

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 55/07; Petition 978-04
Session: Hundred Twenty-Eighth Session (16 – 27 July 2007)
Title/Style of Cause: Kelyenmagategma Indigenous Community of the Enxet-Lengua People and its Members v. Paraguay
Doc. Type: Decision
Decided by: President: Florentin Melendez;
First Vice-President: Paolo Carozza;
Second Vice-President: Victor Abramovich;
Commissioners: Sir Clare Roberts, Freddy Gutierrez.
Commissioner Evelio Fernandez Arevalos, a Paraguayan national, did not take part in the deliberations nor decision regarding this case, pursuant to the provisions of Article 17.2 of the Commission’s Regulations.
Dated: 24 July 2007
Citation: Kelyenmagategma Indigenous Community v. Paraguay, Petition 978-04, Inter-Am. C.H.R., Report No. 55/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by: APPLICANT: the organization Tierraviva para los Pueblos Indígenas del Chaco
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I. SUMMARY

1. On October 1, 2004, the Inter-American Commission on Human Rights (hereafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a complaint lodged by the organization Tierraviva para los Pueblos Indígenas del Chaco (hereafter “TIERRAVIVA” or “the petitioners”), in support of the Kelyenmagategma Indigenous Community of the Enxet—Lengua People and its members (hereafter the “Kelyenmagategma Indigenous Community” or the “Indigenous Community”) against the Republic of Paraguay (hereafter the “Paraguayan State,” “Paraguay,” or the “State”). The petition alleges that the Paraguayan State has violated Articles 4 (right to life), 5 (right to humane treatment), 21 (right to property), 11(2) (protection of honor and reputation), 25 (right to judicial protection), 8 (right to a fair trial), with regard to 1(1) (obligation to respect rights), as set forth in the American Convention on Human Rights (hereafter “the Convention” or “American Convention”); in addition that the State ignored Article 12 of Convention 169 concerning Indigenous and Tribal Peoples of the International Labor Organization (hereafter “Convention 169”), to the detriment of the Indigenous Community and its members.

2. With regard to admissibility, the petitioners allege that their petition is admissible pursuant to the exceptions contained in the requirements for exhausting domestic remedies and the deadline for lodging the petition, as set forth in Article 46(2)(c) of the Convention.

3. On its part, the State argues that the petitioners have not exhausted their remedies under domestic law.

4. Having examined the petition, and as provided in Articles 46 and 47 of the American Convention and Articles 30 and 37 of its Rules of Procedure, the IACHR concludes that it is competent to hear the complaint presented by the petitioners concerning an alleged violation, affecting the Kelyenmagategma Indigenous Community of the Enxet-Lengua people and its members, of Articles 4, 5, 8.1, 11, 21, and 25 of the American Convention, in connection with Article 1(1) of the Convention. Also, in application of the principle *iure novit curia*, the Commission finds the petition admissible as regards the alleged violation of Articles 2, 17, 19, and 22 of the Convention, in relation to Article 1(1) of the Convention, and as regards the alleged violation of Article 13 of the Protocol of San Salvador, affecting the Kelyenmagategma Indigenous Community of the Enxet-Lengua people and its members. The Inter-American Commission also has decided to notify the parties, to publish this decision, and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

A. Processing of the petition

5. On October 1, 2004, the Tierraviva Organization electronically submitted a request for precautionary measures to the IACHR and a petition in support of the Kelyenmagategma Indigenous Community of the Enxet-Lengua People and its members. Said petition and its annexes were physically received in the IACHR Secretariat on October 6, 2004.

6. On October 12, 2004, the Commission transmitted the pertinent parts of the petition to the State and requested that it provide its comments within a period of two months. On December 23, 2004, the Paraguayan State requested a 30-day extension from the IACHR to submit its comments. On December 27, 2004, the IACHR granted the State the requested extension.

7. The Paraguayan State submitted its response to the petition on February 1, 2005. On February 18, 2005, the IACHR, via written note, informed the Permanent Mission of the Republic of Paraguay to the OAS that note no. 30 regarding the Kelyenmagategma Indigenous Community of the Enxet-Lengua People was illegible and requested that a legible copy be sent to it, so that the document could be sent the petitioners.

8. On February 21, 2005, the Permanent Mission of the Republic of Paraguay to the OAS sent to the IACHR a legible copy of the State's response to the complaint filed by the Tierraviva Organization.

9. On February 22, 2005, the IACHR sent the State's response to the petitioners and requested their comments within a period of 15 days. On March 10, 2005, the petitioners requested an extension from the IACHR to submit their comments.

10. On March 23, 2005, the petitioners submitted their comments, and on April 1, 2005, the IACHR sent the State the pertinent parts, requesting its comments within 10 days. On August 11, 2006, the IACHR reiterated to the Paraguayan State its request for information made on April 1, 2005.

11. On August 23, 2006, the petitioners informed the Commission that attorneys Oscar Ayala and Julia Cabello Alonso would be the attorneys authorized to represent the Kelyenmagategma Indigenous Community. They also stated that attorney Andrés Ramírez had been dismissed as a petitioner and representative of the victims.

B. Processing of the precautionary measure

12. On October 1, 2004, the Tierraviva Organization submitted along with its petition a request for precautionary measures in support of the Kelyenmagategma Indigenous Community of the Enxet People because members of this community were at imminent risk of suffering irreparable damage to their basic human rights. The petitioners complained that the indigenous peoples had been displaced a second time in a violent and illegal manner from the area of their traditional settlements, apparently by masked civilians connected with the El Algarrobal, S.A. company. According to the application, members of the Kelyenmagategma Community were living in an unsuitable location under subhuman living conditions and facing permanent threats allegedly made by the staff of the company cited.

