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| Institution: | Inter-American Court of Human Rights |
| Title/Style of Cause: | Sawhoyamaxa Indigenous Community v. Paraguay |
| Doc. Type: | Judgement (Merits, Reparations and Costs) |
| Decided by: | President: Sergio Garcia-Ramirez;<br>Vice President: Alirio Abreu-Burelli;<br>Judges: Oliver Jackman; Antonio A. Cancado Trindade; Cecilia Medina-Quiroga; Manuel E. Ventura-Robles; Diego Garcia-Sayan |
| Dated: | 29 March 2006 |
| Citation: | Sawhoyamaxa v. Paraguay, Judgement (IACtHR, 29 Mar. 2006) |
| Represented by: | APPLICANT: TierraViva |



In the Case of Sawhoyamaxa Indigenous Community,

the Inter-American Court of Human Rights (hereinafter, "the Court", "the Inter-American Court" or "the Tribunal"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), Article 3(1) of the Statue of the Court and Articles 29, 31, 56, 57 and 58 of the Court's Rules of Procedure (hereinafter, "the Rules of Procedure"), delivers the present judgment.

## I. INTRODUCTION OF THE CASE

1. On February 3, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application with the Inter-American Court against the State of Paraguay (hereinafter "the State" or "Paraguay"), originating in petition No. 0322/2001, received by the Secretariat of the Commission on May 15, 2001.

2. The Commission filed the application pursuant to Article 61 of the American Convention, in order that the Court should decide whether Paraguay had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment), 21 (Right to Property), 8 (Right to A Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, with relation to the obligations set forth in Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Adopt Domestic Law Measures) thereof, to the detriment of the Sawhoyamaxa Indigenous Community of the Enxet-Lengua people (hereinafter, the "Sawhoyamaxa Indigenous Community", the "Sawhoyamaxa Community", the "Indigenous Community" or the "Community", irrespectively) and its members (hereinafter, "the members of the Community"). The Community alleged that the State has not ensured the ancestral property right of the Sawhoyamaxa Community and its members, inasmuch as their claim for territorial rights is pending since 1991 and it has not been satisfactorily resolved to date. As stated in the Commission's application, this has barred the

Community and its members from title to and possession of their lands, and has implied keeping it in a state of nutritional, medical and health vulnerability, which constantly threatens their survival and integrity.

3. Likewise, as a result of the foregoing, the Commission requested the Court to order the State to adopt certain reparation measures and reimburse legal costs.

## II. COMPETENCE

4. The Inter-American Court has competence over this case under Article 62(3) of the American Convention, since Paraguay has been a State Party to the Convention since August 24, 1989 and recognized the Court's contentious Competence on March 26, 1993.

## III. PROCEEDING BEFORE THE COMMISSION

5. On May 15, 2001, the non-governmental organization TierraViva a los Pueblos Indígenas del Chaco (hereinafter "TierraViva") submitted a petition to the Commission regarding alleged violation by Paraguay of rights set forth in Articles 21, 8(1) and 25 of the American Convention in connection with the obligations established in Articles 1(1) and 2 thereof, to the detriment of the members of the Sawhoyamaxa Community.

6. On June 7, 2001, the Inter-American Commission forwarded the relevant parts of the petition to the State and gave it two months to submit "an answer to the petition."

7. On February 20, 2003, during its 117th Regular Session, the Commission approved Admissibility Report No. 12/03, declaring the petition admissible.

8. On October 19, 2004, during its 121st Regular Session, the Commission approved Report on the Merits No. 73/04, pursuant to Article 50 of the Convention. The Commission's report made the following recommendations to Paraguay:

1. To promptly adopt any such measures as may be necessary to enforce the right to property and possession of the ancestral territory of the Sawhoyamaxa Indigenous Community of the Enxet-Lengua people and its members, specifically to delimit, demarcate and convey them title to their lands pursuant to their customary law, values, usage and customs, and to guarantee the members of the Community the exercise of their traditional subsistence activities.
2. To adopt any such measures as may be necessary to cure the state of nutritional, medical and health emergency in which the Community is, such as the enforcement of Emergency Executive Order No. 3789/99 of [...] June 23, 1999.
3. To adopt any such measures as may be necessary to protect the habitat claimed by the Indigenous Community while delimitation, demarcation and conveyance of title to the ancestral territory in favor of the Community be still pending, specifically measures aimed at preventing immediate and irreparable harm from activities by third parties.
4. To establish an effective and simple court remedy to protect the right of the Indigenous Peoples of Paraguay to claim and access their traditional territories.

5. To publicly acknowledge international responsibility for the human rights violations determined by the [Commission] in this report. In particular, to conduct a public ceremony, with the participation of relevant Government authorities, the members of the Sawhoyamaxa Community and its representatives, to acknowledge the State's international responsibility for the events in the instant case, and to publish, within two months as from notification of this decision, at least once, in the Official Gazette and in another national-circulation daily, the section entitled "Facts" in Chapter IV (A), [and] the conclusions and recommendations of the [...] report.
6. To make individual and communal reparations of the consequences of the breach of the rights mentioned. The reparations to be paid by the Paraguayan State must be calculated pursuant to international standards, and must be adequate to compensate pecuniary and non-pecuniary damages caused by the human rights violations addressed by this report. Payment of such reparation shall not depend upon the Sawhoyamaxa Community and its representatives filing any court action provided for by Paraguayan law. Likewise, to pay the members of the Sawhoyamaxa Community all expenses and legal costs incurred by them and their representatives in the domestic proceedings and in the international proceeding before the Inter-American system for the protection of human rights. The manner and amount of the reparation must be agreed upon with the members of the Sawhoyamaxa Community and its representatives pursuant to the customary law, values, usage and customs of the Indigenous Community.
7. To adopt any such measures as may be necessary to prevent similar events from happening in the future, in accordance with the duty to prevent and safeguard the fundamental rights recognized in the American Convention.

9. On January 31, 2005, after analyzing the answer by the State to the above recommendations, the Commission decided to refer this case to the Inter-American Court.

## IV. PROCEEDING BEFORE THE COURT

10. On February 3, 2005, the Inter-American Commission filed an application with the Court. The appendixes thereto were received on February 10, 2005. Pursuant to Article 33 of the Rules of Procedure, the Commission informed that the alleged victims would be represented by TierraViva (hereinafter, "the representatives").

11. On March 18, 2005, after the preliminary examination of the application was conducted by the President of the Court (hereinafter, "the President"), the Secretariat of the Court (hereinafter, "the Secretariat") served the State with a copy of the application and its appendixes, and it informed it of the time limit within which it could file an answer and appoint and ad hoc judge to hear the case. On the same day, pursuant to Article 35(1)(d) and (e) of the Rules of Procedure, the Secretariat served the representatives with notice of the application, informing them that they should submit their brief of requests, arguments and evidence (hereinafter, the "brief of requests and arguments") within two months.

12. On May 17, 2005, Paraguay requested an extension of the term granted to appoint the ad hoc judge and the Agent for the State. The State grounded its request on alleged "difficulties in the consulting process" for the appointment of the judge. On May 19, 2005, the State sent a notice reaffirming its request for extension alleging that it had unwillingly commited a mistake in

that “the original request for extension mistakingly stated the name of a case that has not yet been submitted to the Court[,] while the request should have made reference to the Sawhoyamaxa case. Likewise, it has not been possible to effect the appointment owing to difficulties in the process of consulting." Finally, the State requested that “should the […] Court grant the requested extension,” it accept the appointment of Mr. Oscar Martínez-Pérez as Agent and of Mr. Ramón Fogel as ad hoc Judge.

13. On May 26, 2005, the Secretariat informed the State that the proposed appointment of Mr. Ramón Fogel as ad hoc Judge would be submitted to the consideration of the full Court, to the pertinet effects.

14. On May 18, 2005, the representatives filed their brief of requests and arguments. The appendixes were received by the Secretariat on May 23, 2005.

15. On June 15, 2005, the Secretariat informed the State that, in accordance with Articles 10(4) of the Court’s Statute and 18(3) of the Rules of Procedure, the Court decided to refuse Mr. Ramón Fogel’s appointment as ad hoc Judge in the instant case, as it was submitted after the term the State had for doing so had expired (supra para. 12).

16. On July 13, 2005, the State filed its answer to the application and comments on the brief of requests and arguments (hereinafter, “answer to the application”). The appendixes were received by the Secretariat on August 4, 2005.

17. On September 29, 2005, the Secretariat informed the parties that after analyzing the main briefs submitted by the Commission, the representatives and the State, the full Court deemed that it was not necessary to convene a public hearing in the instant case. Moreover, the Secretariat asked the Commission, the representatives and the State, following orders of the President, to furnish a final list of the witnesses and expert witnesses proposed by each of them.

18. On December 21, 2005, the President issued an Order whereby it deemed it convenient to receive in the form of affidavits, the testimonies of Carlos Marecos-Aponte, Leonardo González, Gladys Benítez, Mariana Ayala and Elsa Ayala, who were proposed by the Commission and the representatives; the testimony of Martín Sanneman, proposed by the representatives and the testimony of Oscar Centurión, proposed by the State, as well as the expert reports of José Marcelo Brunstein and Fulgencio Pablo Balmaceda-Rodríguez, who were proposed by the Commission and the representatives; the expert report of Andrew Paul Leake, proposed by the representatives; and the expert report of Augusto Fogel, proposed by the State. Likewise, the President ordered that the expert reports prepared by José Alterto Braunstein, Enrique Castillo, José Antonio Aylwin Oyarzún, Bartomeu Meliá i Lliteres, Bernardo Jacquet and César Escobar-Catebecke for the Case of the Indigenous Community Yakye Axa against Paraguay [FN1] be added to the record in the instant case. Likewise, the President granted the Commission, the representatives and the State a non-postponable term of ten days from the receipt of the aforementioned affidavits to submit the comments they might deem appropriate. In such Order, the President likewise informed the parties that they had a non-postponable term expiring on February 16, 2006, to submit their final written arguments concerning the merits and possibly reparations and legal costs.

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[FN1] Case of the Indigenous Community Yakye Axa, Judgment of June 17, 2005. Series C No. 125.

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19. On January 19, 2006, Mr. Andrew Paul Leake forwarded his expert report in the form of an affidavit, in compliance with the Order of the President of December 21, 2005 (supra para. 18). The report was filed in English. On January 20, 2006, the representatives submitted the Spanish translation of the expert opinion by Andrew Paul Leake, which was rendered by affidavit by Tito Ulises Lahaye-Díaz on January 25, 2006.

20. On January 18, 2006, the State submitted the affidavits by witness Oscar Centurión and expert witness Augusto Fogel, attested by a notary public. Likewise, on January 19, 2006, the representatives submitted the notarized expert opinions of José Marcelo Brustein and Pablo Balmaceda-Rodríguez, and the notarized testimonies of Carlos Marecos-Aponte, Leonardo González, Gladys Benítez, Mariana Ayala and Elsa Ayala, in compliance with the President's Order of December 21, 2005 (supra para. 18). Likewise, the representatives requested an extension of the term for submittting Martín Sanneman's testimony, and made comments on the affidavits by Bernardo Jacquet and César Escobar-Catebecke, added to the body of evidence in the instant case under the Order of the President of December 21, 2005 (supra. para. 18). On January 20, 2006, the Inter-American Commission submitted a communication, whereby it endorsed the affidavits of witnesses Carlos Marecos-Aponte, Leonardo González, Gladys Benítez, Mariana Ayala and Elsa Ayala, and expert witnesses Pablo Balmaceda-Rodríguez and José Marcelo Brunstein, and submitted its comments on the expert opinions by Bernardo Jackquet and César Escobar-Catebecke.

21. On January 20, 2006, following instructions given by the President and considering the extraordinary nature of the case brought by the representatives, the Secretariat granted a non-postponable delay ending on February 6, 2006 for submitting Martín Sanneman's affidavit (supra para. 18). Finally, on February 8, 2006, the representatives submitted Martín Sanneman's affidavit.

22. On January 20, 2006, following instructions given by the President, the Secretariat required the State and the representatives, pursuant to Article 45(2) of the Rules of Procedure, to submit, as evidence to facilitate adjudication of the case, (a) birth and death certificates, autopsy records and any other relevant documents that may show the causes of the alleged deaths of the members of the Sawhoyamaxa Indigenous Community mentioned by the representatives of the alleged victims, to wit: "[NN] Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González, NN González-Aponte, Wilfrido González, Teresio González, NN Yegros, Antonio Alvarenga, Jenny Toledo, Guido Ruiz-Diaz, (NN) González, Luis Torres-Chávez, Derlis Armando Torres, (NN) Torres, Lucía Aponte, Marcos Chávez, Juan Ramón González, Pedro Fernández, Eusebio Ayala, Francisca Britez [and] Diego Andrés Ayala", and (b) the medical histories, certificates of medical care, or any other document evidencing whether the above-mentioned individuals received any kind of medical care in any field of specialization, at any hospital, clinic, health care center or any health care facility, within six months prior to the

alleged deaths. Likewise, following instructions given by the President, the Secretariat required the State to submit, as evidence to facilitate adjudication of the case, a detailed report on the alleged medical and food assistance given by any governmental entity to the members of the Sawhoyamaxa Indigenous Community from the effective date of Executive Order No. 3,789 of June 23, 1999 to date. Finally, the representatives were required to complete the data of the census of the Sawhoyamaxa Indigenous Community in Appendix No. 7 to the application filed by the Inter-American Commission in the instant case, for in such census, some members of the Community are identified merely as "child" or "other."

23. On February 6, 2006, the representatives submitted their comments on the affidavits by the witness Oscar Centurión and by the expert witness Augusto Fogel (supra para. 20). On the other hand, the Commission informed that it had no comments on such affidavits. On February 10, 2006, the State submitted comments on the affidavit by Elsa Ayala and the expert opinion by Pablo Balmaceda-Rodríguez, rendered in the form of affidavit. The State added to said note Order No. 280/92 of April 15, 1992, "establishing that, in addition to the medical care provided to the indigenous people at no cost, they are exempted from paying for examinations and other procedures carried out at the Itagua Hospital", and Circular S.G No. 1/95 on "comprehensive, attentive and free health care provided to indigenous groups" issued by the Public Health and Social Welfare Ministry on February 24, 1995. On February 13, 2006, the State informed that it had no comments on the affidavit by Andrew Paul Leake or its Spanish translation (supra para. 19).

24. On February 16, 2006, the representatives filed documents concerning the request of evidence to facilitate adjudication of the case (supra para. 22). In this regard, the representatives argued that "only exceptionally have the deaths been entered in any public record," so they submitted an affidavit by Sawhoyamaxa Community leader Carlos Marecos stating "the dates of the death of each of the [alleged] victims and their parentage or kinship."

25. On February 16, the Inter-American Commission, the representatives and the State respectively submitted their final written arguments on the merits and possibly reparations and legal costs. On February 20, 2006, the representatives submitted appendixes to their final written arguments.

26. On February 24, 2006, after a term extension, the State submitted part of the evidence to facilitate adjudication of the case required by the Court (supra para. 22). The State made several precisions in this regard. As regards to the request for birth and death certificates and autopsy records or other documents that may show the causes of the alleged deaths of the members of the Community, the State stated that, after issuing orders to the Dirección General del Registro Civil (General Office of Vital Records) and Secciones de Registro Civil (Vital Records Departments) No. 24 and 38 of the INDI, "no birth entries have been found and thus it has not been possible to determine the existence of the allegedly dead individuals." The State also informed that there are no medical histories or evidence of medical care to the above-mentioned individuals in any facilities maintained by the Public Health and Social Welfare Ministry or in any local health center, and that more data were required to "better identify the individuals" to enable the search. Finally, the State submitted information about "health care, food and water [...] provided [...] by

the Public Health and Social Welfare Ministry, the National Emergency Agency, the Concepción Council, the Presidente Hayes local government and the INDI."

27. On March 11, 2006, the representatives submitted a census of the members of the Sawhoyamaxa Indigenous Community updated as of February 2006, in compliance with the request effected by the Secretariat on January 20, 2006, following instructions given by the President, (supra para. 22). On March 14, 2006, the representatives filed a brief clarifying the case of two families that appear in such census of this Community, who also appeared in the prior census of the Indigenous Community Yakye Axa [FN2].

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[FN2] Case of Indigenous Community Yakye Axa, supra note 1, Exhibit A).

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28. On March 13, 2006, following instructions given by the President, the Secretariat required the State to submit the comments it might deem appropriate on the supposed new matters of fact alleged by the Comission and the representatives in their respective final written arguments, concerning the alleged death of other members of the Sawhoyamaxa Community. On March 20, 2006, the State submitted its comments and stated that the allegation of new deaths had been made “without even one document supporting the alleged deaths, which virtually rendered the mention of the existence of the new matters of fact alleged irrelevant” (supra para. 25).

V. Evidence

29. Before examining the evidence tendered, the Court will state, in the light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure, a number of general points, most of which arise from precedents established in the Court itself, and applicable to the instant case.

30. Evidence is governed by the adversary principle, which embodies due respect for the parties’ right to defense. This principle underlies Article 44 of the Rules of Procedure, inasmuch as it refers to the time when evidence must be tendered, so that equality among the parties may prevail. [FN3]

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[FN3] Cf. Case of Acevedo-Jaramillo et al. Judgment of February 7, 2006. Series C No. 144, para. 183; Case of López-Álvarez. Judgment of February 1, 2006. Series C No. 141, para. 36; and Case of Pueblo Bello Massacre. Judgment of January 31, 2006. Series C No. 140, para. 61.

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31. In accordance with Court practice, at the beginning of each procedural stage, the parties must state, at the first opportunity granted them to do so in writing, the evidence they will tender. Furthermore, the Court or the President of the Court, practicing the discretionary authority under Article 45 of the Rules of Procedure, may ask the parties to supply additional items, as evidence

to facilitate adjudication of the case, without thereby affording a fresh opportunity to expand or complement their arguments, unless by express leave of the Court [FN4].

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[FN4] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 184; Case of Pueblo Bello Massacre; supra note 3, para. 62; and Case of García-Asto and Ramírez-Rojas. Judgment of November 25, 2005. Series C No. 137, para. 83.

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32. The Court has also pointed out before that, in taking and assessing evidence, the procedures observed before this Court are not subject to the same formalities as those required in domestic judicial actions and that admission of items into the body of evidence must be effected paying special attention to the circumstances of the specific case, and bearing in mind the limits set by respect for legal certainty and for the procedural equality of the parties. The Court has further taken into account international precedent, according to which international courts are deemed to have authority to appraise and assess evidence based on the rules of a reasonable credit and weight analysis, and has always avoided rigidly setting the quantum of evidence required to reach a decision. This criterion is specially valid with respect to international human rights courts, which enjoy ample authority, when determining the international responsibility of a State for the violation of human rights, to assess the evidence submitted to them concerning the pertinent facts, in accordance with the rules of logic and based on experience [FN5].

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[FN5] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 185; Case of López-Alvarez, supra note 3, para. 37; and Case of Pueblo Bello Massacre, supra note 3, para 63.

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33. Based on the above, the Court will now examine and assess the body of evidence in the instant case within the legal framework in hand. In doing so, the Court will follow the rules of reasonable credit and weight analysis, within the applicable legal framework.

A) DOCUMENTARY EVIDENCE

34. The documentary evidence submitted by the Commission, the representatives and the State includes witness statements and written expert opinions sworn before a notary public in accordance with the Order of the President of December 21, 2005 (supra para. 18). Said witness statements and expert opinions are summarized as follows:

a. Statement by Mr. Carlos Marecos-Aponte, alleged victim and leader of the Sawhoyamaxa Community

He has been the leader of the Sawhoyamaxa Indigenous Community for more than fifteen years. Like his parents and grandparents, he is a “criollo, born and raised in the area claimed” by the Community.
The settlements “Santa Elisa— “to which he belongs— and “KM. 16” are the Community's most populated ones, and have been living on a roadside for more than eight years. Other members of

the Community are living in several other estates in the surrounding area, such as: Ledesma, Maroma, Naranjito, Diana, San Felipe, Loma Porá and Santa Elisa Bray. The members of the Sawhoyamaxa Community "are not by the road because they like to, but because they are near the area they are claiming," which they cannot "enter without permission," as "they say those lands are private property." People who are now living in the "Santa Elisa" village come from various estates, mainly Maroma, Ledesma, Naranjito and Loma Porá. On these estates, "families [...] were spread all over, without a safe place to live."

"The conflict over the lands has been going on ever since [he] can remember; [they] used to live in other people's estates as Paraguayan workers, but [they] felt [they] needed to live on [their] own land [and] have an education." Likewise, he stated that the members of his Community have always had problems as regards to documentation, for example, some members of the Community have never had any kind of identification. Generally, members of the Community have to go to Asunción to apply for a certificate of birth first and then an identity card, but owing to the high cost of transportation, it is not easy for them to travel. Deaths are not recorded either; the witness recalls that formerly the Anglican Church used to "give [them] a little piece of paper documenting the demise, but it was of no legal value."

To start claiming for their lands, the members of the Community "would gather and talk about how their ancestors used to live, and compared their ancestors' way of life with their own reality." They realized they were being displaced, and that many of them were living on the estates without education or medicines. It was then that they joined efforts to demand "a place to live" from the Government. Thus, "[they] made the rounds of the estates visiting [their] people, talking about how, in time, [they] would be able to recover [their] lands, [their] language, [their] health, [their] education and improve their standard of living" in general.

Initially, they stated their claim with the aid of an anthropologist from the Anglican Church. In 1991, the leaders of the Community filed their claim with the Instituto de Bienestar Rural [Rural Welfare Institute]. Likewise, the Instituto Paraguayo del Indígena (INDI) [Paraguayan Institute for Indigenous Affairs] also intervened in the case, and the first steps were taken. Many procedures were followed before different institutions. During those early years, the INDI was asked to allow for a budget item to purchase lands. In turn, the INDI asked Congress for a budget increase for such purpose. However, its budget for the purchase of lands was cut some time later, worsening the situation.

They also requested Congress to expropriate the lands claimed for the Community. The Congressional Human Rights and Indigenous Affairs Committee ruled against the request for condemnation, and when they learnt that the full house would reject the request, they withdrew it. The members of the Community felt that the congressmen did not care about the issue. That was very sad.

The President of the INDI offered them alternative lands, without specifying which; his offer was not serious, and he never showed any document. Moreover, the members of the Community felt fully identified with the Sawhoyamaxa lands and they could not barter "just like that" the lands where their parents and grandparents had lived. According to the witness, the lands claimed by the members of the Community were used by their ancestors to hunt. They are the best ones; the only place where there are still rainforests and other essential conditions for their survival, such as water. The lands claimed are of great significance for the members of the Community because they used to belong to them, and they still show traces of their grandparents. What is more, many of their ancestors are buried there.

In 1994, the members of the Community succeeded in getting a court to issue an injunction, but it was not abided by, and 1,200 hectares of forest were lost. Only a year later was forest cutting stopped.
In 1999, the President of Paraguay declared the Sawhoyamaxa Community in emergency state owing to their lacking lands of their own; this led them to believe that they would have Congressional support and that it would study a new project for condemnation, which was the only available way left open to them after they had exhausted all other available procedures. This was the second time they made a request for condemnation to Congress. After one year of studying the request, the Senate once again rejected it. This made the Community very sad.
The lands have been the main subject of the Community's claim, and once their claim is addressed they will be able to solve the other problems, i.e., health, education and food. The members of the Community demand huge efforts from their leader not to neglect the Community, and he must keep abreast of the developments.

b. Statement by Mr. Leonardo González, leader of the Sawhoyamaxa Indigenous Community and alleged victim

He has been the leader of the second largest village of the Community, known as "KM 16", assisting Carlos Marecos, the first leader. His responsibility is to work with about sixteen families, who champion the struggle for reclaiming their traditional lands. This village has been settling on the roadside, 392 KM down the highway running from Pozo Colorado to Concepción, for over fifteen years. The witness recalls that when he lived with his parents at the Loma Porá estate, his uncle and aunt lived on the roadside in "KM 16", and even his grandparents died there.
Several families who are members of the Community are scattered throughout the neighboring estates such as Naranjito, Diana and others. When they get their lands, all the families will be brought together again. The lands the members of the Sawhoyamaxa Community are claiming were home to their ancestors and many of the surviving old people. In the place there are "orange, grapefruit and guaba trees that were planted by his people, as well as many coconut trees, and all of that is still there."
In 1991, procedures to claim the land started, with the aid of the Anglicans, meeting and talking with the people.
Thus, the Community formally laid claim to the lands before the State, through the INDI, the Instituto de Bienestar Rural [Rural Welfare Institute] and the Congress. During all that time, the members of the Community received several visits by attorneys and congressmen. On one occasion, senator Badel Rachid-Lichi visited them, offering alternative lands, without specifying which, and without the presence of their lawyers, so the members of the Community did not consider this offer. It is a pity that, in all this time, the State has failed to provide a solution to the issue, with the Congress rejecting their request for condemnation, all of which severely affects the members of the Community.
The members of the Community are totally helpless; there are no records of births or deaths in the Community. Many of the members of the Community have no identity cards. The members of the Community are not assisted in health care centers, if they ever get to them, because they have no money or due to the lack of doctors. Many times they want to resort to their knowledge of traditional medicine, but they cannot get to the medicinal herbs because these are to be found

inside the wire-fenced estates. Faced with this, they must contemplate disease and death with resignation.

c. Statement by Ms. Gladys Benítez, alleged victim

She belongs to the Sawhoyamaxa Indigenous Community. Since long ago, the Community has been settled on the roadside, 370 kilometers down the highway running from Pozo Colorado to Concepción.

The soil of this settlement is not good for growing crops. As a result, the members of the Community normally have “no food or place to find it.” On some occasions, members of the Community go into the adjacent enclosure to gather honey and fruit. These incursions must be made “hiding from the guards [...] because if they find [them] there, they shoot at [their] heads, as it happened not long ago with a member of the Community."

The witness stated that the indigenous people live off the forest, so they cannot go for food anywhere else; for instance, she pointed out that this is the honey season, so the women of the Community have to gather as much honey as they can, even hiding. A small watercourse runs near the Community's settlement, but it does not always carry water. In the drought season, the women have to walk long distances for water.

As for health, the witness stated that the members of the Community enjoy no kind of adequate medical care. Physicians visit the community very seldom, and when they do so, they are in a rush, or they come without notice, when the people are away from the settlement. A few medicines arrive once a year. In most cases they resort to traditional medicine. Some go the the Concepción Regional Hospital, 46 KM away from the Community. To reach the hospital, they have to pay for transportation, and if they are admitted, they are given prescriptions to buy medicines at the pharmacist’s, but if they have no money they must do without them. Besides the Regional Hospital, the witness only knows the Military Hospital in Asunción. There are no sanitation facilities in the settlement either, so the children fall ill easily. When members die, they are buried alongside the road, and no document records their death; only in some rare cases do the authorities issue death certificates.

As regards to education, they have a little school, which is almost without resources. A foreigner helps them supplying pencils and notebooks. The Government of Presidente Hayes provides very little help. They have a teacher who works double shifts, but teaches only up to second grade. Lessons are taught in Guaraní and Spanish only, so they do not receive education in their own language. The old women of the Community still speak their language and try to use it to talk to their grandchildren so that their culture may not be lost.

Formerly, “when [the landowners] were not such a nuisance for [them], [they] could practice their rites and customs," but currently this is very difficult, as they live alongside the highway.

The members of the Community trust their leaders and know that they make every effort to get their land, and that they have to face ill treatment from the Paraguayan authorities and the landowners. At the time they were at the Maroma estate, they also suffered a great deal. The indigenous people worked, but they did not know how much their salary was. The witness spoke several times with the owner to tell him that he was treating them like animals but, according to her testimony, he threatened to pull down her house and to call the police. After much mistreatment, they decided to leave the estate and settle alongside the highway to claim their lands. Elderly people and children are the most severely affected by the lack of land.

d. Statement by Ms. Mariana Ayala, alleged victim

She belongs to the Sawhoyamaxa Indigenous Community. She has been living alongside the highway in the “KM 16” village for a long time.

The witness pointed out that the members of the Community cannot grow any crops or keep any cattle in the settlement, since “the area is very small, between the highway and the fence, [which] is only 50 meters wide.” [T]he men [of the Community] go hunting on private land, which formerly belonged to [them], or they seek employment in the neighboring estates as temporary farmhands. Women gather fruit and honey.”

The members of her Community live in appalling conditions; their children are at constant risk, but “[they] have not had any fatal car accidents, as it happened in Santa Elisa." However, many have died since they settled alongside the highway, as verified by doctor Pablo Balmaceda, who visited the Community on several occasions and reported it. The witness pointed out that the medical care the members of the Community receive is inadequate, for which reason they resort to traditional medicine. It is very difficult for them to go to hospital, since they lack sufficient financial means. The city of Concepción, where the nearest hospital is located, belongs to another department, so very often they cannot assist them, and tell them to go to the very distant hospital of their department, i.e., Villa Hayes. Last year, her niece fell severely ill and "while someone went for money for the bus fare, it was too late to get her to the hospital, [and she] died [on] the way there." When somebody dies at the hospital, sometimes their next of kin are extended “a piece of paper” to be submitted to the vital records registry, which for indigenous people is run by the INDI, whose offices are located in Asunción. On the other hand, no document is extended for those who die at the Community, “who are simply remain in [their] memory.”

Another one of the most frequent and stringent hardships suffered by the members of the Community is the lack of drinking water in the area, specially at times of long-running draught. The Community only has a small earth dam located approximately 1,500 meters away from the settlement, but the water it gathers is not good for drinking, as it is used by the animals in the area. On the contrary, during the rainy season, the surroundings of the houses in the village get flooded.

The lands the members of the Community are claiming have always been considered their own. The men would go hunting into those lands, which still have woods, water and forests, unlike other lands in the region, which are highly deforested. Likewise, “the Paraguayans burn the grasslands and now [they] don’t know where [...] [their] ancestors are buried."

The members of the Community in this settlement do not have an Indigenous school. There is only a school for "Paraguayans" in the area, which the children of the Community attend. This represents a problem for indigenous children, as “the Paraguayan teachers discriminate against [them] for going barefoot.” Lessons at this school are taught in Guaraní and in Spanish. This is regrettable, as in the "KM 16" settlement increasingly fewer members of the Community speak the language of their people. When they were in the Loma Porá estate, the members of the Community started to forget their language because they were living among "Paraguayans", and now that they are settled alongside a highway they have lost it much more. The members of the Community wish to recover their customs, but it is hard in the current circumstances; moreover, they need the resources of nature for that.

When the struggle for land was at its fullest, many indigenous employees were sacked from the estates, and now there are but few estate-owners who are willing to hire indigenous people on their estate.
Since her Community is settled alongside the highway, they are barred from the development programs offered by some entities, which require secured land to implement their projects.

e. Statement by Ms. Elsa Ayala, alleged victim

She belongs to the "KM 16" village of the Sawhoyamaxa Indigenous Community. Formerly, she used to live with her parents at the Loma Porá estate. Many of her next of kin died in that estate and were buried in the indigenous cemetery located there and "even now, when people [from the Community] die, [their next of kin] go into the estate to bury [them]." The people in the "KM 16" village mostly come from the Loma Porá estate, where they found it hard to live, for they were constantly threatened by the estate management for having started procedures to reclaim their land.
She cannot remember exactly when "[they] went on the highway, but [she thinks] it was quite long ago." Life is very hard in the "KM 16" village. Men go hunting, or to try and get some temporary, informal job in the nearby estates; women gather honey, and that is all they can do to make a living. There is no indigenous school in the village either, so the children have to attend a school "they share with the Paraguayans," but their relationship with the Paraguayans is very difficult, because the children are discriminated against by the teachers, and when it comes to getting some support, "the Paraguayans" always come first. The State authorities do not visit them, although they know the situation they are living in is very difficult. The Community's settlement is located near Concepción, the nearest city with a hospital. When a member of the Community falls ill, they consider taking him to that hospital, but they suffer a lot because they know that without "money" they will not assist them; furthermore, "there are no medicines for the poor, just prescriptions to buy the medicines at the pharmacist's."

f. Statement by Mr. Martín Sanneman, witness

On April 8, 1994, he traveled to Chaco, accompanied by two attorneys who had agreed to represent the Enxet indigenous peoples from that area (i.e., Lengua, Sanapaná and Angaité), the President of the INDI and the Vice-president of the Asociación de Parcialidades Indígenas (Indigenous Groups Association). His trip had a threefold purpose: (1) to investigate and verify the complaint lodged by the leaders of the Sawhoyamaxa Community concerning forest cuttings carried out by the owner of the Loma Porá estate, which forests were allegedly part of the lands they claimed, and upon which an injunctive order to let matters stand had been issued; (2) to visit the Alwátetkok indigenous village located at the Maroma estate, in order to look into the working conditions of the indigenous people in that place, who are also members of the Sawhoyamaxa indigenous community; and (3) to visit the Indigenous Community in Siete Horizontes, whose members are living alongside the Transchaco highway.
The Sawhoyamaxa community comprises over 80 families from nine villages of the Enxet-Lengua people: Massama Apxagkok (Loma Porá), Elwátetkok (Maroma), Eknennakté Yannenpeywa (Ledesma), Kello Ateg (Naranjito), Ekpawachawok (Diana), Llamaza Apak, Menduk Kwe, Yacu Kai and Kilómetro 16. On August 6, 1991, the latter requested the Instituto de Bienestar Rural [Rural Welfare Institute] to legalize a portion of their traditional lands. The

land claimed is located around Sawhoyamaxa (Santa Elisa) and it is part of the Loma Porá estate, which has an extension of approximately 61,000. The estate is divided into two holdings, owned by the companies Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) and Compañía Paraguaya de Engorde Novillos S.A.

Upon arrival at his destination, he could verify that an immense extension of woods had been deforested. Furthermore, he found approximately one hundred temporary, informal workers, who had been hired to plant grazing pastures in the deforested area.

Before arriving in the area claimed by the Community, the witness visited the Alwátétkok indigenous village, located in the Maroma estate. Prior to this, the leaders of the Sawhoyamaxa Community had denounced before Congress the working conditions of the indigenous people living in this village. At the time, the village was made up of 78 people, out of which five men and one woman worked at the estate. None of them knew what their monthly wages were. According to them, the owner paid them every Christmas. Apparently, they worked "independently", and received the following weekly provisions for free: half a kilo of locro, half a kilo of tapioca flour, half a kilo of beans, half a kilo of salt and half a kilo of yerba mate. They were also given the remains of slaughtered animals. Other provisions and clothing would be delivered to them on credit. The indigenous people did not know the prices of the items and provisions they received. According to the interviews the witness made, the employer made no social security contributions for the indigenous people, nor did he pay them the statutory year-end bonus, and made them work seven days a week, without any annual vacation leave. Moreover, the Community could not grow vegetables in the village, as there were no fences to protect the patches from the cattle. Their only means to survive was through hunting, gathering and fishing. However, the owner forbade them from hunting, although they continued hunting secretly, with the only aim of surviving. There was no school for the children and there was no health care service whatsoever. They would drink water from a large pond, and it was quite dirty.

g. Statement by Mr. Oscar Centurión, witness

He held the position of president of the Instituto Paraguayo del Indígena (Paraguayan Institute on Indigenous Affairs) from January 2002 to September 2005, so he is acquainted with the Sawhoyamaxa Indigenous Community, its leader Carlos Marecos and its legal representatives. In his capacity as President of said institution, he undertook many procedures to carry on the Instituto de Bienestar Rural [Rural Welfare Institute] proceedings concerning the land claim by the Sawhoyamaxa Community, both with the owner of the real property claimed by the Community and with the public entities having jurisdiction on the matter, in order to raise sufficient funds to acquire the property claimed. Pursuant to a resolution issued by the Instituto Paraguayo del Indígena (Paraguayan Institute on Indigenous Affairs), the owner or his legal representative was requested to sell the real property directly so it would be made over to the Community. However, the owner refused, alleging that the estate is in full production. The Community has systematically refused to accept a property other than the estate they claim, which makes the solution of this problem very hard or unlikely. Granting alternative lands to the Sawhoyamaxa Community is feasible since it is part of an ethnic group whose habitat covers the entire extension of the Presidente Hayes department. Faced with the impossibility of reaching a friendly settlement with the owner of the lands, the Instituto Paraguayo del Indígena (Paraguayan Institute on Indigenous Affairs) moved for precautionary measures to protect the rights of the indigenous people.

h. Statement by Mr. Pablo Balmaceda-Rodríguez, expert witness

He prepared a report on the medical and sanitary conditions of the members of the Sawhoyamaxa Indigenous Community during the first quarter of 2003, which was updated during the first half of January 2006, his last visit having taken place on January 7, 2006. The expert witness report is limited to the "Santa Elisa" village of the community, located 376 kilometers down the highway running from Pozo Colorado to Concepción.

For the medical study, a group was drawn by lot from the 157 inhabitants of the Community present that day and various laboratory studies were conducted on them, commensurate with the number of members in the test group. Based on these studies, it could be inferred that 22.22% of the inhabitants of this community are anemic, and 16.66% are in the lowest normal values. Moreover, it was also found that 50% of the population examined suffers from parasite infection.

