*

197. The representatives, in turn, alleged that:

- a) the State must pay the Yakye Axa Community and its members an amount set in fairness as compensation for their sorrow and suffering due to rejection of their legitimate land claim, as well as the anguish and powerlessness that they have felt as victims of threats and harassment by State authorities and private citizens during the years they have been waiting to recover their ancestral land;
- b) the State must pay an amount set in fairness as compensation for the grief and sorrow suffered by the next of kin of the sixteen members of the Community who have died in its current settlement. The State must also pay the Community an amount for the suffering, anguish, powerlessness and unworthy treatment of its members in face of the death of the children and elderly persons in the Community, and
- c) reparations for what the members of the Yakye Axa Community have suffered should include the establishment of a special pecuniary fund to finance educational and training programs as well as psychological and

medical care for the members of the Community, and its implementation will require prior consent by those involved, in accordance with their practices and customs.

### *Pleadings of the State*

198. The State alleged that the damage and detriment that might have taken place in the instant case has not been claimed before the State's judicial system, and there is no link between the deaths of some members of the Community and the matter of ancestral lands. On the other hand, the State recognized that it is necessary for the members of the Community to use the lands they receive productively to cover the needs of the Community and enable their appropriate development. For this, it will implement a project for the appropriate development of the land, immediately after consultation with and acceptance by the Community, directly, without interference by third parties obstructing the negotiations.

### *Considerations of the Court*

199. Non-pecuniary damages must encompass both the suffering and sorrow caused to the direct victims and their relatives, detriment to very significant values of individual persons, as well as non-pecuniary alterations in the conditions of existence of the victim or his family. Since it is not possible to attach a precise monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparations to the victims, it can only be compensated for, in two ways. First, by payment of an amount of money or delivery of goods or services that can be appraised in monetary terms, decided by the Court by applying judicial discretion and in terms of fairness. Second, by carrying out acts or works that are public in their repercussions or scope, such as broadcasting a message of official reproval of the human rights violations involved and stating its commitment with efforts to avoid their happening again and which should have, among other effects, that of recognizing the dignity of the victims.<sup>217</sup> The first aspect of reparation for pecuniary damage will be addressed in this section, and the second aspect in the following section.

200. International jurisprudence has repeatedly established that the judgment constitutes, in itself, a form of reparation. However, taking into account the circumstances of the instant case, the alterations to the conditions of existence of the victims and their non-material or non-pecuniary consequences, the Court deems it pertinent to order reparation of the non-pecuniary damage.<sup>218</sup>

201. In its assessment of the non-pecuniary damage caused in the *sub judice* case, the Court has deemed that the statements by Albino Fernández rendered before a notary public (*supra* para. 38.a), and by Esteban López, Tomás Galeano and Inocencia Gómez in their testimony before this Court during the public hearing (*supra* para. 39.a, 39.b and 39.c), regarding the damage caused to them are representative of the damage caused to the other victims, all of whom are members

<sup>217</sup> See *Case of Caesar*, *supra* note 2, para. 125; *Case of Huilca Tecse*, *supra* note 209, para. 96, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 156.

<sup>218</sup> See *Case of Caesar*, *supra* note 2, para. 126; *Case of Huilca Tecse*, *supra* note 209, para. 97, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 157.

of the Yakye Axa Indigenous Community. This Court has also taken into account the statements by José Alberto Braunstein and Teresa de Jesús Vargas in their statements before a notary public (*supra* para. 38.d and 38.e), and by Rodrigo Villagra and Bartomeu Melia i Lliteres in their statements before this Court during the public hearing (*supra* para. 39.e and 39.f).

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 (*supra* para. 137 and 154), 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.

204. The Court also notes that the State partially acquiesced to the claim by the representatives of the victims regarding guarantees of development of economic, social, and cultural rights set forth in Article 26 of the American Convention, but with the reservation that this is appreciably affected by Paraguay's limitations as a country with a lower relative development and due to imbalances in international trade.

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.

206. The committee mentioned in the previous paragraph will be in charge of deciding the manner of implementation of the development fund, and it will have three members. Said committee must include a representative appointed by the victims and another by the State; the third member of said committee will be appointed by agreement between the victims and the State. If within six months from the date of notification of this Judgment the State and the representatives have not reached an agreement regarding membership in the implementation committee, the Court will summon them to a meeting to decide this matter.

*D) OTHER FORMS OF REPARATION  
(MEASURES OF SATISFACTION AND GUARANTEES OF NON-RECIDIVISM)*

*Pleadings of the Commission*

207. The Commission asked the Court to order the State to implement the following measures, by mutual agreement with the Yakye Axa Community:

- a) to give the Yakye Axa Community a title deed, free of cost, to the land they claim as their traditional habitat or ancestral territory. Said land must be equipped with the basic services as well as education and public health services to enable the Community to develop a decent life in accordance with its own cultural rules;
- b) to protect the land claimed by the Community to ensure that its natural resources, and especially its forests, are not destroyed, and that their traditional subsistence activities are not affected;
- c) to adopt domestic legal provisions to ensure the rights recognized by Paraguayan legislation for the indigenous peoples. The State must, especially, establish an effective recourse for the indigenous peoples of Paraguay to have access to their traditional habitat, in accordance with the rights recognized for them by domestic legislation, and
- d) to carry out, by means of a symbolic act previously agreed upon with the alleged victims and their representatives, a public acknowledgment of its international responsibility for human rights violations against the Yakye Axa Community and its members.

*Pleadings of the representatives*

208. The representatives endorsed *in totum* the claims regarding reparations made by the Commission in its application, and pointed out that:

- a) the State must give the Yakye Axa Community its ancestral land and its own territory and habitat, which will allow its members to have access to decent living conditions and to maintain and pass on to future generations an identity, a culture, and a manner of life. This will redress the long years of waiting and suffering by the members of the Community since the time when they and their leaders decided to return to their land;
- b) return of the ancestral land must include granting the Community the appropriate title deed to guarantee their right to communal ownership of that land, with the minimum area required to ensure preservation and development of their manner of life. Respecting the will of the members of the Community, the minimum area would be the 18,189 hectares that constitute the territory of Yakye Axa, known today as "Estancia Loma Verde";
- c) the land claimed and its natural resources must be protected until the land is effectively turned over to the Community;
- d) the State must establish a fund for payment of the ancestral lands of the Community, based on the average market value of the land in the area claimed, based on the minimum area claimed;

e) the land claimed must be equipped with basic services, including drinking water and sanitary infrastructure, a health post and a school. The State must also provide permanent medical care and education to the members of the Community, and

f) the State must establish mechanisms to effectively apply ILO Convention No. 169 and Chapter V of the Paraguayan National Constitution, to satisfy the claims of the indigenous peoples and ensure their rights to possession and property of their ancestral lands.

### *Pleadings of the State*

209. With regard to the other forms of reparation requested by the Commission and the representatives, the State pointed out that:

a) it is willing to grant a title deed, free of cost, to the Yakye Axa Community, in accordance with the Constitution and legislation in force, to 7,901 hectares within its delimited territory in the Paraguayan Chaco, traditional habitat of the Enxet-Lengua People, subject to what national legislation allows and without affecting the rights of third parties who justify property rights and rational use, whether by means of a negotiated purchase from the owners of said lands or by expropriation in accordance with domestic legislation;

b) it agrees to establish a fund for the exclusive purpose of covering payment of the land that will be granted to the Community, at the price established by negotiation and customary conditions for land sales;

c) it acquiesced to the request to establish a health post, a school, drinking water supply and sanitary infrastructure for the Indigenous Community, at the place where the State is able to establish said services, as close as possible to a provisional settlement, other than the location of the current settlement alongside the road. It also acquiesced to the request to provide medical care and education to the members of the Community, in accordance with existing educational and healthcare plans;

d) domestic legislation regarding this subject matter can be improved, and it therefore justifies a special provision to include an effective and rapid recourse to elucidate the clash between the right to ancestral property and the right of the current owners of the private property, and

e) it is willing to carry out a public acknowledgment, provided that the claim made by the Yakye Axa Community is specified in terms of its content. The symbolic act must be defined, if there is an agreement between the State and the Yakye Axa Community, with regard to the acquiescence proposed. It would also be possible to sign an agreement for a friendly settlement of the instant case.

### *Considerations of the Court*

210. In this section, the Court will now establish measures of satisfaction to



redress non-pecuniary damage, and will also order measures that are public in their scope or repercussions. Said measures are especially relevant in the instant case due to the collective nature of the damage caused.<sup>219</sup>

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. Furthermore, the State has expressed throughout this proceeding before the Court its willingness to grant lands to the members of the Community. Thus, in the brief with its reply to the application it stated that

[b]earing in mind the general interest sought by the substantive matter, even though the State of Paraguay does not agree with the grounds for the application, it acquiesces to the request for reparations and therefore, through the appropriate authorities, it will order the granting of lands to the applicant [C]ommunity, within the [C]ommunity's traditional territory, with the area authorized by the legislation in force, that is, 100 hectares per family, for which purpose it will allocate financial resources that it has already requested from the Legislative [...].

The property that will be granted to the [C]ommunity will be purchased by the State in the manner and under the conditions authorized by the legislation in force, without affecting the rights of third parties who are likewise protected by that legislation and the American Convention, for which reason it undertakes no commitment to conduct an unlawful expropriation or confiscation [...].

212. The State added that

it ratifies its willingness to grant a title deed, free of cost, to the Yakye Axa Community, in accordance with the Constitution and the legislation in force, to 7,901 hectares in favor of said [C]ommunity, within the delimited territory in the Paraguayan Chaco, subject to what national legislation allows and without affecting the rights of third parties who justify property rights and rational use, whether by means of a negotiated purchase from the owners of said lands or by expropriation in accordance with domestic legislation;

213. In its oral pleadings at the public hearing of the instant case, the State pointed out that

what the State [...] plans to give the members of this [C]ommunity is not just any land. It is the land they decide at the appropriate time within their ancestral territory and within what this Chanawatsan community has stated is part of their territory, which I insist is much broader than the eighteen thousand hectares that they claim today as irreplaceable territory [...].

214. In its final written pleadings the State

reiterate[d] its sustained willingness to reach a definitive solution to this case by means of direct negotiations with the Community [...] to grant the Yakye Axa Community an area of land in accordance with its communal needs, pursuant to the Constitution, to ILO Agreement [No.] 169 and to the respective special legislation, within the CHANAWATSAN territory.

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<sup>219</sup> See *Case of Caesar*, *supra* note 2, para. 129; *Case of Huilca Tecse*, *supra* note 209, para. 102, and *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 165.

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 (*supra* paras. 123 to 156). 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 (*supra* paras. 50.1, 50.2 and 50.3). 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, as set forth in paragraphs 144 to 154 of this Judgment. 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*

219. The Commission and the representatives, in their main briefs, expressed the need to provide basic services to the members of the Yakye Axa Indigenous Community, including drinking water and sanitary infrastructure, a public health center and a school. They also mentioned the need for medical and educational services to be provided permanently to the members of the Community in a culturally pertinent manner, taking into account its customs and traditions. The State, in turn, pointed out that

it also acquiesces to the request to establish a health post, a school, drinking water supply and sanitary infrastructure for the Community, at the place where the State is able to establish said services, as close as possible to a provisional settlement.

220. The State added that

insofar as possible it acquiesces [to the request to provide] medical care and education to the members of the Community, in accordance with existing educational and healthcare plans of the State.

221. In view of the above, 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*

222. In the instant case, the Court found that Paraguay violated Articles 8, 21 and 25 of the Convention in combination with Articles 1(1) and 2 of that same Convention, for lack of effectiveness of national legislation to satisfy the territorial rights of the victims, set forth in the Paraguayan Constitution.

223. The State pointed out in this regard that

it is necessary for a new law to address the situation of the indigenous peoples whose need for a land of their own also has the connotation of being necessary to develop their specific manner of life.

224. And the State added that

it also acquiesces to the request to implement legislation that includes an effective and rapid recourse to elucidate situations of clashing rights, as in the case of the Yakye Axa and other communities of the Enxet Lengua people, for which it will conduct consultations with the direct beneficiaries, the indigenous peoples, pursuant to the provisions of [ILO] Agreement [No.] 169, and once a consensus has been attained regarding the bill, it will be processed before the Legislative [...].