13. On October 12, 2004, the Commission requested that the Paraguayan State urgently adopt precautionary measures in order to protect the Kelyenmagategma Indigenous Community of the Enxet-Lengua People and its members, comprising the following:

1. To protect the life and personal integrity of the members of the Kelyenmagategma Indigenous Community of the Enxet People, respecting their cultural identity and their special relationship with the ancestral land;
2. To provide humanitarian aid to members of the Community, especially to guarantee access to basic services in health, food, and education for children in the Community;
3. To ensure that the beneficiaries can continue to live on their ancestral land without facing any type of coercion or threat, until the bodies of the Inter-American Human Rights System have taken a final decision on the matter;
4. To eliminate illegal restriction of the right of the members of the Kelyenmagategma Community to circulate freely;
5. To investigate the facts underlying the application for precautionary measures.

14. On December 3, 2004, the State submitted its first report on the implementation of the precautionary measures. On this occasion, the State stated that on October 28, 2004 the first meeting was held among the State, the petitioners, and the beneficiaries of the precautionary measures and the following was agreed:

Point one: To protect the life and personal integrity of the members of the Kelyenmagategma Indigenous Community of the Enxet People, respecting their cultural identity and their special relationship with their ancestral land. The Office of the Attorney General, the Ministry of the Interior, and the National Congress were appointed for this purpose because, according to this report, members of the Community “are constantly mistreated and intimidated; moreover they were dispersed from the location with extreme violence;”

Point two: To provide humanitarian aid to members of the Community, in particular access to basic services in health, food, and education for children in the Community. To this end, the Ministry of Education and Culture, the Ministry of Public Health and Social Well-being, the Secretariat for Social Action, and the National Emergency Committee were appointed, the last of which was responsible for sending 500 boards and food until December of this year; moreover a complaint was submitted that school no. 15,439, known as the 15 de mayo was completely burned and destroyed, as were the school supplies, so the school was no longer in operation, and the students faced the possibility of losing the academic year; medical care was also requested;

Point three: To ensure that the beneficiaries can continue living on the ancestral land without facing any type of coercion or intimidation until the bodies of the Inter-American Human Rights System have adopted a final decision regarding the matter. The Paraguayan Institute on Indigenous Affairs (INDI: Instituto Paragurayo del Indígena) and the Judicial Branch were given this responsibility;

Point four: To eliminate illegal restriction of the right to free circulation of the members of the Kelyenmagategma Community. The INDI, the Judicial Branch, and the Ministry of the Interior were appointed for this purpose;

Point five: To investigate the facts underlying the application for precautionary measures. The Office of the Attorney General and the Human Rights Technical Unit of the Supreme Court of Justice were appointed for this purpose.[FN2]

[FN2] Ministry of Justice and Labor. General Directorate of Human Rights, Ministry of Foreign Affairs. Memorandum from the meeting held in the city of Asunción, Paraguay on November 8, 2004. Sent by the State via a note dated December 3, 2004.

15. In this same report, the State indicated that on October 22, 2004, a visit was made to the Kelyenmagategma Community in Puerto Colón, in which the State, the petitioners, and the beneficiaries participated. The State provided the following information with regard to the visit:

We found the indigenous people living in tents some 7 kilometers from the Paraguay River. In light of this situation, we informed the company of the precautionary measure put in place by the Inter-American Commission on Human Rights. [We reached] an agreement with company, [which agreed] to build a school and to give access to cutwaters and to the river, so that they can

use the water, [as can the staff] from the National Emergency, who will be bringing staples and boards for the construction of dwellings.[FN3]

[FN3] Ministry of Justice and Labor. General Directorate of Human Rights, Ministry of Foreign Affairs. Memorandum from the meeting held in Asunción, Paraguay on November 8, 2004. Sent by the State via a note dated December 3, 2004.

16. On December 3, 2004, the IACHR sent to the representatives of the beneficiaries, the pertinent parts of the report submitted by the State and asked them to submit their comments within 15 days.

17. On December 22, 2004, the petitioners submitted their comments on the State's report. At that juncture, the petitioners pointed out that the members of the Kelyenmagategma Community of the Enxet-Lengua People were continuing to receive death threats from the staff of the El Algarrobal Company, stating that in spite of this situation, the effective judicial investigation measures ordered by the Commission still had not been adopted. They further indicated that the judicial order to prevent changes from being made to the land was not being respected because there were permanent staff in the protected area working on projects that altered the physical status of the land under claim. In terms of education, the petitioners stated that there was no physical infrastructure for operation of a school, and that the children had definitely lost the academic year. The petitioners also stated that access to water for consumption was being restricted to the Kelyenmagategma Community. They specified that in order to reach water, community members have to travel approximately 8 kilometers to reach the Paraguay River where they could obtain water under good conditions. According to the petitioners, this trip is made under continual harassment from staff of the El Algarrobal S.A. company.

18. On January 21, 2005, the report submitted by the petitioners was sent to the Paraguayan State. On March 23, 2005, the petitioners submitted additional information, which was sent to the State on April 1, 2005, and its comments were requested within 10 days. On August 11, 2006, the IACHR repeated its request for information to the State of Paraguay.

19. On October 20, 2006, the petitioners provided additional information regarding compliance with the precautionary measures.

20. On January 12, 2007, the petitioners made a request to the IACHR that a working meeting be held during the 127th Regular Period of Sessions. On February 15, 2007, the IACHR informed the parties that the meeting requested by the petitioners would be held on March 5, 2007.

21. On February 22, 2007, the State of Paraguay submitted its comments on the petitioners' report dated April 1, 2005. On February 23, 2007, the Commission sent the petitioners the pertinent parts of this report.