Afterwards they made a round of the village, to find that the inhabitants lacked drinking water. The most reliable source of drinking water is the rainwater they gather, but it is very scarce because of inadequate storing facilities. Thus, the small earth dams located inside the fenced lands claimed by the Sawhoyamaxa Indigenous Community for their own are their main source of water, so its members are forced to break into the premises in hiding to get water for their personal use and hygiene. The water is exposed to contact with wild animals and other animals bred on the estate, and it receives the debris flushed by the rain. In November 2002, the members of the Community received a 5,000-liter fiberglass reservoir, which the tank trucks from the Centro Nacional de Emergencia [National Emergency Center] supplied with water drawn from some small earth dam or other, that is to say non-drinking water. In January 2003, they received another high-capacity fiberglass tank. One of the tanks is now broken and the other one is not used because water has not been supplied for several months.

The 24 huts comprising the Community are very precarious. They are made from karanda'y, a palm leaf they use to build the walls and roof of these dwellings because it abounds in the area. The dwellings are so precarious that when it rains they get flooded, including the overcrowded rooms. Owing to the characteristics of the soil in Chaco, water is not easily absorbed by the earth, so "all that water gathers without draining." To this, it should be added that only a few families have managed to build precarious latrines. To relieve nature, they have to cross the fences surrounding the property, and do their business in plain view of the other members of the Community. When it rains, the stagnant water covers the floor of the huts with the excrement that has been spread behind the fencing. It is needless to point out the immense risk this poses for health. In his last visit on January 7, 2006, he could verify the deterioriation of the dwellings compared to previous visits. The room they use as a school is leaning and about to collapse.

To determine the probable causes of the deaths that have ocurred in this Community, the next of kin of the deceased persons were interviewed. Seldom are these deaths recorded in any public registry.

In many of the cases of the deceased members of the Community did not receive previous medical care, and those who got to the hospital were not assisted, either because their next of kin could not buy the medicines prescribed or because the physicians determined there was nothing that could be done in their cases. Moreover, according to the next of kin of the dead people, they received humiliating treatment. Likewise, it was determined from the account of the mothers that several children died from tetanus, measles and diarrhea.

The members of the Community have lived for many years in absolute precariousness. The State is absent; there are no representatives of police, court or welfare authorities, such as health care authorities.

i. Statement by Mr. José Marcelo Brunstein-Alegre, expert witness

The territorial claims of the indigenous communities populating the Paraguayan Chaco have unleashed a conflict of interests with the current owners, who are mostly cattle farmers. The latter have resisted possible condemnations for the purpose of favoring the territorial claims stating arguments aimed at justifying the advancement of societies, openly alluding to the risk of their properties being expropriated and title to them subsequently conveyed to indigenous communities "whose way of lifes are based on hunting and gathering." They argued that to reproduce that way of life in current times would not only require an enormous amount of lands, but it would also prevent the members of indigenous communities from "evolving" and enjoying "the benefits of civilization." The other argument supposedly involves an economic consideration in that it states that the territorial claims by indigenous peoples causes severe harm both to the livestock industry and to the investment and re-investment process.

Paraguay stands out from the other countries in the region for the high proportion of population still living in rural areas. These, in turn, concentrate most of the poor population of the country. Thus, recent data suggest that Paraguay currently stands as the most unequal society in the region. Inequality is evident in the national agrarian structure reflected in the distribution of lands. Several studies have led to dramatic findings as regards to land holding in Paraguay. Cattle farming uses approximately twenty-two million hectares, while agriculture uses next to seven million hectares. The extensive production system predominating among the cattle farming establishments in Paraguay is the main cause of the faulty distribution of lands in the country. A clear example is to be found in that the cattle farming industry accounted for only 1.5% of the farming establishments in 1991, but they used almost 80% of the productive lands.

The high proportion of lands with natural pastures and forests suggests that cattle farming is by far the most important economic activity in connection with the use of productive resources in the Chaco region. In an inequality environment, it is hard to find a logical reason that justifies this land ownership structure. Firstly, the comparison of the amount of resources used by the cattle farming establishments with their contribution to the national economy is an initial indicator of how inefficient they are. Even though agriculture uses only one third of the land owned by the cattle farmers, this activity is three times as large as that of cattle farming with regard to its share in the Gross Domestic Product (GDP), and has a much larger share in total exports. A study performed in Paraguay found a clear inverse relation between land productivity and the size of the estates.

Institutional reforms facilitating the reallocation of lands would contribute to increasing farming production and reducing poverty levels. Based on the size of the cattle farming establishments in Chaco, it may be stated that cattle farming in the region is mostly extensive, with typically reduced efforts being made to maximize profits and secure a quick financial return on investment. On the other hand, the importance of cattle farming in creating employment opportunities is negligible in terms of employment "quality." If we analyze the employment conditions frequently offered to indigenous workers by the cattle farming establishments in Chaco, the treatment is absolutely reprehensible.

In spite of the legal framework recognizing and demanding respect for the rights of indigenous peoples, the State is responsible for the social exclusion, poverty and humiliation of these communities. This is largely due to the denial of the constitutional right to a territory. Thus, according to the 2002 Report on the Situation of Human Rights in Paraguay, the lands secured for indigenous peoples in the East region amount to some 66,356 hectares, and 972,256 hectares in the West region, and yet they are below the statutory minimum. According to the 2002 National Indigenous Census, to cover the minimum values set forth by statute, it is necessary to secure some 240,000 hectares in the East region and 1,200,000 hectares in the West region. The claims by indigenous peoples are not necessarily conflictive; in the case of the Presidente Hayes department, a large percentage of the lands being claimed do not affect operating productive units.

Unfair practices are followed in determining the prices and choosing the lands for allocating resources to the indigenous communities. For example, from 1996 to 1998, the Congress passed a budget allocation of about US$ 30,000,000 (thirty million U.S. dollars) to purchase lands claimed by the indigenous communities. However, as a result of the misuse of public funds and irregular practices in the claims proceedings filed by the INDI, lands that were not being claimed were purchased, and other ones were over-payed.

Among the issues restricting access of the indigenous communities to land are those concerning the legislation governing the latifundia, or large landed estates, which, in spite of introducing efficient use and environmental management standards for real property, set forth loose standards which have not contributed to its disappearance or to foster distribution and the land market. The Loma Porá estate is an example of one of the most common practices in Paraguay for concealing the real extension of lands held by a landowner. This cattle farming establishment covers 61,000 hectares in all, subdivided into different holdings as a result of the territorial claim of the Sawhoyamaxa Community, title to which is vested separately in different business organizations set up for the purpose of splitting up the estate.

j. Statement by Mr. Andrew Leake, expert witness

The general purpose of his study was to review the resources and models of land use by the indigenous people in the East region of the Paraguayan Chaco, and in this context to determine whether the extension of 14,404 hectares claimed by the members of the Sawhoyamaxa Community will allow them to maintain and develop their own sustenance. The data used for the study was obtained from archives, personal communications and published material, but the study basically relies on knowledge the witness has of the region and the indigenous population of Chaco. The depth of the analysis of the land was limited to broad categories of soil coverage, to the extent necessary for a preliminary examination. Any more detailed study will require on-site observation of the lands. The information concerning the current land use was limited to two short interviews conducted by the NGO "Tierraviva."

The settlements comprising the Sawhoyamaxa Community are located on the East edge of the Paraguayan Chaco, west of the city of Concepción. This is the area with which the Sawhoyamaxa Community has historically been associated; it is situated within the ancestral territory of the Enxet, stretching over 200 km along the right bank of Paraguay River, from the González stream in the north up to the Montelindo stream down south.

Climatic variations in the region directly affect the distribution and abundance of plants and animal species, on which the indigenous peoples have traditionally relied for their subsistence.

Historically, the indigenous peoples of the Paraguayan Chaco have provided for their basic needs by gathering plants and fruit, by fishing and by gathering honey, and occasionally through small-scale horticulture and the husbandry of farm animals. People used to have a wide range of techniques for accessing various resources. The diversity of techniques for procuring food enabled the families to respond to seasonal variations, which were, on occasion, extreme. Another key element was the ability of entire groups of families (bands) to regularly change their location, which enabled them to use resources rotationally.

Because of the structure of the Chaco geography, food resources were located apart from each other. The Enxet used to live within certain hunting grounds they established. These areas included places with permanent or semi-permanent water and the resources needed for the subsistence of the group.

Group mobility was crucial for subsistence, and it has been so for most hunter-gatherer societies worldwide. This trait gave people the flexibility needed for adjusting to the changing environment in any circumstance.

The colonization of the Paraguayan Chaco by non-indigenous people, and the imposition of activities connected with the market economy, triggered a process of progressive changes in the region such as the transfer of lands to private property. The fencing in of the fields, together with the authority of the new owners, who enjoyed the support of government officials, had the effect of restricting, and eventually stopping, residential mobility. The last hunting grounds reserves of the Enxet were fenced in at the beginning of 1940.

By the second half of 1970, it was estimated that over 70% of the people who lived in communities that had settled in private estates still hunted, fished and gathered. Paid work, either seasonal or for short terms, literally developed into a whole new subsistence method for the indigenous people. The restrictions on residential mobility meant that the indigenous people could not relocate to new hunting grounds, which led to the depletion of game in the area. The settled communities developed small-scale vegetable patches (sweet potato and tapioca were the most common crops).

The lands claimed by the Sawhoyamaxa Community lie between two wide stretches of palm-tree savannah situated to their north and south. The territory comprises a corridor joining a series of forest islands separating these two savannahs. These forests are associated to water streams running from west to east towards the Paraguay River, and includes gallery forests. The diversity of the vegetation covering it, combined with the watercourses, makes the territory an ideal habitat for a wide range of wildlife, including the pecari, frequently associated with palm-tree savannahs. Two watercourses run across the claimed lands, i.e., the Zanjita Stream, north of the Concepción–Pozo Colorado highway, and the Maroma Stream, to the south. These watercourses divide the land in three sections of equal sizes. The lands claimed offer a good assortment of the resources the indigenous people would typically use. This makes the lands an ideal place for the eventual settlement of the community.

The northern section of the land, mostly covered with palm-tree savannahs, has been used for grazing cattle since before 1990. Although it is hard to confirm by the satellite images used for this study, it is highly probable that the cattle has been feeding in the high lands covered by quebracho forests.

Likewise, these lands have been deforested since 1990 for growing new pastures, and fenced in for intensive cattle grazing. The deforested areas cover approximately 2,000 hectares, a great part of which are located within the Michi estate, to the north of the road. This measurement is not accurate and should be checked by means of an on-site inspection. From an ecological

standpoint, it is most regrettable that deforestation has done away with the integrity of the vegetation of the lands claimed.

Theoretically, the lands claimed by the Sawhoyamaxa Community satisfy almost all of the criteria upheld by the other Enxet communities in their search for lands in which to settle. These criteria are: access to the land by the indigenous people who file their claim, access roads, economic potential, suitability of the land for crops and cattle, safe water sources, location within the areas traditionally used by the group, and possibility of hunting. Moreover, its location is ideal, as it would enable the indigenous people to reach the city of Concepción and other urban centers.

The 400 individuals comprising the Community are currently spread throughout several residence locations. It is unlikely that the 14,404 hectares claimed by the Sawhoyamaxa Community be sufficient, both in quality and in extension, to home the reunited people and enable them to procure their subsistence from activities carried out on those lands.

Land should be seen as an element enabling indigenous families to enhance and develop their current subsistence strategies according to their own priorities. This requires a detailed understanding of their landholding practices and subsistence methods, and any imposition concerning the use of lands by external authorities will constitute a violation of the indigenous people's sovereignty and self-determination. Following this approach, it would be possible to conclude that the lands claimed by the Sawhoyamaxa Community are fit to provide the people with a safe base wherefrom they can (a) continue with their current subsistence activities, guaranteeing their physical survival in the short and mid term; (b) develop alternative, safer activities enabling them to survive in the long term, which they currently cannot carry out owing to their extreme physical vulnerability and their state of economic poverty.

k. Expert Opinion of Mr. Augusto Fogel Pedrozo, expert witness

The expert witness referred to "the most relevant aspects" of the legal framework in effect in Paraguay which is applicable to the instant case. Thus, he expressly referred to the provisions contained in the National Constitution, to ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, to Law No. 904/81 on the Status of Indigenous Communities), as well as to the Criminal Code, the Code of Criminal Procedure, the legislation on environmental and judicial matters, ministerial resolutions, and resolutions issued by the Office of the Attorney General.

The Executive Order containing the regulations for enforcing Law No. 904/81 on the Status of Indigenous Communities is still pending, but several amendments have been made thereto, among them Law No. 2199/03 which dissolved the Junta Consultiva (Advisory Board) and the Consejo Directivo (Governing Board) of the Instituto Paraguayo del Indígena (Paraguayan Institute on Indigenous Affairs), which is now under the control of a President appointed by the Executive, as well as Law No. 919/96, which amended and extended Articles 30, 31, 62, 63 (d) and 71 of Law No. 904/81 on the Status of Indigenous Communities. On the other hand, on November 10, 2005 the National Congress of Paraguay passed Bill No. 2922/2005 on the Status of Indigenous Peoples and Communities, which would supersede Law No. 904/81 on the Status of Indigenous Communities. Several Articles of said bill were challenged by the Executive, whereby it was returned to Congress, which shall finally resolve after the legislative recess.

The expert witness stated that the Judiciary in Paraguay does not include specific courts for agricultural matters, wherefore land management is under the administrative control of the

Instituto de Bienestar Rural (Institute of Rural Welfare) (which at present is the Instituto de Desarrollo Rural y de la Tierra –INDERT (Institute for Rural Development and Land Issues) a government agency which distributes lands and settles conflicts in the first instance, and whose decisions can be appealed before the Tribunal de Cuentas (Government Auditing Office).
The expert witness concluded that the indigenous legislation of Paraguay, on the whole, may be considered to be favorable to the interests of the indigenous peoples. The Paraguayan legal system recognizes the special way indigenous peoples relate to the lands and territories they occupy or use in any way, and establishes their right to ownership and possession of the lands they traditionally occupy. In sum, it is possible to say that, Paraguay has a constitutional and legal framework which is quite advanced and that what is missing is the effective promotion and enforcement of the laws which protect indigenous peoples in the context of a national society that is still quite racist. The main weakness of the legislation lies in the ineffectual scope of the procedure; some provisions are merely declaratory and the operational instances provided for in the legislation do not have the authority or the power to fully enforce the provisions thereof. Failure to comply with the law is not punished, and therefore, it is enforced only partially or at will by the individuals who are bound thereby. In order to render constitutional and legal provisions effective, Paraguay must create an effective mechanism to claim the ancestral lands, whereby the right to property of the indigenous communities may be enforced, pursuant to the American Convention.

B) EVIDENCE ASSESSMENT

35. In this section the Court shall rule on the assessment of the evidence tendered to the Tribunal, regarding both the formal admissibility standards applicable thereto and their material value relating the facts in the instant case.

36. In the instant case, as in others [FN6], the Court recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural stage, which have neither been disputed nor challenged, and whose authenticity has not been questioned.

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[FN6] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 189; Case of López-Alvarez, supra note 3, para. 41, and Case of Pueblo Bello Massacre, supra note 3, para. 71.

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37. As to the sworn statements which have been rendered before a public official whose acts command full faith and credit (affidavits) by Carlos Marecos-Aponte, Leonardo González, Gladys Benítez, Elsa Ayala, and Mariana Ayala, alleged victims in the instant case (supra para. 34), the Court admits them inasmuch as they are in accordance with the object thereof, as set forth in the Order of the President issued on December 21, 2005 (supra para. 18). The Court has considered that the statements given by the alleged victims cannot be assessed separately for they have an interest in the outcome of the instant case, and therefore, must be assessed as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis. [FN7] Regarding both the merits of the case and reparations, the statements given by the alleged victims and their next of kin may provide useful information on the alleged violations and the consequences thereof. [FN8]

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[FN7] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 203; Case of López-Álvarez, supra note 3, para. 50, and Case of Pueblo Bello Massacre, supra note 3, para. 73.
[FN8] Cf. Case of Gutiérrez-Soler. Judgment of September 12, 2005. Series C No. 132, para. 45; Case of YATAMA. Judgment of June 23, 2005. Series C No. 127, para. 116, and Case of the Indigenous Community Yakye Axa, supra note 1, para. 43.

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38. Likewise, the Court notes that the State challenged the statement given before a public official whose acts command full faith and credit (affidavit) by Ms. Elsa Ayala and by "the other members of the Sawhoyamaxa [C]ommunity," regarding the alleged failure to provide medical care at the hospitals of Paraguay, when these lack financial resources. In this regard, it stated that "the Ministry of Public Health provides free medical care to everybody, and particularly, to the poor; furthermore, local Governments have a department for the assistance of indigenous people, to which they can resort and where they are always assisted and advised." As evidence of the foregoing, the State attached Resolution No. 280/92, "wherein it is established that besides being provided with free medical care, the indigenous people should be exempted from paying for medical tests and other procedures carried out at the Hospital Nacional de Itaugua (Itaugua National Hospital)" and Circular Letter S.G. No. 1/95, issued by the Ministry of Public Health and Social Welfare, on "full, deferential, and free medical care to indigenous groups." In this regard, the Inter-American Court considers that the statement given by Ms. Elsa Ayala, as well as those given by the other members of the Sawhoyamaxa Community regarding their situation and living conditions, may contribute to the determination of such facts by the Court and this is the reason why it assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis and taking into consideration the comments submitted by the State (supra para. 23).

39. As to the expert opinion given before a public official whose acts command full faith and credit (affidavits) by expert witnesses José Marcelo Brunstein and Augusto Fogel (supra para. 34(i) and (k)), as well as the statement given by witness Oscar Centurión (supra para. 34 (g)), the Court admits them inasmuch as they are in accordance with the object thereof and assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis. Furthermore, the Court shall take into consideration the comments made by the representatives as regards to the statement given by Mr. Oscar Centurión and the expert opinion given by Mr. Augusto Fogel (supra para. 23).

40. As to the expert statement given before a public official whose acts command full faith and credit (affidavit) by Mr. Martín Sanneman (supra para. 34 (f)), the Court has verified that its content is a copy of the report submitted by the Inter-American Commission as attachment No. 16 to the application, entitled "Report to the President of the Chamber of Deputies of the Congress, to the Commission on Human Rights and to the Ecology Committee regarding the situation of indigenous peoples and forest cutting in the Chaco," likewise authored by Mr. Martín Sanneman on April 8, 1994, and which the Court assesses as such. The expert report submitted through an affidavit shall be assessed inasmuch as it is in accordance with the object set forth in Order of the President issued on December 21, 2005 (supra para. 18).

41. As to the expert opinion given before a public official whose acts command full faith and credit (affidavit) by expert witness Pablo Balmaceda-Rodríguez (supra para. 34 (f)), the Court has verified that its content is an updated reaffirmation of the report submitted by the Inter-American Commission as attachment No. 8 to the complaint, entitled "Medical and Health Report on the Enxet Sawhoyamaxa Community," also authored by Mr. Balmaceda-Rodríguez during the first semester of 2003, and which the Court assesses as such. The expert report submitted through an affidavit shall be assessed inasmuch as it is in accordance with the object set forth in Order of the President issued on December 21, 2005 (supra para. 18).

42. Regarding the expert opinion of Mr. Andrew Paul Leake, which was not given before a public official whose acts command full faith and credit, the Court admits it inasmuch as it is in accordance with the object set forth in Order of the President issued on December 21, 2005 and assesses it as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis. On other occasions the Court has admitted sworn statements which were not given before a public official with authority to confer full faith and credit to the acts passed before him provided that legal certainty and the procedural equality between the parties are not impaired. [FN9]

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[FN9] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 191; Case of "Mapiripán Massacre." Judgment of September 15, 2005. Series C No. 134; para. 82, and Case of Gutiérrez-Soler, supra note 8, para. 45.

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43. At the due procedural stage(supra para. 20) the Inter-American Commission and the representatives submitted their comments to the expert opinions rendered by Mr. Bernardo Jacquet and Mr. César Escobar-Cattebecke in the Case of the Indigenous Community Yakye Axa v. Paraguay, admitted as documentary evidence at the request of the State, to the record of the instant case, by virtue of Order of the President of December 21, 2005 (supra para. 18). In this regard, the representatives stated, inter alia, that "[b]oth the expert opinion given by Bernardo Jacquet and that given by César Escobar-Cattebecke contain general information which makes no reference to the case in point. Though they list the sanitary facilities and medical aid posts which allegedly exist in the area of Chaco, such information is not complete since it does not contain clear data which allow assessing the effectiveness of the medical care services these facilities may provide to the Sawhoyamaxa indigenous community, and even to any other community." For its part, the Commission stated that both expert opinions did not "properly illustrate the situation which is the object of the expert opinion." The Court, notwithstanding, considers that the foregoing expert opinions may be useful for the determination of the facts by the Court in the instant case, and therefore, it assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis and taking into consideration the comments submitted by the Inter-American Commission and the representatives and inasmuch as they are in accordance with the object set forth in Order of the President issued on December 21, 2005 (supra para. 18).

44. As to the compact disc submitted by the Commission together with the application (supra para. 10), the Court admits it into the body of evidence, pursuant to Article 45(1) of the Rules of Procedure. Notwithstanding, the Court shall assess the content of the above mentioned disc within the context of the body of evidence, as it has done in other cases, [FN10] taking into consideration that it contains a video which was edited by the representatives of the alleged victims.

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[FN10] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 193, and Case of Serrano-Cruz Sisters. Judgment of March 1, 2005. Series C No. 120, para. 40.

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45. As to the press documents submitted by the parties, the Court considers that they may be assessed insofar as they refer to public and notorious facts or statements given by State officials or confirm aspects related to the case in point. [FN11]

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[FN11] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 199; Case of López-Alvarez, supra note 3, para. 49; and Case of Pueblo Bello Massacre, supra note 3, para. 74.

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46. The Court finds helpful for the adjudication of the instant case the documents submitted by the representatives in their written final arguments (supra para. 25) which have not been questioned and the authenticity or truthfulness of which have not been challenged, whereby the Court admits them into the body of evidence, pursuant to Article 45(1) of the Rules of Procedure.

47. As to the documents tendered as evidence to facilitate the adjudication of the case (supra paras. 24 and 26), the Court admits them into the body of evidence of the instant case, pursuant to the provisions of Article 45(2) of the Rules of Procedure, taking into consideration the comments submitted by the parties (supra paras. 27 and 28). In particular, this Court decides to admit the statement given before a public official whose acts command full faith and credit by Mr. Carlos Marecos on February 13, 2006, submitted by the representatives as evidence since it may be helpful to facilitate the adjudication of the instant case and since it complies with the request by the President (supra para. 24).

48. As to the other documents requested as evidence to facilitate the adjudication of the instant case and which have not been produced before the Court neither by the State nor by the representatives (supra para. 22), the Court points out that in order to have the greatest possible number of facts with which to form a judgment and substantiate its decisions, it is essential that the parties submit on their own motion or at their request [FN12] all supporting evidence required to facilitate the adjudication of the instant case. In proceedings on violations of human rights this duty is particularly binding on the State, which is obliged to submit before the Court the evidence which can only be obtained with its cooperation. [FN13]

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[FN12] Cf. Case of Gómez-Palomino v. Perú. Judgment of November 22, 2005, Series C No. 136, para. 52; Case of Yean and Bosico Children. Judgment of September 8, 2005. Series C No. 130, para. 89, and Case of YATAMA, supra note 8, para. 134.
[FN13] Cf. Case of Gómez-Palomino v. Perú, supra note 12, para. 52; Case of Acosta-Calderón. Judgment of June 24, 2005, para. 47, and Case of YATAMA, supra note 8, para. 134.
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49. Furthermore, pursuant to Article 45(1) of the Rules of Procedure, the Court admits into the body of evidence the following evidence produced in the Case of the Indigenous Community Yakye Axa, since it is helpful for the adjudication of the instant case: book titled "II Censo Nacional Indígena de Población y Viviendas 2002. Pueblos Indígenas del Paraguay. Resultados finales" [II 2002 National Indigenous Population and Housing Census. Indigenous Peoples of Paraguay. Final Results], Dirección General de Estadísticas, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses], Paraguay, 2002; book titled "Atlas de las Comunidades Indígenas en el Paraguay" (Atlas of the Indigenous Communities in Paraguay), Dirección General de Estadísticas, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses], Paraguay, 2002; report by Mr. Julio Monzón and Mr. Juan Almeida, addressed to the President of the Council of the "Instituto Paraguayo del Indígena" [Paraguayan Institute for Indigenous Affairs] (hereinafter "the INDI") on August 20, 2001 and appendixes thereto; report by Mr. Edgar Pessoa and Mr. Juan Almeida, addressed to the President of the Council of the INDI on September 10, 2001 and appendixes thereto; report by Mr. Claudio Miltos, addressed to the President of the Council of the INDI) on November 5, 2001 and appendixes thereto; report by Mr. Christian Florentín, addressed to the President of the Council of the INDI on February 4, 2002 and appendixes thereto; report by Mr. Juan Almeida, addressed to the President of the Council of the INDI on April 5, 2002 and appendixes thereto; report by Mr. Christian Florentín, addressed to the President of the Council of the INDI on July 22, 2002 and appendixes thereto; report by Mr. Christian Florentín, addressed to the President of the Council of the INDI on July 29, 2002 and appendixes thereto; and report by Mr. Christian Florentín, addressed to the President of the Council of the INDI on September 9, 2002. Likewise, the Court admits the documents listed below as it deems them helpful for the adjudication of the instant case: press release No. 23/99 issued by the Inter-American Commission on Human Rights on July 30, 1999, regarding the visit in loco made to Paraguay and report on the situation of human rights in Paraguay issued by the Inter-American Commission on Human Rights on March 9, 2001.

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50. Among the facts alleged by the Inter-American Commission and subscribed by the representatives, and which have been challenged by the State, is the death of several members of the Sawhoyamaxa Community as a consequence of their allegedly precarious living conditions and the causes thereof. Both the Commission and the representatives grounded their allegations regarding this fact mainly on the medical and health report by Mr. Pablo Balmaceda-Rodríguez (supra para. 34(h)).

51. The Court has established that in international proceedings it is necessary to secure the acquaintance with the truth and the most comprehensive possible submission of the facts and arguments by the parties, ensuring them the right to the defense of their respective positions. The

submission of testimonies or expert opinions by means of a written statement given before a public official whose acts command full faith and credit (affidavit) does not allow the parties to "cross-examine" witnesses or expert witnesses, since there is a procedural stage at which the parties may file the comments they may deem relevant pursuant to the principle of the adversary proceedings, [FN14] as the State did in its pleading on February 10, 2006 regarding the expert opinion given by Mr. Pablo Balmaceda-Rodríguez (supra para. 34(h)).

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[FN14] Cf. Case of Palamara-Iribarne. Judgement of November 22, 2005. Series C No. 135, para 58.

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52. On that occasion the State challenged "the expert opinion on the alleged dead persons, since it was based on interviews with some of their next of kin, [that] is, the expert witness had not treated t[h]em before, and no diagnoses had been made regarding the alleged diseases they suffered."

53. The Court takes into consideration that in order to establish the cause of death of some persons and its relation to the medical and health conditions prevailing in the settlements of the members of the Sawhoyamaxa Community, expert witness Pablo Balmaceda-Rodríguez visited the Community and interviewed the mothers of the victims or their next of kin. It is clear that such a report would be more comprehensive and reliable if it had been carried out on the dead people or based on previous diagnoses of the diseases they suffered. However, within the context of the facts alleged in the instant case, which precisely refer to the alleged neglect of the members of the Community, and given their actual impossibility to obtain further supporting evidence, it is to be admitted that the knowledge of the expert witness may be gained based on the data and elements that were available to him.

54. On the other hand, though the State questioned the expert opinion given by Mr. Balmaceda-Rodríguez, it did not tender any documents to support its statements or to challenge the assessment of the facts or the findings contained therein. Furthermore, the State, failed to submit to the Court the evidence requested thereby to facilitate the adjudication of the instant case (supra para. 26), which in conjunction with the opinion stated by the expert witness himself, by the representatives and by the Commission leads the Court to assume the non-existence of further diagnoses or medical evidence regarding the diseases the members of the Community allegedly suffered.

55. In fact, for the purpose of gaining the best possible knowledge of the disputed facts, and pursuant to Article 45(2) of the Rules of Procedure (supra para. 22), the President deemed advisable to request the State and the representatives that, as evidence to facilitate the adjudication of the instant case, they forward the birth and death certificates, autopsy protocols, and any other relevant documents which may reveal the causes of the alleged deaths of the members of the Sawhoyamaxa Indigenous Community mentioned as alleged victims of the violation of the right to life. Likewise, he requested the State that it submit to the Court:

the medical records, medical certificates, or any other documents which show if the persons […] mentioned received some type of medical care in any medical field of specialization, at any hospital, clinic, health center or any other type of health facility, within six months prior to their death, and a detailed report on the alleged health and food assistance supplied by any State agency to the members of the Sawhoyamaxa Indigenous Community from the effective date of Presidential Executive Order No. 3.789 of June 23, 1999, to date.

56. The representatives submitted the documents "which the members of the Sawhoyamaxa Community were able to gather," in conjunction with an affidavit by the Community leader, Mr. Carlos Marecos, which "certifies the date of death of each of the victims and the pertinent degree of parentage or kinship" (supra para. 24). The representatives argued that "on many occasions the members of the Community cannot go to the assistance centers to receive care for their health or even for their life due to their lack of financial means, let alone going to vital statistics offices."

57. For its part, the State only forwarded documents related to the medical care provided to the Yakye Axa and Sawhoyamaxa Indigenous Communities during the second semester of 2005 and argued that it was not possible to find the "record books of births and thus verify the existence of persons [nor their] medical records [or] evidence of medical care."

58. By virtue of the foregoing, the Court considers that the expert opinion given through an affidavit by Mr. Pablo Balmaceda is a relevant circumstance for the adjudication of the instant case, whereby it shall be assessed together with the rest of the body of evidence as a whole.

## VI. PRIOR CONSIDERATIONS

59. Since the instant case addresses the issue of the rights of the members of an indigenous community, the Court considers it suitable to point out that, as it has done on other occasions, [FN15] pursuant to Articles 24 (Equal Protection of the Law) and 1(1) (Obligation to Respect Rights) of the American Convention, the States should guarantee, under equal conditions, the full exercise and enjoyment of the rights of these individuals who are under their jurisdiction.

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[FN15] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 51.

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60. Notwithstanding, it is to be emphasized that in order to effectively guarantee these rights, in interpreting and applying their domestic legislation, the States should take into consideration the characteristics which differentiate the members of the indigenous peoples from the general population and which conform their cultural identity. The same line of reasoning should be adopted by the Court, as it shall in the instant case, to assess the scope and meaning of the Articles of the American Convention the State has been charged with breaking by the Commission and the representatives.

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61. For the purpose of determining the object of the alleged violation of Article 4 of the American Convention (infra paras. 148 to 185), the Court shall now examine the various lists of the Community members who allegedly died as a consequence of the alleged failure of the State to comply with its duty to prevent violations of the right to life, which were submitted by the Commission and the representatives during the processing of the instant case.

62. In its application, the Inter-American Commission stated specifically that from 1991 to 2003 thirty-one members of the Community died, but at the time it did not expressly request that the State be declared internationally liable for such deaths. The list of persons who died, their age, date of death and cause of death furnished by the Commission were as follows:

| No. | Name and sex | Age at death | Date of death | Cause of death |
|---|---|---|---|---|
| 1 | NN Galarza (m) | 1 month | September, 2001 | Tetanus |
| 2 | Rosana López (f) | 3 years | 1997 | Measles |
| 3 | NN Ferreira (m) | | 1991 | No data |
| 4 | NN Ferreira (m) | 6 months | 1991 | Enterocolitis |
| 5 | Eduardo Cáceres (m) | 1 year | 1999 | Pneumonia |
| 6 | Eulalio Cáceres (m) | 1 month | 1999 | Pneumonia |
| 7 | Esteban González (m) | No data | 2000 | Measles |
| 8 | NN González Aponte | 3 months | December, 2002 | Enterocolitis |
| 9 | Wilfrido González (m) | 20 years | 1997 | Traffic accident |
| 10 | Leoncio González (m) | 2 years | 1991 | Anemia-Parasitosis |
| 11 | Rosana González(f) | 1 year | 1991 | Enterocolitis |
| 12 | Teresio González (m) | 60 years | May 11, 2003 | Traffic accident |
| 13 | NN Yegros (m) | 8 months | May 30, 2002 | Pneumonia |
| 14 | Antonio Alvarenga (m) | 18 years | August 16, 1998 | Murder |
| 15 | Jenny Toledo (f)[FN16] | 1 year and 8 months | August 24, 2003 | Dehydration |
| 16 | Guido Ruiz Diaz (m) | 4 months | August 15, 2002 | Enterocolitis |
| 17 | NN González (m) | 13 days | May 15, 2002 | Tetanus |
| 18 | Luis Torres Chávez (m) | 21 years | August 24, 2002 | Enterocolitis |
| 19 | Derlis Armando Torres(m) | 1 year | 2002 | Cachexia |
| 20 | NN Torres (f) | 3 days | May 2003 | Blood dyscrasia |
| 21 | Lucía Aponte (f) | 50 years | 2002 | Tuberculosis |
| 22 | Marcos Chávez (m) | 70 years | 2000 | Polytraumatism |
| 23 | Juan Ramón González(m) | 1 year and 6 months | October 10, 2002 | Pneumonia |
| 24 | Antonio González (m) | 1 month | November, 1996 | Tetanus |
| 25 | Pedro Fernández (m) | 79 years | October 12, 2001 | Pneumonia |

| | | | | |
|---|---|---|---|---|
| 26 | Ramona Flores (f) | 65 years | July 16, 1995 | Pneumonia |
| 27 | Sandra E. Chávez (f) | 7 months | 1993 | Pneumonic bronchitis |
| 28 | Eusebio Ayala (m) | 80 years | March 16, 1998 | Pneumonia/hypertension |
| 29 | Francisca Brítez (f) | 10 months | October 23, 2000 | Enterocolitis |
| 30 | Diego Andrés Ayala (m) | 13 months | October 3, 2002 | Enterocolitis |
| 31 | Ana María Florentín (f) | 15 days | March, 1991 | Tetanus |

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[FN16] The representatives of the alleged victims identified her as "Yenny Toledo" in their respective pleadings.

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63. For their part, in their brief of requests, arguments and evidence, the representatives stated that thirty-two Community members had died, out of whom 31 match the list furnished by the Commission (supra para. 62), to which the following person was added:

| | | | | |
|---|---|---|---|---|
| 32 | Juan Ramón Marecos (m) | 2 years and a half | October, 2004 | Pneumonia |

64. Notwithstanding, in their brief of requests and arguments, the representatives requested the Court to it adjudge and declare that the State "has failed to comply with its obligation to guarantee the right to life enshrined in Article 4 of the American Convention," to the prejudice of twenty-three persons, namely: NN Galarza (case No. 1), Rosana López (case No. 2), Eduardo Cáceres (Case No. 5), Eulalio Cáceres (case No. 6), Esteban González (case No. 7), NN González Aponte (case No. 8), Wilfrido González (case No. 9), Teresio González (case No. 12), NN Yegros (case No. 13), Antonio Alvarenga (case No. 14), Jenny Toledo (case No. 15), Guido Ruiz-Díaz (case No. 16), NN González (case No. 17), Luis Torres Chávez (case No. 18), Derlis Armando Torres (case No. 19), NN Torres (case No. 20), Lucía Aponte (case No. 21), Marcos Chávez (case No. 22), Juan Ramón González (case No. 23), Pedro Fernández (case No. 25), Eusebio Ayala (case No. 28), Francisca Britez (case 29) and Diego Andrés Ayala (case No. 30).

65. Later on, in its written final arguments the Commission stated that "[p]ursuant to the expert opinion of Dr. Pablo Balmaceda […] regretfully the number of members of the Community who died […] is higher than the one stated in the application," and requested the Court that it declare that such deaths are "to be charged to the State."

66. In their written final arguments the representatives stated that from 2003 "to the moment the expert opinion of [Mr.] Pablo Balmaceda was submitted […], 14 more persons died," whose deaths they requested be charged to the State.

67. The persons mentioned in the statement given by expert witness Pablo Balmaceda before a public official whose acts command full faith and credit and who were neither included in the application nor in the brief of requests and arguments are as follows:

| | | | | |
|---|---|---|---|---|
| 33 | Julia Benítez Galarza (f) | 1 year | 1990 | Dysentery |
| 34 | NN Yegros (m) | 15 days | | Tetanus |

| | | | | |
|---|---|---|---|---|
| 35 | Juana María Chávez (f) | 3 years | 1988 | Enterocolitis-dehydration |
| 36 | Nelson Florentín (m) | 7 years | 1989 | Measles |
| 37 | Ramón Asunción Florentín (m) | 5 months | February, 1991 | Fever |
| 38 | Marcelino Chávez (m) | 5 years | 1989 | Measles |
| 39 | NN Ayala (m) | 2 years | "22 years ago" (f. 692) | Pneumonia |
| 40 | NN Ayala (m) | 2 days after being born | July 6, 1983 | Sepsis |
| 41 | Mercedes Ayala (f) | 1 year | | Tetanus |
| 42 | Karina Maribel Chávez (f) | 7 months | February 14, 2004 | Respiratory failure |
| 43 | Silvia Adela Chávez (f) | 2 months | September 27, 2005 | Respiratory failure |
| 44 | Esteban Jorge Alvarenga (m) | 2 months | December 5, 2005 | Dyspnea and respiratory failure |
| 45 | Arnaldo Galarza (m) | 2 and a half months | December 10, 2005 | Malnutrition, dyspnea and general edema |
| 46 | Fátima Galarza (f) | 3 months | January 6, 2006 | Malnutrition, dyspnea and general edema |

68. The Court has already established that as regards to the facts which constitute the purpose of the proceedings, it is not possible for the representatives to allege new matters of fact other than those alleged in the application, without prejudice to the possibility of stating those facts which allow explaining, clarifying or dismissing those which have been stated in the application or replying to the claims put forth by the applicant. This is quite different from the case of the supervening facts, which can be submitted by either party at any stage of the proceedings before judgment is rendered. [FN17]

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[FN17] Cf. Case of Pueblo Bello Massacre, supra note 3, para. 54; Case of Mapiripán Massacre, supra note 9, paras. 58 and 59, and Case of "Five Pensioners." Judgment of February 28, 2003. Series C No. 98.