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 cases<sup>220</sup>, 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 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.<sup>221</sup> The State must provide the means for said persons to attend the aforementioned act.<sup>222</sup> 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.<sup>223</sup> 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.

e) *Publication and dissemination of the pertinent parts of the Judgment of the Court*

227. As it has ordered in previous cases,<sup>224</sup> the Court deems that, as a measure of satisfaction, 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 cover the cost of radio broadcasting the content of paragraphs 50.12 to 50.16, 50.18, 50.22, 50.24, 50.58, 50.59 and 50.92 to 50.100 of chapter VI on Proven Facts, of paragraphs 135, 154, 155, 161, 162, 169, 172 and 175 of chapters IX and X, and of operative paragraphs One to Fourteen of the instant Judgment, in Enxet language and in Guaraní or Spanish, on a radio station to which the members of the Yakye Axa Community have access. The radio broadcast must be made at least four times, with two weeks time between each broadcast.

## **XII COSTS AND EXPENSES**

*Pleadings of the Commission*

228. The Commission pleaded that after hearing the representatives of the alleged victims, the Court order the State to pay the costs incurred within the country to

<sup>220</sup> See *Case of Huilca Tecse*, *supra* note 209, para. 111; *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 194, and *Case of Carpio Nicolle et al.*, *supra* note 14, para. 136.

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

<sup>222</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 194, and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 196, para. 100.

<sup>223</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 194; *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 196, para. 100, and *Case of Myrna Mack Chang*, *supra* note 10, para. 278.

<sup>224</sup> See *Case of Huilca Tecse*, *supra* note 209, para. 96; *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 194, and *Case of Lori Berenson Mejía*, *supra* note 2, para. 240.

further the proceedings under domestic venue, as well as those incurred internationally processing the case before the Commission and the Court, duly proven by said representatives.

*Pleadings of the representatives*

229. The representatives, in turn, asked the Court to order the State to pay the costs incurred within the country to further the court, administrative and legislative proceedings under domestic venue, as well as those incurred internationally to process the case before the Commission and the Court. In this regard, they argued that the State must pay US \$25,668.86 (twenty-five thousand six hundred and sixty-eight United States dollars and eighty-six cents) in favor of the non-governmental organization Tierraviva, as well as US \$5,500.00 (five thousand five hundred) in favor of CEJIL for costs and expenses.

*Pleadings of the State*

230. The State pointed out it does not accept payment of the amount requested by the representatives of the alleged victims for costs and expenses. In this regard, the State alleged that:

a) it was the attorneys of the Community who “out of negligence lost the case in which it would have been possible to elucidate the issue of the paramount right,” for which reason it is not possible to “come and ask [the] Court to order payment of legal expenses, when the courts and the Supreme Court of Justice have established, in accordance with domestic legislation, that the latter must be covered in the legal system where the case was heard, thus favoring the Indigenous Community in this case,” and

b) “the pertinence of the travel, communications, stationery and sending of packages has not been justified, [...] and it has not been shown that the fees of doctor Balmaceda are based on any justifiable parameter [or] that the work was in fact done.”

*Considerations of the Court*

231. As the Court has pointed out previously,<sup>225</sup> costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention, as the activities carried out by the victims and their representatives with the aim of obtaining justice, both under domestic and international venues, entails disbursements that must be compensated when the State is found to be responsible in a judgment against it. With regard to reimbursements, the Court must judiciously assess their scope, including the expenses incurred before the authorities under domestic venue and those incurred in the course of the proceeding before the inter-American system, bearing in mind the circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. This assessment can be based on the principle of fairness and taking into account the expenses listed by the parties, as long as their *quantum* is reasonable.

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<sup>225</sup> See *Case of the Serrano Cruz Sisters*, *supra* note 2, para. 205; *Case of Carpio Nicolle et al.*, *supra* note 14, para. 143, and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 196, para. 115.

232. The Court takes into account that the members of the Yakye Axa Community acted through their representatives, both under domestic venue and before the Commission and this Court. For this purpose, the Court deems it fair to order the State to pay US \$15,000.00 (fifteen thousand United States dollars) or their equivalent in Paraguayan currency, which must be given to the leaders of the Community, for costs and expenses under domestic venue and in the proceeding followed before the inter-American system for protection of human rights.

### **XIII MANNER OF COMPLIANCE**

233. To comply with the instant Judgment, the State must pay compensation for pecuniary damages (*supra* para. 195), reimbursement of costs and expenses (*supra* para. 232), establishment of the fund to purchase land for the Community (*supra* para. 218), the public act of acknowledgment of international responsibility (*supra* para. 226) and publication and dissemination of the excerpts of the instant Judgment (*supra* para. 227) within one year's time. The State must also identify, delimit, demarcate, grant title deed and transfer free of cost the traditional lands of the Yakye Axa Community or alternative lands if that is not possible, pursuant to paragraphs 211 to 217 of this Judgment, within a maximum period of three years. All these deadlines will be counted from the date of notification of the instant Judgment.

234. The State must also implement the community development program and fund within a maximum of two years from the date when the land is transferred (*supra* paras. 205 and 206). Meanwhile, the State must immediately and on a regular basis provide water, food, medical care, medicines, and school material to the members of the Community (*supra* para. 221).

235. The State must take such measures as may be necessary in its domestic legislation to make the rights embodied in the American Convention effective, pursuant to the terms of paragraph 225 of the instant Judgment, within a reasonable term.

236. The payments for reimbursement of costs and expenses incurred due to the steps taken by the representatives of the Community in the domestic proceeding as well as in the international one before the inter-American system for protection of human rights, will be made in accordance with the provisions of paragraph 232 of the instant Judgment.

237. The State may fulfill its pecuniary obligations by payment in United States dollars or an equivalent amount in the State's national currency, using for this calculation the exchange rate between the two currencies on the New York exchange, the day before the payment.

238. If for reasons attributable to the beneficiaries of the compensations it is not possible for them to receive said payments within the stated one year period from the date of notification of the instant Judgment, the State will deposit said amounts in their name in an account or deposit certificate in a reliable Paraguayan banking institution, in United States dollars and under the most favorable financial conditions allowed by banking practice and legislation. If after ten years the compensation has not been claimed, that amount will be returned to the State together with the

interest accrued.

239. The amounts ordered in this Judgment as compensation for the pecuniary and non-pecuniary damages and the reimbursement of costs and expenses cannot be affected, diminished or subject to conditions due to current or future fiscal reasons. Therefore, they must be delivered completely to the beneficiaries in accordance with the provisions set forth in this Judgment.

240. If the State was to incur in arrears, it must pay interest on the amount owed, based on the banking interest rate for arrearages in Paraguay.

241. In accordance with its usual practice, the Court reserves its inherent authority to oversee complete compliance with the instant Judgment. The case will be closed once the State has fully complied with the provisions of the instant ruling. Within one year from the date of notification of this Judgment, Paraguay must submit to the Court its first report on the measures taken to comply with it.

#### **XIV OPERATIVE PARAGRAPHS**

242. Now therefore,

#### **THE COURT,**

DECLARES THAT:

By seven votes to one,

1. the State violated the rights violated the Rights to Fair Trial and to Judicial Protection, embodied in Articles 8 and 25, respectively, of the American Convention on Human Rights, in combination with Articles 1(1) and 2 of that same Convention, to the detriment of the members of the Yakye Axa Indigenous Community, under the terms set forth in paragraphs 55 to 119 of the instant Judgment.

Judge Ramón Fogel Pedroso partially dissenting.

By seven votes to one,

2. the State violated the Right to Property embodied in Article 21 of the American Convention on Human Rights, in combination with Articles 1(1) and 2 of that same Convention, to the detriment of the members of the Yakye Axa Indigenous

Community, under the terms set forth in paragraphs 123 to 156 of the instant Judgment.

Judge Ramón Fogel Pedroso dissenting.

Unanimously,

3. the State violated the Right to Life embodied in Article 4(1) of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of the members of the Yakye Axa Indigenous Community under the terms set forth in paragraphs 160 to 176 of the instant Judgment.

By five votes to three,

4. it does not have sufficient evidence to prove the violation of the Right to Life embodied in Article 4(1) of the American Convention on Human Rights, to the detriment of sixteen members of the Yakye Axa Indigenous Community, under the terms set forth in paragraphs 177 to 178 of the instant Judgment.

Judges Alirio Abreu Burelli, Antônio A. Cançado Trindade and Manuel E. Ventura Robles dissenting.

Unanimously,

5. this Judgment constitutes *per se* a form of reparation, in the terms set forth in paragraph 200 of the instant Judgment.

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, under the terms set forth in paragraphs 211 to 217 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, in the terms set forth in paragraph 221 of the instant Judgment.

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, under the terms set forth in paragraph 218 of this Judgment.

9. the State must implement a community development fund and program, under the terms set forth in paragraphs 205 and 206 of the instant Judgment.

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, under the terms set forth in paragraph 225 of the instant Judgment.

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, under the terms set forth in paragraph 226 of this 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, under the terms set forth in paragraph 227 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, under the terms set forth in paragraphs 195 and 232 of this Judgment.

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, under the terms set forth in paragraph 241 of this Judgment.

Judge Alirio Abreu Burelli informed the Court of his Partially Dissenting Opinion, Judges Antônio A. Cançado Trindade and Manuel E. Ventura Robles informed the Court of their Joint Dissenting Opinion, Judge *ad hoc* Ramón Fogel Pedrosa informed the Court of his Partially Concurring and Partially Dissenting Opinion. Said votes are attached to this Judgment.

Drafted in Spanish and in English, the Spanish text being authentic, in San José, Costa Rica, on June 17, 2005.

Sergio García Ramírez  
President

Alirio Abreu Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina Quiroga

Manuel E. Ventura Robles

Diego García-Sayán

Ramón Fogel Pedroso  
Judge *ad hoc*

Pablo Saavedra Alessandri  
Secretary

So ordered,

Sergio García Ramírez  
President

Pablo Saavedra Alessandri  
Secretary

**APPENDIX A**

<p style="text-align: center;">LIST OF MEMBERS OF THE INDIGENOUS COMMUNITY OF YAKYE AXA ACCORDING TO THE 2002 CENSUS*</p>
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**RESIDENCE / FAMILY GROUP N. 1**

1. Marcos Yegros
2. Angelina Silva
3. Ramón Yegros
4. Graciela Yegros
5. Elsa Yegros

**RESIDENCE / FAMILY GROUP N. 2**

6. Esteban López Ramírez
7. Flora García de López
8. Valeria López García
9. Elvio López García
10. Elva López García

**RESIDENCE / FAMILY GROUP N. 3**

11. Pedro Silva García
12. María Benítez

**RESIDENCE / FAMILY GROUP N. 4**

13. Raimundo Galarza Ayala
14. Sergio Sosa<sup>226</sup>

**RESIDENCE / FAMILY GROUP N. 5**

15. Tomás Galeano

**RESIDENCE / FAMILY GROUP N. 6**

16. Faustino Chávez
17. Liliana González
18. Santa Chávez

**RESIDENCE / FAMILY GROUP N. 7**

19. Daniel Gonzáles Gonzáles

**RESIDENCE / FAMILY GROUP N. 8**

20. César Chávez
21. Victorina Álvarez
22. Karen Fabiola Chávez
23. Eliseo Chávez

**RESIDENCE / FAMILY GROUP N. 9**

24. Ignacio Torales Severa
25. Felicia González Vda. de Ortiz

**RESIDENCE / FAMILY GROUP N. 10**

26. Balbina Torales Severa

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\* Data collected from the last census conducted on the indigenous community of Yakye Axa on 2002, presented as documentary evidence by the Inter-American Commission of Human Rights (file of the petition appendixes, appendix 5, pages 1250 a 1257). In this regard, the Commission and the victims' representatives indicated that, since this last census, the number of members of the community might have suffered variations.

<sup>226</sup> The birth name of this person is partially illegible in the copy of the census of the indigenous community of Yakye Axa conducted on 2002, presented as documentary evidence by the Inter-American Commission of Human Rights (file of the petition appendixes, appendix 5, pages 1250 a 1257). Despite of this, it has been established that the name might be "Sergio", which can be verified in the future by the leaders of the community.