22. On March 5, 2007, a working meeting was held and attended by both parties as part of the 127th Regular Period of Sessions.

III. POSITION OF THE PARTIES

A. Position of the Petitioners

23. According to the petitioners, the complaint is based on a serious set of violations of the rights of the Kelyenmagategma Community, including permanent exposure of its members to a pattern of violence and coercion on the part of the El Algarrobal company, under the protection of law enforcement, whose goal is to displace them from their settlement and eventually make them abandon their claim to their lands.

24. Based on the foregoing, the petitioners allege that the State of Paraguay is responsible for violation of Articles 4 (right to life), 5 (right to humane treatment), 21 (right to property), 11 (right to privacy), 25 (right to judicial protection), and 8 (right to a fair trial), all of which are related to article 1(1) (obligation to respect human rights), provided for in the American Convention on Human Rights. A violation is also alleged of Article 12 of ILO Convention 169 concerning Indigenous and Tribal Peoples, to the detriment of the Kelyenmagategma Indigenous Community of the Enxet-Lengua People and its members.

25. According to the petitioners, the Kelyenmagategma Indigenous Community of the Enxet-Lengua People is located in a place known as Puerto Colón, 40 kilometers to the north of the port of the city of Concepcion, in the Department of Presidente Hayes, Chaco. As per the last census carried out on May 10, 2003 by the INDI, the Kelyenmagategma Indigenous Community comprises 43 families. Its leaders are Messrs. Crecensio Fernández, Alejandro Benítez, and Celso Zavala, who are recognized as such by the INDI, via Resolution No. 278 of 2000. The petitioners add that on October 2, 2000, the community leaders initiated legal proceedings for restitution of part of their ancestral land.

26. The petitioners state that the Community's traditional habitat comprises the settlement area where their dwellings are located and the area where they carry out their traditional subsistence activities i.e., hunting, fishing, and gathering wild fruits. They add that the Community's traditional habitat, including the settlement area, has been part of the land deeded to the El Algarrobal S.A. company since 2002.

27. The petitioners further state that there were two critical moments in the pattern of violence against members of the Community in less than one year. The first took place on August 30, 2003, the date the indigenous people were expelled from their settlement by police, armed civilians, and two prosecutors, without a judicial order for eviction or search. The second was recorded on August 29, 2004 when employees of the El Algarrobal S.A. company assaulted Community members. They threw petards at dwellings and fired gunshots to again evict them violently from their settlement, forcing them to disperse and take refuge in the mountains.

28. With regard to the events that took place in August 2003, the petitioners maintain that prosecutors Javier Quintana and Luís Ramón Grance, accompanied by police officers, attorneys,

and armed civilians from the El Algarrobal S.A. company came to the settlement site. At that time, the petitioners allege that members of the Community were expelled from the settlement area under threat that police forces would enter and remove them by force.

29. The petitioners state that after being forced to leave their homes, members of the Kelyenmagategma Indigenous Community of the Enxet-Lengua People were left exposed to the elements on the shore of the Paraguay River, including among them more than 60 children, women, and elderly people, who suffered illness, cold, and hunger. According to the petitioners, this move caused the death of the elderly Teresa Gaona, who apparently died because she could not withstand the cold following the eviction.

30. As per information provided by the petitioners, the above-described situation was verified by an INDI official, who, on instructions from the president of that institution, went to the area and provided information in a memorandum dated September 8, 2003, as follows:

We found all of the indigenous people on the shore of the Paraguay River, comprising 41 families, 147 people, out in the elements, exposed to the weather, and without food. The most affected are the children and the elderly. An elderly woman died as a result because she could not withstand the cold. The children are sick with respiratory diseases and need medical attention [the memorandum adds] “As INDI representative, on instructions from the president, we informed them of the status of the land and asked them to return to their houses and defend the site and to not abandon it again.”[FN4]

[FN4] Memorandum of the Instituto Paraguayo del Indígena, (INDI) of November 8, 2003. This document is part of the record.

31. According to the petitioners, three days after the events described, the Kelyenmagategma Indigenous Community of the Enxet-Lengua People, reinstalled themselves in the area from which they had been expelled.

32. The petitioners allege that these serious violations committed by agents of the State should have been officially investigated by the appropriate bodies that administer justice. However, they state that to date, they have no information indicating that there is any judicial process regarding these events. On the contrary, they allege that the people, who provided legal assistance to the community with regard to the expulsion, namely attorneys Oscar Ayala and Mirta Pereira, were sued by the owner of the El Algarrobal company.[FN5]

[FN5] Individual case “11312003 5148 Oscar Ayala, Mirta Pereira, Oscar Centurión, Valentín Gamarra for Encroachment on another’s land et al” heard before the Juzgado Penal de Garantías (Guaranty Criminal Court) No. 1. This document is part of the record.

33. The petitioners stated that on September 23, 2003, INDI lodged a petition for precautionary measures before the Third Circuit Civil and Commercial Court to prevent factual or legal changes to the land and to note litigation pending on farm no. 17326, which stated:

The lands for which I seek judicial protection are part of the ancestral property of the Kelyenmagategma Community (Puerto Colón) of the Enxet people and over which they have exercised their rights of possession and dominion since time immemorial. At present, 41 families permanently reside in this location, and there is a school recognized by the Ministry of Education and Culture (MEC), duly registered as No. 15434 [...] In addition, it must be mentioned that in the year 2000, the representatives of this community formally initiated the request to legalize said lands” [with regard to the acts of violence] members of the community state that they are continually harassed and threatened with removal and expulsion from the site by people, who claim to work for the El Algarrobal S.A company, who are building wire fences, carrying out clean-ups and leveling land with a tractor, building cutwaters and airstrips, etc.; in this sense, it can be said that representatives from the firm are threatening members of the Indigenous Community into working with them as staff, saying that otherwise they will have to abandon the property. [FN6]

[FN6] Application for the precautionary measure to prevent changes to the land and to include a note of pending litigation, filed by the INDI on September 23, 2003. This document is part of the record.