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69. In this regard, the Court notes that the death of the child Juan Ramón Marecos (case No. 32) was not included in the petition filed with the Commission, but in the pleading submitted by the representatives; that is to say, it is a new fact. Furthermore, the alleged date of death of the child is prior to the filing of the petition, whereby it may be deemed to be a supervening fact. In view of this, such death shall not be examined by the Court.

70. Regarding the fourteen deaths referred to by expert witness Pablo Balmaceda (cases No. 33 to 46), which the representatives and the Commission requested that be charged to the State in their respective final written pleadings, the Court has verified that only the deaths of the children Silvia Adela Chávez (case No. 43), Esteban Jorge Alvarenga (case no. 44), Arnaldo Galarza (case No. 45) and Fátima Galarza (case No. 46) occurred after the filing of the application by the

Commission, whereby they shall be examined by the Court as supervening facts. The other cases (No. 33 to 42) refer to deaths which occurred prior to the filing of the petition and the Commission did not justify why it had not included them before, whereby they shall not be considered.

71. Finally, the Court notes that within the list of the 31 deceased submitted by the Commission, the death of members of the Community having occurred before Paraguay accepted the contentious jurisdiction of the Inter-American Court on March 26, 1993 is mentioned. These deaths include the following cases: NN Ferreira (case No. 3), NN Ferreira (case No. 4), Leoncio González (case No. 10), Rosana González (case No. 11) and Ana María Florentín (case No. 31). The Court has no juridiction to hear these cases.

72. In view of the foregoing, in its conclusions on the alleged violation of Article 4 of the American Convention, out of the above mentioned cases the Court shall examine as alleged victims only cases No. 1, 2, 5 to 9, 12 to 30 and 43 to 46, as they appear above.

VII. PROVEN FACTS

73. Having assessed the documentary evidence, the statements rendered by the witnesses, the expert opinions given by the expert witnesses, as well as the statements submitted by the Inter-American Commission, by the representatives and by the State in the proceeding of the instant case, the Court finds the following facts to be proven:

a) The Sawhoyamaxa Indigenous Community and the traditional occupation of the lands claimed

73(1) Towards the end of the 19th century vast stretches of land in the Paraguayan Chaco were acquired by British businessmen through the London Stock Exchange as a consequence of the debt owed by Paraguay after the so-called War of the Triple Alliance. The division and sale of such territories were made while their inhabitants, who, at the time, were exclusively Indians, were kept in full ignorance of the facts. That is how several missions of the Anglican Church started settling in the area. In 1901 the “South American Missionary Society” settled the first cattle estate in the Chaco with the purpose of starting the evangelization and “pacification” of the indigenous communities, and of facilitating their employment in the cattle estates. The company was known as “Chaco Indian Association”, and its main seat was built in Alwátétkok. [FN18]

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[FN18] Cf. statement rendered by Mr. Alberto Braunstein before a public official whose acts command full faith and credit on February 11, 2005 (case file on the merits, reparations, and costs, Volume III, folios 488 to 500); anthropological report on the (Santa Elisa) “Sawhoyamaxa” Community of the Enxet People. Centro de Estudios Antropológicos of the Universidad Católica “Nuestra Señora de la Asunción” (Catholic University “Our Lady of Asuncion” Anthropological Studies Center) (case file of appendixes to the application, appendix 10, folios 864 to 873), and expert opinion given by Mr. Bartomeu Melia i Lliteres rendered before the Inter-American Court on March 4, 2005 in the Case of the Indigenous Community

Yakye Axa v. Paraguay (case file on the merits, reparations, and costs, Volume III, folios 540 to 556).

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73(2) The economy of the indigenous peoples in the Chaco was mainly based on hunting, fishing, and gathering,, and therefore, they had to roam their lands to make use of nature inasmuch as the season and their cultural technology allowed them to, wherefore they kept moving and occupied a very large area of territory. [FN19]

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[FN19] Cf. statement rendered by Mr. Alberto Braunstein before a public official whose acts command full faith and credit on February 11, 2005, supra note 18, and anthropological report on the (Santa Elisa) "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos of the Universidad Católica "Nuestra Señora de la Asunción" (Catholic University "Our Lady of Asuncion" Anthropological Studies Center), supra note 18.

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73(3) Over the years, and particularly after the Chaco War between Bolivia and Paraguay (1933-1936), the non-indigenous occupation of the Northern Chaco which had started by the end of the 19th century was extended. The estates that started settling in the area used the Indians who had traditionally lived there as workers, who thus became farmhands and employees of new owners. Although the indigenous peoples continued occupying their traditional lands, the effect of the market economy activities into which they were incorporated turned out to be the restriction of their mobility, whereby they ended by becoming sedentary. [FN20]

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[FN20] Cf. statement rendered by Mr. Alberto Braunstein before a public official whose acts command full faith and credit on February 11, 2005, supra note 18; expert opinion of Mr. Bartomeu Melia i Lliteres given before the Inter-American Court on March 4, 2005 in the Case of the Indigenous Community Yakye Axa v. Paraguay, supra note 18; statement rendered by Mr. Andrew Paul Leake and translated into Spanish by Mr. Tito Ulises Lahaye-Díaz before a public official whose acts command full faith and credit on January 25, 2006 (case file on the merits, reparations, and costs, Volume III, folios 777 to 807), and anthropological report on the (Santa Elisa) "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos of the Universidad Católica "Nuestra Señora de la Asunción", supra note 18.

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73(4) Since then, the lands of the Paraguayan Chaco have been transferred to private owners and gradually divided. This increased the restrictions for the indigenous population to access their traditional lands, thus bringing about significant changes in its subsistence activities. They increasingly depended on their salary for food and took advantage of their temporary stay in the various estates settled in the area to continue developing their subsistence activities (hunting, fishing, and gathering). [FN21]

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[FN21] Cf. statement rendered by Mr. Andrew Paul Leake and translated into Spanish by Mr. Tito Ulises Lahaye before a public official whose acts command full faith and credit on January 25, 2006, supra note 20.

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73(5) The Sawhoyamaxa ("from the place where coconuts have run out") Community is an indigenous community, typical of those traditionally living in the Paraguayan Chaco that has become sedentary. [FN22] In fact, the members of this Indigenous Community belong to the South Enxet and North Enhelt Lengua ethnic groups. [FN23] The South Enxet and the North Enlhet Lengua ethnic groups, as well as the Sanapaná, Toba, Angaité, Toba Maskoy, and Guaná communities, are part of the Maskoy Lengua (Enhelt-Enenlhet) linguistic family and have ancestrally occupied the Paraguayan Chaco. [FN24]

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[FN22] Cf. statement rendered by Mr. Alberto Braunstein before a public official whose acts command full faith and credit on February 11, 2005, supra note 18; anthropological report on the (Santa Elisa) "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos of the Universidad Católica "Nuestra Señora de la Asunción", supra note 18; statement rendered by Mr. Andrew Paul Leake and translated into Spanish by Mr. Tito Ulises Lahaye before a public official whose acts command full faith and credit on January 25, 2006, supra note 20, and expert opinion of Mr. Bartomeu Melia i Lliteres given before the Inter-American Court on March 4, 2005 in the Case of the Indigenous Community Yakye Axa v. Paraguay, supra note 18.

[FN23] Cf. book titled "II Censo Nacional Indígena de Población y Vivienda 2002. Pueblos Indígenas del Paraguay. Resultados Finales" (II 2002 National Indigenous Population and Housing Census. Indigenous Peoples of Paraguay. Final Results), Dirección General de Estadísticas, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002, pages 21, 22, and 23, and book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadísticas, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002. Volume II, pages 400 and 401.

[FN24] Cf. book titled "II Censo Nacional Indígena de Población y Vivienda 2002. Pueblos Indígenas del Paraguay. Resultados Finales" (II 2002 National Indigenous Population and Housing Census. Indigenous Peoples of Paraguay. Final Results), Dirección General de Estadística, Encuestas y Censos (Bureau of Statistics, Surveys, and Censuses) of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002, pages 21, 22 and 23; book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadísticas, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002. Volume II, pages 400 and 401, and anthropological report on the

"Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos of the Universidad Católica "Nuestra Señora de la Asunción", supra note 18.

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73(6) When the proceedings for claiming the lands were commenced in 1991, the Sawhoyamaxa Community was made up of the members of several indigenous villages scattered in various cattle estates [FN25] of the Chaco area, to the west of the Paraguay river, and among which the most numerous ones were Masama Apxagkok (Loma Porá Estate) and Elwátétkok (Maroma Estate). [FN26]

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[FN25] Such villages are known as Masama Apxagkok, Elwátétkok, Ekpawamakxakyawok, Kello Ateg, Elyepwaté Entengy´ak Enha, Xakmayohéna, and Nakte-Yannenpéna, and were located within the following cattle ranches settled in the area: Loma Porá, Maroma, Diana, Naranjito, Menduca cué, Yakukay, Ledesma, Santa Elisa, and Kilométro 16.

[FN26] Cf. census of the Sawhoyamaxa Indigenous Community conducted by the IBR (Instituto de Bienestar Rural) (Institute for Rural Welfare) on January 18, 1993 (case file of appendixes to the complaint, appendix 10, folios 725 to 729); anthropological report on the "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos of the Universidad Católica "Nuestra Señora de la Asunción", supra note 18; census on the Sawhoyamaxa Indigenous Community conducted by the alleged victims´representatives in 1997 (case file of appendixes to the complaint, appendix 4, folios 500 to 510); official report to the President of the Chamber of Deputies of the Congress, to the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] and to the Comisión de Ecología [Commission on Ecology] regarding the situation of indigenous peoples and forest cutting in Chaco," delivered on April 8, 1994, (case file of appendixes to the complaint, appendix 16, folios 1030 to 1039); request for recognition of the leaders of the members of the Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 villages filed before the INDI (Instituto Nacional del Indígena) (Paraguayan Institute on Indigenous Affairs) on August 6, 1991 (case file of appendixes to the answer to the complaint, appendix 1, folio 1300), and brief filed by the leaders of the Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 villlages before the IBR (Instituto de Bienestar Rural) (Institute of Rural Welfare) on August 6, 1991 (case file of appendixes to the answer to the complaint, appendix 1, folio 1301).

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73(7) At present most members of the Sawhoyamaxa Indigenous Community [FN27] live in the settlements known as "Santa Elisa" and "KM 16." "Santa Elisa" was created after the proceedings for claiming the lands had been commenced (infra para. 73(18)), once most members of the Sawhoyamaxa Community had decided to leave the cattle estates where they lived and settle across the wire fences of the property claimed, alongside the road which runs from Pozo Colorado to Concepción, "Presidente Hayes" Department. [FN28] The settlement known as "KM 16", also located alongside the road that runs from Pozo Colorado to Concepción, "Presidente Hayes" Department, had allegedly been created before the moment the proceedings for claiming the lands were started [FN29]. A minority group of members of the Community still live within the lands demarcated by several cattle estates in the nearby areas,

such as Ledesma, Maroma, Diana, San Felipe, Loma Porá, Naranjito, Yakukai, Misión Inglesa, Santa Ana and San José. [FN30]

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[FN27] Cf. statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 741 to 746); book titled "II Censo Nacional Indígena de Población y Vivienda 2002. Pueblos Indígenas del Paraguay. Resultados Finales" (II 2002 National Indigenous Population and Housing Census. Indigenous Peoples of Paraguay. Final Results), Dirección General de Estadística, Encuestas y Censos (Bureau of Statistics, Surveys, and Censuses) of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002, pages 21, 22 and 23, and book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002. Volume II, pages 400 and 401.
[FN28] Cf. statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27, and statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 722 to 726).
[FN29] Cf. brief filed by the leaders of Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 villages before the Instituto de Bienestar Rural (IBR) (Institute of Rural Welfare) on August 6, 1991, supra note 26, and brief filed by the attorneys of the Sawhoyamaxa Community before the Institute of Rural Welfare on May 12, 1994 (case file of appendixes to the complaint, appendix 10, folio 818).
[FN30] Cf. statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27; census on the Sawhoyamaxa Indigenous Community conducted by the representatives of the alleged victims in 2004 (case file of appendixes to the complaint, appendix 4, folios 631 to 647), and census on the Sawhoyamaxa Indigenous Community conducted by the representatives of the alleged victims in February, 2006 (case file on the merits, reparations, and costs, Volume IV, folios 1181 to 1198).
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73(8) According to the census conducted in 2006, the Sawhoyamaxa Community has 407 members, grouped in approximately eighty-three dwelling places. [FN31]

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[FN31] Cf. census on the Sawhoyamaxa Indigenous Community conducted by the alleged victims´ representatives in February 2006, supra note 30.
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73(9) The lands claimed by the Sawhoyamaxa Indigenous Community (infra para. 73(18)) are within the lands which they have traditionally occupied and which are part of their traditional habitat. [FN32]

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[FN32] Cf. statement rendered by Mr. Andrew Paul Leake translated into Spanish by Mr. Tito Ulises Lahaye-Díaz before a public official whose acts command full faith and credit on January 25, 2006, supra note 20; note P.C. No. 966/98 issued by the INDI and addressed to the Instituto de Bienestar Rural (Institute of Rural Welfare) on November 27, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folios 1578); report No. 2065 issued by the Legal Counseling Department of the Institute of Rural Welfare on December 3, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folio 1580), and anthropological report on the "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos de la Universidad Católica "Nuestra Señora de la Asunción" (Catholic University "Our Lady of Asuncion" Anthropological Studies Center), supra note 18.

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73(10) The lands claimed are suitable for the Indigenous Community members to continue with their current subsistence activities and to ensure their short and mid-term survival, as well as the beginning of a long-term process of development of alternative activities which will allow their subsistence to become sustainable [FN33]

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[FN33] Cf. statement rendered by Mr. Andrew Paul Leake and translated into Spanish by Mr. Tito Ulises Lahaye-Díaz before a public official whose acts command full faith and credit on January 25, 2006, supra note 20, and anthropological report on the "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos de la Universidad Católica "Nuestra Señora de la Asunción" [Catholic University "Our Lady of Asuncion" Anthropological Studies Center], supra note 18.

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b) Process of recognition of the Sawhoyamaxa Indigenous Community leaders and of its legal entity

73(11) On August 6, 1991 the "members of the indigenous communities of Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Gray, Santo Domingo and Kilómetro 16 belonging to the Enxet (Lengua) Ethnic Group [,] settled in [… t]he District of Pozo Colorado, "Presidente Hayes" Department," requested the Instituto Paraguayo del Indígena (INDI) (Paraguayan Institute of Indigenous Affairs) that their leaders Carlos Marecos-Aponte and Teresio González be recognized as such pursuant to Article 12 of Law No. 904/81, which sets forth the Status of Indigenous Communities (hereinafter "Law No.904/81"). [FN34]

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[FN34] Cf. request for recognition of the leaders of Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 indigenous villages filed before the INDI on August 6, 1991, supra note 26.

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73(12) On February 16, 1993 the INDI Field Promoter recommended the Legal Counseling Department of such Institute that the petition of the Indigenous Community (supra para. 73(11))

be admitted. [FN35] This position was reaffirmed by said official on April 13, 1993. [FN36] Later on, after having verified that the Sawhoyamaxa Indigenous Community was scattered over several places, that it was not registered with the Registro Nacional de Comunidades Indígenas (Indigenous Communities National Registry) and that the leaders proposed by the Community (supra para. 73(11)) had not been previously registered before said Registry, [FN37] and after having requested that a social and anthropological report on the Community be drawn, [FN38] on April 27, 1993 the President of the Council of INDI decided "[t]o recognize Mr. Carlos Marecos-Aponte and Mr. Teresio González as leaders of the 'Sa[w]hoyamaxa' Community of the Lengua ethnic group settled in the District of Pozo Colorado, "[Presidente] Hayes" Department." [FN39]

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[FN35] Cf. note of the INDI Rural Promoter addressed to the Legal Department of such institute on February 16, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1228).
[FN36] Cf. note of the INDI Rural Promoter addressed to the Legal Department of such institute on April 14, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1231).
[FN37] Cf. certificate of the Dirección Nacional de Comunidades Indígenas (National Office of Indigenous Communities of the INDI of February 17, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1229).
[FN38] Cf. resolution issued by the Legal Department of the INDI on March 16, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1230).
[FN39] Cf. resolution PC No. 50/93 issued by the INDI on April 27, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1215).

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73(13) Subsequently, on September 7, 1993 Mr. Carlos Marecos-Aponte and Mr. Teresio González started the relevant proceedings before the INDI to obtain the recognition of the Community as a legal entity. [FN40]

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[FN40] Cf. request for recognition of legal personality filed by the Sawhoyamaxa Indigenous Community with the INDI on September 7, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1182).

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73(14) Notwithstanding, the proceeding continued until June 16, 1997, when the Governing Board of the INDI issued Resolution No. 25/97, wherein it was decided that "the request for Recognition of the Sawho[…]yamaxa Indigenous [C]ommunity of the Enxet People, settle[d] in the District of Pozo Colorado, "Presidente Hayes" Department as a Legal Ent[ity] be admitted" and that the case file be forwarded to the Ministry of Education and Worship, "so that the relevant administrative proceedings be started." [FN41]

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[FN41] Cf. resolution No. 25/97 issued by the Board of Directors of the INDI on June 16, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1180).

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73(15) On October 6, 1997 the Legal Department of the Ministry of Education and Worship in its report No. 1140 argued that "nothing prevents the Indigenous [C]ommunity […] from obtaining recognition as a legal ent[ity] through the relevant proceedings, taking into consideration that it meets all the requirements necessary for such purpose." [FN42] Therefore, on July 21, 1998 the President of Paraguay issued Executive Order No. 22008, whereby the Sawhoyamaxa Indigenous Community was recognized as a legal entity. [FN43]

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[FN42] Cf. report No. 1140 issued by the Legal Department of the Ministry of Education and Worship on October 6, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1236).

[FN43] Cf. Executive Order No. 22008 issued by the President of the Republic of Paraguay on July 21, 1998 (case file of appendixes to the complaint, appendix 3, folio 497).

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73(16) On May 11, 2003 Mr. Teresio González, one of the Community leaders, died in an alleged traffic accident. [FN44] Taking this fact into consideration, on February 15, 2005 the INDI issued another resolution, wherein it was decided that Mr. Carlos Marecos, Dionicio Galeano, and Leonardo González be recognized as leaders of the Sawhoyamaxa Indigenous Community and that Resolution PC No. 50/93 of April 27, 1993 (supra para. 73(12)) [FN45] be set aside.

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[FN44] Cf. statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27 and expert opinion given by Mr. Pablo Balmaceda- Rodríguez before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 682 to 696).

[FN45] Cf. resolution No. 180/005 issued by the President of INDI on February 15, 2005 (case file of appendixes to the answer to the complaint, appendix 2, folio 1250).

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c) Proceedings started by the Sawhoyamaxa Indigenous Community for claiming their traditional lands and natural resources before the administrative bodies

73(17) At the time when the facts in the instant case took place, the procedure for dealing with land tenure problems in Paraguay was administrative in nature and was in charge of the Instituto de Bienestar Rural [Institute of Rural Welfare] (hereinafter the "IBR"). [FN46] All territorial indigenous issues are filed with the INDI and with the IBR, which always act within the administrative sphere. [FN47]

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[FN46] Cf. law No. 854/63 enacting the Estatuto Agrario (Agrarian Statute) of March 29, 1963. Digesto Normativo sobre Pueblos Indígenas in el Paraguay (Normative Digest on Indigenous Peoples in Paraguay). 1811-2003. Paraguay, 2003 (case file of appendixes to the complaint, appendix 20, page 823).
[FN47] Cf. law No. 904/81 which sets forth the Estatuto de las Comunidades Indígenas (Status of Indigenous Communities) of December 18, 1981. Digesto Normativo sobre Pueblos Indígenas in el Paraguay (Normative Digest on Indigenous Peoples in Paraguay). 1811-2003. Paraguay, 2003 (case file of appendixes to the complaint, appendix 20, page 877), and statement rendered by Mr. Augusto Fogel before a public official whose acts command full faith and credit on January 13, 2006 (case file on the merits, reparations, and costs, Volume III, folios 631 to 661).

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73(18) On August 6, 1991, the same day when Mr. Carlos Marecos and Teresio González filed a request to be recognized as leaders of the Sawhoyamaxa Community (supra para. 73(11)), they requested the IBR "for [their] immediate and future needs," that 8,000 hectares of land be given them "near Sa[w]hoyamaxa (Retiro Santa Elisa in Loma Porá Estate), approximately 30 KM away from Concepción." They made such petition on the grounds of "their right as members of the original people from t[hat] area [to] be given back a part of what had once belonged to [their] ancestors," and of which they had been allegedly "deprived [without] receiv[ing] any compensation." Likewise, they argued that the lands claimed were part of their "traditional hunting grounds", which at that moment was a "condemned piece of land", meaning that it was not being used productively. [FN48] Such request started administrative proceeding No. 7597/91, entitled "Indigenous Community of Maroma–Pozo Colorado." [FN49]

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[FN48] Cf. brief filed by the leaders of Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 villages with the IBR on August 6, 1991, supra note 26.
[FN49] Cf. title of administrative case file No. 7597/91 (case file of appendixes to the answer to the complaint, appendix 1, folio 1298).

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73(19) On September 4, 1991 the Office for Indigenous Advocacy of the IBR decided that in order to continue with the processing of the request for lands filed by the members of the Sawhoyamaxa Community, subparagraph b) of Article 22 of the Estatuto de las Comunidades Indígenas (Status of Indigenous Communities) (Law No. 904/81), was to be complied with and that the location of such lands in the Land Register Office of the IBR was to be determined, wherefore it advised that case file No. 7597/91 be forwarded to the Engineering Department of such institution. [FN50] Later, based on the land register maps, the Land Register Office of the INDI determined that the piece of land claimed by the members of the Sawhoyamaxa Community belonged to private owners. [FN51]

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[FN50] Cf. report No. 2103 issued by the Office for Indigenous Advocacy of the IBR on September 4, 1991 (case file of appendixes to the answer to the complaint, appendix 1, folio 1311).

[FN51] Cf. notes of September 23, 1991; October 4, 1991; October 7, 1991; October 14, 1991 and May 6, 1992 issued during the proceeding of case file No. 7597/91 before the IBR (case file of appendixes to the answer to the complaint, appendix 1, folios 1311 and 1313).

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73(20) On May 12, 1992 the Office for Indigenous Advocacy of the IBR issued a report whereby it advised that an official of such institution be commissioned to verify, in conjunction with the official appointed by the INDI, the census conducted on the Community and attached to the administrative case file, and to take such steps as might be necessary regarding their commission. Furthermore, it pointed out that the applicant Indigenous Community should provide the name and address of the owners of the piece of land claimed for the purpose of serving notice upon them of the application filed regarding such lands. [FN52]

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[FN52] Cf. report No. 352 issued by the Office for Indigenous Advocacy of the IBR on May 12, 1992 (case file of appendixes to the answer to the complaint, appendix 1, folio 1316).

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73(21) Taking into consideration the foregoing report, on May 25, 1992 the leaders of the Sawhoyamaxa Community, through their attorney, informed the address of the owner and requested the IBR to appoint an official to visit and inspect the lands claimed. [FN53]

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[FN53] Cf. brief filed by the attorney for the Sawhoyamaxa Community with the IBR on May 25, 1992 (case file of appendixes to the complaint, appendix 1, folio 1319)

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73(22) On June 3, 1992 the President of the IBR requested the INDI its cooperation to jointly carry out "a quantitative diagnosis of the applicant community, the social and economic conditions in which its members live, their needs and expectations [, as well as to] identif[y] the lands claimed, their agrologic conditions, state, use, and exploitation, and fundamentally, the situation regarding the ownership thereof." To that purpose, the President of the IBR requested the INDI to appoint an official of such institution to work in conjunction with the official commissioned by the IBR. [FN54]

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[FN54] Cf. note A. No. 211 of the IBR addressed to the INDI on June 3, 1992 (case file of appendixes to the complaint, appendix 1, folio 1318).

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73(23) On two occasions the attorneys for the Sawhoyamaxa Community reaffirmed the request filed with the IBR so that it appoint an official to carry out an inspection and study of the lands claimed, since the "proceedings h[ad] inexplicably and […] unjustifiably halted." [FN55]

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[FN55] Cf. briefs filed by the attorney for the Sawhoyamaxa Community before the IBR on October 2, 1992 and November 13, 1992 (case file of appendixes to the answer to the complaint, appendix 1, folios 1331 to 1332 and 1336 to 1337).

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73(24) Finally, on January 6, 1993 the President of the IBR considered the request filed by the members of the Sawhoyamaxa Community and decided that a visitation and inspection of the lands claimed and a verification of the census conducted on the Indigenous Community be carried out. To that purpose, it appointed an IBR official. [FN56]

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[FN56] Cf. resolution No. 8 issued by the President of the INDI on January 6, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1341).

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73(25) On January 8, 1993 the visual inspection, and the verification of the census, ordered by the IBR were carried out. The IBR official was accompanied by an official from the INDI, and the leaders of the Indigenous Community, together with their attorney and a representative of the Anglican Church of Paraguay, were also present. [FN57]

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[FN57] Cf. written records No. 1 and No. 1.a drawn up on January 8, 1993 by Mr. Alfonso Pastor Cabanellas, an official of the IBR (case file of appendixes to the answer to the complaint, appendix 1, folios 1344 and 1345).

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73(26) On January 18, 1993 the official commissioned by the IBR submitted a report to such institution regarding his assignment (supra para. 73(24)), wherein he recommended that a dialogue be started between the owner of the lands claimed and the members of the Sawhoyamaxa Community, through the settlement and arbitration office of the IBR. [FN58] In accordance with such recommendation, on February 19, 1993 the leaders of the Sawhoyamaxa Community, through their attorney, requested a settlement hearing between the parties. [FN59] Said request was put forth once more on April 14, 1993. [FN60]

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[FN58] Cf. report on the compliance with resolution No. 8 issued by the President of the IBR on January 18, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folios 1346 to 1352).

[FN59] Cf. communication addressed by Maroma, Loma Porá and other indigenous communities to the IBR on February 19, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1402).

[FN60] Cf. communication addressed by the leaders of the Sawhoyamaxa Community to the IBR on April 14, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1416).

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73(27) On February 22, 1993 the attorney for the corporation Compañía Paraguaya de Novillos S.A. (Paraguay Steer Company, Inc.) (hereinafter "COMPENSA") filed several briefs to establish legal domicile and challenge the continuance of the proceedings recorded on case file No. 7597/91 (supra para. 73(18)), on the grounds that "admitting the ridiculous and absurd claim made by the applicants would seriously and irreparably impair the economic interests of a company in full development." [FN61]

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[FN61] Cf. briefs filed by the firm Compañía Paraguaya de Novillos S.A. (Paraguay Steer Company, Inc.) (COMPENSA) before the IBR on February 22, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folios 1353 to 1364).

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73(28) On March 10, 1993 some members of the "Lengua Indigenous Community settled in Loma Porá Estate," addressed the IBR to inform it that "regarding the proceedings in […] case file [No. 7597/91,] they have not been consulted and therefore have not authorized nor granted powers-of-attorney to any lawyers or union organizations such as the INDI." [FN62] In view of this, on June 9, 1993 the IBR forwarded case file No. 7597/91 to the INDI, so that said institution clarify the situation regarding the leadership of the applicant Indigenous Community. [FN63]

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[FN62] Cf. communication addressed by some members of the "Lengua Indigenous Community" to the IBR on March 10, 1993 during the proceeding of case file No. 75/92 (case file of appendixes to the answer to the complaint, appendix 1, folios 1359 to 1361).
[FN63] Cf. communication A No. 248 addressed by the President of the IBR to the President of INDI on June 9, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1451), and memorandum of the Manager of Legal Services and Operations of the IBR addressed to the Council of said institute on April 22, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1417).

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73(29) On September 7, 1993 the leaders of the Sawhoyamaxa Community, through their attorneys requested the IBR that the claim for lands that had been previously filed (supra para. 73(18)) be enlarged "to at least fifteen thousand hectares," on the grounds that the initial request "was insufficient" in the light of Article 64 of the new National Constitution of Paraguay (hereinafter "the National Constitution"). Furthermore, they requested the IBR to take the necessary steps so that "an injunction" be issued on the claimed lands, since the current owner had started to "plunder the place." [FN64]

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[FN64] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on September 7, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folios 1433 and 1434), and brief addressed by Mr. Tomás Galeano-Benítez, leader of the Indigenous Community Yakye Axa to the IBR on October 6, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folios 1418 to 1418).

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73(30) On October 25, 1993 the Chief of the Office of the IBR Ombudsman decided that, "in order to comply with the foregoing, […] it is necessary to send an official letter to the [INDI] and request it to return case f[ile] No. 7595/91." [FN65]

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[FN65] Cf. report No. 823 issued by the Office of the Ombudsman for Indigenous Affairs of the IBR on October 25, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1453).

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73(31) For their part, through a note of July 9, 1993 "the members of the Enxet Indigenous People […] settled in Loma Porá village" referred to the letter sent to the IBR in February, 1993 (supra para. 73(28)) "which [they] had signed" and "made it c[lear] that their master had made [them] sign the letter without their underst[anding] neither the meaning nor the contents thereof." The indigenous members argued that they reaffirmed their request for the "legalization of the lands that were located around Sa[w]hoyamaxa." [FN66] In view of the foregoing, on November 5, 1993 the INDI forwarded case file No. 7597/91 to the IBR, expressing its opinion that "for the above mentioned purposes, the relevant processing should be reset in motion." [FN67]

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[FN66] Cf. communication addressed by some "members of the Indigenous Enxet People" to the IBR on July 9, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1435).

[FN67] Cf. note P.C. No. 415/93 of the President of the Board of Directors of the INDI addressed to the President of the IBR on November 5, 1993 (case file of appendixes to the complaint, appendix 10, folio 811).

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73(32) After the administrative case file was forwarded to the IBR, the Court of the First Instance in Civil and Business Law, Fourth Rotation, requested said institution to send a legalized copy thereof, since it had been seized with a request for a preliminary injunction to be issued on the lands claimed filed by the members of the Sawhoyamaxa Community [FN68] (infra para. 73(55)). It was forwarded on December 29, 1993. [FN69]

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[FN68] Cf. note of the Clerk of the Court of the First Instance in Civil and Business Law, Fourth Rotation, addressed to the President of the IBR on December 21, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folios 1455 to 1456).

[FN69] Cf. note of the President of the IBR addressed to the Clerk of the Court of the First Instance in Civil and Business Law, Fourth Rotation, on December 29, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folio 1458).

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73(33) On March 11, 1994 the leaders of the Sawhoyamaxa Community, through their attorneys, requested the IBR to summon the corporations Urbana Inmobiliaria S.A. (Urban Real Estate,

Inc.) and COMPENSA to make an offer for sale of a piece of land of at least 15,000 hectares in the place known as Retiro Santa Elisa in Loma Porá Estate or an alternative which might allow reaching a solution to the case. [FN70] In view of the request filed by the Community leaders, on March 16, 1994 the Office of Communal Lands of the IBR issued report No. 173, wherein it recommended to request the corporations Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) and COMPENSA that they make an offer for sale. [FN71] Said report was served on Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) and COMPENSA on April 11, 1994. [FN72]

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[FN70] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on March 11, 1994 (case file of appendixes to the answer to the complaint, appendix 1, folios 1460 to 1461).
[FN71] Cf. report No. 173 issued by the Office of Communal Affairs of the IBR on March 16, 1994 (case file of appendixes to the answer to the complaint, appendix 1, folio 1464).
[FN72] Cf. note S.G. No. 81 of the Secretary-General of the IBR addressed to Urbana Inmobiliaria S.A. [Urban Real Estate, Inc.] and Compañía Paraguaya de Engorde de Novillos S.A. [Paraguayan Steer Feeder Company] on April 7, 1994 (case file of appendixes to the answer to the complaint, appendix 1, folios 1462 to 1463).

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73(34) On May 12, 1994 the leaders of the Sawhoyamaxa Community through their attorneys filed a brief with the IBR, wherein they reaffirmed their request for determination of the lands "which are part of their traditional territory and which at present are registered under the name of the corporations Roswell y Compañía S.A. (Roswell and Company, Inc.) and Kansol S.A.," and that said corporations be summoned "so that they make an offer for sale" of the lands claimed." [FN73] On February 8, 1995 the leaders of the Indigenous Community, through their attorneys, reaffirmed said request to the IBR, [FN74] which on August 24 [FN75] and September 19, 1995 [FN76] served once more on Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) and COMPENSA the report issued by the Office of Communal Lands (supra para. 73(33)).

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[FN73] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on May 12, 1994 (case file of appendixes to the answer to the complaint, appendix 1, folios 1438 to 1442).
[FN74] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on February 8, 1995 (case file of appendixes to the answer to the complaint, appendix 1, folio 1471).
[FN75] Cf. note S.G. No. 399 of the Secretary-General of the IBR addressed to Urbana Inmobiliaria S.A. [Urban Real Estate, Inc.] and to Compañía Paraguaya de Engorde de Novillos S.A. [Paraguayan Steer Feeder Company] on August 24, 1995 (case file of appendixes to the answer to the complaint, appendix 1, folio 1479).
[FN76] Cf. note S.G. No. 446 of the Secretary-General of the IBR addressed to Urbana Inmobiliaria S.A. [Urban Real Estate, Inc.] and to Compañía Paraguaya de Engorde de Novillos S.A. [Paraguayan Steer Feeder Company] on September 19, 1995 (case file of appendixes to the answer to the complaint, appendix 1, folio 1481).

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73(35) On September 20, 1995 the attorney for the COMPENSA and Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) corporations addressed the IBR to request that his principals be

dissociated from administrative case file No. 7597/91 pending before said institution on the grounds that the lands claimed known as Retiro Santa Elisa did not belong to such corporations, [FN77] as they had been sold to the Roswell y Cia. S.A. and Kansol S.A. corporations.

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[FN77] Cf. brief filed by the attorney for Compañía Paraguaya de Engorde de Novillos S.A. [Paraguayan Steer Feeder Company] and Urbana Inmobiliaria S.A. [Urban Real Estate, Inc.] before the IBR on September 20, 1995 (case file of appendixes to the answer to the complaint, appendix 1, folio 1601).

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73(36) On September 16, 1996 the Sawhoyamaxa Indigenous Community, through its attorney, ratified the claim it had laid on the lands "which are part of its […] traditional territory and essential habitat." Furthermore, it reaffirmed what had been stated in the information furnished on May 12, 1994 (supra para. 73(34)) to the effect that said lands were individualized as plot No. 16.784 and plot No. 16.786, located in Chaco and which are registered under the name of the Roswell y Cia. S.A. and Kansol S.A. corporations, respectively. Finally, it requested that the owners of said property be sent a requirement that they make an offer for sale so that a negotiated settlement could be reached. [FN78] On September 26, 1996 the Legal Counseling Department of the IBR determined that the Roswell y Cia. and Kansol S.A. corporations should be requested to make "an offer regarding the involved piece of land." [FN79] On October 31, 1996 the IBR notified the Roswell y Cia. S.A. and Kansol S.A. corporations of the request filed by the Community on September 16, 1996, as well as of above mentioned report issued by the Legal Counseling Department of the IBR and requested their intervention in the current proceedings. [FN80]

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[FN78] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on September 16, 1996 (case file of appendixes to the answer to the complaint, appendix 1, folio 1605).
[FN79] Cf. report No. 3882 issued by the Legal Counseling Department of the IBR on September 26, 1996 (case file of appendixes to the answer to the complaint, appendix 1, folio 1612).
[FN80] Cf. note SG No. 575 addressed by the IBR to Mr. Heribert Roedel on October 31, 1996 (case file of appendixes to the answer to the complaint, appendix 1, folio 1600).