**RESIDENCE / FAMILY GROUP N. 11**

27. Severa Alvarenga

**RESIDENCE / FAMILY GROUP N. 12**

28. Cirilo Gómez

29. Rosa Benítez

30. Liliano Benítez

31. Enrique Benítez

32. Alberto Benítez

**RESIDENCE / FAMILY GROUP N. 13**

33. Albino Gómez

34. Elsi Ramos

**RESIDENCE / FAMILY GROUP N. 14**

35. Anuncio Gómez Gonzáles

36. Luisa Benítez Alvarenga

**RESIDENCE / FAMILY GROUP N. 15**

37. Marciano Chico Dávalos

38. Inocencia Gómez

39. Benilda Avaloz Gómez

40. Belfio Avalos Gómez

41. Nicolás Avalos Gómez

42. Lucio Avalos Gómez

43. Richart Avalos Gómez

44. Eliodora Avalos

**RESIDENCE / FAMILY GROUP N. 16**

45. Albino Fernández

46. Irene Gómez Benítez

47. Euleterio Fernández

48. Claudelino Fernández

49. Adolfo Fernández

50. Juquin Fernández

51. Christian Fernández

52. Milena Soledad Fernández

**RESIDENCE / FAMILY GROUP N. 17**

53. Silvio Ramos Valdón

54. Rafaela Flores Solano

55. Marina Ramos

56. Isabelina Ramos

57. Wilfrido Ramos Flores

58. Edgar Ramos Flores

**RESIDENCE / FAMILY GROUP N. 18**

59. Roberto Gómez Yegros

60. Dominga Fernández

61. Asunciona Gómez Fernández

62. Wilfrido Gómez Fernández

63. Gloria Gómez Fernández

64. Digno Gómez Fernández

65. Raquel Gómez Fernández

66. Griselda Gómez Fernández

67. Romina Gómez Fernández

**RESIDENCE / FAMILY GROUP N. 19**

68. Zacarias Flores

69. Nena García

70. Florencio Flores

71. Gabriel Flores

RESIDENCE / FAMILY GROUP N. 20

72. Narciso Yegros

73. Jorgelina Flores

74. Leonor Flores

75. Hugo Flores

76. Fidel Flores

77. Mariel Flores

RESIDENCE / FAMILY GROUP N. 21

78. Oscar Flores Solano

79. Celina Flores

80. Isidoro Flores

81. Cynthia Flores

82. Carolina Flores

RESIDENCE / FAMILY GROUP N. 22

83. Venancio Flores López

84. Cecilia Solano

RESIDENCE / FAMILY GROUP N. 23

85. Angélica Flores Solano

86. Nicanor Dávalos

RESIDENCE / FAMILY GROUP N. 24

87. Basilio Martínez

88. Ofelia Verón Franco

89. Avelino Martínez

90. Aparicio Martínez

91. Kike Martínez

92. Sofía Martínez

93. Isidro Cáceres

94. José Carlos Ramos

RESIDENCE / FAMILY GROUP N. 25

95. Francisco Flores Ramírez

96. Isabelina Aponte

97. María Selva Flores

98. Niño Aponte

RESIDENCE / FAMILY GROUP N. 26

99. Juan Cáserez Ramos

100. Mariana Solano González

101. Delio Cáserez Solano

102. Mauro Cáceres Solano

103. Julio César Cáceres Solano

RESIDENCE / FAMILY GROUP N. 27

104. Marciano Solano Ramírez

105. Victorina González

106. Leonarda Solano Gonzáles

RESIDENCE / FAMILY GROUP N. 28

107. Mario Montanía

108. Celsia Solano González

109. Flavio Humberto Montanía

RESIDENCE / FAMILY GROUP N. 29

110. Alejandro Flores

111. Catalina Galeano

112. Silvino Flores

113. Alejandra Flores

**RESIDENCE / FAMILY GROUP N. 30**

- 114. Dionicio Flores Fernández
- 115. Clotilde Gómez Fernández
- 116. Victoriana Flores
- 117. Deonilda Flores

**RESIDENCE / FAMILY GROUP N. 31**

- 118. Aníbal Flores
- 119. Verónica Fernández
- 120. José Rodrigo Flores
- 121. José Manuel Flores

**RESIDENCE / FAMILY GROUP N. 32**

- 122. Aranda Avalos Flores
- 123. Elodia Solano González
- 124. Cynthia Moreno

**RESIDENCE / FAMILY GROUP N. 33**

- 125. Elías Chico Avalos
- 126. Hilda Flores

**RESIDENCE / FAMILY GROUP N. 34**

- 127. Basilio Morel
- 128. Rosa Chávez
- 129. Ariel Morel Chávez
- 130. Marcelino Morel Chávez

**RESIDENCE / FAMILY GROUP N. 35**

- 131. Ana Sosa Chávez

**RESIDENCE / FAMILY GROUP N. 36**

- 132. Miguel Sosa Silva
- 133. Eleuteria Chávez
- 134. Maura Sosa Silva
- 135. Eleuterio Sosa
- 136. Fátima Sosa

**RESIDENCE / FAMILY GROUP N. 37**

- 137. Fredy Flores
- 138. Maura Sosa
- 139. Ruth Esther Flores

**RESIDENCE / FAMILY GROUP N. 38**

- 140. Elena García
- 141. Bernardo Ozuna
- 142. Rodrigo Álvarez
- 143. Carlos Álvarez

**RESIDENCE / FAMILY GROUP N. 39**

- 144. María Alicia Flores
- 145. Carmelo González

**RESIDENCE / FAMILY GROUP N. 40**

- 146. Seferina Dávalos
- 147. Miriam Flores
- 148. Fidelina Flores

**RESIDENCE / FAMILY GROUP N. 41**

- 149. Feliciano Aponte Apestegui
- 150. Martina Gómez Aponte
- 151. Benjamín Aponte Benítez
- 152. Milciades Aponte Benítez
- 153. Ramona Aponte Benítez
- 154. Narciso Aponte Benítez

155. Virginio Aponte Benítez

156. Victoria Aponte Benítez

RESIDENCE / FAMILY GROUP N. 42

157. Bernardino Fernández

158. Elva Álvarez

RESIDENCE / FAMILY GROUP N. 43

159. Crecencio Solano Gonzáles

160. Nicolasa Moreno

161. Doralicia Solano Moreno

162. Nicolasa Solano Moreno

163. Marlene Solano Moreno

164. Mirna Fermina Solano

RESIDENCE / FAMILY GROUP N. 44

165. Anastacio Duarte Fernández

166. Adela García Morínigo

RESIDENCE / FAMILY GROUP N. 45

167. Dionicia Solano

168. Mariza Galeano

RESIDENCE / FAMILY GROUP N. 46

169. Esteban Galeano Solano

170. Cecilia Ricardi Riquelme

171. Lisa Galeano

172. Germán Galeano

RESIDENCE / FAMILY GROUP N. 47

173. Sarita Cabañas

174. Augustín Flores

RESIDENCE / FAMILY GROUP N. 48

175. Jorge Álvarez

176. Mari Galeano

177. Miltos Álvarez Galeano

178. Cantalicio Álvarez

179. Mirta Álvarez

180. Nelly Álvarez

RESIDENCE / FAMILY GROUP N. 49

181. Fernandino Fernández

182. Elva Álvarez

RESIDENCE / FAMILY GROUP N. 50

183. Pablino Chávez Gonzáles

184. Clementina Galeano

185. Adriano Chávez Galeano

186. Ignacio Chávez Galeano

RESIDENCE / FAMILY GROUP N. 51

187. Nélide Chávez Galeano

188. Alejandro Álvarez

189. Avelino Álvarez

190. Mariela Álvarez

RESIDENCE / FAMILY GROUP N. 52

191. Cecilio Cáserez Martínez

192. Aurelia Cáserez

193. Melciades/Melciada Cáserez

RESIDENCE / FAMILY GROUP N. 53

194. Cristino Toledo

195. Graciela Toledo

**RESIDENCE / FAMILY GROUP N. 54**

196. Ángela Duarte

**RESIDENCE / FAMILY GROUP N. 55**

197. Juan Flores Morales

198. Elena González

199. Víctor Flores

**RESIDENCE / FAMILY GROUP N. 56**

200. Isabelino Gonzáles Duarte

201. Sunilda Flores

202. Corina Gonzáles

203. Enrique Gonzáles Duarte

**RESIDENCE / FAMILY GROUP N. 57**

204. José Carlos Duarte

205. Estela Duarte

**RESIDENCE / FAMILY GROUP N. 58**

206. Tilo Carrillo

207. Virginia Benítez

208. Gustavo Carrillo Benítez

209. Francisca Carrillo

210. Florencio Carrillo

**RESIDENCE / FAMILY GROUP N. 59**

211. Nino Carrillo

**RESIDENCE / FAMILY GROUP N. 60**

212. Ciriaco Morales Moreno

213. Fernanda Toledo Salinas

214. Avelina Morales Toledo

215. Niño Morales Toledo

216. Niño Morales Toledo

**RESIDENCE / FAMILY GROUP N. 61**

217. Ángel Solano Ramírez

218. Ana González Benítez

219. Mirna Benítez

**RESIDENCE / FAMILY GROUP N. 62**

220. Aurelio Solano González

221. Felicita Villalba González

222. Mabelina Solano Villalba

223. Adenir Solano Villalba

224. Milner Solano Villalba

225. Niño Solano Villalba

**RESIDENCE / FAMILY GROUP N. 63**

226. Faustino Benítez

227. Genara de Benítez

**RESIDENCE / FAMILY GROUP N. 64**

228. Juliana Solano González

**RESIDENCE / FAMILY GROUP N. 65**

229. Faustino Fernández González

230. Jorgelina Fernández Martínez

231. Demetrio González Martínez

232. Guillermo Fernández

**RESIDENCE / FAMILY GROUP N. 66**

233. Francisco Flores Morales

234. Cipriano Flores Cásarez

235. Marcelino Flores Cásarez



236. Ever Flores Cáserez  
237. Eduardo Flores Cáserez

RESIDENCE / FAMILY GROUP N. 67

238. Norberto Morales Tórez  
239. Hilaria Ramírez Galeano

RESIDENCE / FAMILY GROUP N. 68

240. Osvaldo Morales Ramírez  
241. Basilia Sosa Ramírez  
242. Marisa Morales Ramírez  
243. Wilfrido Morales  
244. Niño Morales

RESIDENCE / FAMILY GROUP N. 69

245. Leandro Flores Ramírez  
246. Abelina Morales Ramírez  
247. Justo Flores Morales

RESIDENCE / FAMILY GROUP N. 70

248. Clara García Ramírez  
249. Wilfrido Ciriaco  
250. Franquelino Ciriaco

RESIDENCE / FAMILY GROUP N. 71

251. Hipólito García Benítez  
252. Tomaza Alvarenga Ramírez  
253. Luis García  
254. Sonia García  
255. Atilano García  
256. Lourdi/Lourdes García  
257. Marino García

RESIDENCE / FAMILY GROUP N. 72

258. Clemente García  
259. Marilú Ramos

RESIDENCE / FAMILY GROUP N. 73

260. Cecilia García  
261. Mariano (paraguayo)  
262. Delvio Salinas

RESIDENCE / FAMILY GROUP N. 74

263. Justo Carrillo  
264. María Sixta  
265. Olga Beatriz Carrillo  
266. Severiano Carrillo  
267. Rafael Carrillo

RESIDENCE / FAMILY GROUP N. 75

268. Peralta Ramírez

RESIDENCE / FAMILY GROUP N. 76

269. Teófilo Benítez  
270. Aparicia García  
271. Nazario Benítez  
272. Nidia Benítez  
273. Sofía Benítez

RESIDENCE / FAMILY GROUP N. 77

274. Silvina Benítez

RESIDENCE / FAMILY GROUP N. 78

275. Ernesto Benítez  
276. Albina Fernández

**RESIDENCE / FAMILY GROUP N. 79**

- 277. Roque Benítez
- 278. Eleuteria Carrillo
- 279. Mary Elisabet Benítez

**RESIDENCE / FAMILY GROUP N. 80**

- 280. Heriberto Sosa Rojas
- 281. Zulma Benítez García
- 282. Marcelina Sosa
- 283. Porfiria Sosa

**RESIDENCE / FAMILY GROUP N. 81**

- 284. Felicio Dávalos
- 285. Nicanor Dávalos
- 286. Leonor Dávalos
- 287. Fernando Dávalos
- 288. Marcelina Dávalos

**RESIDENCE / FAMILY GROUP N. 82**

- 289. Julián Salinas
- 290. Vicenta Silva

**RESIDENCE / FAMILY GROUP N. 83**

- 291. Leonardo Salinas

**RESIDENCE / FAMILY GROUP N. 84**

- 292. Graciela Salinas
- 293. Reinaldo Álvarez

**RESIDENCE / FAMILY GROUP N. 85**

- 294. Pedro Nelson Florentín
- 295. Clara Salinas de Florentín
- 296. Alejandro Florentín Salinas

**RESIDENCE / FAMILY GROUP N. 86**

- 297. Zoraida Sosa Silva
- 298. Jorgelina Sosa Silva
- 299. Carlos Rubén Sosa Silva
- 300. Zeroína Sosa Silva

**RESIDENCE / FAMILY GROUP N. 87**

- 301. Andreza Solano Recalde
- 302. Victoria Álvarez Salinas
- 303. Rosalba Álvarez Salinas

**RESIDENCE / FAMILY GROUP N. 88**

- 304. Félix Marecos González
- 305. Tereza García Jara
- 306. Erasmo Marecos García
- 307. Lidia Marecos García
- 308. Bonifacio Marecos García

**RESIDENCE / FAMILY GROUP N. 89**

- 309. Roberto Ferreira
- 310. Clarita Galarza
- 311. Luciano Ferreira
- 312. César Ferreira
- 313. Lourdes Ferreira

**RESIDENCE / FAMILY GROUP N. 90**

- 314. Ditrich Zavala
- 315. Marta González Alvarenga
- 316. Lucio Zavala
- 317. Clavelina Zavala

- 318. Aníbal Zavala
- 319. Isabelina Zavala

## PARTIALLY DISSENTING OPINION OF JUDGE A. ABREU BURELLI

1. When we voted on the merits in the “Yakye Axa indigenous community” case, I stated my dissent regarding operative paragraph 4 in which the Court declared that it *“does not have sufficient evidence to find a violation of the Right to life enshrined in Article 4(1) of the American Convention on Human Rights, against sixteen members of the Yakye Axa indigenous community [...]”*.