34. On March 5, 2007, the petitioners stated that the protection measures requested by INDI were lifted by order of the justice courts.

35. The petitioners indicated that on November 25, 2003, based on the facts of the complaint, the Tierraviva Organization filed for the remedy of Constitutional Protection because the owner of the El Algarrobal company had kept the indigenous people from meeting with their attorneys[FN7] and because the right to life had been violated, evident inter alia, in the reduction of the physical space of the indigenous settlement to less than three hectares, limiting their subsistence activities. The protection remedy was rejected on December 26, 2003 by the first instance court due to the a) lack of active competence of the filer; b) failure of the petitioner to exhaust administrative measures first; and c) the contraposition of constitutional rights likewise endangered, i.e. the right to property and the right to defense. This decision was appealed, and on February 23, 2004, the appeals court upheld the ruling of the first instance court.

[FN7] The petitioners state that after the return of the Kelyenmagategma Community to the lands under claim, the Algarrobal S.A. company prevented the Community’s defense attorneys from entering the indigenous settlement and having contact with its members.

36. According to the petitioners, the protection sought was ineffective, depriving the victims of swift and effective protection with regard to the acts under complaint. The petitioners allege

that without an investigative process to clarify and punish the acts that took place in 2003, and the constitutional protection for the community having been rejected twice, the path remained open for new abuses of the Indigenous Community by the same victimizers because of the existing atmosphere of impunity.

37. With regard to the events of August 29, 2004, the petitioners complain that on that day at 2:50 p.m., armed people appeared at the Kelyenmagategma settlement, who physically assaulted them and expelled them from the settlement by firing shots in the air.

38. The petitioners state that, in light of these circumstances, some members of the Indigenous Community had to relocate completely unprotected to an area known as Buena Vista, located 25 kilometers from where the events took place. Some people, including children, had to be separated from their families and go to the mountains to protect themselves. They add that community members again lost their basic assets, such as goods and chattels and domestic animals, and some boys and girls lost their school supplies.

39. The petitioners point out that the members of the Indigenous Community complained that the perpetrators of the eviction were employees of the El Algarrobal company, who were carrying out works on the urban part of the settlement, in violation of a judicial prohibition against modifications ordered by the Third Circuit Civil and Commercial Judge. [FN8]

[FN8] On April 6, 2004, the Judge of the Civil and Commercial First Instance Court communicated to INDI on November 6, 2003 that as per the judicial decision dated November 6, 2003, it had decreed the prohibition against making changes to the land and inclusion of the annotation of the pending litigation on the property known as farm no. 17326 in the District of Chaco, Department of Presidente Hayes. The document is included in the record.

40. The petition further states that in view of this new act of violence and the well-founded fears regarding respect for the freedom and personal integrity of the Indigenous Community, the Human Rights Coordinator of Paraguay (CODEHUPY), in conjunction with Tierraviva brought a General Habeas Corpus Action on August 30, 2004. The petitioners allege that in spite of the acts of violence and urgency of the case, jurisdictional assistance did not manifest itself, compelling the community members with their limited means to search for several of its members whose whereabouts were unknown and who were later found in the mountains.

41. On March 5, 2007, during the working meeting held during the 127th Regular Period of Sessions, the petitioners provided information on new acts carried out against the Kelyenmagategma Indigenous Community:

a.) In May 2005, six burros, the only means of transportation and circulation for the community were stolen by an employee from the Algarrobal S.A. company. This act was reported and still has not been investigated.

b.) In June 2005, two burros were stolen by the same person. The act was reported and still has not been investigated.

- c.) In August 2005, a woman from the community, who had given testimony against the company's employees during one of the open cases against the community's defense counsel, was visited by people with firearms, who secretly and violently broke into her house. She managed to escape. The act was reported to the Office of the Attorney General and has not been investigated.
- d.) In August 2005, civilians shot at several community members, who were hunting wild animals.
- e.) In September 2005, new abuse was perpetrated by armed civilians and police officers who searched houses and destroyed the possessions of community members. They tied the hands of two indigenous people (father and son, the latter of whom was a minor), and subjected them to degrading treatment. The act was reported and has not been investigated by the Office of the Attorney General.
- f.) In January 2006, seven Community members were apprehended and deprived of liberty by employees of the El Algarrobal company, for the alleged crime of cattle rustling. The indigenous people were accused and charged..
- g.) In July 2006, employees of the El Algarrobal company went to the Community to intimidate its members, warning them of new attempts to evict them.
- h.) In February 2007, requests continued to be made to carry out the steps to open the school, and the children run the risk of losing their fourth consecutive year because 2004, 2005, and 2006 are irrevocably lost.

B. Position of the State

42. The State said in its written comments that the Community's legal representatives turned directly toward the Commission without exhausting domestic legal remedies, for which reason failure to comply with Article 8 of the Convention can be invoked.

43. In its arguments, the State indicates that the protection remedy sought by the petitioners through domestic channels is not enough to consider domestic remedies exhausted. It points out that the protection action is the constitutional procedural means that can be applied in the absence of other legal procedural mechanisms. As an example, the State cites Argentine legislation, and specifies that in that country use of the protection remedy requires that the case be serious and irreparable. It adds that the courts have invariably applied the principle of exceptionality to the protection, stating that the protection is an exceptional measure, which can only be used in cases where there are no other appropriate judicial means for protecting the right or guaranteeing the violated right.[FN9]

[FN9] Sosa Enrique, El Amparo Judicial, page 135. Cited by the State in its note dated February 21, 2005.