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73(37) On January 13, 1997 the Sawhoyamaxa Indigenous Community requested the IBR to forward administrative case file No. 7597/91 to the INDI, [FN81] which it did on February 18, 1997. [FN82] On February 26, 1997 the attorney for the Sawhoyamaxa Indigenous Community filed a brief with the INDI, whereby he requested that a "report be drawn recommending the condemnation of the lands claimed [by the members of the Community] so that it be duly dealt with by the Congress of the Republic." [FN83] Later, on April 21, 1997 the leaders of the Indigenous Community reaffirmed such request to the INDI, as a matter requiring urgent treatment. To said brief, they attached a copy of the census of the Community and of the anthropological report on the Sawhoyamaxa Community drawn by the Centro de Estudios

Antropológicos de la Universidad “Nuestra Señora de la Asunción” [Center for Antropological Studies of the “Our Lady of Asunción” University].” [FN84]

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[FN81] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on January 13, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1592).
[FN82] Cf. note SG No. 57 addressed by the Secretary-General of the IBR to the President of the INDI on February 18, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1595).
[FN83] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the INDI on February 26, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folios 1597 to 1598).
[FN84] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the INDI on February 21, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1599).
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73(38) On May 7, 1997 the President of the Council of the INDI issued resolution No. 138/97, whereby it decided “[t]o fully support the claim laid by the Sawhoyamaxa Indigenous Communities and recommend the IBR that it deem the administrative proceeding before it to be concluded and request the condemnation of the property claimed by the Indigenous Community through the proper channels.” [FN85] Soon afterwards, on May 12, 1997 the INDI sent back case file No. 7597/91 to the IBR, “for the purpose of speeding the legalization of the settlement of the Community.” [FN86]

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[FN85] Cf. resolution P.C. No. 138/97 issued by the President of the Council of the INDI on May 7, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1503).
[FN86] Cf. note P.C. No. 249/97 issued by the President of the Council of the INDI on May 12, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1502).
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73(39) As per report No. 1114 of June 4, 1997, [FN87] on the 9th of the same month and year the IBR requested the General Office of Public Registries information on the general conditions of ownership of Plots Nos. 16784 and 16786 located in the Chaco District, the condemnation of which is requested. [FN88] Due to the lack of reply to such request, on August 29 of that same year the Legal Counseling Department issued report No. 1793, whereby it recommended that the request for information be made once more to the General Office of Public Registries on the general conditions of ownership of the pieces of real estate in question “before and for the purpose of issuing a report on the merits of the case.” [FN89] There is no evidence in the case file of a reply to the foregoing request.

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[FN87] Cf. report No. 1114 issued by the Legal Advisor of the IBR on June 4, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1504).

[FN88] Cf. note S.G. No. 328 of the Secretary-General of the IBR addressed to the Director-General of Public Registries on June 9, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1505).
[FN89] Cf. report No. 1793 issued by the Legal Counseling Department of the IBR on August 29, 1997 (case file of appendixes to the answer to the complaint, appendix 1, folio 1520).
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73(40) On October 23, 1998 the legal representatives of the Kansol S.A. and Roswell Company S.A. corporations filed a brief and several appendixes before the IBR, whereby they requested said institution, inter alia, to deem administrative case file No. 7597/91 to be concluded and "therefore […] to forward a copy of the report to the Court of the First Instance in Civil Law, Fourth Rotation […] for the purpose of discharging the preliminary injunctions" issued against such corporations [FN90] (infra para. 73(56)).

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[FN90] Cf. brief filed by the attorney for the firms Kansol S.A. and Roswell Company S.A. before the IBR on October 23, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folios 1551 to 1554).
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73(41) On November 11, 1998 the IBR forwarded the brief filed by the legal representatives of the Kansol S.A. and Roswell Company S.A. corporations to the INDI and the members of the Sawhoyamaxa Community in order to request them to file the comments they might deem relevant. [FN91]

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[FN91] Cf. note S.G. No. 411 of the Secretary-General of the IBR addressed to the President of the INDI on November 11, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folios 1573 and 1574).
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73(42) On November 19, 1998 the attorney for the Community filed a brief with the IBR, wherein he requested said institution to dismiss the request made by the owner corporations (supra para. 73(40)). [FN92] For his part, the President of the Council of the INDI, on November 27, 1998, submitted the comments requested by the IBR, wherein he pointed out, inter alia, that the Legal Counseling Department of such institution was of the "opinion that ways and means should be deployed so that, within the framework of the law, [the Sawhoyamaxa Community] be awarded plots of land which be suitable for their way of living and in which they can obtain the necessary means of subsistence, within the 250.000 hectares which, according to the report by the Anthropological Service, make up [their] traditional habitat." [FN93]

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[FN92] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the IBR on November 18, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folios 1575 to 1576).

[FN93] Cf. note P.C. No. 966/98 of the INDI addressed to the IBR on November 27, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folio 1578).

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73(43) On December 3, 1998 the Legal Counseling Department of the IBR issued report No. 2065, whereby it pointed out that, inter alia, although from the file of the case pending before such institution it results "that the piece of land requested, Retiro SANTA ELISA, is part […] of th[e] traditional habitat" of the members of the Sawhoyamaxa Community, from the steps taken by the IBR and the attached documents "the rationality of the exploitation" of such pieces of land was evidenced, whereby, "pursuant to the provisions of the AGRARIAN STATUTE, it w[as] not possible to compulsively take them and the owners refused any other negotiated outcome." Thus, the report concluded that the IBR had no "powers to sacrifice an ECONOMIC UNIT, particularly if there is an alternative solution." [FN94]

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[FN94] Cf. report No. 2065 issued by the Legal Counseling Department of the IBR on December 3, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folio 1580). What has been highlighted was so in the original document.

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73(44) On June 15, 1999 the IBR issued resolution No. 170, whereby it pointed out, inter alia, that

it is not for the IBR to decide whether to condemn or to negotiate the purchase of a piece of real property claimed by an Indigenous Community, or not; such power lies exclusively with the [INDI. T]herefore, such institution is the one which will consider whether granting such petition is feasible or not [,]

wherefore it decided:

1. To accept the recommendation contained in Resolution PC. No.138/97, issued by the President of the Instituto Paraguayo del Indígena (Paraguayan Institute for Indigenous Affairs) [(supra para. 73(38))], and therefore, to consider the administrative proceeding recorded in this case file to be concluded.
2. To order that Case File No. 7567/91 entitled: "Indigenous Community of Maroma- Pozo Colorado – on/lands", be forwarded to the Instituto Paraguayo del Indígena (Paraguayan Institute for Indigenous Affairs) so that the steps that may be legally appropriate be taken. [FN95]

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[FN95] Cf. resolution No. 170 (Record No.7) issued by the IBR on June 15, 1999 (case file of appendixes to the answer to the complaint, appendix 1, folios 1583 to 1584).

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73(45) On July 16, 1999 the IBR forwarded administrative case file No. 7597/91 to the INDI. [FN96]

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[FN96] Cf. note A No. 131 of the IBR addressed to the INDI on July 16, 1999 (case file of appendixes to the answer to the complaint, appendix 1, folio 1589).

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73(46) On July 13, 1999 the attorney for the Sawhoyamaxa Community filed a brief with the INDI, requesting that a meeting be convened with the owners of the lands claimed in order to speed the possible negotiations. [FN97]

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[FN97] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the INDI on July 13, 1999 (case file of appendixes to the answer to the complaint, appendix 1, folio 1588).

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73(47) There is no evidence in the case file of the instant case that further steps have been taken by the INDI.

d) Requests for condemnation of the lands before the National Congress of Paraguay

73(48) On May 13, 1997 Mr. Carlos Marecos and Mr. Teresio González, leaders of the Sawhoyamaxa Community, with the sponsorship of national deputies Andrés Avelino Díaz and Juan Carlos Ramírez-Montalbetti, introduced to the President of the Chamber of Deputies of the National Congress a bill with its pertinent recitals [FN98], in order to declare the pieces of land owned by Kansol S.A. and Roswel Company S.A. to be of social interest and condemn such property in favor of the INDI, so that thereafter it may be transferred to the members of the Sawhoyamaxa Community. [FN99]

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[FN98] Cf. communication addressed by Mr. Carlos Marecos and Mr. Teresio Gonzalez, leaders of the Sawhoyamaxa Indigenous Community, to the President of the Chamber of Deputies on May 13, 1997 (case file of appendixes to the complaint, appendix 18, folios 1050 to 1059).

[FN99] Cf. Bill introduced by deputies Juan Carlos Ramírez-Montalbetti and Andrés Avelino Díaz on May 20, 1997 mentioned in the communication of the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] of May 20, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folios 1555 to 1556).

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73(49) On May 20, 1998 the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] of the Chamber of Deputies proposed to such Chamber a resolution dismissing the above mentioned bill of condemnation. [FN100] Thereafter, on June 11, 1998 deputy Juan Carlos Ramírez-Montalbetti withdrew said bill. [FN101]

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[FN100] Cf. note D. DD.HH No. 6 of the Comisión de Derechos Humanos y Asuntos de Indígenas [Committee on Human Rights and Indigenous Affairs] of May 20, 1998 (case file of appendixes to the answer to the complaint, appendix 1, folios 1555 to 1556).
[FN101] Cf. note in the case file of the bill regarding the note whereby said bill was withdrawn signed by deputy Juan Carlos Ramírez-Montalbetti of June 11, 1998 (case file of appendixes to the complaint, appendix 18, folio 1060).
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73(50) A year later, on June 25, 1999, Mr. Carlos Marecos and Mr. Teresio González, leaders of the Sawhoyamaxa Community, with the sponsorship of the then senator Juan Carlos Ramírez-Montalbetti, introduced to the President of the Senate of the National Congress a new bill of condemnation with the pertinent recitals [FN102] which "declares […] plot No. 16786 having an area of 9,105 hectares and 2,978 square meters and plot No. 16784 having an area of 5,299 hectares and 4,720 square meters, both pieces of property located in the District of Pozo Colorado, "Presidente Hayes" Department, belonging to the corporations Kansol S.A. and Roswell C. S.A. respectively, to be of social interest and condemns[…] them in favor of the Paraguayan Institute for Indigenous Affairs (INDI), so that they may subsequently awarded to the Enxet-Lengua of Sawhoyamaxa Indigenous Community. The total area of both pieces of property adds up to 14,404 hectares and 7,698 square meters." [FN103]

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[FN102] Cf. communication addressed to the President of the Senate by Mr. Carlos Marecos and Teresio González, leaders of the Sawhoyamaxa Indigenous Community on June 23, 1999 (case file of appendixes to the complaint, appendix 18, folios 1062 to 1074).
[FN103] Cf. bill introduced by deputies Juan Carlos Ramírez-Montalbetti and Andrés Avelino Díaz on June 25, 1999 (case file of appendixes to the complaint, appendix 18, folio 1074).
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73(51) On September 26, 2000 Mr. Carlos Marecos and Marcelino López, leaders of the Sawhoyamaxa and Xakmok Káser Indigenous Communities of the Enxet People, requested the President of the Committee for Agrarian Reform of the Senate of the National Congress, that a favorable report be issued regarding the bills of condemnation introduced thereto (supra para. 73(50)). [FN104]

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[FN104] Cf. communication addressed to the President of the Committee for Agrarian Reform of the Senate of the National Congress by Mr. Carlos Marecos and Marcelino López, leaders of the Sawhoyamaxa and Xakmok Káser Communities of the Enxet People (Lengua and Sanapaná) on September 26, 2000 (case file of appendixes to the complaint, appendix 18, folios 1076 to 1077).
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73(52) On September 27, 2000 the Committee for Agrarian Reform and Rural Welfare of the Senate of the National Congress submitted before such Chamber a report approving the foregoing bill of condemnation. [FN105] Said report has been subscribed by four out of the six members of the Committee for Agrarian Reform and Rural Welfare.

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[FN105] Cf. report No. 12 2000/2001 issued by the Committee for Agrarian Reform and Rural Welfare on September 27, 2000 (case file of appendixes to the complaint, appendix 18, folio 1078).

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73(53) Notwithstanding, on November 9, 2000 the votes of the senators who make up the Committee for Agrarian Reform and Rural Welfare of the Senate of the National Congress were divided. Thus, three of the members of said Committee advised the Senate "in majority" to dismiss said bill, [FN106] while two of them advised "in minority" to pass such bill. [FN107]

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[FN106] Cf. report No. 17 2000/2001 issued by the Committee for Agrarian Reform and Rural Welfare on November 9, 2000 (case file of appendixes to the complaint, appendix 18, folio 1079).

[FN107] Cf. report No. 16 2000/2001 issued by the Committee for Agrarian Reform and Rural Welfare on November 9, 2000 (case file of appendixes to the complaint, appendix 18, folio 1080).

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73(54) Finally, on November 16, 2000 the Senate of the National Congress resolved to dismiss the aforementioned bill. [FN108]

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[FN108] Cf. resolution No. 692 issued by the Senate on November 16, 2000 (case file of appendixes to the complaint, appendix 18, folio 1081).

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d) Preliminary injunctions and notice of lis pendens for the protection of the lands claimed

73(55) On September 7, 1993 the attorneys for the Sawhoyamaxa Community requested the IBR to demand the Judiciary that a preliminary injunction be issued on the lands claimed by said Community on the grounds that their owner had started to cut down the forest in the area. [FN109] By an order dated February 16, 1994 the Court of the First Instance in Civil and Business Law, Fourth Rotation issued an injunction over the real property belonging to the corporations Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) and COMPENSA and had a notice of lis pendens registered on public records regarding said property. [FN110]

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[FN109] Cf. brief filed with the IBR by the Sawhoyamaxa Commnity on September 7, 1993 (case file of appendixes to the answer to the complaint, appendix 1, folios 1433 to 1434).

[FN110] Cf. order A.I. No. 684 issued by the Court of the First Instance in Civil and Business Law, Fourth Rotation, on July 5, 1994 (case file of appendixes to the complaint, appendix 15, folios 1027 to 1028).

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73(56) While these measures were in full force and effect, on April 6, 1994 the leaders of the Sawhoyamaxa Community filed a complaint before the Chamber of Deputies of the National Congress, alleging that the forest on the lands they claimed as part of their traditional lands were being cut down by the owner of Loma Porá Estate. [FN111] On April 8, 1994 national deputy Martín F. Sannemann went to the area to verify the truthfulness of the complaint and drew up a report on such visit. According to such report, an immense forest area had been cut down by the owner of the estate, notwithstanding the injunctions issued over such lands which were in full force and effect. [FN112]

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[FN111] Cf. official report to the President of the Chamber of Deputies, to the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] and to the Comisión de Ecología [Commission on Ecology] regarding the situation of the indigenous communities and forest cutting in Chaco submitted on April 8, 1994, supra note 26.

[FN112] Cf. official report to the President of the Chamber of Deputies, to the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] and to the Comisión de Ecología [Commission on Ecology] regarding the situation of the indigenous communities and forest cutting in Chaco submitted on April 8, 1994, supra note 26.

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73(57) Later, it was shown that the piece of land claimed by the applicant Indigenous Community was not within the estates unto which restraints on ownership rights had been imposed, whereby the Court ordered to discharge them. [FN113] Next, the attorneys for the Sawhoyamaxa Community submitted before said Court a copy of the title deeds to said pieces of real property belonging to the Kansol S.A. and Roswel y Compañía S.A. corporations, as well as a map wherein the location of the real property owned by such corporations appeared, so that the pieces of real property claimed by the Indigenous Community might be properly identified. On July 5, 1994 the Court of the First Instance in Civil and Business Law, Fourth Rotation issued "an injunction over the real property belonging to the corporations Urbana Inmobiliaria S.A. (Urban Real Estate, Inc.) and COMPENSA and filed notice of lis pendens on public records under bail bond by way of surety […] over the real property identified as Plot No. 16786, Chaco, Registration No. 12,935, belonging to the Kansol S.A. corporation, having an area of 9,105 hectares and 2,978 square meters and as Plot No. 16.784, Chaco, Registration No. 12,930, belonging to the corporation Roswel y Compañía S.A. having an area of 5,299 hectares and 4,720 square meters." [FN114]

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[FN113] Cf. order A.I. No. 684 issued by the Court of the First Instance in Civil and Business Law, Fourth Rotation, on July 5, 1994 (case file of appendixes to the complaint, appendix 15, folios 1027 to 1028).

[FN114] Cf. order A.I. No. 684 issued by the Court of the First Instance in Civil and Business Law, Fourth Rotation, on July 5, 1994 (case file of appendixes to the complaint, appendix 15, folios 1027 to 1028).

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73(58) On April 24, 2002 the attorneys for the members of the Sawhoyamaxa Community requested the INDI to take such steps as may be deemed necessary so that preliminary injunctions be issued by a court "in the face of the danger of the further cutting down of the forest in the area claimed." [FN115] On February 7, 2003 the Governing Board of the INDI decided to "authorize the Presidency of the Council to request that the relevant preliminary injunctions be ordered for the purpose of securing the rights of the Community […]." [FN116]

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[FN115] Cf. brief filed by the Sawhoyamaxa Indigenous Community with the INDI on April 24, 2002 (case file of appendixes to the answer to the complaint, appendix 1, folios 1615 to 1616).
[FN116] Cf. resolution No. 01/2003 issued by the Council of the INDI on February 7, 2003 (case file of appendixes to the answer to the complaint, appendix 1, folios 1617 to 1618).

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73(59) On June13, 2003 the INDI requested the Court of the First Instance in Civil and Business Law, Seventh Rotation, that "a preliminary injunction be issued restraining all innovations in both the physical and the legal conditions and that a notice of lis pendens be filed on public records" regarding the real property registered under the name of the Roswel y Cia. S.A. and Kansol S.A corporations. [FN117]

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[FN117] Cf. brief filed by the INDI before the Court of the First Instance in Civil and Business Law, Seventh Rotation, on June 13, 2003 (case file of appendixes to the answer to the complaint, appendix 1, folios 1620 to 1622).

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73(60) On July 23, 2003 the Court of the First Instance in Civil and Business Law, Seventh Rotation, requested the General Director of the Public Registries "to order that an injunction be issued" affecting the above mentioned property. [FN118]

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[FN118] Cf. official letter No. 1108 addressed by the Court of the First Instance in Civil and Business Law, Seventh Rotation to the Director-General of the Public Registries on July 23, 2003 (case file of appendixes to the answer to the complaint, appendix 1, folio 1619).

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e) Living conditions of the members of the Sawhoyamaxa Community

73(61) On the estates the members of the Sawhoyamaxa Community lived in extreme poverty, which was characterized by poor health conditions and medical care, the working conditions of exploitation to which they were subjected, and the restrictions imposed on them to own crops and cattle and to exercise freely their traditional subsistence activities. [FN119] This situation worsened as a consequence of the pressures exerted on the owners of such estates when they learned the Community had claimed lands for their own . [FN120]

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[FN119] Cf. brief filed with the IBR by the leaders of Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 villages on August 6, 1991, supra note 26; anthropological report on the "Sawhoyamaxa" Community of the Enxet People. Centro de Estudios Antropológicos de la Universidad Católica "Nuestra Señora de la Asunción" [Catholic University "Our Lady of Asuncion" Anthropological Studies Center], supra note 18; official report to the President of the Chamber of Deputies, to the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] and to the Comisión de Ecología [Commission on Ecology] regarding the situation of the indigenous communities and forest cutting in Chaco submitted on April 8, 1994, supra note 26; statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 676 to 679); statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28, and statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27.

[FN120] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006 supra note 28; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 734 to 738); and official report to the President of the Chamber of Deputies, to the Comisión de Derechos Humanos y Asuntos Indígenas [Committee on Human Rights and Indigenous Affairs] and to the Comisión de Ecología [Commission on Ecology] regarding the situation of the indigenous communities and forest cutting in Chaco submitted on April 8, 1994, supra note 26.

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73(62) Most members of the Sawhoyamaxa Community decided to leave said estates and at present they live along a national road in extreme poverty, without any type of services, and waiting for the competent bodies to decide on the land claim they filed. [FN121] This situation was recognized by the President of the Republic of Paraguay on June 23, 1999, by means of Executive Order No. 3789 whereby the Yakye Axa and the Sawhoyamaxa Indigenous Communities of the Enxet-Lengua People were declared to be in a state of emergency. [FN122]

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[FN121] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27; statement rendered by Mr. Pablo Balmaceda before a publid official whose acts command full faith and credit on January 17, 2006, supra note 44; book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses], Paraguay, 2002" of the Secretaría Técnica de Planificación de la Presidencia de

la República [Office of the Technical Secretary of State for Planning to the President of the Republic], Paraguay, 2002. Volume II, pages 400 and 401; Executive Order No. 3789 issued by the President of the Republic of Paraguay on June 23, 1999 (case file of appendixes to the answer to the complaint, appendix 1, folios 1629 to 1631); report drawn by Mr. Claudio Miltos and Augusto Ortigoza, officials of the Instituto Paraguayo del Indígena [Paraguayan Institute of Indigenous Affairs] on February 25, 2000 (case file of appendixes to the complaint, appendix 3, folios 1640 to 1642); video entitled "On the Way to Sawhoyamaxa" made by TierraViva Organization (case file of appendixes to the complaint, appendix 21); press release 23/99 issued by the Inter-American Commission on Human Rights on July 30, 1999, para. 58; report on the situation of human rights in Paraguay issued by the Inter-American Commission on Human Rights on March 9, 2001, Chapter IX, para. 8; journalistic article entitled "Diseases and hunger, indigenous problems" published on October 31, 1994 in ABC newspaper (case file of appendixes to the complaint, appendix 6, folio 536); journalistic article entitled "Medical care is a luxury in the Enxet Community", published in March 1995 in ABC newspaper (case file of appendixes to the complaint, appendix 6, folio 537); journalistic article entitled "The Enxet Indians marginalized" published on May 8, 1995 in Ultima Hora newspaper (case file of appendixes to the complaint, appendix 6, folio 538); journalistic article entitled "Diseases and lack of lands keep agony intact" published on April 8, 1995 in ABC newspaper (case file of appendixes to the complaint, appendix 6, folio 539); journalistic article entitled "Indigenist regrets the situation of native peoples" published on July 28, 1995 in ABC newspaper (case file of appendixes to the complaint, appendix 6, folio 540); journalistic article entitled "Indigenous Communities in Chaco request medical care and food" published on July 31, 1995 in Noticias newspaper (case file of appendixes to the complaint, appendix 6, folio 541); journalistic article entitled "Indigenous people fight to survive" published on February 5, 1997 in La Nación newspaper (case file of appendixes to the complaint, appendix 6, folio 543); journalistic article entitled "Plunged in poverty, native people resist disappearance" published on October 13, 1994 in ABC newspaper (case file of appendixes to the complaint, appendix 6, folio 558); journalistic article entitled "For the Indigenous Peolple of Chaco slavery was not abolished" published on September 6, 1994 in La Corbata newspaper (case file of appendixes to the complaint, appendix 6, folio 535); journalistic article entitled "Natives exploited by estates in Chaco", published on August 5, 1994 in Noticias newspaper (case file of appendixes to the complaint, appendix 6, folios 533 to 534).

[FN122] Cf. Executive Order No. 3789 issued by the President of the Republic of Paraguay on June 23, 1999, supra note 121.

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73(63) The foregoing presidential Executive Order recognized that these communities were deprived of the "access to the traditional means of subsistence tied to their cultural identity as a result of the prohibition by the owners to their entry to the habitat they claimed as part of their ancestral territories [, which] hinders the normal development of the life of these native communities [due to] the lack of a minimum of food and essential medical care and which is a matter of concern to the Government which demands an urgent response"; consequently it decided that the INDI, "in conjunction with the Ministries of the Interior and of Public Health and Social Welfare[,] take such actions as may be necessary to provide the families of the [Sawhoyamaxa Community] with food and medical care during the period of the judicial

proceedings regardin[g] the legalization of the lands claimed as part of the traditional habitat [of such Community].” [FN123]

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[FN123] Cf. Executive Order No. 3789 issued by the President of the Republic of Paraguay on June 23, 1999, supra note 121.

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73(64) On February 18, 2000 officials from the INDI visited the settlements of the Sawhoyamaxa Community members, where they were able to verify “the precarious conditions in which they live due to the lack of access to the territories they claim in order to develop their traditional subsistence activities such as hunting, fishing and gathering [,] the scarcity of drinking water as a result of the long drought caused by lack of scarce rain in the area [, as well as] by the impossibility to grow any crops for their subsistence” in the settlements where they currently live. [FN124]

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[FN124] Cf. report drawn by Mr. Claudio Miltos and Augusto Ortigoza, officials of the Instituto Paraguayo del Indígena [Paraguayan Institute for Indigenous Affairs], on February 25, 2000 (case file of appendixes to the answer to the complaint, folios 1640 to 1642).

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73(65) As a follow-up on the foregoing report, officials from the INDI visited the Community to deliver food to its members on March 15, 2000, September 8, November 5, 2001, and January 31, April 5, July 19, July 29, and September 9, 2002. [FN125] Likewise, on March 25, 2000 officials from the INDI visited the Community and gave out school items, gathered data from the existing schools, distributed medicines among the Community members and made a campaign to register children and other interested persons at the Registry of Civil Status. [FN126]

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[FN125] Cf. report submitted by Mr. Edgar Pessoa and Juan Almeida to the President of the Council of the INDI on September 10, 2001 and appendixes thereto; report submitted by Mr. Claudio Miltos to the President of the Council of the INDI on November 5, 2001 and appendixes thereto; report submitted by Mr. Christian Florentín to the President of the Council of the INDI of January 31, 2002 and appendixes thereto; report submitted by Mr. Juan Almeida to the President of the Council of the INDI of April 5, 2002 and appendixes thereto; report submitted by Mr. Christian Florentín to the President of the Council of the INDI of July 19, 2002 and appendixes thereto; report submitted by Mr. Christian Florentín to the President of the Council of the INDI on July 29, 2002 and appendixes thereto, and report submitted by Mr. Christian Florentín to the President of the Council of the INDI on September 9, 2002.

[FN126] Cf. report submitted by Mr. Claudio Miltos to the President of the Council of the INDI on March 30, 2000 and appendixes thereto.

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73(66) During the second semester of 2005, officials from the Ministry of Public Health and Social Welfare made three visits to the members of the Sawhoyamaxa Community to provide medical care and vaccination, give educational talks, and teach nursery procedures. [FN127]

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[FN127] Cf. report submitted by the Coordinator of Indigenous Affairs of the Ministry of Public Health and Social Welfare to the Minister on January 30, 2006 (case file on the merits, reparations, and costs, folio 1157).

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73(67) Despite the fact that the Sawhoyamaxa Community was declared to be in a state of emergency, its members continue living in precarious conditions, without access even to the basic essential services. [FN128]

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[FN128] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44; book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic]." Paraguay, 2002.Volume II, pages 400 and 401; Executive Order No. 3789 issued by the President of the Republic of Paraguay on June 23, 1999, supra note 121; report drawn by Mr. Claudio Miltos and Augusto Ortigoza, officials of the Instituto Paraguayo del Indígena [Paraguayan Institute of Indigenous Affairs], on February 25, 2000, supra note 121, and video entitled "on the Way to Sawhoyamaxa", supra note 121.

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73(68) In "Santa Elisa" and "KM 16" settlements, the members of the Sawhoyamaxa Community have a total number of forty-nine precarious houses, with an average number of four members living in each of them. Only a few of those houses have electricity, and the members of the Community generally burn wood to cook, as well as candles and oil lamps to light the place. [FN129] In "Santa Elisa" settlement some families have built precarious latrines. [FN130] In general, the members of the Community use the open field to relieve themselves. [FN131]

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[FN129] Cf. book titled ""Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la

Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic]." Paraguay, 2002. Volume II, pages 400 and 401.
[FN130] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN131] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
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73(69) The water used by the members of the Community, both for human consumption as well as for their personal hygiene, comes from wells (earth dams breakwaters) located in the lands claimed, which are also used by animals. [FN132] In periods of drought, the lack of clean water in the Community is alarming. [FN133] During November 2002 and January 2003 the members of the Community who had settled in “Santa Elisa” received two large water tanks which were fed by the Centro Nacional de Emergencia [National Emergency Center] with water brought from breakwaters, that is, with non-drinking water. Notwithstanding, at present such water tanks are not operating. [FN134]

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[FN132] Cf. book titled ““Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay],” Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic] ." Paraguay, 2002. Volume II, pages 400 and 401and statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN133] Cf. statement rendered by Ms. Gladys Benítez before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120, and statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN134] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44, and book titled “Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay],” Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic]." Paraguay, 2002. Volume II, pages 400 and 401.
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73(70) The main settlements of this Indigenous Community are not fit for growing crops or practicing their traditional subsistence activities. [FN135] In order to obtain food the members of the Community enter the lands claimed: the men to hunt and fish, and the women to gather fruit and honey. [FN136]

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[FN135] Cf. statement rendered by Ms. Gladys Benítez before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120, and book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic]." Paraguay, 2002. Volume II, pages 400 and 401.
[FN136] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44, and book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic]." Paraguay, 2002. Volume II, pages 400 and 401.
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73(71) In "Santa Elisa" settlement there is a school which is regularly attended by the Community children. Given the characteristics of such settlement, the school has neither the proper structure nor enough facilities or materials. [FN137] The members of the Community settled in "KM 16" do not have an "indigenous" school of their own, whereby the Community children attend a "non-indigenous" school in the area. [FN138] In both schools classes are given in Spanish and Guarani. [FN139]

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[FN137] Cf. statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28, and statement by Mr. Pablo Balmaceda given before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN138] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119, and statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120.
[FN139] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120, and statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28.
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73(72) The members of the Community do not have a health post or center in their settlements and are rarely visited by health workers. Visits by health workers have been made without notice, for which reason only a few members of the Community were given medical care [FN140]. The nearest medical center for the members of the Community to attend is the Hospital Regional de Concepción [Hospital Regional de Concepción] (Concepción Regional Hospital) [FN141] located 46 kilometers away (from Santa Elisa settlement). [FN142] According to the Paraguayan legislation, medical, dental, hospital, laboratory services and other medical procedures should be provided by the State to the members of the Indigenous Communities of Paraguay free of charge. [FN143] However, when they are ill they generally resort to the traditional medicine or to "household remedies." The greatest material obstacle the members of this indigenous community have to face in order to have access to medical care is the lack of financial means to travel to the hospitals and to buy medicines. [FN144]

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[FN140] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44, and book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadística, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República [Office of the Technical Secretary of State for Planning to the President of the Republic]." Paraguay, 2002. Volume II, pages 400 and 401.

[FN141] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44, and statement rendered by Mr. Bernardo Jacquet in 2005 according to a certified copy of the original document as attested by Notery Public José Cayo Estigarribia (case file on the merits, reparations, and costs, Volume III, folio 557).

[FN142] Cf. statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28.

[FN143] Cf. form letter S.G No. 1/95 on "integral, deferential and gratituous medical care provided to indigenous communities" issued by the Ministry of Public Health and Social Welfare on February 24, 1995 (case file on the merits, reparations, and costs, Volume III, folio 867), and resolution No. 280/92 issued by the Ministry of Public Health and Social Welfare on April 15, 1992 (case file on the merits, reparations, and costs, Volume III, folios 864 to 865); statement rendered by Mr. César Escobar-Cattebecke before a public official whose acts command full faith and credit on February 18, 200 (sic) (case file on the merits, reparations, and costs, Volume III, folios 560 to 564).

[FN144] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

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73(73) Likewise, the members of this Community have obstacles to register their births, deaths, and changes in their civil status, as well as to obtain any other identification document. [FN145] Particularly, the members of the Community NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González Aponte, NN González Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres Chávez, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza died without being legally recognized as a person (infra para. 194). None of these children had a birth certificate, a death certificate, or any other type of identification document. [FN146]

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[FN145] Cf. statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27; statement rendered by Mr. Leonardo González-Fernández before a public official whose acts command full faith and credit on January 17, 2006 (case file on the merits, reparations, and costs, Volume III, folios 728 to 731), and response of the State to the request for evidence to facilitate the adjudication of the case made by the President of the Court on January 20, 2006 (case file on the merits, reparations, and costs, Volume III, folios 610 and 611).

[FN146] Cf. response of the State to the request for evidence to facilitate the adjudication of the cse made by the President of the Court on January 20, 2006 (case file on the merits, reparations, and costs, Volume III, folios 610 and 611).

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73(74) Within the context of the precarious living and health conditions described, the members of the Sawhoyamaxa Community, particularly the children and the elderly, are vulnerable to diseases and epidemics, and many died from tetanus, pneumonia, and measles, serious dehydration, cachexia, and enterocolitis or alleged traffic and occupational accidents without any state control. Among the Community members who died are:

1) NN Galarza: He died in September 2001. He received medical care before death at the Hospital Regional de Concepción [Hospital Regional de Concepción], where he was diagnosed tetanus and released, since “nothing could be done.” After a few days the characteristic rigidity of this disease set in and death ensued within hours, at an age of one month. [FN147] His mother is Sonia Galarza-Aponte.

2) Rosana López: She died in 1997 from measles. She did not receive medical care before she died. According to her mother, she had measles, then cough, and as she did not receive any treatment, her condition worsened and finally she suffered from diarrhea and died rapidly. She was three years old. [FN148] Her parents are Antonio López and Porfiria Alvarenga.

3) Eduardo Cáceres: He died in 1999 from pneumonia. Some days after he got sick, his mother took him to the Hospital Regional de Concepción [Hospital Regional de Concepción] [Concepcion Regional Hospital]. The child was admitted into hospital, but was not administered medication "due to economic reasons, that is, his mother could not afford to buy the medicines he had been prescribed, and the child died eight days after being admitted into hospital." He was one year old. [FN149] His mother is Nélida Cáceres.

4) Eulalio Cáceres: He died in 1999 from pneumonia. He received medical care before he died at the Hospital Regional de Concepción [Hospital Regional de Concepción], where he was admitted, like his brother, but was not administered medication. After his brother´s death, his mother was asked to take Eulalio away from hospital if she was not to buy the medication prescribed and he was released from hospital. He was one month old. [FN150] His mother is Nélida Cáceres.

5) Esteban González-Aponte: He died in 2000 from measles. He was not given medical care before he died. [FN151] His parents are José González and Anuncia Aponte.

6) NN González-Aponte: She died on December 30, 2002 from enterocolitis-dehydration. She was given medical care at the Hospital Regional de Concepción [Hospital Regional de Concepción] and released without being actually much better, though she was given a few medicines. She died eight days later. She was three months old. [FN152] Her parents are José González and Anuncia Aponte.

7) NN Yegros: Died on May 30, 2002 from pneumonia. Was not given medical care before dying. Eight months old. [FN153] The mother is Elina Yegros.

8) Jenny Toledo: She died on August 24, 2002 from dehydration. She was given medical care and was admitted into the Hospital de Clínicas de Asunción [Asunción Clinical Hospital] due to a likely "bronchopneumonia." She was released from hospital apparently in good condition, but without medication. She was one year and eight months old. [FN154] Her parents are Emiliano Toledo and Carmen Yegros.

9) Guido Ruiz-Díaz: He died on August 15, 2002 from enterocolitis and dehydration. He was not given medical care before he died. He was three months old. [FN155] His parents are Raimundo Ruiz-Díaz and Juliana Sosa-Benítez.

10) NN González: He died on May 15, 2002 from tetanus. He was given medical care by the nurse of Río Verde, "who diagnosed tetanus and said that she could do no more." [FN156] He was thirteen days old. His parents are Aparicia González and Dionisio Galeano.

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[FN147] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN148] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN149] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN150] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN151] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN152] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN153] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN154] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN155] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN156] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

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11) Luis Torres-Chávez: He died on August 24, 2002 from enterocolitis and a hepatic colic. He was not given medical care before his death. He died a week after the onset of the disease. He was twenty-one years old. [FN157] His mother is Veneranda Chávez-Acuña and his grandmother, Hipólita Acuña.
12) Derlis Armando Torres: He died in 2002 from hypoalbuminemia and cachexia. He was given medical care at the Hospital Regional de Concepción [Hospital Regional de Concepción], where he died. He was one year old. [FN158] His mother is Veneranda Chávez-Acuña.
13) NN Torres: She died in May 2003 from blood dyscrasia. She was not given medical care before she died. She was three days old. Her mother is Natalia Torres-Chávez.
14) Juan Ramón González: He died on October 10, 2002 from pneumonia. He was given medical care at the Hospital Regional de Concepción [Hospital Regional de Concepción], where he died two days after being admitted. He was one year and a half old. His parents are Juan José González and Margarita González.
15) Diego Andrés Ayala: He died on October 3, 2002 from enterocolitis-dehydration. He was not given medical care. He had a fever, dhyarrea and vomiting. [FN159] His mother is Hermelinda Ayala.
16) Francisca Britez: She died on October 23, 2000 from enterocolitis and dehydration. She was not given medical care before she died. She was ten months old. [FN160] Her parents are Amado Britez and Emilia Ayala.
17) Antonio González: He died in November 1996 from tetanus. He was given medical care at the Hospital Regional de Concepción [Hospital Regional de Concepción], where he died. He was one month old. [FN161] His parents are Cirilo González and Clementina Fernández.
18) Sandra Elizabeth Chávez: She died in 1993 from pneumonic bronchitis. She was not given medical care. She was seven months old. [FN162] His parents are Daniel Chávez and Victoria Fernández.
19) Ramona Flores: She died on July 16, 1995 from pneumonia. She was not given medical care before she died. She was sixty-five years old. Her daughter is Leonidas Fernández.
20) Pedro Fernández: He died on October 12, 2001 from pneumonia. He was not given medical care before he died. He was seventy-nine years old. His daughter is Leonidas Fernández.