2. Since the judgment on the merits in the Villagrán Morales et al. vs. Guatemala case (November 1999), the Court has repeatedly stated that the right to life involves not only the negative obligation to not deprive anyone of their life arbitrarily, but also the positive obligation to take steps to ensure that said basic right is not abridged. Said interpretation of the right to life, to encompass measures of protection by the State, is supported today both by international jurisprudence and by legal doctrine.

3. It has been said, with regard to these criteria of the Court, that the right to life can no longer be viewed in a restrictive manner, as it was in the past, regarding not only the prohibition to arbitrarily deprive of physical life. There are various ways to deprive an individual of life arbitrarily: when the person’s death is directly caused by the unlawful act of homicide, and when circumstances that can likewise lead to a person’s death are not avoided, especially in the case of vulnerable individuals, with regard to whom life, before losing it physically, lacked meaning, because they had lost the possibility of developing their life aspirations and even of finding a meaning for their own existence.<sup>1</sup>

4. It has also been deemed that this broad interpretation of the right to life under the American Convention (Article 4 in combination with Article 1(1)) is in accordance with the evolutionary interpretation of international rules on protection of the rights of human beings. *“In the last years, the conditions of life of large segments of the population of the States Parties to the American Convention have deteriorated notoriously, and an interpretation of the right to life cannot make abstraction of this reality,”*<sup>2</sup> especially with regard to vulnerable persons: children, the elderly, and destitute persons.

5. The Court has likewise deemed, in other judgments, in the cases of the “Instituto de Reeducción del Menor”, on September 2, 2004, “Gómez Paquiyuari brothers,” July 8, 2004, that the right to life is fundamental in the American Convention, as realization of other rights depends on safeguarding the right to life. When it is not respected, all the other rights disappear, as the person entitled to them is extinguished. In view of this fundamental nature, approaches that restrict the right to life are inadmissible. The Court has essentially asserted that this right encompasses not only the right of all human beings to not be arbitrarily deprived of their life, but also the right to not be subjected to conditions that impede or make it difficult to enjoy a decent existence.

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<sup>1</sup> Case of the “Street Children” (Villagrán Morales et al.) vs. Guatemala. Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli.

<sup>2</sup> Idem.

6. These criteria, ratified in the Whereas section of the judgment in the case of the "Yake Axa indigenous community," in the course of an analysis of Article 4(1) of the Convention, are part of the Court's contribution to an evolutionary interpretation of international human rights law. Said criteria also include acknowledgment of the right to life aspirations, broadening of the concept of the victim, inclusion of the victim in the contentious proceeding through amendments to the rules of procedure, the right to consular assistance of persons detained by the police or the judiciary, as part of the right to due process, and acknowledgment of the labor rights of undocumented migrants.

7. Therefore, my dissenting opinion is not because I believe that the Court, in operative paragraph 4 of the judgment, has distanced itself from the broad interpretation of the right to life, in this case to the detriment of sixteen members of the Yake Axa indigenous community, but rather my dissent is because the evidence was not assessed in a manner consistent with the criteria that this Court has asserted on that issue.

8. When it examined the evidence submitted at the respective hearing, the Court included the statement or report of expert witness Pablo Balmaceda Rodríguez as follows:

**Blood and fecal tests were conducted on samples taken from the members of the Community. These studies demonstrated that the members of the Yake Axa Community suffer significant parasitism and anemia. Samples were also taken from the water used by the Community. The study corroborated that the Community has a single source of non-drinkable water, which is a water deposit... which is a pool, roughly sixty by forty meters, to store rainwater. This pool is behind the barbed wire fence of the land they claim, so the members of the Community have to enter furtively to fetch water for personal hygiene and use. The water is subject to contact with wild animals and with livestock raised on the farm.**

**The huts in which the inhabitants of this community live are very precarious. They are built with a material that is abundant in the area, a palm from which they make walls and roofing. When it rains, everything is flooded, including the rooms in which they live in overcrowded conditions. Given the characteristics of the lands of the Chaco, the water is not easily absorbed by the soil, so all that water remains there without draining. To this we should add that there are no toilets in the community, for its members to use, for which reason they use the existing plants. Thus, the rainwater floods the area and carries the fecal remains with it toward the dwellings and the little school. Miserable conditions of this abandoned Community make its situation disastrous. There is no need to be an expert to corroborate these circumstances.**

9. *The expert witness then referred to the difficulty of obtaining information from the indigenous people on their next of kin allegedly deceased due to diseases; since*

*there are no records of these deaths, it was not possible to precisely establish their dates. He added that for the Enxet indigenous people it is not easy to remember their deceased, given their special relationship with death, for which reason they had to make a very significant psychological effort to accept being asked about their deceased next of kin. Based both on their accounts and on his own observations, the expert found in his study that:*

**In most cases of deaths that were recorded, there was no prior medical care. Two cases reached the hospital, where they were diagnosed and sent back to their homes, as the physicians found that there was nothing that could be done. The mothers' accounts show that several children died from bronchitis o bronchopneumonia. The symptoms described by the mothers are fully in accordance with this diagnosis: the children were coughing, had a high fever, and found it difficult to breathe, until they died without having received medical care or medicine. Those interviewed also stated that during the dry season the children died from diarrhea, and that is in fact the time of year in which said health problems are most frequent. These children died with all the symptoms of diarrhea: fever, constant diarrhea, sometimes with blood, and vomiting. There were also cases of adults who died for lack of adequate and timely medical care and due to lack of food.**

**There is no health care post, clinic or health promoter in the Community. The village is 356 kilometers from the capital and 70 kilometers from the closest hospital. The closest regional hospital is 225 kilometers away, very close to Asunción, for which reason it is not easy for the members of the community to go to those health centers.**

**Currently the nutritional conditions of the children of the Community are quite precarious. Malnutrition among children is evident. Children's hair is discolored, their bellies are swollen, and their height is lower than it should be at their age. Furthermore, this has negative consequences such as learning and intellectual development problems. This situation can be changed by beginning, as soon as possible, a deworming therapy and adequate, permanent nutrition.**

10. *In Chapter VI of the Judgment on proven facts, and under the title of "living conditions of the members of the Yakye Axa indigenous community", the Court found that they "do not have access to clean water and the most reliable source is rainwater. The water that they use on a regular basis comes from pools (water*

deposits) located in the lands that they claim; however, it is used both for human consumption and for personal hygiene, and it is not protected from human contact.”

11. *The State of Paraguay, in turn, in its reply to the application, stated that it acquiesced to the request to establish a healthcare center, a school, drinking water supply and sanitary infrastructure for the community, wherever the State can establish said services as close as possible to the provisional settlement. Also, that “insofar as possible it acquiesces (to the request to provide) medical care and education in accordance with the State’s education and health programs.”*

12. *The latter point gave rise to the Court’s decision, with regard to reparations, to order that “...as long as the Community remains landless, given its special state of vulnerability and its inability to resort to its traditional subsistence mechanisms, the State must provide sufficient drinking water for consumption and personal hygiene of the members of the Community; it must provide medical care on a regular basis and adequate medicines to protect all persons’ health, especially that of the children, the elderly, and pregnant women, including medicine and adequate treatment for deworming of all members of the Community; it must provide sufficient food, in appropriate variety and quantities, for all members of the Community to have minimum conditions required for a decent life; it must provide latrines or any other appropriate type of sanitary facilities for effective management of the Community’s biological wastes, in a manner consistent with public health...”*

13. *Both the partial acquiescence by the State and the reparations ordered by the Court show beyond a doubt that there has been and currently is a lack of basic services, including drinking water, indispensable for the health and life of the members of the Community. Therefore, it is not difficult to infer that the death of children, among others: a two year old, due to dysentery; a six year old due to dysentery and sores; a one year old, due to meningitis; a two year old, due to tetanus; a one year old, due to bronchitis; a twelve-day old baby, due to bronchitis; a two year old, due to bronchitis, were due to their precarious living conditions.*

14. Article 19 of the American Convention on Human Rights establishes that “Every 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.” The Convention on the Rights of the Child, whose provisions are part of the domestic law of the

States, establishes, among other measures, those to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.

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\*       \*

15. *I wish to emphasize that my dissent with regard to operative paragraph 4 of the Judgment is due only to my specific consideration of the evidence in this case.*

16. *As grounds for my opinion that the Court should have considered the circumstances that caused the death of some of the persons listed in the application to have been sufficiently proven, I will quote the reasoning of Judge De Roux Rengifo, in his partially dissenting opinion in the judgment on the "Durand and Ugarte" case (August 16, 2000):*

**"...In its recent jurisprudence on evidence appraisal (including the one having an effect on the judgment related to this opinion), this Court has stated the following three criteria: 1) an international court of human rights has a significant scope of flexibility when assessing evidence, according to logic rules and based on experience; 2) international courts can largely base their decisions on circumstantial or indirect evidence, on presumptions as long as these means can give rise to solid conclusions on the facts; 3) in processes of violations of human rights the State defense cannot be grounded on the failure of the plaintiff to gather evidence because, very frequently, these cannot be obtained without the cooperation of the State itself, which precisely has the necessary resources to clarify the facts that have taken place in its territory."**

17. *Just as Judge De Roux Rengifo stated at the time in his partly dissenting opinion, mutatis mutandi, I myself deem that if the Court had applied its own criteria on assessment of the evidence, it would have issued a different ruling in operative paragraph 4 of the Judgment in the case of the "Yakye Axa indigenous community vs. Paraguay".*



**18. I thus respectfully set forth the grounds for my partly dissenting opinion, announced in the operative section of the aforementioned judgment.**

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19. Besides referring to my dissenting opinion, I believe it appropriate to refer to the right to cultural identity, which is mentioned several times in the text of the aforementioned Judgment and with which I fully concur.

20. In this regard, in my view, among the various definitions of culture, one that stands out defines it as the set of distinctive spiritual and material, intellectual and emotional traits of a society, a social group or an individual and which, in addition to arts, includes ways of life and of living together, value systems, traditions, and beliefs.<sup>3</sup>

21. In the framework of international human rights law, the right to cultural identity is still undergoing permanent construction and it is primarily dependent on cultural rights.

22. In the regional framework of the Americas, Article XIII of the American Declaration of the Rights and Duties of Man establishes that

[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.  
He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

23. Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the "San Salvador Protocol," sets forth that:

The States Parties to this Protocol recognize the right of everyone:

a. To take part in the cultural and artistic life of the community;  
b. To enjoy the benefits of scientific and technological progress;  
c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.

3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields

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<sup>3</sup> See Preamble of UNESCO's Universal Declaration on cultural diversity.

of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

24. As regards the American Convention, the right to cultural identity, while not explicitly set forth, is protected in the treaty based on an evolutionary interpretation of the content of the rights embodied in its Articles 1(1), 5, 11, 12, 13, 15, 16, 17, 18, 21, 23 and 24, depending on the facts of the specific case. In other words, the right to cultural identity is not abridged every time one of said articles is breached.