44. The State states that this case is related to discussion about the ownership of the land that the members of the Indigenous Community say they have inhabited traditionally. In this regard, the State equally feels that there could be dispute over ownership by the Community or the forced eviction by those who make claim to the property and say that they have the

corresponding deeds (Algarrobal S.A.). According to the State, this dispute should be handled through regular judicial channels, and it adds that the judges and tribunals formed under the conditions described in Article 8 of the Convention are the bodies that the petitioners should access to reach the best settlement for the Community, by filing a regular claim of usurpation, as set forth in the Civil Procedure Code in Articles 635 to 652.

45. According to the State, the protection action is an exceptional judgment and appropriate only in cases where there are no other procedural remedies. It adds that in this instance, justice was not sought before any judicial authority, therefore the petition before the IACHR can only be interpreted as a substitution for the proceeding and for the domestic courts.

46. The State further states that if rights provided for in the National Constitution are weakened, the petitioners should bring an unconstitutionality action against rulings or decisions that violate those basic rights set forth in the Magna Carta.

47. In conclusion, the State says that this observation shows that the petitioners have not complied with the rule of exhausting domestic remedies.

48. The State also indicates that the petitioners, like previous cases, called upon the jurisprudence of the Inter-American Court (the case of *Awas Tingi versus the State of Nicaragua*). However, there are differences between the Kelyenmagategma Indigenous Community and the Mayagna of Awas Tingni community,^[FN10] including the nature of the North Atlantic Autonomous Region (RAAN), the process of occupying the land, the social and cultural differences between the members of the two communities (Awas Tingni – Kelyenmagategma), and the problem that according to the State is different in both cases.

[FN10] Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79.

49. The State says that the Kelyenmagategma Indigenous Community obtained its legal identity on February 16, 2004, via Decree No. 1767, which recognizes the possibility of receiving the right to ownership of one's own land, provided that that land justifiably constitutes the community's ancestral heritage, and that the owner be compensated for the value of that property. In this case, according to the State, the owner refused to sell, and the expropriation was rejected by the competent body because the property under claim was in use.

50. The State indicates that in Paraguayan legislation, indigenous people have the right to access ancestral land free of charge, which they shall access via transfer from the State to the community. Indigenous lands are not considered physical lands, on the contrary, they are lands that cannot be transferred, traded, rented, or divided. This right is enshrined in Article 64 of the National Constitution. The State adds that in Paraguay effectiveness of the right to property for indigenous people hinges on the transfer of the land, which occurs when the State makes an administrative or judicial decision that the community has the right to own the land.

51. The State points out that in Paraguay, domestic legislation gives the possessor of land the right to obtain dominion over the same, as defined according to the provisions set forth in article 1989 of the Civil Code. In this case, according to the State, said right has not been invoked because possession, as one of the main elements of usurpation, does not exist. The State indicates that the traditional definition of possession is the act via which the person has a thing under his power with the intention of making it his or subjecting it to his dominion, and Paraguayan legislation reduces this legal concept to dominion in effect or in fact over the thing.

52. According to the State, the members of the Kelyenmagategma Indigenous Community of the Enxet-lengua People obtained their legal identity in February 2004, so it is from that moment that they have had the ability to request expropriation or exercise any right over the land under claim. In addition, it points out that the claims of the Indigenous Community would be based on the historic right of their ancestors.

53. In this context, the State says that in Paraguayan law there is no way to obtain right to property merely by justification that ancestors occupied that geographic area at one time. In this regard, the State adds that, "This is so because it is a matter of the rights inherent to the person, which is characterized by non-transmissibility to heirs. As a result, such rights and obligations are born and die with the holder, whose personal conditions have been taken into account in establishing them. Even if the administrative body or Executive Branch had recognized that the indigenous population known as ENXET-LENGUA had its traditional habitat in the area of the Paraguayan Chaco, that does not mean that for that reason alone, those who own the land or lands in accordance with national laws will be dispossessed of them, so that they can be given to the community making the claim. Otherwise, we would not be a State of law, but rather a populist dictatorship that confiscates from some to give to others, something that would separate the nation from the constitutional and legal precepts related to the duties and rights recognized for all citizens of the Republic."

54. With regard to the evictions to which the Kelyenmagategma Indigenous Community was subjected, the State pointed out that a domestic complaint about the events that took place should be filed and that, in all instances, the Community must wait until these bodies make a decision regarding these events before obtaining the corresponding reparations.

55. The State points out that it has made an urgent request to the Ministry of the Interior, so that the necessary measures to protect members of the Community are taken. The State says that the INDI has no authority to address health-related matters. It adds that the precautionary measure to not make changes to the land was requested by INDI and is in force, even though the legal representatives of the El Algarrobal S.A. company have requested that it be lifted.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence of the Commission *ratione loci*, *ratione personae*, *ratione temporis*, and *ratione materiae*

56. The petitioners are authorized by Article 44 of the American Convention to present complaints to the Commission, and, with respect to the alleged victims, i.e. the

Kelyenmagategma Community and its members,[FN11] the Paraguayan State undertook to respect and ensure the rights enshrined in the Convention. As for the State, the Commission observes that Paraguay is a state party to the American Convention, having ratified it on August 24, 1989. Accordingly, the Commission is competent *ratione personae* to examine the complaint.

[FN11] In the petition, the petitioners state that the Kelyenmagategma Community comprises 43 families.

57. The Commission is competent *ratione loci* to take cognizance of this petition insofar as it alleges violations of rights protected in the American Convention in the territory of a state party.