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[FN157] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN158] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN159] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN160] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN161] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
[FN162] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.
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21) Eusebio Ayala: He died on March 16, 1998 from pneumonia and hypertension. He was not given medical care before he died. He was eighty years old. [FN163] His daughter is Elsa Ayala.
22) Lucia Aponte: She died in 2002 from tuberculosis, a disease she had suffered for several years. She was not given medical care before she died; she had been treated several times before, but she "would not finish treatment because she could get the medicines in Concepción or in other cities" She was 50 years old. Her sons are Elodio, Sindulfo, Ricardo, and Zunny Ramírez.
23) Marcos Chávez: He died in 2000 from a polytraumatism caused during an occupational accident. He was not given medical care before he died. According to his next of kin, he fell off a horse while he was working at Diana estate, from where he "was brought back to the Community and abandoned there, dying later due to the trauma suffered." He was 70 years old. [FN164] His daughter is Mónica Chávez.
24) Antonio Alvarenga: He was allegedly murdered on August 6, 1998 by another member of his Community. He died a few minutes after the attack. He was eighteen years old. [FN165] His grandparents are Víctor Alvarenga and Victorina Galarza.
25) Wilfredo González: He died in 1997 in an alleged traffic accident. He was not given medical care before he died. He was twenty years old. [FN166] His mother is Guillermina Aponte.
26) Teresio González: He died on May 11, 2003 in an alleged traffic accident. He was not given medical care before he died. He was sixty years old. [FN167] His wife is Guillermina Aponte.
27) Silvia Adela Chávez: She died on September 27, 2005 from respiratory failure. She was given medical care and was recommended to go to the Regional Health Headquarters since at that sanitary post the necessary medication was not available. A month later she died. She was two months old. [FN168] Her mother is Teodora Chávez.
28) Esteban Jorge Alvarenga: He died on December 5, 2005 from dyspnea and respiratory failure. He was given medical care at the Hospital Regional de Concepción [Hospital Regional de Concepción]. He was not admitted into hospital. His mother could not afford to buy the medication he had been prescribred and he died some days later. He was one month old. [FN169] His mother is Paulina Alvarenga.
29) Arnaldo Galarza: He died on December 10, 2005 from malnutrition, general edema, and dyspnea. He was given medical care at the Hospital Regional de Concepción [Hospital Regional

de Concepción]. His mother died after the childbirth. The child suffered from severe malnutrition. He was two months and a half old. [FN170] His biological mother is Manuela Yegros; after his mother's death he was looked after by Belén Galarza.

30) Fátima Galarza: She died on January 6, 2006 from malnutrition. She was given medical care at the Hospital Regional de Concepción [Hospital Regional de Concepción], where she died. Her mother died after the childbirth. Like her brother (supra para.73(74)(29)), she suffered from severe malnutrition, general edema, and symptoms of lack of oxygen. She was three months old. [FN171] Her biological mother is Manuela Yegros; after her mother's death she was looked after by Belén Galarza.

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[FN163] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN164] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN165] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN166] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN167] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN168] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN169] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN170] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

[FN171] Cf. statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44.

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f) Non-pecuniary damage caused to the members of the Sawhoyamaxa Indigenous Community

73(75) The lack of guarantee of the right to their communal property and the serious conditions in which the members of the Community still live have caused them suffering [FN172] and have been detrimental to the preservation of their way of living, customs, and language. [FN173]

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[FN172] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Pablo Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44; statement rendered by Mr. Carlos Marecos before a public

official whose acts provide full faith and credit on January 17, 2006, supra note 27; and statement giyen by Mr Leonardo González-Fernández before a public official whose acts command full faith and credit on January 17, 2006, supra note 145.
[FN173] Cf. statement rendered by Ms. Elsa Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 119; statement rendered by Ms. Mariana Ayala before a public official whose acts command full faith and credit on January 17, 2006, supra note 120; statement rendered by Ms. Gladys Benítez-Galarza before a public official whose acts command full faith and credit on January 17, 2006, supra note 28; statement rendered by Mr. Balmaceda before a public official whose acts command full faith and credit on January 17, 2006, supra note 44; statement rendered by Mr. Carlos Marecos before a public official whose acts command full faith and credit on January 17, 2006, supra note 27; statement rendered by Mr. Leonardo González-Fernández before a public official whose acts command full faith and credit on January 17, 2006, supra note 145, and book titled "Atlas de las Comunidades Indígenas in el Paraguay" [Atlas of the Indigenous Communities in Paraguay]," Dirección General de Estadísticas, Encuestas y Censos [Bureau of Statistics, Surveys and Censuses] of the Secretaría Técnica de Planificación de la Presidencia de la República (Office of the Technical Secretary of State for Planning to the President of the Republic), Paraguay, 2002. Volume II, pages 400 and 401.
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g) Legal costs and expenses

73(76) The representatives of the alleged victims gave assistance to the members of the Sawhoyamaxa Community during the domestic processing of the case, whereby they incurred various expenses. Furthermore, the representatives incurred expenses during the processing of the instant case during the international proceedings. [FN174]

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[FN174] Cf. statement of expenses drawn by "TierraViva" Organization and submitted together with the written final pleadings (case file on the merits, reparations, and costs, Volume IV, folios 1112 to 1123).
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VIII. VIOLATION OF ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION (JUDICIAL PROTECTION AND RIGHT TO FAIR TRIAL) IN RELATION TO ARTICLES 1(1) AND 2 THEREOF

Argument by the Commission

74. In relation to Articles 8, 25, 1(1) and 2 of the American Convention, the Commission alleged that:

a) the domestic administrative remedy proceedings whereby the Sawhoyamaxa Indigenous Community sought to lay claim to their lands, under the rules of procedure established under the Ley sobre el Estatuto de las Comunidades Indígenas [Law on Status of Indigenous Communities], have not been effective to settle such Community's claim in a final way. Neither

have the steps taken by the members of the Community in 1997 and 2000 before the National Congress of Paraguay, through the introduction of bills proposing condemnation of the claimed lands;

b) Paraguayan legislation fails to provide for an effective judicial remedy aimed at protecting legitimate land claims laid by indigenous communities in Paraguay, something which constitutes per se a violation of the American Convention;

c) Even hypothetically accepting that a judicial remedy is unnecessary, it is a proven fact that despite the many proceedings commenced since 1991, the procedures established under Paraguayan legislation have not been sufficient to secure the Sawhoyamaxa Community members their ownership rights over their ancestral lands

d) in the instant case, the lack of an effective remedy allowing Paraguayan state agencies to secure full and free exercise of human rights by the members of the Community is tantamount to a violation by Paraguay of the duty to adopt domestic provisions that ensure the exercise of the rights established in the American Convention, pursuant to Article 2 thereof, and

e) the State should have adopted effective administrative, legal or judicial measures for the purpose of achieving a final solution to the claim laid by the leaders of the Sawhoyamaxa Community in 1991.

Argument by the Representatives

75. In relation to Articles 8, 25, 1(1) and 2 of the American Convention, the Representatives alleged that:

a) the Paraguayan State failed to comply with its obligation to provide for an effective remedy aimed at restoring their lands to the Sawhoyamaxa Community. Firstly, because of the lack of administrative and legislative response, since 1991, to the claim laid by the Sawhoyamaxa Community over their lands; and, secondly, because the provisional measures adopted in order to protect their habitat were overlooked with impunity, and as a result, over 1,250 hectares of forest were cut down;

b) the judicial measures ordered on the motion of the members of the Community to protect their ancestral habitat turned out to be ineffective, since six months after their adoption, the owner of the piece of real estate conveyed the lands fictitiously and cut down 1,250 hectares of forest, and was stopped on account of the pressure of national and international public opinion. Finally, said orders were reversed by the Court of Appeals seized with the matter, even though the Community stated its claim to be still current and therefore its interest in protecting its habitat;

c) although the land restitution proceedings are very complex, the reasonable time guarantee was violated because the case file rested in several state agencies for long periods of time — even though they were seized with no more than trivial proceedings — and no pronouncement or ruling with respect to the requests was entered within statutory deadlines, it being therefore possible to uphold that the omissive attitude taken up by the State adds one more factor to the inherent complexity of land restitution proceedings;

d) according to Inter-American precedents, an excessive delay amounts, per se, to a violation of the right to fair trial. Therefore, the delays of 14 years and 6 months in providing a response to land claims; of 1 year and 9 months in recognizing leaders; of 6 years and 11 months in recognizing legal personality, and the delay of two months to grant the requested injunctions,

fail to conform to the concept of reasonable time defined in Article 8(1) as a conditioning element of full protection and respect of the right to fair trial;

e) the administrative remedies for land restitution is so ineffective that the possibility of the State purchasing the claimed lands remains subject to the exclusive acquiescence of the affected owner, who by withholding consent leaves indefinitely open the possibility of submitting a new offer, and so on and so forth;

f) the bills of law on condemnation presented by the Community in 1997 and 2000 to the Congress also proved to be an ineffective land restitution method. This approach only rendered positive results in the cases where the owners were willing to negotiate the transfer of the claimed lands, and

g) to the causes of the failure by the State to comply with the duty to adopt measures must be added the failure to apportion to the INDI the necessary funds to acquire lands for indigenous communities; the continuous denial by the Congress to expedite condemnations in favor of the indigenous communities; the lack and ineffectiveness of provisional and environmental injuctions aimed at protecting the habitat of the Sawhoyamaxa Community. These omissions by the State amount to a violation of Articles 1(1) and 2 of the Convention.

Argument by the State

76. In relation to Articles 8, 25, 1(1) and 2 of the American Convention, the State alleged that:

a) in the administrative proceedings, all the steps necessary to allow the Community to make possession and property claims with respect to their ancestral lands were effectively taken;

b) the actions taken by the attorneys for the Sawhoyamaxa Community in the domestic courts have always been inadequate, untimely or clearly insufficient. Indeed, having statutory remedies available to them, in no case did they challenge any of the resolutions by administrative authorities, which became final by operation of law;

c) the representatives are the ones burdened with proving the inexistence of adequate and effective remedies. However, in the instant case, available remedies have not been sought. For example, the administrative-law remedy;

d) it is true that the final step in any administrative action is the adoption of a resolution by the IBR ordering condemnation of the land, or as the case may be, dismissing the request for condemnation, based on whether the claimed piece of land is determined to be rationally exploited or not. In the instant case, the second course was precisely the one taken. If the resolution is based on statutory rules such as the Agrarian Law, which takes into consideration the suitableness for production purposes of the lands claimed, it is logical for the authorities to conclude that the lands claimed by the Sawhoyamaxa Community failed to meet condemnation requirements. However, since the remedies to judicially challenge the administrative authorities' possible misconstruction of said statute have not been exhausted, the resolutions adopted with respect to the request of the Community have become final by the latter's consent;

e) an essential requirement to access communal property of the land is to have obtained legal personality. Under Article 62 of the National Constitution of Paraguay, no ethnic group or people, such as the Enxet Lengua in the instant case, ,is required to have its legal personality recognized because their existence as cultural groups is prior to the formation of the State; however, for a community, understood as a group of families, to access communal property of a

piece of land, said recognition is essential. Therefore, time should be computed, and actions aimed at enforcing the right to communal property should be deemed valid, from the moment the Community obtained such legal personality and not from before that, and

f) it did not violate the rights of the members of the Indigenous Community or any other indigenous group with respect to the obligation to adopt domestic legal provisions that ensure the rights of indigenous peoples in Paraguay. On the contrary, never as in this period of the history of Paraguay have so many and so varied aspects of the life of the citizens in general and of indigenous communities in particular been recognized and protected.

Considerations of the Court

77. Article 8 of the American Convention prescribes 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.
[…]

78. Article 25 of the Convention states 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 this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
[…]

79. Article 1(1) of the Convention prescribes that:

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

80. Article 2 of the Convention states that:

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.

81. In the instant case, the Court has been requested to rule on the alleged violations of the rights prescribed in the above mentioned Articles in four proceedings conducted before domestic authorities, to wit: i) proceedings for recognition of leaders; ii) proceedings for recognition of legal capacity; iii) injunctions, and iv) land claim proceedings.

82. Therefore, in this Chapter, the Court will analyze whether said proceedings were conducted with respect for the right to a fair trial and within a reasonable time, as well as whether they were an effective remedy to ensure the rights of the petitioners. To that effect, the Court recalls that the due process of the law guarantee must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons. [FN175]

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[FN175] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 62, and Case of Baena-Ricardo,. Judgment of February 2, 2001. Series C No. 72, para. 127.

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83. Likewise, pursuant to the case law of the Court, it is crucial that the States grant effective protection providing for the particular conditions of the indigenous peoples, their economic and social situation, as well as their special vulnerability, customary law, values, and customs. [FN176]

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[FN176] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 63.

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i) Proceedings for recognition of leaders

84. With regard to the recognition of leaders, Article 12 of Law No. 904/81 establishes that:

The leaders shall act as legal representatives of the community. The nomination of the leaders shall be notified to the Instituto [Paraguayo del Indígena] [Paraguayan Institute on Indigenous Affairs], which shall recognize said appointment within the term of thirty days from the date of notice thereof and shall record it in the Registro Nacional de Comunidades Indígenas [Indigenous Communities National Registry.]

85. The Court has ascertained that on August 6, 1991, members of the indigenous communities of Maroma, Loma Porá, Ledesma, Naranjito, Diana, Santa Elisa Garay, Santo Domingo and Kilómetro 16 filed with the INDI a petition for recognition of Carlos Marecos-Aponte and Teresio González as their leaders, which was granted only as late as April 27, 1993, by Resolution of the President of the Council (supra paras. 73(11) and 73(12)).

86. While it took more than twenty months for the State to grant the petition, even though the legal term is thirty days, the Court notes that Paraguay ratified the contentious competence of the Court on March 26, 1993, and that as from that date, it took only thirty-two days for the authorities to issue the decision recognizing the leaders of the Community. In view of the foregoing, the Court considers that in the instant case the it lacks competence rationae temporis to declare a violation of the American Convention, in relation to the process of recognition of leaders.

ii) Proceedings for recognition of legal personality

87. The provisions of Law No. 904/81 concerning this issue prescribe that:

Article 9.- The petition for recognition of legal personality shall be filed with the Instituto Paraguayo del Indígena (Paraguayan Institute on Indigenous Affairs) by the leaders of the community, and shall include the following particulars:

a) name of the community; list of families and family members, their ages, civil status and gender;

b) geographical location of the community, if settled on a permanent basis, or otherwise, location of most frequently used areas; and

c) names of the leaders of the community and evidence of their appointment.

Article 10.- The Institute, within a maximum of thirty days, will request the Executive, through the Ministry of National Defense, the recognition of legal personality.

Article 11.- The Institute will register the Executive Order recognizing the legal personality of an Indigenous Community in the Registro Nacional de Comunidades (Communities National Registry) and shall issue an authenticated copy thereof for the interested parties.

[…]

Article 19.- The community may grant their members the use of plots of land as needed. If the lands are left vacant, the community shall annul said concession.

Article 20.- Upon recognition of the legal personality of an indigenous community, title to the lands shall be conveyed to said community at no cost, on a pro indiviso basis and free from any liens and encumbrances. Said title shall be registered in the Registro Agrario [Agrarian Register,] in the Registro General de la Propiedad [General Property Register] and the Registro Nacional de Comunidades Indígenas [Indigenous Communities National Registry.] The deed conveying title shall be executed under the provisions of Article 17 hereof.

[…]

Article 27.- Upon recognition of the legal personality of an indigenous community, the State shall transfer adequate lands for its benefit, under the provisions of Article 19 hereof.

88. The Court has ascertained that a petition for recognition of what in Paraguay is known as "legal personality" of the Sawhoyamaxa Community was filed with the INDI on September 7, 1993 (supra para. 87) and that the Executive Order recognizing said personality was issued on July 21, 1998, that is to say, four years, ten months and fourteen days later (supra para. 73(15)).

89. The foregoing being considered, and taking into account that said proceedings are not complex and that the State has not justified said delay, the Court deems it to be out of proportion and a violation of the right to be heard in a reasonable time as provided for in Article 8(1) of the American Convention.

iii) Injunctions

90. As mentioned in the Chapter on Proven Facts of the instant Judgment, the Court has ascertained that domestic judicial authorities granted injunctions affecting the claimed area. The first injunction was ordered on February 16, 1994 by the Judge of First Instance in Civil and Business Law Matters of the Fourth Rotation (supra para. 73(55)). However, such measures were addressed to two companies that did not have title to the claimed area, for which reason, the

Judge decided to discharge them (supra para. 73(57)). Afterwards, on July 5, 1994, the same Judge ordered a new injunction against those actually holding title to the lands (supra para. 73(57)). This Court does not know neither the date on which title to the lands was conveyed to those who were the owners by that time, nor whether the injunctions have been discharged or not, and if so, the precise date on which said discharge would have occurred is also unknown. Finally, on July 23, 2003, upon the INDI's request, the above mentioned Judge of First Instance ordered a new injunction in relation to the pieces of real estate claimed.

91. On the other hand, according to Martin Sanneman's statement (supra para. 34. f), during a visit he made to the claimed area on April 8, 1994, he was able to ascertain that "around 4,000 meters" measured "from east to west" had been cut and that "it seem[ed] that between 500 and 1,000 meters" measured "from north to south" "had been cleared." Also, expert witness Andrew Leake pointed out that "deforested areas cover an area of some 2,000 hectares, mostly within the Michi estate;" however, this was "not an exact measurement," and that "an in situ inspection of the lands is needed."

92. In view of the foregoing, the Court is unable to determine the exact date on which forest cutting activities were carried out, and therefore, if such activities took place while the injunctions were in force. As a consequence, the Court lacks conclusive elements to determine whether the State ensured enforcement of the judgment entered by the Judge of First Instance through its competent authorities under Article 25(c) of the American Convention.

iv) Land claim proceedings

93. In the instant case, there is a discrepancy with respect to the date of commencement of the land claim proceedings. On the one hand, the Inter-American Commission and the representatives state that the proceedings were instituted on August 6, 1991, by means of a notice served by the leaders of the Sawhoyamaxa Community on the IBR, claiming surrender of 8,000 hectares. On the other hand, the State contends that time should be computed from the date the Community obtained its legal personality, i.e. July 21, 1998, and the only actions aimed at enforcing the right to communal property that should be deemed valid are those taken thereafter.

94. To that respect, in the Case of the Indigenous Community Yakye Axa v. Paraguay, where the State used the same arguments cast in the instant case, the Court stated that:

recognition of legal personality allows indigenous communities to enforce their previously existing rights; the same rights they have enjoyed historically and not since their establishment as legal entities. Their political, social, economic, cultural, and religious organization systems, and the rights stemming therefrom, such as the appointment of their own leaders and the right to lay claim to their traditional lands, are recognized, not to the legal entity which has to be registered to fulfill a legal formality, but to the community itself which the very Constitution of Paraguay recognizes as existing prior to the State.
Indigenous communities, under Paraguayan laws, are no longer just a factual reality to become legal entities with the capacity to fully enjoy legal rights vested not only in its individual memebers, but in the community itself, that is endowed with its own singular existence. Legal personality is the legal mechanism granting them the necessary status to enjoy certain

fundamental rights, such as the right to hold title to communal property and to demand protection against any breach thereof. [FN177]

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[FN177] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, paras. 82 y 83.

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95. The Court finds no grounds to contradict the above mentioned position, therefore, it considers that land claim administrative proceedings were instituted on August 6, 1991. However, taking into account that Paraguay ratified the contentious competence of the Court on March 26, 1993, the Court will compute the duration of the proceedings as of that date. From said date until the date of the instant Judgment, 13 years have elapsed without any final solution having been given to the claim of the Sawhoyamaxa Community members.

96. Moreover, the Court notes that the delay in the administrative proceedings under analysis in the instant Judgment is the result of state authorities systematically deferring action. In fact, since March 26, 1993, date on which Paraguay recognized the contentious competence of the Court, until now, no significant steps have been taken in the administrative proceedings analyzed. INDI and IBR have just sent the case file to each other and recurrently requested the owners of the lands claimed by the Community to make offers "with respect to the affected piece of land," without getting any positive answer thereto, for the IBR finally to declare, on June 15, 1999, that it had no competence to decide whether or not to condemn the lands and to hand over the responsibility to the INDI (supra para. 73(44), an agency which, according to the case file kept in this Court, has taken no action since July 1999.

97. In view of the foregoing, and considering that in the above mentioned Case of the Indigenous Community Yakye Axa v. Paraguay, the Court declared that the term of 11 years and eight months incurred in the land claim proceedings was in itself a violation of the right to a fair trial of the members of said Community, [FN178] it declares that the term of 13 years incurred in the proceedings related to the instant case may hardly be considered reasonable.

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[FN178] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, paras. 85-87.

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98. Thus, the Court considers that the action taken by state authorities in the land claim administrative proceedings fail to conform to the reasonable time principle.

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99. Furthermore, the State asserted that the representatives had not used the administrative law proceedings to challenge the status of rationally exploited the lands were given and that the interested parties had failed to institute ordinary judicial proceedings to determine whether the right to ancestral communal property of the land prevailed over the right to its private ownership.

100. In this regard, the Court considers that the argument of the State relates to the exhaustion of domestic remedies; consequently, according to the invariable case law of this Court, it is not feasible that at this stage of the proceedings to discuss issues that should have been addressed in previous stages in which the tacit waiver of the State´s opportunity to object the lack of exhaustion of domestic remedies was operative. [FN179] Therefore, the Court takes into account that, at the initial stages of the proceedings before the Commission, the State failed to allege that ordinary and administrative law remedies had not been exhausted; on the contrary, the State advocated in furtherance of the requests for condemnation before the National Congress, the negotiated direct purchase with the private owners of the claimed lands, and the negotiations with the members of the Community for the purpose of conveying to them lands of the same extension and quality; in other words, of such actions as belong in administrative and legislative proceedings.

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[FN179] Case of the Indigenous Community Yakye Axa, supra note 1, para. 91 and cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 124; Case of García-Asto and Ramírez-Rojas, supra note 4, paras. 49 and 50, and Case of of the Serrano-Cruz sisters v. El Salvador. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 135.

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101. Therefore, the Court dismisses this argument of the State on the grounds of its being time barred.

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102. With respect to the effectiveness of the land claim administrative procedure for indigenous communities in Paraguay, the Court considered in a previous case that said procedure was “overtly ineffective,” because:

it only allows[…] the IBR and the INDI[…] to dispose of state lands, to condemn irrationally exploited lands and to negotiate with private owners the surrender of lands to indigenous communities, but every time private owners refuse to sell the lands and prove that the lands are being rationally exploited, the members of the indigenous communities lack an effective administrative remedy to claim them. [FN180]

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[FN180] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 97.

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103. Likewise, expert witness Augusto Fogel, proposed by the State in the instant case:

gave evidence of loopholes in Paraguayan laws because sufficient rules and regulations to make the National Constitution operative are still lacking, as well as an updated and adequate legal framework to make it easier for indigenous communities to have actual access to the lands.

104. The Court considers that the administrative proceedings under analysis have at least three major flaws. The first one is that domestic laws refer to the Agrarian Law, wherein the yardstick is whether or not the claimed lands are rationally exploited, regardless of considerations specific to the indigenous peoples, such as what lands mean for them. It is enough to ascertain that the lands are being rationally exploited for the IBR not to be able to return them to the indigenous communities. It was so acknowledged by the Legal Counseling Department of the IBR (supra para. 73(74)) when it pointed out that although from the file of the case pending before such institution it resulted "that the piece of land requested, Retiro SANTA ELISA, is part […] of th[e] traditional habitat" of the members of the Sawhoyamaxa Community, from the steps taken by the IBR and the attached documents "the rationality of the exploitation" of such pieces of land was evidenced, whereby, "pursuant to the provisions of the AGRARIAN STATUTE, it w[as] not possible to compulsively take them and the owners refused any other negotiated outcome." The report concluded that the IBR had no "powers to sacrifice an ECONOMIC UNIT, particularly if there is an alternative solution." Afterwards, the IBR, in a resolution adopted on June 15, 1999 (supra para. 73(74), stated that:

it is not for the IBR to decide whether to condemn or to negotiate the purchase of a piece of real property claimed by an Indigenous Community, or not; such power lies exclusively with the [INDI. T]herefore, such institution is the one which will consider whether granting such petition is feasible or not [,]

105. The same difficulties appear in the legislative proceedings before the National Congress. According to the State, these proceedings "have not been effective […] because the Congress has considered the productivity and economic land uses, in keeping with the priorities set by the law of a country that must marshall all available resources to reach the global development of its population and to fulfil its national and international commitments."

106. The second major flaw lies is that the INDI is only empowered to conduct negotiations related to purchase the lands or to resettle indigenous community members. In other words, the proceedings before such institution are fully dependant upon the willingness of one of the parties — consent to sell the lands, on the one side, and consent to resettle, on the other — and not upon a judicial or administrative assessment to settle the dispute. In this regard, expert witness Augusto Fogel pointed out that:

the main weakness of the law lies in the innocuous scope of the procedure: there are provisions that are merely declarative and the operative bodies established in the law do not have responsibility or powers to comply fully with its terms. No penalties for non-compliance with the law are provided for, and as a result, the application of its provisions is partial or commensurate with the will to cooperate of those obliged

107. Finally, as it stems from the Chapter on Proven Facts in the instant Judgment, Paraguayan administrative authorities have failed to conduct enough technical surveys. According to the case file kept in this Court, the only two steps taken in the instant case are: i) visual inspection and verification of the Community census carried out by an IBR officer (supra paras. 73(25) and (26), whereby it was determined that "the claimed piece of land (Retiro Santa Elisa) belonged to [the] ancestors [of the members of the Community,] according to them," and ii) anthropological

report by the Centro de Estudios Antropológicos de la Universidad "Nuestra Señora de la Asunción" [Center of Antropological Studies of the "Our Lady of Asunción" University] (supra para. 73(37)), that points out that "[t]he lands claimed by the Sawhoyamaxa [C]ommunity have been traditionally occupied by their ancestors, the Chanawatsams, and that their descendants are still in possession thereof." The second report was not even requested by state authorities, it was instead submitted by the representatives of the Community. None of these reports include a detailed survey individualizing the specific area of the Chanawatsam territory that belongs to the members of the Sawhoyamaxa Community as a result of the attachment and special significance these particular lands have for their members. The second report (uncontested by the parties) [FN181] only shows that the claimed lands are within the ancestral lands of the Sawahoyamaxa Community, but it fails to specify the extension and boundaries of said lands. Such lack of technical and scientific actions render the proceedings undertaken before the INDI and the IBR ineffective.

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[FN181] In its closing written arguments, the State pointed out that "it has informed that the lands claimed by the Indigenous [C]ommunity were declared part of their traditional habitat."

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108. On the grounds of the foregoing, the Court reaffirms its previous decision, [FN182] according to which the land claim administrative proceedings have been ineffective and failed to grant the Sawhoyamaxa Community the possibility to regain access to their traditional lands.

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[FN182] Cr. Case of the Indigenous Community Yakye Axa, supra note 1, para. 98.

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109. In relation to the alleged violations of Articles 1(1) and 2 of the Convention, the Court recalls that the State is obliged to provide for appropriate procedures in its national legal system to process the land claim proceedings of the indigenous peoples with an interest thereon. For such purpose, the generic obligation to respect rights established in Article 1(1) of said treaty imposes on the States the duty to ensure an accessible and simple procedure and to provide competent authorities with the technical and material conditions necessary to respond timely to the requests filed in the framework of said procedure.

110. Article 2 of the Convention imposes on the States Parties the generic obligation to adapt their domestic laws to the rules of the Convention itself to give effect to those rights provided for therein. Domestic legal provisions passed for such purpose must be effective (effet utile principle), that is to say that the State must adopt all the measures necessary to actually comply with the provisions of the Convention. [FN183]

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[FN183] Cf. Case of Gómez-Palomino, supra note 12, para. 91; Case of Yatama, supra note 8, para. 170; Case of Lori Berenson. Judgment of November 25, 2004. para. 220.

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111. In the instant case, Paraguay has failed to adopt the appropriate domestic law measures necessary to ensure an effective procedure providing a final solution to the claim laid by the members of the Sawhoyamaxa Community, in the terms of the preceding paragraphs.

112. On the basis of all the foregoing, the Court considers that the land claim legal proceedings instituted by the members of the Sawhoyamaxa Community did not observe the reasonable time principle and proved to be completely ineffective, all of which is in violation of Articles 8 and 25 of the American Convention, in the light of Articles 1(1) and 2 thereof.

IX. VIOLATION OF ARTICLE 21 OF THE AMERICAN CONVENTION (RIGHT TO PROPERTY) IN RELATION TO ARTICLES 1(1) AND 2 THEREOF

Argument by the Commission:

113. In relation to Article 21 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, the Commission alleged that:

a) Paraguay has not guaranteed the right to property over their ancestral lands of the members of the Sawhoyamaxa Community, consequently depriving said Indigenous Community not only of the material possession of their lands but also from the fundamental basis to develop their culture, their spiritual live, their integrity and their economic survival;
b) Paraguayan laws in force make up a favorable legal framework for indigenous peoples; however, they cannot by themselves guarantee the rights of such peoples. In the instant case, even though there are constitutional and legal rules that recognize the rights of the members of the Sawhoyamaxa Community to their ancestral territory and even though the State has expressly recognized said rights, restitution proceedings brought by the Community in 1993 are still pending, and
c) the lands claimed by the Community are part of its traditional habitat or ancestral territory and its current situation violates its right to live in said lands. The Commission does not overlook that, as asserted by the State, the territory of the Enxet-Lengua people is part of an ancestral territory which is much larger than the territory that the Community claims to be their traditional habitat, which represents a very small part of the whole ancestral territory of the Enxet-Lengua people; however, the claimed area is not the result of a whim of the Indigenous Community, as it stems from the statements presented as evidence to the Court.

Argument by the Representatives

114. In relation to Article 21 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, the Representatives alleged that:

a) as pointed out by the State, the right of the Sawhoyamaxa Community to the communal property of their ancestral land would be colliding with the right to private property vested in the current owners of such land. In this regard, the State should have argued that, in the instant case, the principle of rational exploitation of the lands that the Community claimed, to which the

current private owners resorted, implied an imperative public interest that differs from serving a useful or timely purpose. The State has not presented any argument along such line of thought. On the contrary, in the instant case, failure to observe the ancestral right of the Community and its members with respect to their lands would radically affect other basic rights, such as, and in a fundamental way, the right to cultural identity and to the very survival of the Indigenous Community and of its members;

b) the restriction currently allowed by the State on the right of the Sawhoyamaxa Community to the communal property of its traditional habitat exceeds the proportionality principle. Firstly, the legitimate purpose of the decision to refuse restitution of traditional lands to the Community is not at all clear. Secondly, the current restriction does not just interfere with the exercise by the Community of its right to its ancestral land, but it absolutely prevents it and affects other basic rights intimately tied to the right to the land. Thirdly, inasmuch as the restriction imposed on the exercise of the right of the Community totally vacates such exercise, it is in itself disproportionate, regardless of the legitimate interest the State may allege, and

c) the acknowledgment of the injustice sustained by the Sawhoyamaxa Community as a result of the dispossession, might also lead the Court to consider that Paraguay, by failing to restore ancestral land to the Community commits a violation of the principles of necessity, proportionality and attainment of legitimate aims in a democratic society.

Argument by the State

115. In relation to Article 21 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, the State asserted that:

a) the State has guaranteed the Community members access to all available legal means to exercise the right to property, and if it has not been possible to enjoy such right to date, that is due to factual situations it has not been possible to solve in the domestic venue, but that does not amount to an obstruction or denial of rights;

b) the lands claimed by the Community were declared part of its traditional habitat by the INDI; nonetheless, the refusal by the land owner to sell the lands to the INDI so that said area might, in turn, be transferred to the Sawhoyamaxa Community has proven to be a stumbling block. Moreover, the owner is protected under a treaty between Paraguay and Germany on the promotion and reciprocal protection of capital investments from both countries;

c) the State offered temporary location solutions to the members of the Community while negotiations on a final solution were carried out. Said solutions became unfeasible as a result of the inflexibility of the legal representatives of the Indigenous Community and the refusal by Community members to be relocated in undisputed areas;

d) the geographical location of the Enxet-Lengua covers an ancestral territory much larger than the one specifically pointed out as their traditional abode and which is the subject-matter of this claim they lay against the State;

e) the State has not denied its obligations to restore rights to these peoples, but said rights must be in proportion with those of the general population that also abide by the other statutory obligations in order to come into landed property;

f) it is remarkable that while both Yakye Axa and Sawhoyamaxa indigenous communities belong to the same ethnic group, the Enxet-Lengua, they each claim territories in locations so very distant from each other. When each group separated from the other to form a different

community, they “chose” particular land spaces as belonging to “their ancestors”, based on little more requirements than their own whim. Historically, the areas they moved about cover a much larger area within the Chaco territory, for which reason their stubborness in claiming estates which have been declared rationally exploited and held under lawful property title, is a token of intolerance and shows their willingness to hinder the endeavors of Paraguay, and

g) the State has not violated the rights of the members of the Sawhoyamaxa Community or any other indigenous group with respect to the obligation to adopt domestic legal provisions that ensure the rights of the indigenous peoples of Paraguay. On the contrary, never as in this stage of the history of Paraguay have so many aspects of the life of the citizens in general and of the indigenous communities in particular been recognized and protected.

Considerations of the Court

116. Article 21 of the American Convention declares 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.

117. In analyzing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the Inter-American system considering the development that has taken place regarding these matters in international human rights law. [FN184] The State ratified Convention No. 169 and incorporated its provisions to domestic legistlation by Law No. 234/93. [FN185]

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[FN184] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, paras. 124-131, and Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August, 31, 2001. Series C No. 79, paras. 148 and 149.

[FN185] Law No. 234/93 whereby ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries is ratified.

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118. Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. [FN186] The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the

form part of their worldview, of their religiousness, and consequently, of their cultural identity. [FN187]

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[FN186] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 137, and Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 149.
[FN187] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 135.

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

120. Likewise, this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land "is not centered on an individual but rather on the group and its community." [FN188] This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.

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[FN188] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 149.

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121. Consequently, the close ties of indigenous peoples with their traditional lands and the native natural resources thereof, associated with their culture, as well as any incorporeal element deriving therefrom, must be secured under Article 21 of the American Convention. On the matter, the Court, as it has done before, is of the opinion that the term "property" as used in Article 21, includes "material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value". [FN189]

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[FN189] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para 137; Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 144, and Case of Ivcher-Bronstein. Judgment of February 6, 2001. Series C No. 74, para. 122.

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122. The Paraguayan Constitution recognizes the existence of indigenous peoples as groups which have preceded the formation of the State, as well as their cultural identity, the relation with their respective habitat and their communal characteristics of their land-tenure system, and

further grants them a series of specific rights which serve as basis for the Court to define the scope of Article 21 of the Convention.

123. On the other hand, Article 3 of Law No. 43/89 points out that settlements of indigenous communities are "constituted by a physical area made up of a core of houses, natural resources, crops, plantations, and their environs, linked insofar as possible to their cultural tradition […]"

124. In the instant case, the State does not deny that the members of the Sawhoyamaxa Community have the right to lands of their own; that hunting, fishing, and gathering are essential elements of their culture; that the members of the Sawhoyamaxa Community originate in the Chanawatsan subgroup, which, in turn, belongs to the Enxet people, a traditional inhabitant of the Paraguayan Chaco; and that Santa Elisa and Michi Estates "have been declared part of the traditional habitat [of the members of the Sawhoyamaxa Community] by the INDI." The point at issue is the effective vesting of the property rights.

125. The State has pointed out that it "does not deny its obligation to restore rights to these peoples," but the members of the Sawhoyamaxa Community "claim title to a piece of real estate based exclusively on an anthropologic report that, worthy as it is, collides with a property title which has been registered and has been conveyed from one owner to another for a long time." Likewise, the State fears that, would claim by the Community be granted, "it would be convicted for the 'sins' committed during the [C]onquest" (inner quotation marks as used in the original text), and that this could lead to the "absurd situation in which the whole country could be claimed by indigenous peoples, for they are the primitive inhabitants of the strech of territory that is nowadays called Paraguay."

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

i) The possession of the lands

127. Acting within the scope of its adjudicatory jurisdiction, the Court has had the nopportunity to decide on indigenous land possession in three different situations. On the one hand, in the Case of the Mayagna (Sumo) Awas Tingni Community, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration. [FN190] On the other hand, in the Case of the Moiwana Community, the Court considered that the members of the N'djuka people were the "legitimate owners of their traditional lands" although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them. In this case, the traditional lands have not been occupied by third parties. [FN191] Finally, in the Case of the Indigenous Community Yakye Axa, the court considered that the members of the Community were empowered, even under domestic law, to

file claims for traditional lands and ordered the State, as measure of reparation, to individualize those lands and transfer them on a for no consideration basis. [FN192]

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[FN190] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 184, para. 151.
[FN191] Cf. Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124. para. 134.
[FN192] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, paras. 124-131.

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

129. Paraguay acknowledges the right of indigenous peoples to claim restitution of their lost traditional lands. In fact, Law No. 904/81 provides the procedure to be followed to claim privately-owned lands. The pertinent rules therein point out that:

Section 24.- Claims of privately-owned lands for the settlement of indigenous communities shall be filed by the community itself, or by any member thereof or by any representative with legal entity, directly with the I.B.R. or through the [INDI].
The IBR may proceed to do so ex officio, in conjunction with the Institute.
Section 25.- Land claims shall meet the requirements set forth in subsection a) of Section 22, [FN193] including full name of the owners of the piece of land occupied by indigenous communities. Claims shall be processed under the rules outlined in said Section.
Section 26.- In case of condemnation, the procedure and compensation shall be governed by the Constitution and the laws, condemnation compensations shall be paid out of the appropriations of the necessary funds to be made in the National General Budget.