25. Protection under Article 5 (Right to Humane Treatment) of the American Convention, in combination with Article 10 (Right to Health) of the San Salvador Protocol includes the right of the members of ethnic and cultural groups to use their own medicine and traditional health practices, as well as the right of access to public health institutions and medical care provided to the rest of the population, to ensure their physical, psychological and moral wellbeing.

26. Protection under Article 11 (Right to Privacy) of the Convention includes the right of the members of ethnic and cultural groups not to suffer arbitrary or abusive interference with their private, family and community life, which involves protection of their culture and respect for the integrity of the values, practices and institutions of these peoples.

27. Protection under Article 12 (Freedom of Conscience and Religion) of the Convention entails the right of members of ethnic and cultural groups to protect, express, disseminate, develop, teach and change their practices, ceremonies, traditions, and spiritual customs, both in the public and private spheres. It also involves their right to not be forcefully converted and for beliefs not to be imposed upon them against their will.

28. Protection under Article 13 of the Convention (Freedom of Thought and Expression) includes the right of the members of ethnic and cultural groups to express their own culture, both in public and privately, that is, to use their dress, artistic expressions, their entertainment; to preserve their own language; to seek and obtain information on their culture; to participate in generating and disseminating information and to request that information they deem erroneous regarding their culture and history be corrected; to have access to the media and to establish their own media; to contact and conduct activities with other cultures or with members of their own culture who are outside their territory; and to be informed regarding all matters that affect their spiritual, social, cultural life, as well as their movable and real property.

29. Protection under Articles 15 (Right of Assembly) and 16 (Freedom of Association) of the Convention includes the right of the members of ethnic and cultural groups to meet and to establish associations in accordance with their own culture, values, and customary law. These rights, in combination with Article 23 (Right to Participate in Government) of the Convention, allow these persons to organize in accordance with their own traditional forms of organization, to elect their representatives in accordance with their own forms of election, and to foster their development in accordance with their aspirations and needs.

30. Protection under Article 17 (Rights of the Family) of the Convention asserts the right of the members of these groups to maintain their own forms of family organization and of kinship.

31. Protection under Article 18 (Right to a Name) of the Convention includes their right to name their communities, places and persons in their own language, and to maintain those names.

32. Protection under Article 21 (Right to Property) of the Convention includes the right to use and enjoy their material and non-material property.

33. Protection under Article 23 (Right to Participate in Government) of the Convention is based on acknowledgment of the right of members of ethnic and cultural groups to freely participate at all decision-making levels in public institutions responsible for policies and programs that concern them.

34. Finally, Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the American Convention are two cross-cutting themes that run through all the aforementioned aspects, as members of ethnic and cultural groups are free and equal to all persons in dignity and rights and must fully enjoy human rights and basic freedoms, with no obstacles or discrimination of any sort. Furthermore, in some cases, the States must adopt positive measures to ensure full exercise of all their human rights.

35. The right to cultural identity and all the rights that stem from it are subject to the same limitations as the other rights embodied in the American Convention, that is: "by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."<sup>4</sup>

36. In view of the above, it is possible to establish that cultural identity is expressed in various ways that fall under the protection, as well as the limitations, set forth in the American Convention on Human Rights.

***Alirio Abreu Burelli***  
***Judge***

***Pablo Saavedra Alessandri***  
***Secretary***

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<sup>4</sup> Art. 32 of the American Convention.

**SEPARATE DISSENTING OPINION OF JUDGES  
A.A. CANÇADO TRINDADE AND M.E. VENTURA ROBLES**

1. We have concurred with our votes in adoption the instant Judgment of the Inter-American Court of Human Rights in the case of the *Yakye Axa Indigenous Community versus Paraguay*, with most of which we basically agree, with the exception of operative paragraph No. 4 and the respective Whereas paragraphs, regarding which we firmly differ, based on the grounds we will set forth below, in the instant Joint Dissenting Opinion. Furthermore, we believe that the Court's decision with regard to operative paragraph No. 4 failed to consider other points that we deem essential, especially with regard to the fundamental right to life, and compromised the balance and harmony of the instant Judgment of the Court as a whole.

2. The Inter-American Court has asserted a concept of the fundamental right to life that encompasses conditions for a decent life (Article 4(1) of the American Convention on Human Rights). In this regard, in a well-known *obiter dictum* in the *Villagrán Morales et al. versus Guatemala* case ("*Street Children*" case, Judgment on the merits, November 19, 1999, para. 144), the Court stated that:

The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a decent existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.

3. In the instant case, the Court accepted this hermeneutics when it found, in operative paragraph 3 of this Judgment, an abridgment of 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 steps to address the conditions that prejudiced their possibilities of having a decent life. In this regard, we fully agreed with the warning by the Court that the State must take steps to ensure the right to adequate nutrition, access to clean water, and health care, and specifically,

the State must care for the elderly with chronic diseases and those in a terminal phase, to avoid unnecessary suffering. In this case, it must take into account that in the Yakye Axa indigenous Community oral transmission of their culture to the younger generations is primarily entrusted to the elderly (para. 175).

4. Along these same lines of reflection, we have deemed, in our respective individual Dissenting Opinions in the previous case of the *Serrano Cruz Sisters versus El Salvador* (Judgment of 01.03.2005), that the fundamental right to life takes on a higher dimension when the right to personal and cultural identity is taken into consideration; the latter cannot be disassociated from the legal personality of the individual as an international subject. The right to identity clearly follows from the circumstances of the instant case (also see paras. 18-19, *infra*).

5. We must also state, regarding this subject matter, that personal identity encompasses not only strictly biological concepts, but also various other concepts such as the individual's cultural, historical, religious, ideological, political, professional, social, and family heritage, for which reason, in the instant case, detriment to the cultural identity of the Yakye Axa Community also injured the personal identity of each of its members. In the instant Judgment, the Court stopped at the issue of the juridical personality of the Yakye Axa indigenous Community under Paraguayan domestic law (paras. 83 and 84); it is our understanding that beyond this matter one must always take into account, at a different level, the legal personality of each of the members of the Yakye Axa Community under international human rights law, specifically under the American Convention.

6. In the instant case, what we do not understand is why the Court, once it found that Article 4(1) of the Convention had been abridged, in the aforementioned terms (para. 3, *supra*), deemed that it did not have "sufficient evidence to prove violation of the right to life" to the detriment of members of the Yakye Axa indigenous Community, who in fact died under the aforementioned conditions, that is, living, or surviving, along the route from Pozo Colorado to Concepción, outside the territory that they claim as their ancestral right.

7. In our opinion, the death of some of these individuals (cf. para. 8 *infra.*), based on the Court's own reasoning, rather than requiring a higher standard of proof of the causal link with the demise of these individuals, as the majority of the Court unfortunately deemed, is instead an aggravating circumstance of the abridgment of the right to life (Article 4(1) of the Convention), already established by the Court itself.

8. The following list clearly manifests what we stated above, regarding ten of the sixteen deceased,<sup>1</sup> with regard to whom there is no doubt, in our opinion, that they died due to lack of medical care and as a direct consequence of the completely destitute and truly subhuman conditions under which they lived or survived:

- 1) Griselda Flores (2 years old): died on March 2, 1997 due to dysentery without receiving medical care before her death;

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<sup>1</sup> With regard to the other six deceased persons, listed below, there may be some doubts regarding the cause of their death: **1)** Hilario Gómez (20 years old): he died on March 7, 2005 due to convulsions associated with a congenital neurological lesion, without receiving medical care before his demise; **2)** Mauro Fernández Gómez (1 year old): he died on January 20, 1998 of meningitis, without receiving medical care at a hospital before his death. He was discharged after 22 days of hospitalization with a diagnosis of meningitis with ensuing complications and no possibility of being cured; **3)** N/N Sosa Chávez (one month old) died in August 1998 due to tetanus. He was seen at the regional hospital in Concepción and released with a diagnosis of tetanus; **4)** Santiago Gómez (78 years old) died between June 30 and July 7, 2002, of suffocation, without receiving medical assistance before his death; **5)** Ignacio Torales (68 years old) died on January 2, 2003 due to mitral insufficiency –chronic congestive cardiac insufficiency-, without receiving medical assistance before his death; and **6)** Severa Benítez Alvarenga (80 years old) died on January 5, 2003 from arrhythmia –chronic congestive cardiac insufficiency- having been examined by physician Pablo Balmaceda prior to her death.

- 2) Alcides Morel Chávez (6 years old): died in November 1997 due to dysentery and sores, without receiving medical care before his death;
- 3) Adolfo Ramírez (64 years old): died on August 15, 1998 due to cachexia, without receiving medical care before his death;
- 4) Isabel García de Ramírez (64 years old): died on August 22, 1998 due to cachexia, without receiving medical care before her death;
- 5) Justina Chávez (1 year old): died on August 10, 1999 due to bronchitis, without receiving medical care before her death;
- 6) Ramón Chávez (1 year and 11 months old): died on September 6, 1999 due to bronchitis, without receiving medical care before his death;
- 7) N/N Morel Chávez (1 day old): died on January 1, 2000 for reasons unknown, without receiving medical care before his death;
- 8) N/N Morel Chávez (2 days old): died on January 2, 2000 for reasons unknown, without receiving medical care before his death;
- 9) María Adela Flores Gómez (12 days old): died in January 2003 due to bronchitis; and
- 10) Silvino Martínez Gómez (2 months old): died in February 2003 due to bronchitis.

9. Under the American Convention, the right to life is not limited to protection against arbitrary deprivation of life, but also requires *positive measures* by the State to ensure its full enjoyment. It is a basic right, whose importance has been duly emphasized by the Court in all its jurisprudence on this subject (paras. 21-22, *infra*). Likewise, the thesis of the positive obligations of the State is today universally reflected in doctrine.

10. Said obligations, regarding the right to life, are clearly shown by jointly reading Articles 4(1) and 1(1) of the American Convention. Thus, the deaths of the ten aforementioned individuals (para. 8, *supra*), instead of requiring that the Court have additional evidence, in our opinion constitute an *aggravating* circumstance of the violation, previously established by the Court, of Articles 4(1) and 1(1) by the State.

11. In our opinion, the "causal link" sought by the majority of the Court is clearly established by lack of due diligence by the State regarding the living conditions of *all* members of the Yakye Axa Community (objective international responsibility of the State). The Court has, in fact, acknowledged this explicitly in the instant case, when it pointed out that

This Court notes that lack of effective exercise of the right to communal property of the members of the Yakye Axa Community, as well as the grave living conditions to which they were subjected as a consequence of the delay by the State in making their territorial rights effective, must be taken into account by the Court when it sets non-pecuniary damages.

12. The Court has acknowledged, in the instant Judgment, that it must assess both the lack of effective exercise of the right to communal property and *the grave living conditions* of the members of the Yakye Axa Community (para. 202); this established the causal link to set non-pecuniary damages. The Court should have explicitly stated that the extremely destitute situation that was established led directly to the death of several members of the Community.

13. The Court also established, in the instant Judgment, that the respondent State must “provide regular medical care and appropriate medicine to protect the health of all individuals, especially children, the elderly and pregnant women, including medicine and adequate treatment to deworm all the members of the Community” (para. 221). In our opinion, the very Judgment of the Court clearly establishes the causal link between the inhumane living conditions of the members of the Community and the death of some of them.

14. Regarding this point, in his expert opinion at the public hearing before this Court on March 4 and 5, 2005, expert witness P. Balmaceda Rodríguez pointed out<sup>2</sup> the precariousness of the living conditions of the members of the Yakye Axa Community, who lived in huts, and the lack of healthcare posts or community clinics, as the Community’s settlement is 356 kilometers from the capital city, Asunción, and 70 kilometers from the nearest hospital (para. 40.g) of the instant Judgment).

15. In addition to said expert opinion at the aforementioned hearing before the Court, the representatives of the victims sent the Court, as an annex to their brief with pleadings, motions and evidence, a public health-medical report on the Yakye Axa indigenous Community, prepared by expert witness Pablo Balmaceda himself, together with his team. Said report literally asserted that

The community as a whole has for many years been living in an absolutely precarious situation, in huts that cannot be considered housing, in indescribable overcrowding, without a single latrine in all the community, without drinking water and without sufficient water for even the most basic needs.

They have not the slightest possibility of living their lives in accordance with the Enxet traditions, hunting, gathering, and farming on a small scale.

Furthermore, the State is absent, there are no police, judiciary or public health authorities, as we can corroborate through the deaths. They all died without medical care. The two or three who were able to reach a medical professional did so belatedly.

In view of all this, we can say that the Yakye Axa community is in a completely destitute state.