58. The Commission is competent *ratione temporis* insofar as the facts alleged in the petition took place when the obligation to respect and ensure the rights established in the Convention had already entered into force for the Paraguayan State.

59. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights contained in the American Convention.

60. As per the claim of the petitioners in the complaint, which states that the Paraguayan State ignored Article 12 of ILO Convention 169, the Commission is not competent in this regard, without prejudice to which it can and should be used as a guideline for interpretation of conventional obligations, as per the provisions of Article 29 of the Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

61. Article 46(1)(a) of the Convention establishes as a requirement for a petition to be admitted that domestic remedies first be pursued and exhausted, in keeping with generally recognized principles of international law. Article 46(2)(a) provides that this requirement shall not be applied when (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of its rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

62. With regard to exhaustion of domestic remedies, the State alleges that the petitioners have not complied with the rule on exhaustion of domestic remedies because the writ of amparo is the constitutional process, which is applied in the absence of other legal process mechanisms to resolve the case. The State argues that this case is related to discussion of ownership of the land, which members of the indigenous community claim to have inhabited traditionally. This dispute should have been processed through regular judicial channels, by lodging a petition on usurpation or a special suit, as set forth in the Civil Procedure Code in articles 635 to 652. It adds that, with regard to weakening the rights set forth in the National Constitution, the petitioners

should bring a claim of unconstitutionality against the rulings or decisions that infringe on these basic rights. As per the evictions to which members of the Kelyenmagategma Indigenous Community were subjected, the State pointed out that a domestic complaint regarding these events should have been filed, and that, in all instances, the Community should wait until these bodies make a decision regarding these events in order to obtain the corresponding reparations.

63. In accordance with the documents contained in the record, the petitioners have brought the following motions:

a) Application to claim the ancestral land of the Kelyenmagategma Indigenous Community before the Institute of Rural Well-being (I.B.R: Instituto de Bienestar Rural). Record no. 2974-00:

On October 2, 2000, community leaders initiated the legal proceedings for restitution of part of their ancestral territory with the Institute of Rural Well-being. (I.B.R.), the current National Institute of Rural and Land Development (INDERT: Instituto Nacional de Desarrollo Rural y de la Tierra). Pending resolution.[FN12]

[FN12] As per the petitioners' note dated March 5, 2007, and as stated during the meeting held on the same date during the 127th Regular Period of Sessions.

b) Writ of amparo:[FN13]

Filed for on November 25, 2003 by the NGO Tierraviva against the El Algarrobal S.A. company. The remedy alleged: a) violation of the rights to juridical assistance and arbitrary restriction of personal freedom; b) violation of the right to life of indigenous peoples.[FN14] The motion was rejected on December 26, 2003 in the first instance court. The decision was appealed, and the Court upheld the appealed decision in all its parts, using as it bases: a) the lack of active competence on the part of those seeking remedy ; b) failure to first exhaust administrative channels on the part of the petitioner; c) contraposition of other constitutional rights also put in danger, i.e. the right to property and defense.[FN15]

[FN13] Article 134 of the Paraguayan Political Constitution..

[FN14] Writ of amparo filed by Tierraviva Organization on November 25, 2003. This document is part of the record.

[FN15] Agreement and Ruling No. 5, dated February 23, 2004. This document is part of the record.

c) General Habeas Corpus Remedy:[FN16]

Filed for on August 30, 2004 by the Human Rights Coordinator and the NGO Tierraviva following the second eviction and the acts of violence against members of the Kelyenmagategma

Indigenous Community.[FN17] The remedy requested the following: 1) issue whatever measures are needed to repair the violations of the rights to personal integrity and freedom of the victims of the acts described in the remedy; 2) issue whatever measures are needed to determine the whereabouts of the disappeared victims, ordering, if applicable, the suspension of the circumstances depriving personal; 3) that court be held in the area where the events took place in order to carry out the appropriate investigations and verify the circumstances described.[FN18] According to the petitioners, procedural steps were taken to request reports from government institutions; these requests were not addressed. The petitioners also say that to date no decision has been made on the remedy.[FN19]

[FN16] Article 133 of the Paraguayan Political Constitution.

[FN17] The petitioners' application before the Judge states that the indigenous families of the Kelyenmagategma Community were victims on August 29, 2003, of serious acts of violence, which led to forced eviction from their homes and the disappearance of several of its members. "On the day and time indicated, four armed people with their faces covered arrived at the settlement and proceeded to physically assault and dispel members of the settlement by firing shots in the air with long, high-caliber weapons. Under these circumstances, many of these people had to move away with absolutely no protection to a place called Buena Vista located 25 km from where the events took place. The whereabouts of some of these people are unknown, including children who were separated from their families and took refuge in the mountains." See: Generic Habeas Corpus Remedy requested by the Human Rights Coordinator and the Tierraviva Organization on August 30, 2004. This document is part of the record.

[FN18] General habeas corpus remedy requested by the Human Rights Coordinator (CODEHUPY) and the Tierraviva Organization on August 30, 2004. The document is part of the record.

[FN19] Law 1500 of July 1989, which regulates the habeas corpus remedy states: Article 34. Final Ruling. Deadline. Effects. Once the case has been concluded, the court shall issue a final ruling within one day. If the general habeas corpus is granted, in this instance, the circumstances restricting liberty or threatening personal safety will be rectified, or the physical, mental, or moral violence aggravating the circumstances of people legally deprived of liberty will be suspended.

d) Application for precautionary measure to prevent changes from being made to the land and to include an annotation of pending litigation:[FN20]

On September 23, 2003, the INDI filed with the Third Circuit Civil and Commercial Court, a petition for precautionary measures to prevent changes from being made to the land and to include an annotation of pending litigation for farm no. 1732 in the department of President Hayes, Chaco, the settlement location of the Kelyenmagategma Indigenous Community. The protection measure requested was lifted on April 27, 2005, and its lifting was upheld on June 14, 2005 before the Court of Appeals. Later new precautionary protection measures were sought from the Seventh Circuit Civil and Commercial Court, which were granted and again lifted on May 26, 2006. At present, according to the petitioners, they have again requested precautionary measures for which a decision is pending.