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[FN193] Section 22 of Law No. 904/81 prescribes that:
The following procedure shall be followed for indigenous communities´ settlements in state lands:
a) The Institute shall notify the I.B.R. of the existence of an indigenous community, detailing number of members, settlement location, time of stay, crops and improvements, actually occupied area and any additional land claimed to satisfy their economic and expansion needs;

b) Location of the area according to the I.B.R.´s property cadastral registry within twenty days from filing date;
c) Visual inspection by I.B.R. within thirty days from cadastral location date, including filing of report in said term;
d) Surveying and marking of the area by the I.B.R. within sixty days from date of filing of the report by the officer authorized to perform the visual inspection;
e) Approval of surveying report within thirty days from filing date; and
f) I.B.R. Resolution based on prior approving report issued by the Institute, authorizing indigenous community settlement.
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130. Consequently, under the very laws of Paraguay, the members of the Sawhoyamaxa Community have the right to claim restitution of their traditional lands even though said lands may be privately held and they, as claimants, may not be in full possession therof.

ii) Time-restriction on the right to restitution

131. The second issue under analysis refers to whether the right to the restitution of traditional lands lasts indefinitely in time. In order to solve this matter, the Court takes into consideration that the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands. As long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse. Said relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture. [FN194]

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[FN194] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 154.
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132. It is to be further considered that the relationship with the land must be possible. For instance, in situations like in the instant case, where the relationship with the land is expressed, inter alia, in traditional hunting, fishing and gathering activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear.

133. As it stems from the Proven Facts Chapter in the instant judgment (supra para. 73(70), the members of the Sawhoyamaxa Community, in spite of having been dispossessed and of being denied access to the claimed lands, still carry out traditional activities in them and still consider them their own. This has been pointed out by the members of the Community themselves who submitted their statements through affidavits:

"[W]e could not barter just like that the lands where our parents and grandparents lived, we felt fully identified with Sawhoyamaxa, and we still uphold that […] The lands we are claiming were the ones used by our ancestors to hunt and are the only lands that still have native forests and other things […] that are important for us, for us to live, such as water. Those lands are very meaningful for us because they used to be ours. Many of our ancestors are also buried there. […] Those lands are the ones best enabling us to live, we are not claiming them just for the sake of it, but because they are the only ones still to hold traces of our grandparents." [FN195]
"This is the way we are affected by being landless, we do not want to bury our people just like that, in the street, but as we have no land of our own, we do it in a cemetery located in Loma Porâ; but we would like to be given back our Sawhoyamaxa land so that this will not go on any longer and we be able to bury our beloved ones in the lands we are asking for." [FN196]
"Many times we want to resort to our traditional medical knowledge, but we cannot get to gather medicinal herbs because they are to be found inside the wire-fenced lands and we must contemplate disease and death with resignation." [FN197]
"It is sad because our language is being lost. In KM 16 there people who speak our language are fewer and fewer all the time, already when we were in Loma Porâ, as we lived among Paraguayan people, we had started to slowly lose our language and now that we live alongside the road it is being lost all the more. It is not that we do not want to speak our language, on the contrary, we want our customs back, but it is hard when, at school for example, and in our daily business, we need to try and live exclusively among Paraguayan people. It is hard for our children to learn our customs this way […]. If there are professors who teach in our language we could soon use it and speak it and recover our culture that is being lost… When I was a child I used to watch our people practice our rites and now old women tell us how it was then, that is no longer done, because it is difficult now where we are living. How can we manage to do it if we do not have a proper place? We cannot do it on the street, besides we need certain natural resources we cannot get in this situation, that is why we think that if we have our lands back, we will be able to recover all that and this way our children will not go through what we are now going through. We will be able to practice our customs." [FN198]

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[FN195] Cf. testimony by affidavit of Carlos Carlos Marecos of January 17, 2006, supra note 27.
[FN196] Cf. testimony by affidavit of Elsa Ayala of January 17, 2006, supra note 119.
[FN197] Cf. testimony by affidavit of Leonardo González of January 17, 2006, supra note 145.
[FN198] Cf. testimony by affidavit of Mariana Ayala of January 17, 2006, supra note 120.

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

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

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

will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures. [FN199]

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[FN199] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 149.

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

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

138. Regarding the first argument, the Court considers that the fact that the claimed lands are privately held by third parties is not in itself an "objective and reasoned" ground for dismissing prima facie the claims by the Indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other. The contents of each parameter have been defined by the Court in the Case of the Indigenous Community Yakye Axa, hence express reference to said decision is hereby made. [FN200]

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[FN200] Cf. Case of the Indigenous Community Yakye Axa, supra note 1, para. 149.

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

140. Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a "public purpose or interest", which could justifiy land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States. [FN201]

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[FN201] Cf. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29.

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

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142. Finally, it is worth recalling that, under Article 1(1) of the Convention, the State is under the obligation to respect the rights recognized therein and to organize public authority in such a way as to ensure to all persons under its jurisdiction the free and full exercise of human rights. [FN202]

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[FN202] Cf. Case of the Yakye Axa Comunidad Indigenous Community, supra note 1, para. 153; Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 142, y Case of Ivcher Bronstein, supra note 189, para. 168.

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

144. For the aforementioned reasons, the Court concludes that the State violated Article 21 of the American Convention, to the detriment of the members of the Sawhoyamaxa Community, in relation to Articles 1(1) and 2 therein.

## X. VIOLATION OF ARTICLE 4 OF THE AMERICAN CONVENTION (RIGHT TO LIFE) AS REGARDS TO ARTICLES 19 AND 1(1) THEROF

Arguments by the Commission

145. As regards to Article 4 of the Convention, in connection with Article 1(1) thereof, the Commission alleged the following:

a) in the instant case, Paraguay has violated its obligation to guarantee the right to life to the members of the Sawhoyamaxa Community, since the lack of recognition and protection of their lands forced them to live on a roadside and deprived them from access to their traditional means of subsistence;
b) The provision of food and medical care by the State to the members of the Community has been clearly insufficient and irregular, and
c) thirty-one members of the Community died between 1991 and 2003. Nine were more than 18 years old, twenty were boys and girls and there are two dead persons of whom there is no data regarding their age at the time of death. The causes of death in the twenty cases of boys and girls are tetanus, measles, enterocolitis, pneumonia, dehydration and cachexia, being all of them medical conditions that could have been prevented and cured, or even better, avoided by allowing the members of the Community to live in a healthy environment, avoiding exposure to the risks brought about by their indefinite situation, dwelling alongside a public road.

Arguments by the Representatives

146. As regards to Article 4 of the Convention, regarding Article 1(1) thereof, the representatives alleged the following:

a) the State has violated the right to life of the Sawhoyamaxa Community and its members: i) by failing to restore to the Community their ancestral lands and their traditional habitat, thus affecting their different way of life, as wel as their life projects; ii) by failing to guarantee decent living conditions respectful of their distinctive way of living; iii) by failing to adopt the necessary measures to overcome the conditions of extreme vulnerability and risk in which they live, and iv) by failing to adopt the necessary measures to prevent and avoid the death of the 31 members of the Community to whom reference was made in the brief of requests and arguments, and the death of 14 more members who died after 2003, and
b) even though the State declared the Community to be in an emergency and undertook to adopt the necessary measures to ensure the right to life, physical integrity and safety of its members, such services have been insufficient and deficient, and the vulnerability and risk situation has continued.

Arguments by the State

147. As regards to Article 4 of the American Convention, regarding Article 1(1) thereof, the State alleged the following:

a) A public health service has been made available to indigenous peoples, as well as to all the citizens. However, it is the personal responsibility of the citizens to reach health centers; and, in the case of the indigenous communities, leaders as well as chiefs share the responsibility of taking their people to such centers, or at least, to make it possible for assistance to reach their communities by communicating such situation to the regional sanitary authorities or to the INDI itself. The members of the Sawhoyamaxa Community have not used hospitals or public assistance because they so decided; nobody has prevented them from doing so;
b) The leaders of the Sawhoyamaxa Community, maybe wrongly advised, have led the members of their Community to extreme situations foreign to their traditional forms of subsistence, when settling them along the roadside, as a form of protest, which departs from their customs. At this point, the State strongly points out the responsibility of the non-governmental organization Tierraviva and holds it jointly responsible for the emergency situation this community, as well as others, is undergoing;
c) Within the limitations of a relatively less developed country, affected by the inequities of international trade, and of its financial possiblities, the State has created the conditions necessary to guarantee a decent life for these indigenous populations, providing periodical food and sanitary assistance, pursuant to an Executive Order that declared them, as well as another indigenous community, in a state of emergency;
d) The indigenous people settled by the side of the route or public road have systematically rejected being transferred to a temporary dwelling place while the case is being solved, following the advice of their representatives; this has placed them in a critically vulnerable situation. There is no relationship between "the land and physical survival" as a cause for the alleged lack of preservation of the right to life, as pointed out by the Inter-American Commission, and
e) It cannot be blamed for the death or the illnesses suffered by the individuals occurring due to natural causes or Acts of God, unless it be proved that there has been negligence to address these particular cases by the health care authorities or by other authorities with knowledge of the facts, for which purpose, this representation is open to the use of all the forms of evidence that might be necessary to clarify this issue. In the instant case, neither the existence of these persons, nor their death, has been proved.

Considerations by the Court

148. The Commission and the representatives allege that the physical conditions in which the members of the Sawhoyamaxa Community have been living, and still live, as well as the death of several persons due to such conditions, are a violation of Article 4 of the Convention, which reads as follows:

[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.

149. The State denied its responsibility for the conditions in which the members of the Community are and for the deaths that occurred.

i) general principles

150. The right to life is a fundamental human right, which full enjoyment is a pre-requisite for the enjoyment of the other human rights. [FN203] If this right is not respected, all other rights do not have sense. Having such nature, no restrictive approach of the same is admissible. [FN204] Pursuant to Article 27(2) of the Convention, this right forms part of the essential nucleus, since it is consecrated as one of the rights that cannot be suspended in cases of war, public danger or any other threat to the independence or security of a State Party. [FN205]

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[FN203] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 120; Case of 19 Merchants. Judgment of July 5, 2004. Series C No. 109, para. 153; , Judgment of November 25, 2003, Series C No. 101, para. 152; Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 110, and the Case of the "Street Children" (Villagrán Morales et al.), Judgment of November 19, 1999. Series C No. 63, para. 144.
[FN204] Cf. The "Street Children" Case (Villagrán Morales et al,) supra note 203, para. 144; in this sense see also Nachova and others v. Bulgaria application nos. 43577/98 and 43579/98, EurCourt HR [gc], Judgment 6 July 2005, para. 94.
[FN205] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 119.
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151. By virtue of this fundamental role that the Convention assigns to this right, the States have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right. [FN206]

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[FN206] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 120.
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152. In that sense, the Court has constantly shown in the cases heard that regarding the compliance with the obligations imposed by Article 4 of the American Convention, as regards to Article 1(1) thereof, it is not only presumed that no person shall be deprived of his life arbitrarily (negative obligation), but also that, in the light of its obligation to secure the full and free enjoyment of human rights, the States shall adopt all appropriate measures [FN207] to protect and preserve the right to life (positive obligation) [FN208]

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[FN207] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 120; in that sense, also Cf. L.C.B. vs. United Kingdom (1998) III, EurCourt HR 1403, 36.
[FN208] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 120; Case of the "Mapiripán Massacre", supra note 9, para. 232; Case of Huilce Tecse. Judgment of March 3, 2005. Series C No. 121, para. 66; Case of the "Juvenile Reeducation Institute" Judgment of September 2, 2004. Series C No. 112, para. 158; Case of the Brothers Gómez-Paquiyauri. Judgment of July 8, 2004. Series C No. 110, para. 129; Case of 19 Merchants, supra note 203, para. 153; Case of Myrna Mack Chang, supra note 203, para. 153; Case of Juan Humberto Sánchez, supra note 203, para. 110; Case of Bámaca-Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 172; and the "Street Children" Case (Villagrán Morales et al,) supra note 203, 144 to 146.
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153. In view of the above, the States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, [FN209] or by individuals; [FN210] and to protect the right of not being prevented from access to conditions that may guarantee a decent life, [FN211] which entails the adoption of positive measures to prevent the breach of such right.

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[FN209] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 120, y Kiliç v. Turkey (2000) III, EurCourt HR, 62 and 63.
[FN210] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 120; Case of the "Mapiripán Massacre", supra note 9, para. 111; see also Osman v. the United Kingdom (1998) VIII, 115 and 116.
[FN211] Cf. Case of Indigenous Community of Yakye Axa, supra note 1, para. 161; the "Stre ,) supra note 203, para. 144, y Case of the "Juvenile Reeducation Institute" Judgment of September 2, 2004. Series C No. 112, para. 156.

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154. The Court has determined that, within the framework of the American Convention, the international responsibility of States arises at the moment of the violation of the general obligations embodied in Articles 1(1) and 2 of such treaty. [FN212] From these general obligations special duties are derived that can be determined according to the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, [FN213] such as extreme poverty, exclusion or childhood.

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[FN212] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 111; Case of the "Mapiripán Massacre", supra note 9, para. 111, and Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion AO-18/03, of September 17, 2003. Series A No. 18, para. 140.
[FN213] Cf. Case of the Pueblo Bello Massacre, supra note 3, 111 and 112; Case of the "Mapiripán Massacre", supra note 3, paras. 108 and 110, and Case of the Gómez-Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 71.

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155. It is clear for the Court that a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities. [FN214] In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk. [FN215]

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[FN214] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 124, and Kiliç v. Turkey (2000) III, EurCourt HR, 63.
[FN215] Cf. Case of the Pueblo Bello Massacre, supra note 3, paras. 123 and 124, see also Kiliç v. Turkey (2000) III, EurCourt HR, 63, Öneryildiz v. Turkey, application no. 48939/99, EurCourt HR [gc], Judgment 30 November 2004, 93, and Osman v. the United Kingdom (1998) VIII, 116.

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ii) application of such principles to the instant case

156. In the instant case, there is no dispute between the parties regarding the fact that the conditions in which the members of the Sawhoyamaxa Community live are inadequate to lead a decent existence, nor regarding the fact that such conditions represent an actual and impending risk for their lives. The dispute lies regarding the determination of the State's responsibility for the conditions in which the alleged victims are, and regarding whether the State has adopted any necessary measures within the scope of its authority which could be reasonably expected to prevent or avoid the risk to the right to life of the alleged victims.

157. Likewise, there is no dispute among the parties regarding the knowledge by the State of the vulnerability situation of the members of the Community. The State has never alleged lack of knowledge. A determination must be made of the date as from which such knowledge existed.

158. The Paraguayan authorities had certain clues to the situation of vulnerability of the Community since August 6, 1991, date on which the petition laying claim to the traditional lands was filed (supra para. 73(18),) by means of which the members of the Community pointed out that their petition for lands was "urgent" since their situation was "very precarious." Likewise, in the report filed by the IBR officer on January 18, 1993, after the visual inspection made within the land claim administrative proceedings, it is pointed out that the members of the Community declared that "they had already suffered many hardships due to the lack of lands of their own wherein they could grow crops or hunt." Finally, in the official report addressed on April 8, 1994 to the President of the Chamber of Deputies of the National Congress, to the Human Rights and Indigenous Affairs Committee and to the Ecology Committee of the National Congress, Deputy Martín Sannmann described that the treatment that the indigenous people received on the Maroma Estate "should be described as 'modern slavery'" (internal inverted commas from original text.)

159. However, the Court considers that since April 21, 1997, the State has had full knowledge about the actual risk and vulnerability situation to which the members of the Sawhoyamaxa Community are exposed, especially children, pregnant women and the elderly, and also about their mortality rates. Indeed, on that date, the leaders of the Community sent to the INDI an anthropological report prepared by Miguel Chase-Sardi, in which he stated, among other things, that deaths were occurring in the Sawhoyamaxa Community villages and that their members

have not been visited by a doctor, nurse or health promoter to assist them for years. As a consequence of all the foregoing, children are constantly dying of conditions that can easily be

cured, such as diarrhea, vomiting, etc. Last year, four minor children died (data related to Maroma Village exclusively.) Curiously, those dead minors were the children of the estate employees.
At it commonly happens, in the indigenous communities that do not have their own appropriate lands, health conditions worsen since they do not have the necessary food to complete their nutritional diet.

160. It is as from that date (April 21, 1997) that the Court will analyze whether the State adopted the necessary measures, within the scope of its authority, which could reasonably be expected to prevent or avoid risk to the life of the Community members. Consequently, the Court shall not make any determination as regards to the deaths occurred before that date, to wit: the deaths of Antonio González (supra para. 73(74)(17)), Ramona Flores (supra para. 73(74)(19)) and Sandra E. Chávez (supra para. 73(74)(18).)

161. The Court notes that the deaths of Rosana López (supra para. 73(74)(2)) and Wilfredo González (supra para. 73(74)(25)) occurred in 1997, but there is no certainty as to the exact month, and thus, it is not possible to clearly determine whether they occurred before or after April 21, 1997 (supra para. 73(37).) In that respect, the Court takes into account that the State has not produced before it the birth and death certificates of those persons who died, and such certificates could have been useful to solve this problem. According to the information provided by the State itself, no records could be found.

162. Furthermore, pursuant to the statements made by the representatives and Carlos Marecos, Community leader, the deaths of the indigenous people are not recorded and go unnoticed by the state authorities (supra para. 24.) Taking the aforesaid into account, and considering the fact that this Court is a human rights court where the pro personae principle prevails, and that the State cannot benefit from its deficiencies, the Court determines that it is seized with the deaths of Rosana López (supra para. 73(74)(2)) and of Wilfredo González (supra para. 73(74)(9).)

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163. The Court acknowledges the criterion of the State in the sense that it has not induced or encouraged the members of the Community to move and settle by the side of the road. However, the Court considers that there were powerful reasons for the members of the Community to abandon the estates where they lived and worked, due to the extremely hard physical and labor conditions they had to endure (supra para. 73(61) and (2).) Likewise, this argument is not enough for the State to disregard its duty to protect and guarantee the right to life of the alleged victims. It is necessary that the State proves that it carried out all necessary actions take the indigenous peoples from the roadside, and in the meantime, to adopt all necessary measures to reduce the risk that they were facing.

164. In that respect, the Court notes that the principal means available for the State to get the members of the Community out of the side of the road was to give them their traditional lands. However, as it has been shown in the previous chapters, the administrative proceedings before the INDI and the IBR did not offer any security of an effective resolution and proved to be slow and inefficient (supra paras. 93 to 112.) Hence, the Court determined that the State did not

guarantee to the members of the Sawhoyamaxa Community the right to communal property and did not provide either guarantees or judicial protection within a reasonable time (supra paras. 112 and 114.) In other words, although the State did not take them to the side of the road, it is also true it did not adopt the adequate measures, through a quick and efficient administrative proceeding, to take them away and relocate them within their ancestral lands, where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life. [FN216]

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[FN216] Cf. U.N. Doc. E/C. 12/1999/5. Committee on Economic, Social and Cultural Rights. Substantive issues to be dealt with in the application of the International Covenant on Economic, Social and Cultural Rights. Objection 12 (twentieth session,1999.) The Right to Food (Article 11.) para. 13, and U.N. Doc. HRI/GEN/1/Rev.7 at 117. Committee on Economic, Social and Cultural Rights. The Right to Water (Articles 11 and 12) of the International Covenant on Economic, Social and Cultural Rights. Committee on Economic, Social and Cultural Rights. (twenty-ninth session, 2002,) para. 16. CHECKED AT UN OFF.PAGE

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

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

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167. As regards to the provisional measures, the Court notices that in Paraguay, domestic legislation (supra para. 73(72)) grants indigenous peoples the right to receive free medical care in public health centers, and they are exempted from paying for all medical check-ups, tests and other medical procedures carried out at the Hospital Nacional de Itaugua (Itaugua National Hospital) and at all the other medical centers of the country within the jurisdiction of the Ministerio de Salud Pública y Bienestar Social (Ministry of Public Health and Social Welfare) [FN217] (supra para. 73(72).) Likewise, the Court acknowledges and appreciates the initiative promoted by Paraguay by the adoption of Presidential Order Nº 3789 (supra paras. 73(62) and (63),) for the delivery of a certain amount of food, medical-sanitary attention and educational material to such Community. However, the Court considers, as in many other occasions, [FN218] that legislation alone is not enough to guarantee the full effectiveness of the rights protected by the Convention, but rather, such guarantee implies certain governmental conducts to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights.

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[FN217] Cf. Affidavit of César Escobar-Cattebecke, dated February 18, 2005, supra note 143, and circular S.G No. 1 of the Ministerio of Salud Pública y Bienestar Social [Ministry of Public Health and Social Welfare,] dated February 24, 2005, supra note 143.
[FN218] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 142.

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168. In the instant case, together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes (supra paras. 73(61) to (74).)

169. During the two years following the submission by Miguel Chase-Sardi of the anthropological report to the INDI, communicating the precarious situation of the Community and the death of several children, the State did not take any specific measure to prevent the violation of the right to life of the alleged victims. During that period, at least four persons died (supra para. 73(74)(2), (3), (4) and (21).)

170. It was not until June 23, 1999 that the President of the Republic of Paraguay issued the aforementioned Presidential Order Nº 3789 declaring the Sawhoyamaxa Community in a state of emergency. However, the measures adopted by the State in compliance with such order cannot be considered sufficient and adequate. Indeed, for six years after the effective date of the order, the State only delivered food to the alleged victims on ten opportunities, and medicine and educational material in two opportunities, with long intervals between each delivery (supra para. 73(64) to (66).) These deliveries, as well as the amounts delivered, are obviously insufficient to revert the situation of vulnerability and risk of the members of this Community and to prevent violations to the right to life, to the point that after the emergency Presidential Order became effective, at least 19 persons died (supra para. 73(74)(1), (5) to (16), (20), (22) and (27) to (30).)

171. As it has been shown in the chapter of Proven Facts (supra para. 73(74,) most of the Community members that died were boys and girls under 3 years of age, and the causes of their deaths range from enterocolitis, dehydration, cachexia, tetanus, measles, and respiratory illnesses, such as pneumonia and bronchitis; all of them are reasonably foreseeable diseases that can be prevented and treated at a low cost. [FN219]

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[FN219] Cf. The United Nations Children's Fund (UNICEF) and the World Health Organization (WHO), Immunization Summary 2006 (2006).

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172. The illnesses of Rosana López (supra para.73(74)(2)), Esteban González (supra para. 73((74)(5),) NN Yegros (supra para. 73(74)(7),) Guido Ruiz-Díaz (supra para.73(74)(9),) Luis Torres-Chávez (supra para. 73(74)(11),) Francisca Brítez (supra para. 73(74)(16),) and Diego Andrés Ayala (supra para. 73(74)(15),) were not treated. These persons simply died in the Community. The State has not specifically contested these facts and has not filed any evidence to

prove the contrary, in spite of the requests made by the Tribunal (supra para. 20.) Consequently, this Court finds that the said deaths are attributable to the lack of adequate prevention and to the failure by the State to adopt sufficient positive measures, considering that the State had knowledge of the situation of the Community and that action by the State could be reasonably expected. The aforesaid cannot be applicable to the death of the male child NN Torres (supra para. 73(74)(13,) who suffered from blood dyscracia and whose death cannot be attributable to the State.

173. The Court does not accept the State argument regarding the joint responsibility of the ill persons to go to the medical centers to receive treatment, and of the Community leaders to take them to such centers or to communicate the situation to the health authorities. From the issuance of the emergency Order, the INDI and the Ministerio del Interior [Ministry of the Interior] and the Ministerio de Salud Pública y Bienestar Social [Ministry of Public Health and Social Welfare] had the duty to take "the actions that might be necessary to immediately provide food and medical care to the families that form part of [the Sawhoyamaxa Community], pending the judicial proceedings regarding the legislation of the lands claimed by such Community as part of [their] traditional habitat" (supra para. 73(63).) Therefore, the provision of goods and health services did no longer specifically depend on the individual financial capacity of the alleged victims, and therefore, the State should have taken action contributing to the provision of such goods and services. That is to say, those measures which the State undertook to adopt before the members of the Sawhoyamaxa Community were different, in view of their urgent nature, from those that the State should adopt to guarantee the rights of the population and of the indigenous communities in general. To accept the contrary would be incompatible with the object and purpose of the American Convention, which requires that its provisions be interpreted and applied so that the rights contemplated therein be effectively protected in practice.

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

We are near a big city, Concepción, where the nearest hospital is located. When our people get ill we think of taking them there, but we suffer a lot, because we know that without money we are not going to get assistance, there are no medicines for the poor, they only provide you with the prescription to buy the medicines in pharmacies, and the little money that we sometimes have is not enough, we have to request help through some radio broadcast that campaigns, this is the only way, when people of good will help us. [FN220]
In our situation, in case of illness or death, for example, our community is totally unprotected. There are no records of births or deaths occurring in our communities. The State disregards us for being indigenous and we are discriminated. We cannot even get assistance when we manage to get to the health centers because we do not have any money or because they tell us that "there are no doctors." Furthermore, many of us do not have identity cards. Many times we want to resort to our knowledge of traditional medicine, but we cannot get to gather medicinal herbs because these are to be found inside the wire-fenced lands and we must contemplate disease and death with resignation. [FN221]

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[FN220] Cf. Affidavit of Elsa Ayala, dated January 17, 2006, supra note 119.

[FN221] Cf. Affidavit of Leonardo González-Fernández, dated January 17, 2006, supra note 145.
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175. On the other hand, the Court notes that in spite of such difficulties, some persons managed to get to the health centers and received some kind of medical care, but it was insufficient, untimely or incomplete. The newborns NN Galarza and NN González (supra para. 73(74)(1) and (10),) both suffering from tetanus, were released by their respective treating doctors since "nothing could be done" for them. They died in the Community "with the typical rigidity of those who suffer from tetanus." The brothers Eduardo and Eulalio Cáceres, (supra para. 73(74)(3) and (3).) died of pneumonia. The former was admitted in the Concepción hospital, but did not get any medicines because "the mother could not buy [them]." He died in hospital eight days after admission. After Eduardo's death, "the mother was requested to take away Eulalio from the hospital if she was not going to buy the medicines and they issued the hospital certificate of discharge." Six days after this, Eulalio died in the Community. The girls González-Aponte and Jenny Toledo (supra para. 73(74)(6) and (8)) were discharged from the medical center they were in "with scarce health improvement" the former, and the latter "without any medication." The González-Aponte girl died 8 days after this, of enterocolitis / dehydration, whereas Jenny, who was apparently in good conditions, had a relapse and "there was no opportunity to take her back" to hospital. She died of dehydration. Esteban Jorge Alvarenga, a newborn, (supra para. 73(74)(28)) who suffered from dyspnoea and respiratory failure could be taken to the Concepción hospital but he was not admitted there. The treating doctor provided a medical prescription that, "due to her scant resources, it was impossible for his mother to buy, and the newborn died a few days later." Silvia Adela Chávez, a newborn, (supra para. 73(74)(27)) was assisted by a "medical delegation" which did not provide her with any medicines and recommended her mother to get such medicines form a "Sanitary Registry." The newborn died a month later. Belén Galarza, the mother of Arnaldo and Fátima Galarza (supra para. 73(74)(29) and (30),) had a post-delivery hemorrhage that extended for over fifteen days, for which reason she was admitted to hospital together with Arnaldo and Fátima, who had "a malnutrition condition," since they had not had any intake "for at least a week." Arnaldo could never recover his strength and died. Fátima, though showing a certain improvement, died a month after her brother. Finally, the boy Derlis Armando Torres died of cachexia (supra para. 73(74)(12)) and the boy Juan Ramón González died of pneumonia (supra para. 73(74)(14).) Despite having received some kind of medical care, it was was not timely nor sufficient.

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

177. As regards to the right to life of children, the State has, in addition to the duties regarding any person, the additional obligation to promote the protective measures referred to in Article 19 of the American Convention, which states the following: "[E]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society,

and the state." Thus, on the one hand, the State must undertake more carefully and responsibly its special position as guarantor, and must adopt special measures based on the best interest of the child. [FN222] The aforesaid cannot be separated from the likewise vulnerable situation of the pregnant women of the Community. States must devote special attention and care to protect this group and must adopt special measures to secure women, specially during pregnancy, delivery and lactation, access to adequate medical care services.

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[FN222] Cf. Case of the "Mapiripán Massacre", supra note 9, para. 152; Case of the Indigenous Community of Yakye Axa, supra note 1, para. 172, and Case of "Juvenile Reeducation Institute" supra note 211, para. 160. In that sense, also, Cf. Juridical Condition and Human Rights of Children. Advisory Opinion AO-17/02 of August 28, 2002. Series A No. 17, paras. 56 and 60.

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178. Considering the aforesaid, the Court finds that the State violated Article 4(1) of the American Convention, as regards to Article 1(1) thereof, since it has not adopted the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of the Sawhoyamaxa Community. The Court considers that the deaths of 18 children members of the Community, to wit: NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Esteban Jorge Alvarenga, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza (supra para. 73(74)) are attributable to the State, precisely for the lack of prevention, which furthermore additionally violates Article 19 of the Convention. Likewise, the Court finds that the State violated Article 4(1) of the American Convention, as regards to Article 1(1) thereof, due to the death of Luis Torres-Chávez, who died of enterocolitis, without any kind of medical care (supra para. 73(74).

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179. From what is known about the deaths of Wilfredo González (supra para. 73(74)(25), Teresio González (supra para. 73(74)(26)) and Marcos Chávez (supra para. 73(74)(23)), who died after alleged work and traffic accidents, as well as the death of Antonio Alvarenga (supra para. 73(74)(24)), who was allegedly deprived of his life by another member of the Community, this Court considers that such deaths are not attributable to the State.

180. Finally, the Court ascertains that Pedro Fernández, 79 years old, (supra para. 73(74)(20),) Eusebio Ayala, 80 years old (supra para. 73(74)(21) died of pneumonia and Lucía Aponte, 50 years old (supra para. 73(74)(22),) died of tuberculosis, and that life expectation in Paraguay was 59.6 years for men and 64.2 years for women. Taking into account the aforesaid, and also the lack of further evidence, this Court cannot find that such deaths are totally attributable to the State.

XI. ARTICLE 5 OF THE AMERICAN CONVENTION (RIGHT TO HUMANE TREATMENT) AS REGARDS TO ARTICLE 1(1) thereof

Allegations by the Commission

181. As regards to Article 5 of the Convention, in connexion with Article 1(1) thereof, the Commission alleged that the living conditions that the Sawhoyamaxa Community currently has to endure are infra-human. If the State had guaranteed its members their right to live in their ancestral lands, in such a way as to allow them to practice their traditional subsistence activities, the living conditions would have improved.

Allegations by the representatives

182. The representatives alleged the following:

a) by failing to restore the ancestral lands and the traditional habitat to the Sawhoyamaxa Community, the State has prevented their members from hunting, fishing and gathering in the claimed lands and habitat, thus affecting their cultural and religious identity, and further placing them in a situation of extreme vulnerability characterized by extreme poverty and inadequate observance of their basic rights, such as the rights to health and food, and
b) the State has violated the right to humane treatment of the members of the Sawhoyamaxa Community for its failure to adopt the necessary measures to prevent unnecessary moral and psychological suffering. The long years waiting for the restitution of their lands have caused them feelings of sadness and a deep sense of lack of protection and frustration. The impossibility of burying their dead in the ancestral land, and following their rituals and traditions, generates feelings of sadness and guilt to the members of the Community. To Furthermore, they also fear to be assaulted by "white men or Paraguayan people", when they covertly access their ancestral land to carry out their traditional practices.

Allegations by the State.

183. The State has not filed any specific arguments regarding Article 5(1) of the Convention.

Considerations by the Court

184. Article 5(1) of the American Convention states that: "Every person has the right to have his physical, mental, and moral integrity respected."

185. The considerations that the Inter-American Commission and the representatives of the victims submit as regards to Article 5(1) of the Convention have already been analyzed by the Court in the Chapter referring to Article 4(1) thereof; therefore, it is not pertinent to analyze the same in this Chapter.

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

186. This Court has jurisdiction — in the light of the American Convention, and based on the iura novit curia principle, which is solidly supported by international case law — to study the possible violation of the rules of the Convention which have not been alleged in the petitions and

briefs filed with the Court, in the understanding that the parties have had the opportunity to express their respective positions with regard to the supporting facts. [FN223].

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[FN223] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 54; Case of the "Mapiripán Massacre", supra note 9, para. 57, and Case of the Moiwana Community, supra note 191, para. 91.

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187. In the instant case, neither the Commission nor the representatives have alleged the violation of Article 3 of the American Convention. However, from the facts of the case, it is appears that there has been no registration or official documentation of the existence of several members of the indigenous Sawhoyamaxa Community (supra para. 73(73).) The Court considers that the parties have had the opportunity of addressing such situation (supra paras. 24, 26, 27 and 28;) thus, it is pertinent to examine the obligations stemming from Article 3 of the American Convention which provides as follows:

"Every person has the right to recognition as a person before the law."

188. The right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such person can enforce such rights. [FN224] The breach of such recognition implies the absolute denial of the possibility of being holder of such rights and of assuming obligations, [FN225] and renders individuals vulnerable to the non-observance of the same by the State or by individuals. [FN226]

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[FN224] Cf. International Covenant on Civil and Political Rights. Examination of Reports submitted by the State Parties pursuant to Article 40 of the Convention. UN Doc CCPR/C/ 31/ADD. 4 (1996), para. 58.
[FN225] Cf. Case of Bámaca-Velásquez. Judgment of November 25, 2000, Series C No. 70, para. 179.
[FN226] Cf. Case of the Yean and Bocico girls, supra note 12, para. 178; Case of Bámaca-Velásquez, supra note 225, para. 179.

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

190. In the instant case, the Court has considered proved that 18 out of the 19 members of the Sawhoyamaxa Community who died as a consequence of the failure by the State to comply with its preventive duty regarding their right to life (supra para. 178,) did not have any birth or death records, nor any other document provided by the State capable of evidencing their existence and identity.

191. Likewise, it stems from by the facts that the members of the Community lived in extremely risky and vulnerable conditions, and thus they have economic and geographical hindrances to get births and deaths duly registered, as well as to obtain any other identification documents. In that sense, Carlos Marecos, Community leader expressed that:

As regards to personal documents, we indigenous peoples have always had many problems, there are still people that have never had any identification documents, and there are persons that have got identity cards only when they reached old age, because they had never gone to Asunción. They worked on estates, just like that, without any documents [....], not even my children have identity cards, we have to go to Asunción to get the birth certificate and then the identity card, but the fare to get there is expensive, it is not easy to travel [....]. Most children born in the Community are not registered. [...] Neither are the demises of the persons who die registered.

192. The above mentioned members of the Community have remained in a legal limbo in which, though they have been born and have died in Paraguay, their existence and identity were never legally recognized, that is to say, they did not have personality before the law. Indeed, the State, in the instant proceeding before the Court, has intended to use this situation for its own benefit. In fact, at the time of referring to the right to life, the State alleged:

If neither the existence of these persons nor even their death has even been proved, it is not possible to claim liability from anyone, lest the State, where are their birth and death certificates?

193. This Court, apart from having rejected this allegation by the State and having determined the violation of Article 4(1) of the Convention, (supra 161,) considered that Paraguay failed to provide the Court with the evidence it requested to facilitate the adjudication of the case, which the State particularly has the burden to provide (supra paras. 22 and 48.) The Court considers that it was the duty of Paraguay to implement mechanisms enabling all persons to register their births and get any other identification documents, ensuring that these processes are, at all different levels, accessible both legally and geographically, to render the right to personality before the law operative.

194. On the basis of the above considerations, and notwithstanding the fact that other members of the Community may be in the same situation, the Court finds that the State violated the right to personality before the law enshrined in Article 3 of the American Convention, to the detriment of NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres-Chávez, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza.

## XIII. REPARATIONS (ENFORCEMENT OF ARTICLE 63(1))

### Obligation to remedy

195. Pursuant to the analysis made in the preceding chapters, the Court has declared, on the basis of the facts of the case, the violation of Article 3 of the American Convention, as regards to

Article 1(1) thereof; the violation of Article 4(1) of the Convention, as regards to Articles 19 and 1(1) thereof, and of Articles 21, 8 and 25 of the American Convention, as regards to Articles 1(1) and 2 of the same, in detriment of the members of the indigenous Sawhoyamaxa Community. The Court has established, on several occasions, that any violation of an international obligation which has produced harm implies the obligation to provide an adequate remedy. [FN227] To such effect, Article 63(1) of the American Convention states the following:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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[FN227] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 294; Case of López-Álvarez, supra note 3, para. 179 , and Case of the Pueblo Bello Massacre, supra note 3, para. 226.

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196. As the Court has pointed out, Article 63(1) of the American Convention reflects a rule of customary law which constitutes one of the fundamental principles of contemporary International Law regarding the responsibility of States. Thus, when an illegal act occurs that can be attributable to a State, the international responsibility of such State immediately arises from the breach of the international rule in question, with the corresponding obligation to remedy and to cause the consequences of the violation to cease. [FN228]

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[FN228] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 295; Case of López-Álvarez, supra note 3, para. 180, and Case of the Pueblo Bello Massacre, supra note 3, para. 227.