16. As if the above were not enough, the Court, in operative paragraph No. 7 of the instant Judgment –which, together with operative paragraph No. 3 of this Judgment, conclusively proves the flagrant contradiction between operative paragraph No. 4 and the Judgment as a whole,- has correctly decided that

as long as the members of the Yakye Axa indigenous Community are without land, the State must provide them the necessary basic services and goods for their subsistence, pursuant to paragraph 221 of the instant Judgment.

17. In whereas paragraphs 219-221 of the instant Judgment, the Court has noted that

The Commission and the representatives, in their main briefs, stated the need to provide basic services to the Yakye Axa indigenous Community, including drinking water and sanitary infrastructure, a public health center, and a school. They also asserted the need to permanently provide culturally pertinent medical and educational care to the members of the community, bearing in mind its customs and traditions. The State, in turn, pointed out that

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<sup>2</sup> As can be corroborated in the recording and transcript of the public hearing before this Court, held on March 4 and 5, 2005, at the seat of the Court in San José, Costa Rica, available in the Court’s archives.

It likewise acquiesces to the request to establish a healthcare post, a school, drinking water supply, and sanitary infrastructure for the Community, at a place where the State can provide said services as close as possible to a provisional settlement. (...)

Insofar as possible, it accepts [the request to provide] medical care and education in accordance with the States' education and health care plans.

In light of the above, the Court deems that, while the Community has no land, given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms, the State must, immediately and on a regular basis, provide sufficient drinking water for consumption and personal hygiene of the members of the Community; it must provide regular medical care and appropriate medicine to ensure the health of all individuals, especially boys, girls, the elderly and pregnant women, including medicine and appropriate treatment for deworming all members of the Community; delivery of sufficient food, with the appropriate variety and quality, for the members of the Community to have minimum conditions for a decent life; to provide latrines or any other type of appropriate sanitary facilities for effective and salubrious biological waste management in the Community; and to provide sufficient bilingual material for the educational requirements of the students at the school in the Community's current settlement.

Cultural identity has historical roots, and under the circumstances of the instant case of the Yakye Axa indigenous Community, it is tied to ancestral lands. We must emphasize that cultural identity is a component or is attached to the right to life *lato sensu*; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitably suffers. An expert opinion submitted to this Court at the public hearing on 04.03.2005 asserted that the only ones to "humanize" the region of El Chaco were the indigenous people themselves, with their culture, their way of life, the way they themselves organized.

19. During their displacement, in recent years, from their "ancestral lands," the *cultural identity*, as well as the very right to life of the members of an indigenous community such as the Yakye Axa, has seriously suffered. As the Inter-American Commission on Human Rights pointed out at the public hearing on 05.03.2005 before this Court –and this was not disputed by the State– as a consequence of the aforementioned situation, when the children of the Yakye Axa Community are born, they are predestined to disease, to lack of access to education, and to servitude. It is our understanding that this clearly constitutes, in itself, a violation of the basic right to life.

20. In our opinion, the Court should have reasoned in greater depth on the basic right to life, as it did in connection with the right to property (of ancestral lands). Ultimately, the right to life is a non-derogable right under the American Convention, while the right to property is not. In the instant case, the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life.

21. This Court has pointed out in its *jurisprudence constante* (e.g., "*Street Children*" (*Villagrán Morales et al.*), 1999; *Bulacio* case, 2003; *Myrna Mack Chang* case, 2003; case of the "*Juvenile Reeducation Institute*", 2004; *Huilca Tecse* case, 2005), that the right to life, whose full enjoyment is a prerequisite for enjoyment of all the other rights, is basic in its nature, and it requires that the States take positive steps to ensure conditions for a decent life. In the case of the *Gómez Paquiyauri Brothers* (2004), the Court asserted that the States' duty to respect the right to life



"has special aspects in the case of minors," given their vulnerability and the special protection that they require to "prevent situations that might lead, by action or by omission," to abridgment of said basic right (para. 124).

22. And in the cases of *Juan Humberto Sánchez* (2003, para. 110) and the *19 Tradesmen* (2004, para. 153), the Court explicitly stated that

The right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights. When the right to life is not respected, all other rights lack meaning. The States have the obligation to ensure creation of the conditions required to avoid violations of this inalienable right and, specifically, the duty of avoiding violations of this right by its agents. Compliance with Article 4, in combination with Article 1(1) of the American Convention, not only requires that no person be deprived of his life arbitrarily (negative obligation), but also that the States take all appropriate measures to protect and preserve the right to life (positive obligation), as part of their duty to ensure full and free exercise of the rights by all persons under their jurisdiction. This active protection of the right to life by the State does not only involve legislators, but all State institutions.

23. For all the aforementioned reasons, we find that for operative paragraph n.4 of the instant Judgment not to contradict the body of the judgment, and specifically its operative paragraphs ns. 3 and 7, the Court should have found the State to be objectively responsible internationally, also due to lack of due diligence, as a causal link to the death of the ten members of the Yakye Axa Community listed in paragraph 8 (*supra*) of our Dissenting Opinion. We hope that our reasoning will help to correct, as soon as possible, the regression that operative paragraph 4 of the instant Judgment constitutes in connection with evolution of the jurisprudence of this Court.

24. We the undersigning Judges decided to state our position and issue the instant Joint Dissenting Opinion on the objective international responsibility of the State for violation of the right to life of ten members of the Yakye Axa Community, including eight helpless children (see paragraph 8, *supra*), because in cases such as this one, in which lack of due diligence by the State has a direct impact in terms of loss of human lives, it is our understanding that the Judges of the Inter-American Court of Human Rights must enhance the awareness of all inhabitants of our region so that facts such as those of the instant case do not happen again, to the detriment of those who most need protection, who have no one else to resort to in our societies, and of all those who are socially marginalized and excluded, who suffer in silence, but who in no way can be forgotten by the Law.

Antônio Augusto Cançado Trindade  
Judge

Manuel E. Ventura Robles  
Judge

Pablo Saavedra Alessandri  
Secretary

**PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF  
JUDGE RAMON FOGEL**

**I participated in issuing the judgment of the Court in the Yakye Axa case, and I have dissented with regard to some of its operative paragraphs, based on the reasons stated during the deliberations, including the following:**

1. The Yakye Axa Indigenous Community is part of the Chanawatsan group and of the Enxet-Lengua people. The Enxet are a nomad people with a hunting, gathering, horticultural and pastoral way of life; the Yakye Axa Community is constituted by a variable number of families, 28 at the time of the 2002 Indigenous Peoples Census, and 57 in 1993<sup>1</sup>. The facts described by the Commission and by the Representatives of the alleged victims state that the community includes 57 families, some of whom live in the settlement called El Estribo or in places neighboring the farms that they claim. El Estribo settlement covers 27,741 ha and includes 266 families, according to the 2002 Indigenous Peoples Census.

2. The Chanawatsan, an Enxet-Lengua group, traditionally inhabited the territory whose limits are the Verde river to the North, the Montelindo river toward the South, the Paraguay river toward the East, and a band parallel to this river some 70 kilometers inland in the Chaco. The Chanawatsan, like other Enxet groups, are hunters, gatherers, horticulturalists, and herdsmen.

3. With more intense economic occupation of the lower Chaco since the early 20th century, livestock ranches were established in the Chanawatsan's traditional territory. The 1978 Anglican Mission census found 47 indigenous people in one of those 'estancias', Loma Verde, and today they are part of the Yakye Axa community.<sup>2</sup>

4. Due to the very difficult living conditions at Loma Verde, the Community moved to another cattle ranching area, El Estribo, in 1986.<sup>3</sup> They were not forced to move, and the State was not involved in this process. In their new settlement at El Estribo, the community was unable to overcome the problems associated with extreme poverty, and in 1996 they decided to return to the vicinity of the Loma Verde ranch, part of their ancestral territory, where they settled along the road between Pozo Colorado and Concepción, around kilometer 80.

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<sup>1</sup> The 2002 Indigenous Census records 28 dwellings with 147 individuals, and it defines a dwelling as the lodging for individual homes; the Census defines a home as all persons living together under the same roof and sharing food expenses (common pot).

<sup>2</sup> Autonomous submission by the representatives of the victims before the Inter-American Court of Human Rights. Historical Background of the Yakye Axa Community.

<sup>3</sup> The colony at El Estribo encompasses 27.741 hectares and in 2002 it included 266 homes or dwellings. 2002 National Indigenous Census.

5. At the community's makeshift settlement, between the public road and the barbed wire fence of the Estancia, it is not feasible to build basic sanitary infrastructure, and the possibility of providing basic social services is severely hampered by the very limited physical conditions of the settlement.<sup>4</sup> No productive activities can be carried out there, and in general terms the place does not allow acceptable living conditions.

6. On December 10, 2001, pursuant to the provisions of Law 904/81, the government acknowledged the legal personality of the "Yakye Axa Community established in the Pozo Colorado district, in the Presidente Hayes Department,"<sup>5</sup> enabling it to take steps to obtain public or private lands.

7. In 1993, a file was opened on "El Estribo -Pozo Colorado- Yakye Axa Indigenous Community on legal registration of land, 15,000 ha." In this file, the IBR stated that it could not request expropriation because the real estate claimed was under rational use. The owners of the aforementioned real estate refused to sell it.

8. Having exhausted the administrative steps, the Community requested that Congress expropriate the 18.189 has. Of Estancia Loma Verde; the expropriation bill was withdrawn on November 28, 2000. Subsequently, on January 30, 2002, the Executive submitted another bill to Congress to expropriate 7,901 ha of that same ranch, Estancia Loma Verde; the Senate rejected this proposal, exercising its constitutional authority.

9. Conditions in the petitioning Community's makeshift settlement worsened its risky and vulnerable situation, as the community was without its traditional means of subsistence and there were objective difficulties for the State to provide means to protect the community against the risks faced by its members, to ensure minimum living conditions.<sup>6</sup>

In this context, in just under six years, six indigenous members of that same settlement died. Based on its submission of the facts, the Commission argues that the State of Paraguay has not complied with its obligation to ensure the right to life set forth in Article 4 in combination with Article 1(1) of the American Convention, to the detriment of the Yakye Axa Indigenous Community.<sup>7</sup>

In its reply to the application, the State of Paraguay rejects the aforementioned accusation, and it acquiesces to the proposal by the representatives of the alleged victims to resort to an expert opinion regarding the causes of those deaths, and it

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<sup>4</sup> Under domestic law, investment of public funds to build sanitary infrastructure alongside the public road.

<sup>5</sup> Articles 8, 9 and 16 of Law 904/81.

<sup>6</sup> Application by the Commission, para. 178. The protective factors include medical services, establishment of physical conditions for production of their own food, educational services, etc. According to domestic law, use of public funds to build a drinking water system or other infrastructure alongside a public road and its public domain area constitutes the crime of misappropriation.

<sup>7</sup> Application by the Commission, para. 192.

states that the claim has not been made under the domestic judicial system.<sup>8</sup>

10. With regard to the legal grounds, we must take into account that the Inter-American Court, exercising its adjudicatory jurisdiction, must interpret the provisions of the American Convention, pursuant to the provisions of the Convention as well as others that might be invoked in the juridical framework of the pertinent Treaties. In this regard, Article 31(1) of the Vienna Convention on Treaties sets forth: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The object and purpose of the American Convention aim at acknowledgment of human dignity and the need to protect all persons, ensuring their basic rights, including the development of the latter.

The Inter-American Court noted that

"the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (...), but also the system of which it is part", quoting the International Court of Justice when it held that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J Reports 1971, p. 16 ad 31)<sup>9</sup>.

11. With regard to the alleged violation of Article 21 of the American Convention, I believe, as the Court has asserted, that the right to private property cannot be interpreted in an isolated manner, but rather bearing in mind the overall juridical framework of which it is a part, taking into account domestic and international law.<sup>10</sup>

In this same regard, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries sets forth, in Article 8(1), that:

"In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws" and Article 8(2) asserts: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."<sup>11</sup>

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<sup>8</sup> Reply to the application para. 166 to 170, 189.

<sup>9</sup> Advisory opinion OC - 16/99 – The Right to Information on Consular Assistance in the framework of the Guarantees of Due Criminal Process, para. 113. Separate concurring opinion of Judge Sergio García Ramírez to the Judgment on the Merits and Reparations in the case of the Mayagna (Sumo) Awas Tingni Community.