[FN20] Law 43-89, Article 2. Changes in fact or law shall not be allowed to the detriment of the settlements of indigenous communities while administrative and judicial records are being processed and definitive ownership of the land is being established. The sowing and harvesting of fruits and products needed for subsistence shall not be considered as changes, if they are carried out in habitual locations.

64. Based on the foregoing, with regard to recovery of part of the ancestral territory of the Kelyenmagategma Indigenous Community, in 2000 procedures were initiated with the appropriate authority, as provided in Paraguay's domestic legislation for such purpose. In effect, on October 2, 2000, Community leaders submitted to the Institute of Rural Well-being (the current National Institute of Rural and Land Development) a claim for recognition of the ancestral land. As a result, the processing of record No. 7974/00 was initiated, in which the INDI also intervened. Approximately 7 years have passed, and the procedure is still pending.

65. With regard to this, the State argues that the petitioners should bring a regular motion of usurpation or a special suit, as established in articles 635 to 652 of the Civil Procedure Code, or an action of unconstitutionality against the rulings or decisions it believes contravene constitutional rights to the detriment of those represented.

66. The Commission points out that remedies indicated by the Paraguayan State in its arguments on admissibility are not adequate. This is the case because Paraguayan legislation provides for a special procedure[FN21] before the administrative authority,[FN22] to initiate the claim for ancestral territory or traditional habitat on the part of indigenous peoples. This special procedure was used and initiated by the leaders of the Kelyenmagategma Community on October 2, 2000, and seven years later, it still has not been resolved.

[FN21] Law 904/81 on the "Statute for Indigenous Communities" in Articles 24-27[21] sets forth the procedure for the settlement of indigenous communities on privately owned lands.

[FN22] See Inter-American Court of Human Rights, Case of the Yakye Axa Indigenous Community. Judgment of June 17, 2005. Series C, and Case of the Sawhoyamaya Indigenous Community. Judgment of March 29, 2006.

67. Therefore, the exception set forth in article 46(2)(c) of the Convention applies because the actions of the state authorities in the administrative procedure of claim of the lands have not been compatible with the principal of reasonable deadline.[FN23]

[FN23] See Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community. Judgment of March 29, 2006, para. 98.

68. Now, with regard to the alleged illegal evictions, attacks, threats, destruction of homes, school, and goods and chattel, theft of animals, fencing of the settlement area, and destruction of the traditional habitat to the detriment of the alleged victims and the prohibition invoked against the legal representatives of the Kelyenmagategma Community from communicating with those they represent, the record shows that there have been applications for a remedy for amparo and a generic habeas corpus, complaints to the Office of the Ministerio Público, and requests for the precautionary measure to prevent changes and to include an annotation of pending litigation.

69. With regard to this point, the Paraguayan State argues that the events that took place should be handled through domestic complaints to the appropriate bodies and that, in all cases, the petitioners should wait until these bodies make a decision regarding these events, so that they can obtain appropriate reparations.

70. In this regard, the Commission points out that Article 134 of the Political Constitution of Paraguay on the writ of amparo, states the following:

Any person, who through manifestly illegal commission or omission would be considered seriously injured or in imminent danger of being so in terms of the rights or guarantees enshrined in this Constitution or in the law, and, if the matter could not be resolved through ordinary channels due to its urgency, can apply for protection before the appropriate magistrate. The procedure shall be brief, summary, free, and class action for cases set forth in law.

The magistrate shall have the power to safeguard the right or guarantee or to immediately reestablish the infringed-upon legal situation.

If it is an electoral matter or related to political organizations, electoral justice shall prevail.

The remedy cannot be part of the processing of legal proceedings, used against judicial bodies, or be part of the formation, sanction, or promulgation of laws.

The law shall regulate the respective procedure. The rulings made in the remedy shall not be final.

71. In addition, article 133 of the Paraguayan Constitution concerning habeas corpus states:

This guarantee can be filed by the affected party himself or through an intermediary without the need for sworn power of attorney and before any first instance court judge of the respective judicial district. The habeas corpus can be:

1. Preventative: any person in imminent danger of being illegally deprived of his physical freedom may request an examination of the legality of the circumstances, which in the view of the party affected, threaten his freedom, as well as an order to cease said restrictions.

2. Reparative: all people who have been illegally deprived of their liberty can request rectification of the circumstances of the case. The magistrate shall order the appearance of the detainee, with a report from the public or private agent who detained him, within twenty-four hours of lodging the petition. If the person summoned does not appear, Judge shall go to the site where the person is held and in said place shall judge the merits and shall grant his immediate release, the same as if the detainee had appeared and as if a report had been submitted. If there is

no legal foundation for the deprivation of liberty, he shall be released immediately; if there is a written order from a judicial authority, the justification of the release shall be sent to whomever ordered the detention.

3. General: a suit can be brought to rectify circumstances, which are not included in the two foregoing cases and which restrict liberty or threaten personal safety. Likewise, this remedy could be applied in cases of physical, psychological, or moral violence that aggravate the conditions of people legally deprived of their liberty.