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197. The reparation of the damages caused for the violation of an international obligation, requires, whenever possible, the full restitution (restitutio in integrum,) which consists of the reinstatement of the situation prior to the violation. Were this not possible, the international court may determine a series of measures that, apart from the guaranteeing observance of the human rights that have been violated, may also remedy the consequences of the breaches and impose the payment of a compensation for the damages caused. [FN229] The duty to remedy, which is governed in all its aspects (scope, nature, forms and determination of beneficiaries) by International Law, cannot be modified or not complied with by the State owing such duty, by alleging domestic law provisions. [FN230]

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[FN229] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 296; Case of López-Álvarez, supra note 3, para. 182, and Case of the Pueblo Bello Massacre, supra note 3, para. 228.
[FN230] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 296; López-Álvarez, supra note 3, para. 182, and Case of the Pueblo Bello Massacre, supra note 3, para. 228.

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198. The reparations, as the term itself indicates, consist of measures tending to eliminate the effects of the breaches perpetrated. Their nature and amount depend on both the pecuniary and non-pecuniary damages caused. The reparations cannot imply enrichment or detriment for the victims or their successors. [FN231]

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[FN231] Cf. Case of Acevedo-Jaramillo et al, supra note 3, para. 297; López- Álvarez Case, supra note 3, para. 181, and Case of the Pueblo Bello Massacre, supra note 3, para. 229.

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199. Pursuant to the evidence gathered during the proceeding, and in the light of foregoing criteria, the Court proceeds to analyze the relief sought by the Commission and by the representatives, as well as the considerations of the State in respect of the reparations, with the purpose of determining, in the first place, who the beneficiaries of the reparations are, in order to subsequently determine the reparations for the pecuniary and non-pecuniary damages, and lastly, of determing the costs and expenses.

200. The Court will now summarize the arguments regarding the reparations filed by the Inter-American Commission, by the representatives and by the State.

Allegations by the Commission

201. As regards to reparations, the Commission alleged that:

Regarding the beneficiaries

a) The persons entitled to receive reparation are the indigenous Sawhoyamaxa Community and its members. The violations have been in detriment of an Indigenous Community that, due to its cultural identity, must be considered from a collective and an individual standpoint;
b) the reparations in the instant case reach a special dimension due to the collective nature of the rights that the State has violated, in detriment of the Community and its members. Action by the State, contrary to international law, has affected not only the victims as individuals, but the existence of the Community itself;

Regarding the pecuniary damages

c) the Court must determine in equity the amount to compensate the consequential damages and loss of earnings suffered by the members of the Indigenous Sawhoyamaxa Community due to the violations of their human rights;

Regarding the non-pecuniary damages

d) the State must pay an amount in equity as compensation for the non-pecuniary damages caused to the victims in the instant case “by the suffering, anguish, and indignities to which they

have been subjected during those years in which they had been waiting for an effective response to their territorial claims;"

e) the Sawhoyamaxa Community fabric has been especially affected by the death of several of its members as a consequence of the deplorable living conditions in which it dwells;

f) the Court must order the State to pay the next of kin of the Community members that have died during their sojourn in their current settlement location, an amount that it may be equitably determine. In effecting such determination, the customary law of the Community must be taken into account;

g) the Court must provide for the creation of a special fund for the reparations intended to finance educational, training and psychological and medical care programs for the members of the Community; the implementation of such programs must be previously consented to by the interested parties and must adjust to their customs;

As regards to the other forms of reparation:

h) to make over, for no consideration, to the Sawhoyamaxa Community the lands claimed as their traditional habitat or part of their ancestral lands;

i) to provide the claimed area with basic services, including drinking water and sanitation facilities, a health center and a schooling institution;

j) To provide the members of the Sawhoyamaxa Community with permanent medical care and educational services that be culturally pertinent;

k) to order the protection of lands the Community claims until the same be effectively made over to them;

l) to adopt in their domestic laws, the legislative, administrative or other measures that may be necessary to create a judicial mechanism to enforce the right of the indigenous peoples of Paraguay to own their traditional habitat or ancestral lands;

m) to make a public recognition of the Community and its members, through a symbolic act, previously agreed upon with the representatives and the victims, and

As regards to costs and expenses

n) upon hearing the representatives, the Court must order the payment of the domestic costs derived from the proceedings followed by the alleged victims or their representatives, as well as the international costs for the processing of the case before the Commission and before the Inter-American Court that the representatives may duly prove.

Allegations by the representatives

202. The representatives alleged that:

As regards to beneficiaries:

a) Taking into account the decision of the Community, the compensatory measures that may be ordered by the Court in its judgment must consider the group of extended families forming the Sawhoyamaxa Community as beneficiaries. These families comprise those included in the last census made in 2002, and also the families that during these four years have increased this

census. In this respect, taking into account that the Sawhoyamaxa Community is an organized indigenous community having duly elected leaders and representatives, and furthermore that such leaders and representatives are formally recognized by the State, the identification of the new families can be certified to the Court by the Community authorities;

b) As regards to the members of the Community that died during the period in which the Community has dwelled in their current settlement location, their next of kin are the ones who must receive the indemnification that the Court may determine;

As regards to pecuniary damages:

c) They join the Commission in its application as regards to the claims for reparation, and they have requested that the cultural characteristics and the specific circumstances of each victim be taken into consideration;

d) It should be taken into account that the members of the Community and their leaders have had to carry out many procedures and to take many trips, during the years the domestic proceedings for claiming their lands have been pending. Likewise, and furthermore the victims have had to resort to national and international non-governmental organizations and to contact well-known domestic and foreign personalities, with the purpose of reporting the facts, as well as to visit different public institutions in order to request the authorities to take action intended to guarantee justice be done to them. All these activities, though not forming part of the judicial procedure itself, are on occasions such as the instant case, necessary to demand justice from the authorities. All of this implies additional expenses and must be considered and recognized as part of the pecuniary damages they have sustained.

As regards to non-pecuniary damages:

e) The Court shall order the State to pay an amount for "the sadness and suffering they have experienced at beholding the rejection of their legitimate territorial claim, as well as for the anguish and impotence they have felt as the victims of the violations described, during the years they have been waiting for the restitution of their ancestral land;"

f) Regarding the 45 members of the Community that have died, the Court shall order the State to indemnify their next of kin with an equitable amount for the pain and sadness that they had experienced. Likewise, the State must pay the Community, on account of these same facts, an amount for the suffering, anguish, impotence and inhumane treatment that their members experienced at the death of their children and elders;

g) The reparations regarding the suffering experienced by the members of the Sawhoyamaxa Community must contemplate the creation of a special pecuniary fund to finance educational, training, medical and psychological assistance programs for the members of the Community, the implementation of which programs must be previously consented to by the interested parties and must adjust to their customs;

As regards to the other forms of reparation:

h) The main satisfaction measure to be ordered to the State is the restitution of their traditional habitat, notwithstanding which this order may be extended so as to include full restitution of the right to use other lands adjoining those that have been claimed. Furthermore,

the lands that are claimed in restitution and their natural resources must be subject to a preliminary protective order until they are effectively made over to the Community;

i) As security for the fulfillment of the preceding item, the State shall be ordered to set up a fund to cover the payment of the lands to be purchased, on the basis of the average market value of the lands located in the area that is claimed, and to be figured out taking into account the total minimum area that the Community claims, i.e. 14,404 hectares.

j) Taking into account the urgency of the situation, the State has to provide the area claimed by the Sawhoyamaxa Community with basic services, including drinking water and sanitation facilities, a health center and a schooling institution;

k) As a measure aimed at improving the material living conditions, the State shall be ordered to provide medical care to the members of the Community, as well as to guarantee them the exercise of their right to education;

l) In order to dignify the Community and their members, the State shall be ordered to organize a public recognition act;

m) In view of the lack of personal identification, the State shall be ordered to field a campaign aimed at providing identification documents to all the members of the Community;

n) As a non-repetition guarantee, the State shall be ordered to enact an effective remedy enabling the indigenous peoples of Paraguay to access their traditional habitat pursuant to the rights granted them under domestic legislation;

o) As a guarantee for the victims and for the purpose of monitoring compliance by the State of the reparations ordered, the State shall be ordered to develop an official follow-up procedure;

As regards to costs and expenses:

p) The State shall pay for the domestic costs and expenses arising from judicial, administrative and legislative actions and proceedings that have been followed by the alleged victims or their representatives in the national venue, as well as the international costs and expenses derived from the processing of the case before the Commission. As there is no documentary evidence of such expenses, the Court is requested to make a determination of the amount of such costs and expenses in equity; and

q) Regarding the handling of the case before the Inter-American Court, the Tierraviva organization incurred in expenses related to the proceedings carried out in during the time allowed to produce evidence amounting to US $ 4,638 (four thousand six hundred and thirty-eight United States Dollars) which are backed by documentary evidence.

Allegations by the State

203. As regards to reparations, the State alleged that:

As regards to the pecuniary and non-pecuniary damages:

a) The damages that might have been caused in the instant case have not been claimed before the Courts of Justice of the State, and there is no relationship between the deaths of some of the members of the Community and the ancestral lands issue;

b) The State acknowledges the need of the members of the Community to generate a productive yield out of the lands to be made over to them in order to cater for the needs of the

Community and to allow the adequate development of such lands. To such effect, the State will implement a project for the adequate development of such lands;

As regards to the other forms of reparation:

c) The State intends to make over, for no consideration, a certain extension of land to the Sawhoyamaxa Community, as provided in the Constitution and in the statutes in force;
d) The State accepts the claim to set up a fund for the payment of the lands at the price determined by bargaining and the customary offer conditions;
e) The State accepts the request for the establishment of a health care center, a school, and the provision of drinking water and sanitation facilities for the Community;
f) The State accepts the claim for medical care and educational services for the Community, pursuant to the educational and health plans contemplated by the State;
g) The State accepts the claim for the enactment and enforcement of legislation contemplating an effective and expedient remedy to solve conflicts of rights as those at issue in the instant case;
h) The State does not object to making a public recognition, provided the representatives define the characteristics of the claim that they put forth; and

As regards to costs and expenses:

i) The State does not agree with the payment of the amount claimed as costs and expenses, for the State is not bound to reimburse expenses made without its consent and knowledge, and above all, without its control. Furthermore, these alleged expenses are not backed by any documents that may evidence that such expenses have effectively been incurred.

Considerations of the Court

A) BENEFICIARIES

204. The Court considers that the members of the Sawhoyamaxa Indigenous Community are the injured parties, in their capacity as victims of the violations specified above (supra para. 195). Exhibit A), appendixed to this Judgment, contains the list of members of the aforementioned Indigenous Community, as per the census performed in February 2006 [FN232] (supra para. 27).

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[FN232] Cf. Census on the Sawhoyamaxa Indigenous Community prepared by the representatives of the alleged victims in February 2006, supra note 30.
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205. The Court has been able to verify, through the various Community censuses submitted, [FN233] as indicated by the Commission and the representatives, that the number of people and families that compose the aforementioned Indigenous Community has changed. For instance, the 2004 Community census surveyed 376 people distributed into 80 families, while the February 2006 census surveyed 407 people grouped into 83 families. The Court finds that all these variations are inherent to the internal structure of such groups.

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[FN233] Cf. Sawhoyamaxa Indigenous Community census carried out by the representatives of the alleged victims in 1997, supra note 26; Sawhoyamaxa Indigenous Community census carried out by the representatives of the alleged victims in July 2003, supra note 30; Sawhoyamaxa Indigenous Community census carried out by the representatives of the alleged victims in 2004, supra note 30, and Sawhoyamaxa Indigenous Community census carried out by the representatives of the alleged victims in February 2006, supra note 30.

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206. The above mentioned considerations apply to the families of Luis Chávez and Victorina Álvarez (No. 51) and their children Karen Fabiola, Eliseo and César Daniel, and the family of Faustino Chávez and Liliana González (No. 40) and their children, Sandra, Fausto, Ramón, Justina, Gerardo and another male child. Although it is true that the abovementioned families were reported as members of the Yakye Axa Community, and thus victims of the human rights violations declared by the Inter-American Court in its judgment on such case, on the basis of the December 2004 census, said families were considered members of the Sawhoyamaxa Community. The Court cannot but respect the decision of these families to leave the Yakye Axa Community to join the Sawhoyamaxa Community, both indigenous communities of the Enxet-Lengua people and the decision of the members of the Sawhoyamaxa Community to accept those families into their group.

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

208. Furthermore, this Court considers “injured party” the 19 members of this Indigenous Community who died as a result of the events, to wit: NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres-Chávez, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Esteban Jorge Alvarenga, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza (supra para. 178).

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

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

210. In view of its conclusions contained in the chapter related to Article 21 of the American Convention (supra para. 144), the Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the restitutio in integrum principle, therefore the Court orders that the State shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands.

211. As it has been proven, the lands claimed before the domestic jurisdiction by the members of the Community are part of their traditional habitat (supra para. 73(9)) and are suitable for their ultimate settlement (supra para. 73(10)). However, restitution of such lands to the Community is barred, since these lands are currently privately owned.

212. On that matter, pursuant to Courts precedent, [FN234] the State must consider the possibility of purchasing these lands or the lawfulness, need and proportionality of condemning these lands in order to achieve a lawful purpose in a democratic society, as reaffirmed in paragraphs 135 to 141 of the instant Judgment and paragraphs 143 to 151 of the judgment entered by the Court in the Case of the Indigenous Community Yakye Axa. If restitution of ancestral lands to the members of the Sawhoyamaxa Community is not possible on objective and sufficient grounds, the State shall make over alternative lands, selected upon agreement with the aforementioned Indigenous Community, in accordance with the community's own decision-making and consultation procedures, values, practices and customs. In either case, the extension and quality of the lands must be sufficient to guarantee the preservation and development of the Community's own way of life.

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[FN234] Cf. Case of Indigenous Community Yakye Axa. Interpretation of the Judgment on the Merits, Reparations, and Costs (art. 67(1) American Convention on Human Rights). Judgment of February 6, 2006. Series C No. 142, para. 26, and Case of Indigenous Community Yakye Axa, supra note 1, para. 144 to 154 and 217.

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213. In the instant case, the Court notes that the State has expressed that it "intends to make over, for no consideration to the Sawhoyamaxa Community, as provided in the Constitution and in the statutes in force, an extension of land consistent with the number of stable and permanent members of the Community, in favor of such Community, within their lands delimited in the Paraguayan Chaco, where the Enxet-Lengua people has traditionally been settled, always to the extent permitted by domestic legislation and without affecting any third party who accredits to hold ownership title and a rational exploitation, either by acquisition, upon agreement with the owners of those lands, or by condemnation pursuant to the laws of the Republic."

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

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

C) PECUNIARY DAMAGE

216. The Court has repeatedly sustained in its precedents that pecuniary damage involves a loss of, or detriment to, the income of the victims, the expenses incurred as a result of the events and the pecuniary consequences that may have a cause-effect link with the events in the instant case. [FN235]

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[FN235] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 301; Case of López-Álvarez, supra note 3, para. 192, and Case of Blanco-Romero et al. Judgment of November 28, 2005. Series C No. 138, para. 78.

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217. The representatives requested the Court to take into account that during domestic claims for restitution of their lands the members of the Community and its leaders had to make significant efforts before government authorities, which allegedly forced the leaders of the Community to travel to other cities. According to the representatives, the members of the Community "had to resort to national and international non-governmental organizations and to contact well-known domestic and foreign personalities, with the purpose of reporting the facts."

218. Based on the above and on equitable grounds, the Court fixes compensation for pecuniary damage in the amount of US$ 5,000.00 (five thousand United States Dollars) to be delivered to the leaders of the Community, as set forth in paragraph 207 herein.

D) NON-PECUNIARY DAMAGE

219. Non-pecuniary damage may include distress and suffering caused directly to the victims or their relatives, tampering with individual core values, and changes of a non pecuniary nature in the living conditions of the victims or their families. As it is impossible to assess the value of the non-pecuniary damage sustained in a precise equivalent in money, for the purposes of full reparation to the victims, said damage may only be compensated in one of two ways. Firstly, compensation may be made effective by paying an amount of money or delivering property or services whose value may be established in money, as reasonably determined at the Court's discretion based on equitable grounds. And secondly, compensation may be made effective through public actions or works, such as the publication of an official message repudiating the human rights violations at stake and committing to prevent further similar violations with the aim of, among other purposes, recognizing the victims' dignity. [FN236] The first aspect of reparation of non-pecuniary damage will be analyzed in this section and the second aspect in the following section.

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[FN236] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 308; Case of López-Álvarez, supra note 3, para. 199; Case of the Pueblo Bello Massacre, supra note 3, para. 254.

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220. Pursuant to repeated international precedents, judgments constitute in and of themselves a form of reparation. [FN237] However, in view of the circumstances of the instant case, the

alterations to the living conditions of the victims and their pecuniary and non pecuniary consequences, the Court considers that non-pecuniary damage should be subject to reparation.

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[FN237] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 309; Case of López-Álvarez, supra note 3, para. 200; Case of the Pueblo Bello Massacre, supra note 3, para. 258.

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221. This Court finds that the non enforcement of the right to hold title to the communal property of the members of the Sawhoyamaxa Community, and the detrimental living conditions imposed upon them as a consequence of the State's delay in enforcing their rights over the lands must be taken into account when assessing the value of the non-pecuniary damage sustained.

222. Similarly, the Court finds that the special meaning that these lands have for indigenous peoples, in general, and for the members of the Sawhoyamaxa Community, in particular (supra para. 133), implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations.

223. In the instant case, the State recognized "the need of the members of the Community to generate a productive yield out of the lands to be made over to them in order to cater for the needs of the Community and to allow the adequate development of such lands. To such effect, the State will implement a project for the adequate development of such lands, immediately after consultations with and acceptance by the Community" (supra para. 203).

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

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

226. On the other hand, in view of the conclusions contained in the chapter of the instant Judgment regarding Article 4(1) of the Convention, given the existence of sufficient grounds to presume the suffering of the deceased persons, mostly boys and girls, as a result of the circumstances described above (supra para.73(74), the Court, based on equitable grounds and a

reasonable assessment of non-pecuniary damage, orders the State to pay compensation in the amount of US$ 20,000.00 (twenty thousand United States Dollars), or its equivalent in the currency of the State, to each of the 17 members of the Community who died as a result of the events in the instant case (supra para. 178). That amount must be distributed among the next of kin of the victims pursuant to the cultural practices of the Sawhoyamaxa Community its.

227. As a result of the above and based on equitable grounds, this Court fixes the value of compensations for non-pecuniary damage, as specified in the chart below.

| Victims | Amount |
|---|---|
| NN Galarza | US$ 20,000.00 |
| Rosana López | US$ 20,000.00 |
| Eduardo Cáceres | US$ 20,000.00 |
| Eulalio Cáceres | US$ 20,000.00 |
| Esteban González-Aponte | US$ 20,000.00 |
| NN González-Aponte | US$ 20,000.00 |
| NN Yegros | US$ 20,000.00 |
| Jenny Toledo | US$ 20,000.00 |
| Guido Ruiz-Díaz | US$ 20,000.00 |
| NN González | US$ 20,000.00 |
| Luis Torres-Chávez | US$ 20,000.00 |
| Diego Andrés Ayala | US$ 20,000.00 |
| Francisca Britez | US$ 20,000.00 |
| Silvia Adela Chávez | US$ 20,000.00 |
| Esteban Jorge Alvarenga | US$ 20,000.00 |
| Arnaldo Galarza | US$ 20,000.00 |
| Fátima Galarza | US$ 20,000.00 |
| Derlis Armando Torres | US$ 20,000.00 |
| Juan Ramón González | US$ 20,000.00 |
| Total Amount | US$ 380,000.00 |

E) OTHER FORMS OF REPARATION (MEASURES OF SATISFACTION AND NON-REPETITION GUARANTEES)

228. In this subparagraph, the Court will determine those measures of satisfaction aimed at redressing non-pecuniary damage as well as other measures with a public scope or impact. [FN238] These measures are especially relevant in the instant case, given the collective nature of the damage caused.

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[FN238] Cf. Case of the Pueblo Bello Massacre, supra note 3, para. 264, Case of Blanco-Romero et al. Judgment of November 28, 2005. Series C No. 138, para. 93; and Case of Gómez Palomino, supra note 12, para. 136.

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a) Delivery of property and basic services

229. In the instant case, Paraguay stated its intention to satisfy the request of the Commission and the representatives regarding the establishment of a health care center and a school, as well as the provision of drinking water, sanitation facilities medical care and educational services, in favor of the members of the Community (supra para. 203).

230. With the foregoing in mind and in view of the conclusions contained in the chapter related to Article 4 of the American Convention (supra para. 156 to 180), the Court orders that, while the members of the Community remain landless, the State shall immediately, regularly and permanently adopt measures to: a) supply sufficient drinking water for consumption and personal hygiene to the members of the Community; b) provide medical check-ups, tests and care to all members of the Community, especially children, elder people and women, together with periodic parasite removal and vaccination campaigns, respecting their practices and customs; c) deliver sufficient quantity and quality of food; d) set up latrines or other type of sanitation facilities in the settlements of the Community, and e) provide the school of the "Santa Elisa" settlement with all necessary material and human resources, and establish a temporary school with all necessary material and human resources for the children of the "Kilómetro 16" settlement. The education provided must, inasmuch as possible, respect the cultural values of the Community and of Paraguay, and is to be bilingual; in the Exent language, and at the discretion of the members of the Community, either in Spanish or in Guarani.

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

232. Lastly, given the difficulties encountered by the members of the Community to access health care centers (supra para. 73(72), the State shall set up in the Santa Elisa and Kilómetro 16 settlements of the Sawhoyamaxa Community a communication system to allow victims to contact health authorities competent to address emergency cases. If necessary, the State shall provide transportation. The State shall establish such communication system within six months as from the date notice of the instant Judgment be served.

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

c) Adapting domestic legislation to the American Convention

234. In the answer to the application, the State "acquiesced" to the request made by the Inter-American Commission and the representatives "for the enactment and enforcement of legislation contemplating an effective and expedient remedy to solve conflicts of rights as those at issue in the instant case" (supra para. 203).

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

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

236. As ordered in prior cases, [FN239] the Court finds that, as a measure of satisfaction, the State shall publish within one year as from the date notice of the instant Judgment be served and at least once, in the Official Gazette and in another national daily newspaper, the section entitled Proven Facts, without the footnotes, and operative paragraphs one to fourteen of the instant Judgment. Furthermore, the State shall finance the radio broadcasting [FN240] of the content of paragraphs 73(1) to 73(75) of chapter VII on Proven Facts, without the footnotes, and of operative paragraphs one to fourteen of the instant Judgment, in the language indicated by the members of the Community, in a radio station accessible to them. Said radio broadcasting shall be made at least four times in two-week intervals.

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[FN239] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 313; Case of López-Álvarez, supra note 3, para. 208; Case of the Pueblo Bello Massacre, supra note 3, para. 279.
[FN240] Cf. . Case of Indigenous Community Yakye Axa, supra note 1, para. 227; and Case of Yatama, supra note 8, para. 253.

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COSTS AND EXPENSES

237. As the Court has stated on previous occasions, [FN241] costs and expenses are contemplated within the concept of reparations as enshrined in Article 63(1) of the American Convention, since the efforts of the victims and their representatives to obtain justice both at the domestic and the international levels lead to disbursements that must be compensated when international responsibility of the State is declared in a conviction judgment. With regard to their reimbursement, the Court must prudently assess their extent, which involve the expenses generated when acting before authorities within the domestic jurisdiction as well as those generated in the course of proceedings before the Inter-American human rights protection system, taking into account the particular circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. Such estimate may be made based on equitable grounds and in consideration of the expenses reported by the parties, provided their amount be reasonable.

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[FN241] Cf. Case of Acevedo-Jaramillo et al., supra note 3, para. 315; Case of López-Álvarez, supra note 3, para. 214; Case of the Pueblo Bello Massacre, supra note 3, para. 283.

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238. The Court takes into account that the members of the Sawhoyamaxa Community acted through representatives before the domestic jurisdiction and before the Commission and this Court as well. Therefore, based on equitable grounds, the Court orders the State to pay as costs and expenses incurred in the domestic proceedings, and during the proceedings before the Inter-American human rights protection system, the amount of US$ 5,000.00 (five thousand United States Dollars) or an equivalent amount in the currency of Paraguay, to be paid to the leaders of the Community, who in turn will transfer to TierraViva the amount they deem appropriate to compensate the expenses incurred by such institution.

F) TERMS OF COMPLIANCE

239. To comply with this Judgment, the State shall pay compensations for pecuniary and non-pecuniary damage (supra para. 218, 226 and 227), reimburse costs and expenses (supra para. 238), publish and disclose excerpts of the instant Judgment (supra para. 236) and implement a campaign for registering and documenting all members of the Community (supra para. 231), within one year. Moreover, the State shall individualize, demarcate, delimit, confer title to and make over for no consideration the traditional lands to the members of the Sawhoyamaxa Community or, were this impossible, alternative lands, as set forth in paragraphs 210 to 215 herein, no later than three years from the date of the instant Judgment. All the foregoing time-limits will run as from the date notice of the instant Judgment be served.

240. Furthermore, the State shall implement a community development fund within two years after making over the lands (supra para. 224 to 227). In the meantime, the State shall immediately and periodically adopt measures aimed at delivering supplies and basic services to the members of the Community, as set forth in paragraphs 229 and 230 of the instant Judgment. Likewise, the State shall set up in the settlements of the Community a communication system allowing victims to contact health authorities competent to address emergency cases, within six months as from the date notice of the instant Judgment be served (supra para. 232).

241. The State shall enact into its domestic legislation the necessary measures to enforce the rights enshrined in the American Convention, as set forth in paragraph 235 herein, within a reasonable time.

242. Payment of compensations for pecuniary and non-pecuniary damage, and the related reimbursement of costs and expenses, shall be made as set forth in paragraphs 207, 218 and 227 herein.

243. The State may discharge its pecuniary obligations by tendering United States Dollars or an equivalent amount in the currency of the State, at the New York, USA exchange rate between both currencies on the day prior to the one payment is made.

244. If the beneficiaries of compensations are not able to receive payments within one year after the date notice of judgment is served upon them due to reasons attributable to them, the State shall deposit said amounts in an account in their name or draw a certificate of deposit from

a reputable Paraguayan bank, in United States Dollars, under the most favorable financial terms the law in force and customary banking practice allow. If after ten years compensations be still unclaimed, the corresponding amount, plus any accrued interest, shall be returned to the State.

245. The amounts fixed in the instant Judgment for pecuniary and non-pecuniary damage and reimbursement of costs and expenses shall not be affected, reduced or conditioned by tax reasons, be they present or future. Beneficiaries shall therefore receive the total amount as per the provisions herein.

246. Should the State fall into arrears with its payments, Paraguayan banking default interest rates shall be paid on the amount owed.

247. In accordance with its constant practice, the Court retains the authority inherent in its jurisdiction to monitor full compliance with this Judgment. The instant case shall be closed once the State implements in full the provisions herein. Paraguay shall, within six months, submit to the Court an initial report on the measures adopted in compliance therewith.

## XIV. OPERATIVE PARAGRAPHS

248. Therefore,

THE COURT,

DECLARES,

Unanimously that:

1. The State violated the rights to Fair Trial and Judicial Protection enshrined in Articles 8 and 25, respectively, of the American Convention on Human Rights, relating to Articles 1(1) and 2 thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community, as set forth in paragraphs 87 to 89 and 93 to 112 herein.
2. The State violated the right to Property enshrined in Article 21 of the American Convention on Human Rights, relating to Articles 1(1) and 2 thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community, as set forth in paragraphs 117 to 144 herein.
3. The State violated the right to Life enshrined in Article 4(1) of the American Convention on Human Rights, relating to Articles 1(1) and 19 thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community, as set forth in paragraphs 150 to 178 herein.
4. It is not necessary to rule on the right to Personal Integrity, as set forth in paragraph 185 herein.
5. The State violated the right to Recognition as a Person Before the Law enshrined in Article 3 of the American Convention on Human Rights, relating to Article 1(1) thereof, to the detriment of NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, Niño Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres-Chávez, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Derlis

Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza, as set forth in paragraphs 186 to 194 herein.
5. This judgment is in and of itself a form of redress, as set forth in paragraph 220 herein.

AND RULES,

6. The State shall adopt all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaxa Community their traditional lands, within three years, as set forth in paragraphs 210 to 215 herein.
7. The State shall implement a community development fund, as set forth in paragraphs 224 and 225 herein.
8. The State shall pay compensation for non-pecuniary damage, costs and expenses within one year as from the date notice of the instant Judgment be served, as set forth in paragraphs 218, 226 and 227 herein.
9. As long as the members of the Sawhoyamaxa Indigenous Community remain landless, the State shall deliver to them the basic supplies and services necessary for their survival, as set forth in paragraph 230 herein.
10. Within six months as from the date notice of the instant Judgment be served, the State shall set up in the Santa Elisa and Kilómetro 16 settlements of the Sawhoyamaxa Community a communication system enabling victims to contact health authorities competent to address emergency cases, as set forth in paragraphs 232 herein.
11. The State shall implement, no later than one year as from the date notice of the instant Judgment be served, a registration and documentation program, as set forth in paragraph 231 herein.
12. The State shall enact into its domestic laws and within a reasonable time the legislative, administrative or other measures necessary to establish a mechanism to claim restitution of the ancestral lands of the members of indigenous communities, that be efficient in enforcing their rights over traditional lands, as set forth in paragraph 235 herein.
13. The State shall comply with the publications specified in paragraph 236 of the instant Judgment within one year as from the date notice of the instant Judgment be served. Similarly, the State shall finance the radio broadcasting of the instant Judgment, as set forth in paragraph 236 herein.
14. The Court shall monitor full compliance with this Judgment and shall consider the instant case closed upon full compliance by the State with the provisions therein. Within a year as from the date notice of the instant Judgment be served, the State shall submit to the Court a report on the measures adopted to comply herewith, as set forth in paragraph 247 herein.

Judges Sergio García-Ramírez, Antônio A. Cançado Trindade and Manuel E. Ventura-Robles informed the Court of their Separate Concurring Opinions, appendixed hereto.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Oliver Jackman
Antônio A. Cançado Trindade

Cecilia Medina-Quiroga
Manuel E. Ventura-Robles
Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

INTER-AMERICAN COURT OF HUMAN RIGHTS

APPENDIX A

| MEMBERS OF THE INDIGENOUS COMMUNITY OF Sawhoyamaxa | |
|---|---|
| FULL NAMES | LOCATION |
| House Nº 1 | |
| 1. Carlos Marecos Aponte | Santa Elisa |
| 2. Gladys Benítez | Santa Elisa |
| 3. Alejandro Benítez | Santa Elisa |
| 4. Vicente Marecos | Santa Elisa |
| 5. Griselda Marecos | Santa Elisa |
| 6. Rubén Marecos | Santa Elisa |
| 7. Blasia Marecos | Santa Elisa |
| 8. Marilu Benítez | Santa Elisa |
| House Nº 2 | |
| 9. Julio Apesteguia Benítez | Santa Elisa |
| House Nº 3 | |
| 10. Guillermina Aponte | Santa Elisa |
| 11. Feliciano González | Santa Elisa |
| 12. Bernardo González | Santa Elisa |
| 13. Basilio González | Carandilla |
| 14. Bernarda González | Santa Elisa |
| 15. Cristina González | Santa Elisa |
| 16. Rosana González | Santa Elisa |
| House Nº 4 | |
| 17. Dionicio Galeano | Santa Elisa |
| 18. Aparicia González | Santa Elisa |

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|---|---|
| 19. Delcy Galeano | Santa Elisa |
| 20. Mirta Galeano | Santa Elisa |
| 21. Mariela Galeano | Santa Elisa |
| | |
| House Nº 5 | |
| 22. Maximina González | Santa Elisa |
| 23. Vidalia Montanía Galeano | Santa Elisa |
| | |
| House Nº 6 | |
| 24. Josefina Galeano | Santa Elisa |
| 25. Fiorella Galeano | Santa Elisa |
| | |
| House Nº 7 | |
| 26. Aurelio Silva Benítez | Santa Elisa |
| 27. Claudelina Aponte Galarza | Santa Elisa |
| 28. Emerenciano Aponte | Santa Elisa |
| 29. Estanislao Ortega Aponte | Santa Elisa |
| 30. Isabelino Silva | Santa Elisa |
| 31. Francisco Silva | Santa Elisa |
| 32. Cintia Elizabeth Silva | Santa Elisa |
| 33. Andrea Soledad Silva | Santa Elisa |
| 34. Yessica Rocio Silva | Santa Elisa |
| 35. Ariel Silva | Santa Elisa |
| | |
| House Nº 9 | |
| 36. Pablina Galarza | Santa Elisa |
| | |
| House Nº 10 | |
| 37. Miguel Alvarenga | Santa Elisa |
| 38. Gabriela Aponte | Santa Elisa |
| 39. Luz Mariela Martínez | Santa Elisa |
| | |
| House Nº 11 | |
| 40. Tomasa Yegros | Santa Elisa |
| 41. Elina Yegros | Estancia Yakukai |
| 42. Leonarda Sosa Fernández | Santa Elisa |
| 43. Nilda Gómez | Santa Elisa |
| | |
| House Nº 12 | |
| 44. Feliciano González | |
| 45. Petrona Gómez Yegros | Santa Elisa |
| 46. Elsi Patricia Yegros | Santa Elisa |
| 47. Felicia Yegros | Santa Elisa |
| | |
| House Nº 13 | |
| 48. Marcos Acuña | |

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| 49. Dominga Benítez | Estancia Diana |
| 50. Daniel Gómez | Estancia Diana |
| 51. Blanca Gómez | Estancia Diana |
| 52. Rosi Goméz | Estancia Diana |
| | |
| House Nº 14 | |
| 53. Mariano Benítez | Santa Elisa |
| 54. Eulalia Fernández | Santa Elisa |
| 55. Cecilio Benítez | Santa Elisa |
| 56. Eulalio Benítez | Santa Elisa |
| 57. Héctor Benítez | Santa Elisa |
| 58. Leonarda Benítez | Santa Elisa |
| 59. Lourdes Benítez | Santa Elisa |
| | |
| House Nº 15 | |
| 60. Leongino Yegros | Santa Elisa |
| | |
| House Nº 16 | |
| 61. Belén Galarza | Santa Elisa |
| 62. Isidro Benítez | Carandilla |
| 63. Miguel Benítez | Carandilla |
| 64. Nelsón Benítez | Carandilla |
| 65. Edgar Benítez | Estancia Armonia |
| 66. Juana Benítez | Santa Elisa |
| 67. Ricardo Galarza | Santa Elisa |
| 68. Darío Benítez | |
| | |
| House Nº 17 | |
| 69. Sonia Galarza Aponte | Santa Elisa |
| 70. Gabriel Yegros | |
| 71. María Claudia Galarza | Santa Elisa |
| 72. Claudio Yegros Galarza | Santa Elisa |
| 73. Maribella Galarza | Santa Elisa |
| | |
| House Nº 18 | |
| 74. Antonio López | |
| 75. Porfiria Alvarenga | Santa Elisa |
| 76. Jorge Alvarenga | Estancia Maroma |
| 77. Ramón Alvarenga | Santa Elisa |
| 78. Inocencio Alvarenga | Santa Elisa |
| 79. Thalia Alvarenga | Santa Elisa |
| 80. Amado Alvarenga | Santa Elisa |
| 81. Leona Alvarenga | Santa Elisa |
| | |
| House Nº 19 | |
| 82. Luis Melgarejo | Santa Elisa |

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| 83. Raquel Alvarenga | Santa Elisa |
| 84. Luis Miguel Alvarenga | Santa Elisa |
| | |
| House Nº 20 | |
| 85. Fermín Galarza | Loma Porá |
| 86. Antonia Cáceres Aponte | Santa Elisa |
| 87. Noelia Leticia Cáceres | Santa Elisa |
| 88. Verónica Andrea Cáceres | Santa Elisa |
| | |
| House Nº 21 | |
| 89. Bernardo Cáceres Severo | Santa Elisa |
| | |
| House Nº 22 | |
| 90. José González | Santa Elisa |
| 91. Anuncia Aponte | Santa Elisa |
| 92. Juan José González | Santa Elisa |
| 93. Josefina González | Santa Elisa |
| 94. Gloria Felicia González | Santa Elisa |
| 95. Miguel Angel González | Santa Elisa |
| 96. Eliodoro González | Santa Elisa |
| 97. Eduardo González | Santa Elisa |
| 98. José Osvaldo González | Santa Elisa |
| 99. Alvaro Javier González | Santa Elisa |
| | |
| House Nº 23 | |
| 100. Froilan Gímenez Aponte | Santa Elisa |
| | |
| House Nº 24 | |
| 101. Celestina Aponte | Santa Elisa |
| | |
| House Nº 25 | |
| 102. Nélida Cáceres Aponte | Santa Elisa |
| 103. Sebastian Aponte | |
| | |
| House Nº 26 | |
| 104. Ricardo Ruíz Díaz Chavez | Santa Elisa |
| 105. Mercedes González | Santa Elisa |
| 106. Federico González | Santa Elisa |
| 107. Hilario González | Santa Elisa |
| 108. Cintia Pamela González | Santa Elisa |
| 109. Sergio David González | Santa Elisa |
| 110. Guadalupe González | Santa Elisa |
| 111. Matias González | Santa Elisa |
| | |
| House Nº 27 | |
| 112. Darío González | Santa Elisa |