<sup>10</sup> Article 29. Rules of Interpretation. American Convention on Human Rights; Application by the Inter-American Commission in the instant case, para. 136; I-A Court of HR. Case of the Five Pensioners. Judgment of February 28, 2003, para.103

<sup>11</sup> Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted during the 76<sup>th</sup> International Labor Conference, held in Geneva on June 7th, 1969, ratified by Law 234/93.

12. The National Constitution guarantees the right to private property –both individual and corporate- and to community property to which the indigenous peoples are entitled; Article 63 acknowledges and guarantees the right of indigenous peoples to preserve and develop their ethnic identity in the respective habitat. Furthermore, Article 64 of this Constitution states that:

Indigenous peoples have the right to community ownership of the land, to a sufficient extent and of sufficient quality for conservation and development of their own manner of life. The State will provide these lands to them free of cost, and these will be non-encumberable, untransferable, inextinguishable, not subject to use as guarantees for contractual obligations nor can they be rented; also, they will not be subject to taxation. Indigenous peoples may not be moved or removed from their habitat without their explicit consent.

13. With regard to the right to private property, the American Convention provides that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 109 of the National Constitution states:

Private property is guaranteed, and its content and limits will be set by law, taking into account its economic and social function, with the aim of making it accessible to all.

Private property cannot be violated.

No one can be deprived of his property unless this is ordered by the courts, but there may be expropriation for reasons of public utility or social interest, and this will be established in each case by the law. The law will guarantee prior payment of fair compensation, established by conventional means or by the decision of a court, except in the case of non-productive latifundia, in accordance with procedures for expropriation set forth in the law.

14. Individuals entitled to private property include both the indigenous people of the Yakyé Axa community and the other indigenous peoples, as well as all citizens, in the framework of the principle of equality of all persons, enshrined in Article 46 of the National Constitution, which states: "All inhabitants of the Republic are equal in dignity and rights, and no discrimination is allowed. The State will remove obstacles and impede factors that maintain or foster discrimination.

Protection established regarding unfair inequalities will not be considered discriminatory factor, but rather an egalitarian one.” Those requiring positive discrimination, in the Paraguayan context, include at least 2,000 indigenous families in the Chaco and 2,000 families in the Eastern Region who are landless, as well as some 100,000 landless peasant families living in extreme poverty. In my view, the provisions of the American Convention must be interpreted in this context.

15. Law 904/81, prior to the 1992 National Constitution, regulates access of indigenous communities to community landholding. In Article 8, it provides that, after completing the established procedures, “legal personality of the indigenous communities that existed before enactment of this law will be recognized, as well as that of indigenous families regrouping in communities to benefit from it.” In the latter case, the minimum amount of indigenous families is 20 (Article 9). With regard to settlement of the indigenous communities, Law 904 provides the following:

Article 14. Settlement of the indigenous communities will take into account insofar as possible current or traditional possession of land. Free and express consent of the indigenous community will be essential for their settlement in places other than their territories, except for reasons of national security.

Article 15. When in the cases foreseen in the previous article it is imperative to transfer one or more indigenous communities, they will be given appropriate land of at least equal quality to the land they occupied, and they will be adequately compensated for the damage and detriment suffered due to the displacement, as well as for the value of the improvements made to the land.

Article 22 of said Law 904, in turn, sets forth the procedure for settlement of indigenous communities on public lands, and Articles 24 and 25 lay out the procedures for settlement on private lands occupied by the indigenous peoples. Article 26 of the law states that: “in case of expropriation, the procedure and compensation will be in accordance with the provisions of the Constitution and the law, and the national budget will set aside the necessary funds.”

16. Law 43/89, which establishes a system to normalize the situation of indigenous communities’ settlements, provides in Article 4: “During the administrative and judicial proceedings set forth in Article 2, the Instituto Paraguayo del Indígena (INDI) and the Instituto de Bienestar Rural (IBR) must offer definitive solutions to the indigenous communities’ settlements, pursuant to Law 854/63 Estatuto Agrario and Law 904/81, Estatuto de las Comunidades Indígenas, proposing expropriation under Article 1 of Law 1372/88 when solutions are not attained by the other means foreseen.”<sup>12</sup>

The provisions of both Law 904 and Law 43/89 establish, when there is no contractual agreement with the owner, expropriation as a way to normalize the situation of indigenous communities settled on private lands. These provisions are consistent with the Civil Code provisions according to which private domain or real estate is lost by: a) sale; b) judicial transmittal or statement; c) execution of a judgment; d) expropriation; and e) abandoning said domain by means of a public writ, duly registered in the Registro de Inmuebles, and in other cases set forth in the law (Article 1967). Article 1966, in turn, specifically lists the ways to acquire ownership of real estate: a) contract; b) accession; c) usucapion; and d)

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<sup>12</sup> Law 854/63 was abrogated by Law 1863/02.

inheritance.<sup>13</sup>

17. Article 94 of Law 1863/02, which abrogates Law 854/63, in turn specifies the rural real estate that may be expropriated:

*The following private domain rural landholdings are declared to be of social interest and subject to expropriation:*

- a)** landholdings that are not utilized rationally, that are appropriate for establishing agricultural settlements, and that are located in areas with social problems;
- b)** those where there are stable settlements, well established for over ten years, under the terms and requirements of Law N° 622/60 on de facto urbanization and settlements; and,
- c)** landholdings subject to Law N° 662/60, on proportional subdivision of large landholdings, in accordance with the procedure set forth in said law.

18. Regarding this point, we should note the clash between the constitutional provision and Article 64 of Law 1863/02; while the latter limits the possibility of expropriation to landholdings that are not utilized rationally, Article 109 of the National Constitution, the supreme law of the Republic, establishes that in case of unproductive latifundia for the agrarian reform, the law itself sets the amount of compensation, while in other cases said amount is set by agreement or a court ruling. The Constitutional Court of the Supreme Court of Justice, itself, has established case law asserting that for expropriation to be in order it is sufficient for the legislators to be convinced of the existence of a social or public interest or need that can be remedied by expropriation of specific landholdings.

To the aforementioned extent, it is not necessary to demonstrate lack of rational use of the farms whose expropriation is sought.

19. Certain paragraphs of Agreement and Ruling No. 377 are especially relevant:

"Constitutional motion regarding lawsuit by Comercial Inmobiliaria Paraguayo-Argentina S.A. CIPASA against Law 517/95".

(...) the Constitution itself orders that decisions regarding expropriation be made by Congress, in its typical manner of action, that is, that of a law. Furthermore, it is a political act, in the highest sense of the word. As stated in said decree, Congress acts "not precisely as legislator, but rather as representative of the political community interested in defining a given matter."

(...) The State that expropriates does not enter into a contractual relationship with the person suffering the expropriation: the State subjects this person to its authority..."  
 "Taken as a juridical act under public law, expropriation is "unilateral" in its structure or manner of formation: the will of the person suffering the expropriation is not involved in said act... the currently acknowledged nature of expropriation as an act of "power" excludes the consent of the person subject to it (...) Given the juridical nature of expropriation, clearly when the State orders an expropriation it exercises an "authority" and not a "right".

(...) It is a limitation of the right to property inasmuch as it refers to perpetuity of domain, that is, in connection with time. This limitation derives from prevalence of the interest of

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<sup>13</sup>

Reply to the application, para.148.



the community, represented by the State, over the interest of the individual who must yield to public requirement.”

(...) Clearly, then, since expropriation is a unilateral act of the expropriating agency (Congress), as a result of exercising State power, of the “jus imperii”, all the more so when said act must be expressed in the form of a law, intervention of the owner in actions of the chambers in the process of expropriation is not in order.

(...) The decision adopted by Congress must be based on concrete facts that generate that “cause of public or social interest” mentioned in the Constitution, leading the legislators to the conviction that the expropriation must take place. Congress has the authority to assess whether in a given situation said “cause of public or social interest” actually exists and is sufficiently significant to justify the exceptional action to which we have referred.

(...) In this same regard, the veto by the Executive branch states the following: “As a logical corollary of this ideal of providing access to landholding for the largest possible number of countrymen, we must highlight that the spirit of the Constitution reflects rejection of large scale landholdings, whether or not they are latifundia”...

20. Involvement of the Legislative branch of government in the two requests for expropriation of lands of Estancia Loma Verde must be assessed in this legal framework (para. 8). In the first case, the expropriation bill submitted by Members of Congress Sonia de León and Rafael Filizzola was withdrawn by means of a Congressional Resolution, in response to a request by the proponents of the bill, given the involvement of the Inter-American Commission on Human Rights and the interest of the Paraguayan State in attaining a friendly settlement.<sup>14</sup>

The second expropriation request was rejected by the Senate. In this case, the senators, exercising their constitutional authority, did not find that the social problems of the Yakye Axa Community could be solved exclusively by expropriation of the farms mentioned in the bill. The minute of the regular meeting of June 27, 2002 does not reflect non-recognition of the rights of the indigenous community to landholding, but rather rejection of expropriation of the farms of Estancia Loma Verde. Senator Rachid Lichi, specifically, mentioned the provisions of Law 904, which in fact require, for expropriation of private lands, that they be occupied by the community benefiting from the expropriation.<sup>15</sup>

21. When they rejected the aforementioned expropriation bill, the Senators acted on the basis of the conviction that their decision was based on their constitutional authority, pursuant to the respective provisions of domestic legislation. However, in their decision to reject the bill, the Senators did not refer to any of the provisions of Articles 63 and 64 of the National Constitution, which are not reflected in laws that enable effective exercise of the rights acknowledged therein.

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<sup>14</sup> Note by the Members of Congress who proposed the bill, received on November 17, 2000, file 3886, leaf 2.

<sup>15</sup> Minutes of the Regular Meeting of the Senate on June 27, 2002. Payment of fair compensation for expropriation of a farm with modern facilities, in accordance with domestic legislation and Article 21 (2) of the American Convention, would in fact limit the possibility of the State to intervene with the aim of protecting the rights of other indigenous communities entitled to said protection.

Insisting on expropriation of those same farms, in the framework of existing legislation, without correcting the aforementioned gaps, may be ineffective, insofar as the legislators can resort to the same reasoning, based on constitutional provisions, to once again reject the expropriation, even though this possible decision could reproduce existing inequalities and once again the law could be at odds with justice.

22. Based on the grounds set forth above, I disagree with the judgment insofar as it asserts that the State violated, to the detriment of the Yakye Axa Community of the Enxet-Lengua people, the right to property embodied in Article 21 of the American Convention. The steps taken to ensure the right to property of the Yakye Axa Community were not effective due to the domestic legal gaps, and due to inappropriate procedures, especially the insistence on claiming a single space regarding the traditional territory; in connection with this point, we must bear in mind that the testimony as a whole leads to the conclusion that at times the State did not carry out consultations with the Community when it took steps to purchase lands for the Community, but at other times it did but without attaining acceptance by the Community, which insisted on acquiring Loma Verde; this leads to the need to establish a difference, in terms of legal provisions, between consultation and consensus.

23. Given the delays to date, the State of Paraguay must ensure, within a reasonable time, the right to community property of the land in accordance with the demands of the Yakye Axa Community. The land for the community must be located within the ancestral territory of the Chanawatsan group of the Enxet-Lengua people and must encompass an appropriate area for the community to maintain and develop its ethnic identity. This action must take into account the principles of universality, indivisibility, and interdependence.

24. Analysis of the case leads to the conclusion that currently there are no domestic legal provisions to enable expropriation of lands that were part of the traditional habitat of indigenous peoples but are not currently occupied by them, unless the legislators are convinced, in specific cases, that said expropriation is in order; if the right to ancestral territory does not go hand in hand with possession of the lands claimed, there is no recognition of said right under domestic legislation.<sup>16</sup> Furthermore, there are no suitable legal instruments for recovery of the lands of indigenous peoples that have been invaded and are currently occupied by third parties. Therefore, the Paraguayan State is under the obligation to take special steps to ensure effective exercise by the indigenous peoples of basic human rights enshrined in Articles 63 and 64 of the National Constitution, pursuant to the provisions of Article 2 of the American Convention:

#### Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

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<sup>16</sup> Reply to the Application, para. 152.

In its compliance with this obligation, the Paraguayan State must take into account Article 14 (3) of Agreement 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which establishes the need to establish appropriate procedures in the framework of the national legal system to address the land claims of the peoples involved. These are the grounds for my partly concurring vote regarding operative paragraph one of the Judgment.