The law shall regulate the various modalities of habeas corpus, which shall be applicable even during states of emergency. The procedure shall be brief, summary, free, and class action for cases set forth in law

72. Based on the information provided by the petitioners and by the State, the Commission observes that the alleged victims, all members of the Kelyenmagategma Community, have been subjected for years to a series of attacks, violence, threats, privations, and prohibitions that place them in an extremely vulnerable situation, particularly the children and the elderly. They are also continually faced with the permanent imminence of being illegally evicted from the land they have inhabited since ancestral times. The situation described, as per documents provided by the State, has been well known by the State.

73. Within this complex context, the Commission considers that filing on November 25, 2003 for the amparo remedy by the Tierraviva Organization; filing on August 30, 2004 for the generic habeas corpus by CODEHUPY and the Tierraviva Organization; the applications for precautionary measures to prevent changes and to include an annotation of pending litigation submitted to the appropriate courts, and the complaints brought by members of the Community to the Office of the Ministerio Público, have been sufficient for the authorities to have due knowledge of the situation under complaint and to act in response. However, they have been ineffective because to date the authorities have not resolved the problem under complaint, thereby fulfilling the exceptions set forth in article 46(2)(b) and (c) of the Convention.

74. Based on the foregoing, given the circumstances of this case, the Commission deems it appropriate to apply the exceptions established in Article 46(2)(b) and (c) of the American Convention.

2. Time period for lodging a petition

75. Under Article 46(1)(b) of the American Convention, petitions, to be admissible, must be lodged within six months of notification to the allegedly injured party of the judgment exhausting domestic remedies. Article 32 of the Commission's Rules of Procedure establishes: "In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

76. In the instant case, the Commission stated supra its finding that the exception to the prior exhaustion requirement applies. In this respect, the Commission considers that the petition

submitted to the IACHR by the petitioners on October 1, 2004 was filed within a reasonable time.

3. Duplication of procedures

77. Articles 46(1)(c) and 47(d) of the Convention establish as admissibility requirements that the subject matter of the petition or communication not be pending before another international proceeding for settlement, and that it not be substantially the same as a petition already examined by the Commission or any other international body.

78. It does not appear from the record that the subject matter of the petition is pending any other international proceeding for settlement nor that it reproduces a petition already examined by the Commission or any other international body.

79. Accordingly, the Commission finds that the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the facts alleged

80. In determining admissibility, the Commission should decide if the facts alleged could constitute a violation of rights, as stipulated in article 47(b) of the American Convention, or if the petition is “manifestly groundless” or is “obviously out of order” as per subparagraph (c) of that same article. The standard of appreciation of these rules is different from that required for deciding on the merits of the complaint. The IACHR must undertake a prima facie evaluation to examine whether the facts alleged in the complaint lay a foundation for the apparent or potential violation of a right guaranteed by the Convention, and not to establish the existence of a violation. This examination is a summary analysis that does not imply pre-judging the merits in any way.

81. In light of these comments, the Commission notes that the facts alleged by the petitioners could characterize violations of the rights protected in articles 4,[FN24] 5,[FN25] 8(1), 11(2), 21, and 25 of the American Convention in connection with Article 1.1 of the same treaty.

[FN24] See Inter-American Court of Human Rights, Case of the Yakyé Axa Indigenous Community. Judgment of June 17, 2005. Series C and the Case of the Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006.

[FN25] See Inter-American Court of Human Rights, Case of the Yakyé Axa Indigenous Community. Judgment of June 17, 2005. Series C and the Case of the Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006.

82. In addition, taking into account the documents provided by the parties, the allegations of the petitioners, and recent jurisprudence of the Inter-American Court on the rights of indigenous peoples, the Commission finds that given the situation that might be affecting members of the Kelyenmagategma Community, particularly the children, the facts reported could constitute a

violation of Articles 2, 17, 19 and 22 of the American Convention on Human Rights and Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, "Protocol of San Salvador." [FN26] Based on the foregoing, the Commission shall apply the principle of *iure novit curia* to determine during the merits stage whether Articles 2, 17, 19 and 22 of the Convention have been violated in terms of the general obligation to respect and guarantee the rights set forth in Article 1(1) of the American Convention and Article 13 of the Protocol of San Salvador because these articles are implied in the description of the facts of the complaint, even though they have not been explicitly mentioned by the petitioners.

[FN26] Ratified by Paraguay on May 28, 1997.

83. Based on the foregoing, the Commission deems the requirements set forth in Article 47(b) and (c) of the American Convention met.

V. CONCLUSIONS

84. The Commission finds itself competent to hear the complaint presented by the petitioners and that the petition is admissible under Articles 46 and 47 of the Convention as regards the alleged violation of Articles 4, 5, 8(1), 11, 21, and 25 of the American Convention in connection with Article 1(1) of the Convention. Also, in application of the principle *iure novit curia*, the Commission finds the petition admissible as regards the alleged violation of Articles 2, 17, 19, and 22 of the Convention, in relation to Article 1(1) of the Convention, and as regards the alleged violation of Article 13 of the Protocol of San Salvador.

85. Based on the foregoing arguments of fact and law, and without pre-judging on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare admissible the complaint lodged by the petitioners alleging violations of Articles 2, 4, 5, 8(1), 11, 17, 19, 21, 22 and 25 of the American Convention in connection with Article 1(1) of the same Convention and Article 13 of the Protocol of San Salvador, to the detriment of the Kelyenmagategma Indigenous Community of the Enxet-Lengua People and its members.
2. To notify the Paraguayan State and the petitioners of this decision.
3. To continue analyzing the merits of the case.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 24th day of the month of July, 2007.
Signed: Florentín Meléndez, President; Paolo Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Sir Clare Roberts, and Freddy Gutiérrez, Commissioners.