25. With regard to the alleged violation of Article 4 of the American Convention (Right to Life) the application filed by the Inter-American Commission asserts that the State of Paraguay failed to comply, to the detriment of the Yakye Axa Community, with the obligation to ensure the right to life embodied in Article 4 of the American Convention, to the detriment of eight members of the indigenous community, duly identified by that community, and that the State "has placed all members of the community in a situation of constant risk," affecting their enjoyment and exercise of basic human rights, through continuation of a situation of vulnerability of the community.<sup>17</sup> Said Article 4 (1) of the Convention establishes that:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

26. The application states that the H. Inter-American Court has established that the right to life is a basic human right, crucial for exercise of the other human rights, and that it encompasses not only the right of every human being not to be arbitrarily deprived of his or her life, but also the right of access to conditions that ensure a decent existence. Regarding this right, the Court has in fact stated:

"Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it."<sup>18</sup>

27. Interpretation of the right to life in a way that encompasses positive measures of protection for the indigenous peoples to enjoy the right to a decent life is based on international jurisprudence and doctrine, and it entails new steps forward in International Human Rights Law.

The Inter-American Court has pointed out that the duty of the State to take positive steps must be a high priority precisely in connection with protection of the life of the more vulnerable persons, such as members of indigenous communities. This

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<sup>17</sup> Application by the Inter-American Commission. Main brief regarding the petition. Summary Doc., para. 2.

<sup>18</sup> I-A Court of HR. Villagrán Morales et al. Case ("Street Children" Case), Judgment of November 19, 1999, para. 144.

concept of the right to life, with regard to indigenous communities in a destitute situation, which can be reflected in death rates that could be avoided, asserts the obligation to provide social protection and to put an end to extreme poverty. Since they suffer severe deprivation, these indigenous communities lack strategies to adequately address the risks they face, to take advantage of opportunities to improve their living conditions and to attain minimum conditions regarding their quality of life.<sup>19</sup> In my opinion, the international responsibility of the Paraguayan State in the case of the deaths of members of the Yakye Axa community that could have been avoided, and which as I will show must be shared with others involved, stems from extreme poverty, worsened by precarious settlement of the community along the route, a fact that is not attributable to the State.

28. The right to life is embodied in various instruments, and pursuant to them, existence of extreme poverty, which tends to grow in the country, entails denial of economic, social, and cultural rights, including the rights to adequate nutrition, to health, to food, and to work.<sup>20</sup> The United Nations Human Rights Commission recognized that extreme poverty is contrary to the basic right to life, and it established the human rights that are essential to protect the right to life (food, drinking water, health).<sup>21</sup> The World Conference on Human Rights, held in Vienna in 1993, in turn, deemed that extreme poverty is contrary to human dignity. In the case of the indigenous communities, especially those suffering harsh poverty, the situation of extreme poverty entails a systematic denial of the possibility of enjoying the inherent rights of the human person.<sup>22</sup> The Yakye Axa Community certainly suffers extreme poverty, as the testimony of witnesses and expert witnesses shows.<sup>23</sup>

29. Interventions by the State must prevent, attenuate, and overcome risks such as malnutrition, prevalence of anemia, morbidity and mortality, creating basic conditions in terms of health care, adequate nutrition, education, occupational training, and income generation. Protective factors that must be guaranteed by the State, including medical services, conditions for self-production of food, and integration into community networks that ensure essential self-sufficiency, require basic conditions regarding settlement of the indigenous community members that are the target group of the services; the size of the group must enable social/communal self-sufficiency, and quality of the land must be adequate to

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<sup>19</sup> Inter-American Court of Human Rights. Joint concurring opinion of judges Antonio Augusto Cançado Trindade and Alirio Abreu Burelli, Villagrán Morales et al. Case ("Street Children" Case), para. 4.

<sup>20</sup> Additional Protocol to the American Convention on Human Rights regarding Economic, Social, and Cultural Rights. "San Salvador Protocol". The United Nations Human Rights Commission asserted that situations of extreme poverty affect all human rights, civil, cultural, economic, and political, as well as the right to development, for which the human person is crucial. E/CN.4/1995/101 para. 83.

<sup>21</sup> E/CN.4/ Sub 2/200425.

<sup>22</sup> E/CN.4/ Sub 2/2004/44.

<sup>23</sup> Case of the Yakye Axa Indigenous Community, Public Hearing held on March 3 and 4, 2005 at the Seat of the Court.

prevent, attenuate, and overcome the risks.

30. Said interventions must take into account that, pursuant to the Vienna Declaration and Programme of Action (1993), at the World Conference on Human Rights, all human rights are universal, indivisible, and interdependent, and interrelated.<sup>24</sup> I believe that, in light of these principles, it is not a matter of protecting one of the human rights embodied in the Inter-American System to the detriment of another or other such rights, or of protecting some complainants in a way that leads to violation of these rights of others also protected by the Convention. In this framework, we must deem it axiomatic that no assistance provided to small groups that are dispersed and/or settled on precarious lands can create conditions that ensure a decent existence.<sup>25</sup>

31. Insisting on supplying food to the members of indigenous communities, with no ending date and without meeting the conditions stated in the previous paragraph, can lead to an unwanted end by creating dependency and weakening their own social protection mechanisms. It is also necessary to take into account that access to appropriate land is a necessary condition, but not sufficient, to create conditions that ensure a decent life.<sup>26</sup> In this regard, it is necessary to avoid using most of the existing financial resources to purchase land or pay compensation for land expropriation.

32. The State's duty to adopt positive measures to protect the right to life, even if this involves aid to the vulnerable population groups in a situation of extreme poverty, cannot be limited to them, as said assistance does not attack those factors that generate poverty in general, and especially extreme poverty, and therefore it cannot create said conditions for a decent life. In this regard, it is necessary to take into account what the Inter-American Court has asserted regarding the need for interpretation of an international protection instrument to "go hand in hand with the changing times and current living conditions." The Court has also pointed out that said evolutionary interpretation, pursuant to the general rules of treaty interpretation, has significantly contributed to furthering International Human Rights Law.<sup>27</sup>

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<sup>24</sup> The principle of indivisibility establishes that improvements regarding one human right cannot be obtained in a manner that is detrimental to another, while the principle of interdependence asserts that improvements in realization of any human right depend on realization of all, or at least of several. E/CN.4/ Sub 2/2004/25.

<sup>25</sup> Law 904/81 establishes that indigenous groups that have separated from their communities and regroup must have at least 20 families.

<sup>26</sup> It is necessary to take into account that in fact there are already indigenous communities that despite access to land that is adequate in terms of quality and size are in a situation of extreme poverty due to lack of adequate intervention.

<sup>27</sup> Inter-American Court of Human Rights. Case of the "Street Children" (Villagrán Morales et al.) Judgment of November 19, 1999, para. 193, and Inter-American Court of Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law - Advisory opinion OC - 16/99, para. 114.

33. In my opinion, the evolutionary interpretation of the right to life embodied in the American Convention must take into account the socio-economic situation of Paraguay and of most Latin American countries, where extreme poverty has increased in absolute and relative terms despite implementation of social protection policies. Interpretation of the right to life involves not only compliance, by the State, with social protection measures that temporarily ensure minimum living conditions, but also addressing the causes generate poverty, reproduce its conditions, and create additional poor population, as discussed in the framework of the United Nations.<sup>28</sup> This poses the need to link measures for eradication of poverty with the set of phenomena that give rise to it, bearing in mind the impact of decisions by the States, international and multi-lateral bodies;<sup>29</sup> reproduction of conditions of poverty entails responsibilities of the international and national actors and institutions involved.

34. In this context, the ability of the States to intervene, in developing countries such as Paraguay, and application of international provisions regarding extreme poverty are not a juridical matter that involves only the State, which is often subject both to its limited financial resources and to structural factors linked to the "adjustment process," which the Paraguayan State does not control in an isolated manner, as set forth in the Reply to the Application (para. 185).<sup>30</sup> International responsibility is not limited to the right to international assistance when the State Party cannot attain, on its own, the model set forth in the Covenant, embodied in the International Covenant on Economic, Social and Cultural Rights.<sup>31</sup>

35. In this view, growing poverty is the result of primarily economic and financial decisions taken by private actors in agreement with public actors, with far greater power than the States of developing countries. Responsibilities of multi-national

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<sup>28</sup> *UNESCO, Poverty as a violation of Human Rights. 2004, by José Bengoa, Member of the United Nations Sub-Commission for the protection and promotion of human rights, Chairman of the United Nations working group on extreme poverty.*

<sup>29</sup> E/CN.4/ Sub 2/2004/44 para. 11, 17 and 19.

<sup>30</sup> Inter-American Court of Human Rights. Joint concurring opinion of judges Antônio Augusto Cançado Trindade and Alirio Abreu Burelli, Case of the "Street Children" (Villagrán Morales et al.), para. 6. Bearing in mind that conduct of the States, and especially of small ones, vis-à-vis multinational corporations that control markets exhibits weakness, the international community as a whole must effectively acknowledge that the responsibility is shared by the actors involved. E/CN.4/Sub 2/2004/44, para. 19 and 20.

<sup>31</sup> Articles 2 and 11 of the Covenant are pertinent. The text of the article refers to "international assistance and co-operation", while Article 11 establish that "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed (...) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need." E/CN.4/1995/101. para. 64.

firms and of multilateral bodies regarding abridgments of economic, social and cultural rights are addressed in this framework; thus, when the Human Rights Commission asserted that poverty abridges the fundamental right to life, it requested an analysis of the policies of the World Bank, of the World Trade Organization, of the International Monetary Fund, and of other international bodies.<sup>32</sup>

36. Progress of International Human Rights Law requires that the international community acknowledge that poverty, and especially extreme poverty, is a form of abridgment of all human rights, civil, political, economic, and cultural, and that it act accordingly so as to facilitate identification of the internationally liable perpetrators. The economic growth system linked to a type of globalization that impoverishes growing sectors constitutes a "massive, flagrant, and systematic violation of human rights",<sup>33</sup> in an increasingly interdependent world. This interpretation of the right to life, attuned to evolving times and current living conditions, must pay attention to the causes of extreme poverty and to their perpetrators. From this standpoint, the international responsibility of the State of Paraguay and of other Signatory States of the American Convention does not cease, but it is shared with the International Community that requires new instruments.

37. It is also necessary to take into account, in addition to what was stated in previous paragraphs, that Article 46(1)a of the Convention asserts that for a petition or communication filed before the Inter-American Commission pursuant to Articles 44 or 45 of the Convention to be admissible, it is necessary to have filed and exhausted domestic remedies, which did not happen in the instant case.

With regard to the deceased members of the indigenous community, it is necessary to assert that if complaints had been filed in a timely manner under domestic venue regarding possible negligence that could lead to avoidable deaths, it would have been possible to correct, or at least to attenuate, said health problems; this path would have enabled an investigation of abridgments of the right to life, punishment of those responsible, and reparations for the next of kin of the victims. Lack of

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<sup>32</sup> E/CN.4/Sub 2/2004/25. Likewise, the United Nations Committee on Economic, Social and Cultural Rights has asserted in international fora that Intellectual Property rights as reflected in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization are contrary to human rights treaties, conventions and agreements. E/CN.4/Sub 2/204/44 para. 11, 17, and 19. The Social Forum held in the framework of the United Nations Human Rights Commission, in 2004, highlighted the growing need to include a human rights dimension in international economic decisions, such as those pertaining to debt payment, trade, and free trade agreements, as a way to avoid generating poverty.

<sup>33</sup> International Conference on Poverty and Social Exclusion, held in San Jose, Costa Rica, in January 1997; *General Assembly Resolution (A/RES/55/106) of 14 March 2001*, Resolutions of the Commission on Human Rights and the General Assembly of the United Nations state that both poverty and social exclusion are a "violation of human dignity". Paragraph 1; E/CN.4/Sub.2/1996/13, *Final report on human rights and extreme poverty, submitted by the Special Rapporteur, Mr. Leandro Despouy*; UNDP, *Poverty reduction and human rights, a practice note* (March 2003).; J. Bengoa, *Implementation of existing human rights norms and standards in the context of the fight against extreme poverty* (E/CN.4/Sub.2/2003/17).

reparation, in proven cases of negligence by agents of the State, could have given rise to domestic responsibility of the State of Paraguay.

38. With regard to the alleged violation of Articles 8 and 25 of the American Convention (Right to Fair Trial and Judicial Protection) and more specifically regarding the proceeding against the members of the Community, I believe that the unfair treatment against the Community in connection with violation of the right to fair trial, which originated in the early procedural steps, in the trial court, could have been readressed in other stages of the same proceeding, under domestic venue.

Ramón Fogel Pedroso  
Judge *ad hoc*

Pablo Saavedra Alessandri  
Secretary