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| 113. María Yegros | Santa Elisa |
| 114. Nilsa González | Santa Elisa |
| 115. Derlis González | Santa Elisa |
| 116. Rolando González | Santa Elisa |
| | |
| House Nº 28 | |
| 117. Juan Alvarenga | Santa Elisa |
| 118. Victorina Galarza | Santa Elisa |
| | |
| House Nº 29 | |
| 119. Gregorio Alvarenga | |
| | |
| House Nº 30 | |
| 120. Cristaldo Sosa | Santa Elisa |
| 121. Paulina Alvarenga Ramírez | Santa Elisa |
| 122. Juana Alvarenga | Santa Elisa |
| 123. Bernardina Alvarenga | Santa Elisa |
| 124. Pedro Rubén Alvarenga | Santa Elisa |
| 125. Freddy Alvarenga | Santa Elisa |
| 126. Jorge Alvarenga | Santa Elisa |
| | |
| House Nº 31 | |
| 127. Cristino Ramírez | Santa Elisa |
| 128. Manuela Yegros | Santa Elisa |
| 129. Milciades Ramírez | Santa Elisa |
| | |
| House Nº 32 | |
| 130. Cirilo García Alvarenga | Naranjito |
| 131. Esmeralda Chávez | Narajito |
| 132. Lourdes María Acuña | Naranjito |
| 133. Ceferino Torres | Naranjito |
| 134. Carlos Ruben Alvarenga | Naranjito |
| 135. Gilberto Alvarenga | Naranjito |
| 136. Héctor Milciades Alvarenga | Naranjito |
| 137. Rufino Torres | Naranjito |
| | |
| House Nº 33 | |
| 138. Bernardo Cáceres Severo | Santa Elisa |
| 139. Ignacia Galarza | Santa Elisa |
| 140. Estanislao Acosta | Santa Elisa |
| 141. Sindulfo Ramírez | Santa Elisa |
| 142. Hilario Ramírez | |
| | |
| House Nº 34 | |
| 143. Venancio Acosta | Santa Elisa |
| 144. Mónica Chávez Galarza | Santa Elisa |

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| 145. Lorena Chávez | Santa Elisa |
| 146. Silverio Chávez | |
| | |
| House Nº 35 | |
| 147. Julio Toledo | San José |
| | |
| House Nº 36 | |
| 148. Ciriaco Benítez Fernández | Santa Elisa |
| 149. Santa Galarza Palacios | Santa Elisa |
| 150. Aníbal Toledo | Santa Elisa |
| 151. Francisco Toledo | Santa Elisa |
| 152. Crescencio Toledo | Santa Elisa |
| 153. Gerónimo Toledo Palacio | Santa Elisa |
| 154. Eleuterio Héctor Benítez | Santa Elisa |
| 155. Aurelio Benítez | Santa Elisa |
| 156. Alcides Benítez | Santa Elisa |
| | |
| House Nº 37 | |
| 157. Luisa Chávez | Estancia Diana |
| 158. Ricardo Chavez | Estancia Diana |
| 159. Dominga Chavez | Estancia Diana |
| 160. Amada Chavez | Estancia Diana |
| | |
| House Nº 38 | |
| 161. Rafael Martínez | San José |
| 162. Marta Toledo | San José |
| 163. Francisco Martínez | San José |
| 164. Felipe Martínez | San José |
| 165. Cintia Mabel | San José |
| 166. Chita Magdalena | San José |
| 167. Agustín Martínez | San José |
| 168. Teofila Martínez | San José |
| 169. Victoriano | San José |
| | |
| House Nº 39 | |
| 170. Pablo Martínez | San José |
| 171. Natalia Torres | San José |
| 172. Nancy Martínez | San José |
| | |
| House Nº 40 | |
| 173. Faustino Chávez | Santa Elisa |
| 174. Liliana González | Santa Elisa |
| 175. Sandra Chávez | Santa Elisa |
| 176. Fausto Chávez | Santa Elisa |
| 177. Gerardo Chávez | Santa Elisa |
| 178. N. Masculino | Santa Elisa |

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| Casa Nº 41 | |
| 179. Cristina Marecos | Santa Elisa |
| 180. Menor | Santa Elisa |
| 181. Menor (masc) | |
| | |
| House Nº 42 | |
| 182. Laureano Jara | Santa Elisa |
| 183. Bernarda Marecos | Santa Elisa |
| 184. Juan José Jara | Santa Elisa |
| 185. José Domingo Jara | |
| 186. Julio César Jara | Santa Elisa |
| 187. Carmen Lucia Jara | Santa Elisa |
| 188. Pabla Marecos | Santa Elisa |
| | |
| House Nº 43 | |
| 189. Roberto Ferreira | |
| 190. Gloria Alvarenga | Santa Elisa |
| 191. Jorge Alvarenga | Santa Elisa |
| 192. Cintia Karina Alvarenga | Santa Elisa |
| 193. Juan Pablo Alvarenga | Santa Elisa |
| 194. María Laura Alvarenga | Santa Elisa |
| 195. Cristhian David Alvarenga | Santa Elisa |
| 196. María Gabriela Alvarenga | Santa Elisa |
| 197. Maria Tereza Acuña | Santa Elisa |
| 198. Eulalio Yegros | Santa Elisa |
| 199. Diego Eduardo Yegros | Santa Elisa |
| 200. Rodrigo Marcial Yegros | Santa Elisa |
| | |
| House Nº 44 | |
| 201. Emiliano Gerónimo Toledo | Santa Elisa |
| 202. Carmen Yegros | Santa Elisa |
| 203. Delia Toledo | Santa Elisa |
| 204. Roberto Yegros | Santa Elisa |
| 205. Yenny Toledo | Santa Elisa |
| | |
| House Nº 45 | |
| 206. Teodora Chavez Acuña | Santa Elisa |
| 207. Liz Paula Benítez | Santa Elisa |
| 208. Idilio Benítez | Santa Elisa |
| | |
| House Nº 46 | |
| Cecilia Chávez Alvarenga | Santa Elisa |
| Alfredo Chávez | Santa Elisa |
| | |
| Casa Nº 47 | |

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|---|---|
| 209. José Alberto González | Kilómetro 16 |
| 210. Graciela Montania Torales | Santa Elisa |
| 211. José Alberto González | Kilómetro 16 |
| 212. Juan Pablo González | Santa Elisa |
| 213. José Lucas González | Santa Elisa |
| | |
| House Nº 47 | |
| 214. Marío Florentín | Kilómetro 16 |
| 215. Justina Fernández | Kilómetro 16 |
| 216. Roberto Carlos Florentín | Kilómetro 16 |
| 217. Alberto Javier Florentín | Kilómetro 16 |
| 218. José Asunción Florentín | Kilómetro 16 |
| 219. Liza Ramona Florentín | Kilómetro 16 |
| 220. Francisco Florentín | Kilómetro 16 |
| 221. Vicente Andrés Florentín | Estancia Aurora |
| 222. Marío David Florentín | Kilómetro 16 |
| | |
| House Nº 48 | |
| 223. Elsa Ayala | Kilómetro 16 |
| 224. Andrés Ayala | Kilómetro 16 |
| 225. Guillermo Ayala | Kilómetro 16 |
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| House Nº 49 | |
| 226. Mauricio Ramírez | Kilómetro 16 |
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| House Nº 50 | |
| 227. Daniel Chávez | Kilómetro 16 |
| 228. Victoria Fernández | Kilómetro 16 |
| 229. Cinthya Carolina Chávez | Santa Ana |
| 230. María Olga Chávez | Santa Ana |
| | |
| House Nº 51 | |
| 231. Luis Chávez | |
| 232. Victorina Alvárez | Santa Ana |
| 233. Karen Fabiola | Santa Ana |
| 234. Eliseo Chavez | Santa Ana |
| 236. César Daniel Chávez | Santa Ana |
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| House Nº 52 | |
| 237. Andrea Soledad Chávez | Kilómetro 16 |
| 238. Marialina Chávez | Kilómetro 16 |
| | |
| House Nº 53 | |
| 239. Eugenio Fernández | Misión Inglesa |
| 240. Fátima Beatriz Montania | Concepción |

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| House Nº 54 | |
| 241. Guillermo Fernández | Kilómetro 16 |
| 242. Hermelinda Zuni Ayala | Kilómetro 16 |
| 243. Patricia Joana Fernández | Kilómetro 16 |
| 244. Jorge Fabián Fernández | Kilómetro 16 |
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| House Nº 55 | |
| 245. Amado Brítez | Kilómetro 16 |
| 246. Emilia Rita Ayala | Kilómetro 16 |
| 247. Dahiana Brítez Ayala | Kilómetro 16 |
| 248. Marío Valentín Britez | Kilómetro 16 |
| 249. Miriam Estela Brítez | Kilómetro 16 |
| 250. Ana Beatriz Brítez | Kilómetro 16 |
| 251. Milciades Brítez | Kilómetro 16 |
| 252. Alicia Soledad Brítez | Kilómetro 16 |
| | |
| House Nº 56 | |
| 253. Rosalino Torres | Kilómetro 16 |
| 254. Susana Chávez | Kilómetro 16 |
| 255. Rubén Dario Torres | Estancia Aurora |
| 256. Aldo Ramón Torres | Kilómetro 16 |
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| House Nº 57 | |
| 257. Cirilo González Carrillo | Kilómetro 16 |
| Cirilo González Carrillo | Kilómetro 16 |
| 258. Clementina Fernández | Kilómetro 16 |
| 259. Leonardo González | Kilómetro 16 |
| 260. Nery Heriberto González | Kilómetro 16 |
| 261. Ignacio González | Kilómetro 16 |
| 262. Felipe González | Kilómetro 16 |
| 263. Víctor Rafael González | Kilómetro 16 |
| 264. Teresa Beátriz González | Kilómetro 16 |
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| House Nº 58 | |
| 265. José González | Kilómetro 16 |
| 266. Margarita Dejesus González | Kilómetro 16 |
| 267. Fernando David González | Kilómetro 16 |
| 268. Rubén Darío González | Kilómetro 16 |
| 269. Sergio González | Kilómetro 16 |
| 270. Otro | Kilómetro 16 |
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| House Nº 59 | |
| 271. Fernando Ayala | Kilómetro 16 |
| Fernando Ayala | Kilómetro 16 |
| 272. Antonia Torales | Kilómetro 16 |
| 273. Alcides Ayala | Kilómetro 16 |

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| 274. Rodrigo Ayala | Kilómetro 16 |
| 275. Lidia Mabel Ayala | Kilómetro 16 |
| 276. Ana Graciela Ayala | Kilómetro 16 |
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| House Nº 60 | |
| 277. Mariana Ayala | Kilómetro 16 |
| 278. Jorge Manuel Ayala | Kilómetro 16 |
| 279. Alberto Carlos Ayala | Kilómetro 16 |
| 280. Cristian Humberto Ayala | Kilómetro 16 |
| 281. Rosa Alejandra Ayala | Kilómetro 16 |
| 282. Oscar Ramón Ayala | Kilómetro 16 |
| 283. Mariela Ayala | Kilómetro 16 |
| 284. Oscar Ramón Ayala | Kilómetro 16 |
| 285. Heriberto Ayala | Kilómetro 16 |
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| House Nº 61 | |
| 286. Dionisia Ayala | Estancia 3 Hermanos |
| 287. Lorenza Ayala | Estancia 3 Hermanos |
| 288. Juan Carlos Ayala | Estancia 3 Hermanos |
| 289. Alejandra Ayala | Estancia 3 Hermanos |
| 290. Pablo Ayala | Estancia 3 Hermanos |
| 291. Celestino Ayala | Estancia 3 Hermanos |
| 292. Natalia Ayala | Estancia 3 Hermanos |
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| House Nº 62 | |
| 293. Emilio Florentín | Kilómetro 16 |
| 294. Juana Duarte | Kilometro 16 |
| | |
| House Nº 63 | |
| 295. Florinda Florentín | Kilómetro 16 |
| 296. Antolín Ramírez Florentín | Estancia Aurora |
| 297. Gilberto Ramón Florentín | Kilómetro 16 |
| 298. Juana Leticia Florentín | Kilómetro 16 |
| 299. Derlis Ariel Florentín | Kilómetro 16 |
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| House Nº 64 | |
| 300. Soila Florentín | Misión Inglesa |
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| House Nº 65 | |
| 301. Carmelo Fernández | Kilómetro 16 |
| | |
| House Nº 66 | |
| 302. Leonida Fernández | Kilómetro 16 |
| 303. Víctor Samaniego | Kilómetro 16 |
| 304. Arnaldo Ramón Fernández | Kilómetro 16 |
| 305. Liliana Raquel Fernández | Kilómetro 16 |

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| 306. Miguel Angel Fernández | Kilómetro 16 |
| 307. Mónica Fernández | Kilómetro 16 |
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| House Nº 67 | |
| 308. Andrés Chávez | Santa Elisa |
| 309. Impolita Acuña | Santa Elisa |
| 310. Celestino Chávez | Santa Elisa |
| 311. Pedro Fabian Acuña | Santa Elisa |
| 312. Marcos Antonio Chávez | Santa Elisa |
| 313. Estefanía Benítez | Santa Elisa |
| | |
| House Nº 68 | |
| 314. Eulalio Yegros | Santa Elisa |
| 315. Teresa Acuña | Santa Elisa |
| 316. Dieguito Eduardo Acuña | Santa Elisa |
| | |
| House Nº 69 | |
| 317. Catalina Chávez Acuña | Yakukai |
| 318. Yessica Gómez | Yakukai |
| 319. Celso Chávez | Yakukai |
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| House Nº 70 | |
| 320. Albino Ortíz | Estancia Loma Porá |
| 321. Ignacia Montanía | Estancia Loma Porá |
| 322. Sixta Ortíz | Estancia Loma Porá |
| 323. Mirta Ortíz | Estancia Loma Porá |
| 324. Isabel Ortíz | Estancia Loma Porá |
| 325. Fidelina Ortíz | Estancia Loma Porá |
| 326. Balbina Ortíz | Estancia Loma Porá |
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| House Nº 71 | |
| 327. Florencia Martínez | Misión Inglesa |
| 328. Amado Fernández | Misión Inglesa |
| 329. Isabel Fernández | Misión Inglesa |
| 330. Mónica Fernández | Kilómetro 16 |
| 331. Sonia Fernández | Misión Inglesa |
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| House Nº 72 | |
| 332. Eugenio Chávez | Naranjito |
| 333. Lucia Alvarenga | Naranjito |
| 334. Alejandra Chávez | Naranjito |
| 335. Francisca Chávez | Naranjito |
| 336. Jorge Chávez | Naranjito |
| 337. Wilfrido Chávez | Naranjito |
| 338. Larissa Chávez | |
| 339. Lidia Chávez | Naranjito |

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| 340. Maribel Chávez | Naranjito |
| 341. Cinthia Ramona Chávez | Naranjito |
| 342. Otra | Naranjito |
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| House Nº 73 | |
| 343. Cristina Chávez | Naranjito |
| 344. Alexis García | Naranjito |
| 345. Rocío García | Naranjito |
| 346. Eduardo García | Naranjito |
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| House Nº 74 | |
| 347. Norberto Alvarenga | Naranjito |
| 348. Florencia García | Naranjito |
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| House Nº 75 | |
| 349. Julia Alvarenga | Naranjito |
| 350. Carolina García | Naranjito |
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| House Nº 76 | |
| 351. Gabriela Alvarenga | Naranjito |
| 352. Marcial Alvarenga | Naranjito |
| 353. Oscar Alvarenga | Naranjito |
| 354. Alberto Franco | Naranjito |
| 356. Verónica Franco | Naranjito |
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| House Nº 77 | |
| 357. Librada Alvarenga | Naranjito |
| 358. Julio Alvarenga | Naranjito |
| 359. Javier Alvarenga | Naranjito |
| 360. Karina Alvarenga | |
| 361. Paola Alvarenga | |
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| House Nº 78 | |
| 362. Inocencio García | Naranjito |
| 363. Marciana García | Naranjito |
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| House Nº 79 | |
| 364. Cecilia Chávez | Naranjito |
| 365. Alfredo Chávez | Naranjito |
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| House Nº 80 | |
| 366. Herminia Alvarenga | Naranjito |
| 367. Faustino Alvarenga | Naranjito |
| 368. Gustavo Alvarenga | Naranjito |
| 369. Vicente Alvarenga | Naranjito |
| 370. Jessica Alvarenga | Naranjito |

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| 371. Mirta Alvarenga | Naranjito |
| 372. Bernarda Alvarenga | Naranjito |
| 373. Isabelino Alvarenga | Naranjito |
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| House Nº 81 | |
| 374. Juan Ortega | Naranjito |
| 375. Sofia Alvarenga | Naranjito |
| 376. Claudelino Ortega | Naranjito |
| 377. Fabian Ortega | Naranjito |
| 378. Bernardino Ortega | Naranjito |
| 379. Sabino Ortega | Naranjito |
| 400. Delia Ortega | Naranjito |
| 401. Silvano Ortega | Naranjito |
| 402. Alicia Ortega | Naranjito |
| 403. Sarita Ortega | Naranjito |
| | |
| House Nº 82 | |
| 404. Lorenzo Acuña | Santa Elisa |
| 405. Lidia Torales Barreto | Misión Inglesa |
| 406. Wilfrido Sosa | Misión Inglesa |
| | |
| House Nº 83 | |
| 407. Maximina Rojas | Estancia Diana |

SEPARATE OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ IN THE JUDGMENT RENDERED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON MARCH 29, 2006 IN THE CASE OF SAWHOYAMAXA INDIGENOUS COMMUNITY V. PARAGUAY

I. Procedural matters: effective procedures and reasonable time

1. In the case at hand, ―as in other disputes brought before the Court generating an ever wider and comprehensive case law― the problems associated with the effective protection —whether in court or out of court— of the individual rights —that is to say, from a certain standpoint— with the access to justice have become evident once again. As Mauro Cappelletti has said, the right to justice is the "most essential right", as I recalled on March 28, 2006 in my opening speech at the 27th Special Session held in Brasilia, where the Inter-American Court tried the Case of Sawhoyamaxa Indigenous Community v. Paraguay and rendered the judgment to which I join this Opinion.

2. Certainly, rather than placing the right to justice, which belongs to all individuals, above the right to life, which is a condition preceding the existence of all the other rights, the fortunate expression by the Italian legal scholar singles out the right to justice as a requirement for the enforcement of all other rights when the be at risk, disregarded or infringed, that is to say for them to go from the aura of good propositions to the reality of existence. The right to justice is a gateway to the defense of all rights: it is a condition for the enjoyment and the exercise —a vitality requisite, if I may say so— of rights, freedoms and prerogatives.

3. The right to justice is often impaired by a myriad of obstacles. Some are linked to the very existence of legal means to claim an interest or right and enforce the corresponding obligation; others to the legal standing to get started on the way to thereto; yet some other hindrances —connected with the former— bearing on legal representation at trial; not a few others are linked to the conditions, requirements and intricacies of the procedure; and more than a few others are linked with lengthy trials —or more broadly— with the length of the proceeding aimed at enforcing the enjoyment and exercise of the right challenged, a lengthiness which may become a denial of justice. As the popular aphorism goes, "justice delayed, justice denied."

4. Such vicissitudes, springing from many sources —not always from malice— are wont to appear with particular frequency and intensity in the path that must be trod by the individuals least provided with support and fortune, belonging to marginalized social strata, who often have little awareness of their own rights and little power to enforce them, and who are enervated by factors stemming from long-standing and persistent inequalities. The impossibility of accessing justice is precisely a typical characteristic of inequality and marginalization. This is where it appears most evidently that there is a need for the State —as the benefactor of those who could not proceed by their own means— to help overcome obstacles and inequalities, providing material and formal means for compensation to open the gateway to justice. The idea is not for the State to tilt the balance of the scale at will, but for it to safeguard the existence of the scale itself and to ensure that it is not unbalanced beforehand.

5. The claims of indigenous groups, communities and peoples and their members are a good example —or perhaps we should say a terrible example— of delayed justice. There is abundant enough evidence for it not to be an overstatement to say that in these cases the delay has spanned centuries: first, the delay in recognizing that "the original peoples could have a property right", in spite of the law imposed over them by a new domination which disregards the original claims; afterwards, once the recognition is achieved —after historical endeavors— the delay in "recognizing specifically that such right is to be exercised by certain claimants." The former is a general legal reparation readjusting the horizon of domestic law, whereas the latter is an individual legal restitution specifically reconstituting the heritage of communities and individuals.

6. Issues of such kind arose in the instant case. They included the delays in the processing the recognition of leaders —something which was excluded ratione temporis, from the competence of the Court as it pointed out—, the recognition of the community's juridical personality and its claim for lands. We are aware that it is not possible —at least it has not been so thus far— to define precise time frames for the proceedings to achieve their purpose, in other words, it is impossible to identify the reasonable time stated in the American Convention with a strictly defined time limit. The characteristics and contingencies of each case carry their own specific weight, and they must be individually addressed in order to declare the existence or inexistence of a violation. In spite of the relative span of the reasonable time, there has been a general progress in fixing some conditions thereof, particularly in order to rationalize and facilitate decision by the Court.

7. One the one hand, it is meet to consider certain factors, as the Inter-American Court has done following in the the wake of the European Court, to wit: the complexity of the matter in dispute, the behavior of the authorities seized with the case, and the behavior of the interested party. In my recent Separate Opinion in the judgment rendered in the Case of López Alvarez v. Honduras, of February 1, 2006, I suggested that the "actual infringement of the rights and duties of the individuals —i.e., the their legal position— " caused by the proceedings should be taken as a fourth factor in calculating the reasonable time." In explaining this budding notion, I elaborated in the sense that "such factor could have little impact upon the legal position held; if that is not the case, that is, if the impact gets higher to the point of being great, then it will become necessary, in furtherance of justice and security that are seriously jeopardized, to speed up the proceedings so that the situation of the individuals, which has started to severely affect their life, is decided promptly, i.e within a "reasonable time". The infringement must be actual, and not merely possible, likely, incidental or remote."

8. On the other hand, it is necessary to establish the acts commencing and ending the proceedings, focusing on the protection of the fundamental rights at issue rather than on the formal acts which, strictly speaking, start and end each stage in a proceeding, in order to determine the dies a quo and the dies ad quem of the term the "reasonableness" of which is to be tested under Article 8(1) of the American Convention.

9. In my opinion, all of these factors were brought to bear on the position of the Court regarding the possible violations of Article 8 of the Convention, which in fact occurred. In the case at hand, the Court has found that the legal proceedings and other measures associated thereto resulted in themselves ineffective or failed to meet the standards of the rule in the Convention as well as those in Article 25 —concerning the prompt recourse for the protection of fundamental rights— and thus ordered, by way of reparation in the broad sense, the adjustment of domestic law so as to provide an effective mechanism for asserting claims and, if it were the case, for laying claim to the ancestral lands of the members of the indigenous groups.

II. Claim on lands

10. The infringement of rights of the members of the indigenous communities perpetrated in the context of the infringement of the rights of the communities as such, adopted various forms in history, whether successive or simultaneous, which I have addressed elsewhere. In this connection, I refer to my Opinion accompanying the judgment rendered in the Case of Yatama v. Nicaragua on June 23, 2005, wherein I attempted to establish certain "categories" of violations —whether successive or simultaneous, as stated earlier— committed against such individuals. The most violent and spectacular ones are those falling into the category of physical elimination, which includes some of the events related to the Case of Moiwana Community v. Surinam. Others relate mostly to measures barring the use or enjoyment of property, as in the Cases of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua and of the Indigenous Community Yakye Axa v. Paraguay. Finally, it is possible to identify hypotheses of "contention", i.e., refusal to recognize and allow the exercise of certain rights, such as were apparent in the Case of Yatama v. Nicaragua.

11. In the matter disposed of in the judgment to which I attach this Opinion, the members of an indigenous community were deprived of property they had owned under ancestral title. Once again, the Court has had to look at communal rights from the perspective of individual rights admitted under to Article 1(2) of the American Convention. Hence, the language of the judgment refers to the members of the indigenous groups and not necessarily to the groups collectively. However, the approach in the Convention, which provides grounds for the Court to be seized, does not imply the denial of, or exception against, collective rights. Moreover, it is generally granted —as I myself have done, since my Separate Opinion in the Case of Mayagna (Sumo) Awas Tingni Community— that individual rights, which constitute human rights under the Pact of San José, originate from, and acquire existence, effectiveness and significance in, the context of collective rights. Therefore, it follows that protecting the former is a way of preserving the latter, and the opposite also stands: protecting collective rights, through the rules and instruments pertaining thereto, helps understand and furthers the preservation of individual rights. Thus, there is no conflict at all, between these two "ways of looking at the status of persons" that strictly complement each other.

12. In this Opinion, I wish to emphasize the nature of the right of the members of the communities —and, in their environment, and to the appropriate extent, of the communities themselves— over the lands that they lawfully claim: ancestral lands they have owned under title predating the forms of land appropriation that came with the empire of conquest and colonization. Even though the Pact of San José does not expressly mention this form of landholding, it was already said in the judgment passed in the Case of Mayagna Community, "through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention —which precludes a restrictive interpretation of rights—, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property (…)". This recognition is also part of several American legal systems.

13. When property is mentioned in connection with the rights vested in the members of the indigenous communities or the communities as such over certain lands —to which they furthermore attach traditions, traditions and beliefs, spiritual relations that transcend the mere possession and economic enjoyment— the meaning labeled should not necessarily be confused with the absolute ownership that is characteristic of ordinary civil law. The property rights of the indigenous people are different —and so it must be recognized and protected— from this other form of ownership created by the European law rooted in liberal ideology. Moreover, the forced introduction of the notions of property rights stemming from Roman law and received, albeit with variations, by the nineteenth-century law that took root in America involved an extensive process that plundered and dispersed the communities, the consequences of which can still be seen.

14. The property the indigenous groups had held and enjoyed under their own original Law were occupied pursuant to a second-generation legal system, imposed from overseas on the Indies. Subsequently, the third-generation legal system that flourished under the liberal ideology, dissuaded the indigenous claims even further, blurring them into the past. There would yet come the time of a fourth-generation law, the order deriving from agrarian reform and the recognition

of the original peoples, which retrieved legal institutions from the old system and brought them into the present and the future system, simply in furtherance of justice. It was necessary to make up for the lost four hundred years in a very short time —with dubious results.

15. Thus, from the conquest on, the original population of America —who had formerly held sway over their territories and played the leading role in their own history— exited both their history and their rights over them; they roamed their old lands, now turned over to new lords, and fruitlessly claimed on their ancestral titles before new powers. Finally they became exiles, and as such watched the centuries go by, almost offhandedly. The damage caused to the groups and individuals was extremely severe and deep. At the heart of the cases filed before the Inter-American Court lies this phenomenon excluding the old forms of landholding and replacing them with new types of ownership, under the aegis of the Western concept of private property.

16. I am forced not to object to the use of the term 'property' to describe the rights of the indigenous peoples rights over the lands they have owned and over those the currently own, provided it be understood that, in the instant case, the property rights are "qualified", that is to sxay it has unique characteristics, which correspond in some aspects to ordinary ownership, but differ radically from it in others. The idea of putting the indigenous form of ownership —i.e., the indigenous landholding under their particular customary law— on the same footing as that of the civil law also preserved under Article 21 of the Convention may prove extremely disadvantageous to the legitimate interests and lawful rights of the indigenous people. None of this would go on under a rigorous interpretation of the Pact of San José, which the Court has already established in the Case of the Mayagna Community.

III. Right to life

17. The Inter-American Court has issued a large number of decisions concerning the right to life —essential right, root of all others, supporting all the rest of the rights and freedoms as a whole. Article 4 of the American Convention, which addresses this issue, lays the primary stress on curtailing the arbitrary deprivation of existence and on restricting capital punishment. This is the main focal point of most of the paragraphs of the article. Thus, the rule in the Convention protects individual life against any excesses committed by the State —an active and often deliberate behavior—, invariably threatened by acts of public agents either through illegal violation or lawful breach pursuant to laws providing for the termination of life as a punishment. The central features of such provision are thus arbitrary death and death.

18. Some remarkable decisions by the Court have shifted the focus towards the other side of the right to life which, seen from yet another perspective, constitutes the other face of State duties: beyond the mere omission curbing arbitrariness or mitigating punishment, action is required to create conditions to guarantee a decent existence. In this view, the right to life is restored to its original status as an opportunity to choose our destiny and develop our potential. It is more than just a right to subsist, but is rather a right to self-development, which requires appropriate conditions. In such framework, a single right with a double dimension is set, like the two-faced god Janus: one side, with a first-generation legal concept of the right to life; the other side, with the concept of a requirement to provide conditions for a feasible and full existence, that is to say a concept among the ones considered "second-generation rights", to employ a

figure of speech that has become successful. Hence the principle “you may not kill" and its counterpart "you shall favor life.” Both concepts protect the human being and bind the State.

19. This rule, which is a dogma of humanism, one of very few unimpeachable dogmas that enables, and even calls for, a democratic society, charges the State with an ethically-driven, teleological task, and crystallizes the conviction that political society has been established, as propounded in the late 18th century, for the protection of natural rights and the well-being of people. This is what justifies the State. This idea, which influenced the anthropocentric constitutionalism of the 18th, 19th and 20th centuries, lies at the heart of International Human Rights Law and governs the language and the spirit of the American Convention.

20. Such is the origin of the protective function of the State: it is vested with powers so that it fulfil its duties —otherwise, such power would lack an ethical basis and legal grounds—, which are aimed at furthering, in the best practicable conditions, the development of the human being, respecting its dignity and its own decisions. Needless to say, the State does not relieve individuals from running their lives, but rather it provides them —or should provide them— with favorable conditions for their self-development, which involves supplying a large number of pertinent means. This is where a number of rights including the right to work, education, health, and housing come into play, together with their corresponding duties.

21. The Inter-American Court has forcefully gone a long way in this direction. It has affirmed the duty to provide decent living conditions. It has highlighted the positive duties of the State, and not only its negative obligations. By doing so, it has broadened the horizons of human rights under the aegis of the American Convention. This has been the doctrine firmly upheld by the Court in each and every one of its most recent decisions. The foundations of such doctrine is discussed at length in each of them. A very recent example of this has been the decision rendered in the case of Indigenous Community Yakye Axa v. Paraguay, in which, following the same line of thought, the Court has upheld the positive duties concerning the right to life and the legal consequences of the failure by the State to fulfill them.

22. In the case of Yakye Axa, the Court addressed the violation of the right recognized by Article 4 of the Convention. However, the Court found, by a majority, that there was not enough evidence to hold the State liable for the death of several people. A respectable decision —as respectable as the dissenting opinion—, that did not absolve, but rather halted at the fence a judge must honestly heed in each case: evidence. In the instant case, however, the Court is unanimously satisfied that all the weight of evidence necessary and sufficient to find, once judicial conviction is formed, that the circumstances in which the victims were caused their death; that for each and every fact quoted in the judgment there is enough proof —beyond a reasonable doubt— to establish that the ill health of the victims was the result of the situation they were enduring; that this, in turn, was the direct consequence of the living conditions imposed by the dwelling and marginalization problems they suffered, the final, inequivocal and direct outcome of which was their demise; that such circumstances were particularly severe for minors, who were —or should have been— protected in a special, more strict way; that the resulting deaths are attributable to the State, not because of the action taken by its agents as in other cases, but rather as a result of its omission —which is just as disapprovable, since it implies the failure to perform strict duties— to foresee such outcome, perfectly foreseeable, and to take

the necessary steps to prevent it —something the State was in a position to do; and that it is not reasonable to blame the victims for such outcome, because the State had, as has been said, the means to foresee and prevent them, and it was under a duty to do so.

23. In sum, the judgment to which I join this Opinion has confirmed the essential criteria upheld in the cases of the "Street Children" (Villagrán Morales et al.), Gómez Paquiyauri Brothers, Juvenile Reeducation Institute and Yakye Axa. The Court has once again reaffirmed its progressive construction of the scope of the right to life under Article 4 of the American Convention on Human Rights, has insisted in the positive duties —rather than just the duties to refrain from acting— the State has a derivation of such scope, and it has highlighted the ethical relationship —as opposed to the political relationship of power and subordination— between the State and the citizen, and it has based its decision on the consideration of the facts, the application of the law and the weighing of the evidence, which a court must subject to the unbiased scrutiny of its reason and its conscience, with the care required to issue a condemnatory judgment.

IV. Recognition of juridical personality

24. In this judgment, the Court has considered certain facts that give rise to novel considerations regarding an issue that the Court had initially explored in past cases such as Case of Bámaca Velásquez v. Guatemala and Case of the Girls Yean and Bosico v. Dominican Republic, namely, the recognition of legal personality endorsed by Article 3 of the Pact of San José, in an emphatic language: "Every person has the right to recognition as a person before the law". The Court found that this right has been violated to the detriment of several people.

25. Of course, it is worth analyzing the various aspects or expressions of the right in hand, which is the crux of any democratic legal system, taken as a whole, as well as of the system established by the American Convention. Note that the Convention provides for the rights of persons and, under Article 1(2), the Pact of San José it takes it that human beings are the persons to whom the Pact applies. The idea of a person and the corresponding concept of personality are the gateway to the legal system, and denying the latter would necessarily imply denying or degrading the former.

26. It can be affirmed that the right to personality implies the recognition that the human being, as a member of a politically organized society and ruled by of law, necessarily has rights and duties; that it is essential that such status, with its manifold consequences, be protected by the legal system and by those enforcing it; that no one can be extcluded from such primary condition as a "person before the law", and be cast out of the legal system, and deprived of rights, freedoms, powers, guarantees, etc., which are the signs, the implications or the consequences of the recognition of personality by the State, notwithstanding, of course, the lawful restrictions or conditions that could be imposed thereon. This perspective casts light on one of the dimensions of juridical personality: the one having a material or substantive character.

27. The material recognition of juridical personality would be pointless or non-existent in the absence of the means to assert it, which would result in a —de jure or de facto— deprivation of personality before the legal system, or at least of legal standing to take the consequences thereof,

particularly to the extent that such benefits involve rights on which development, well-being or perhaps even life hinge. Therefore, the availability of such means or instrument constitutes an implicit requirement for the effectiveness of the express recognition of personality before the law under Article 3 of the Pact. This is the formal or instrumental dimension of this right.

28. Article 3 of the Convention was violated inasmuch as the persons mentioned in the Judgment by the Court were outside the official records, which meant that they could not be issued and given the documents enabling them to receive vital services, for which reason they had to go without them and were barred from any real possibility of accessing them. Once again, we are faced with failure by the State to comply with its duty to provide goods and services, not through a positive violation by excluding individuals from their previously acquired status of persons before the law or by striking them from records or by withdrawing their documents, but by omitting to perform a duty, a conduct of abstention that could and should have been rectified, bearing in mind the conditions of marginalization and vulnerability of the victims and considering the characteristics the guarantor role of the State could reasonably be expected to assume.

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION BY JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote in the adoption, in this city of Brasilia, of the instant Judgment the Inter-American Court of Human Rights has just handed down in the Case of Sawhoyamaxa Indigenous Community v. Paraguay. In view of the high relevance I attach to the subject-matter of the instant Jugment, I feel the obligation to put on record my personal thoughts regarding it, as the grounds for my position on the question decided by the Court, specifically as to the following aspects: a) two core matters: the wide scope of the fundamental right to life and the right to cultural identity; b) the historical roots to be found in the situation of want affecting the members of the Community; c) forced internal displacement as a matter of human rights; d) inadmissibility of the probatio diabolica; d) the question of the causal connection: the lack of due diligence by public authorities; e) the right to life and cultural identity; f) the suffering of the innocent and the central position of the abandoned victim as a subject of the International Law of Human Rights. The stage will then be set for my final reflexions, dealing with two points: the rights of indigenous peoples in the genesis and the development of the law of nations (jus gentium); and b) the great lesson to be learned from the instant case of the Sawhoyamaxa Indigenous Community.

I. Two Core Matters: The Wide Scope of the Fundamental Right to Life and The Right to Cultural Identity.

2. In the case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala, (1999), its leading case on the wide dimension or scope of the fundamental right to life, which includes the conditions necessary for a life with dignity, the Court considered 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 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."
[FN1]

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[FN1] Inter-American Court of Human Rights (IACHR), Judgment on the Merits of November 19, 1999, Series C, No. 63, para. 144.

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3. And, and in the case of Mayagna Awas Tingni Community v. Nicaragua (2001), its leading case on the communal property rights over ancestral land by members of indigenous communities, the Inter-American Court pointed out that for the members of such communities the relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations [FN2].

In a Vote pronounced in such case, the intertemporal dimension of the relation the members of such communities had with their lands was underscored, as well as the necessary prevalence that they attribute

“to the element of conservation over the simple exploitation of natural resources. Their communal form of property, much wider than the civilist (private law) conception, ought to, in our view, be appreciated from this angle, also under Article 21 of the American Convention on Human Rights, in the light of the facts of the cas d'espèce.
The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future) [FN3] , in respect of which we have obligations." [FN4]

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[FN2] IACHR, Judgment on the merits of August, 31, 2001, Series C, No. 79, para. 149.
[FN3] Future generations are starting to attract the attention of contemporary international law scholars: cf., for example, A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 Recueil des Cours de l'Académie de Droit International de La Haye (1982) pages 109-253; E. Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and

Intergenerational Equity, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pages 1-351; E. Agius y S. Busuttil et alii (eds.), Future Generations and International Law, London, Earthscan, 1998, pages 3-197; J. Symonides (ed.), Human Rights: New Dimensions and Challenges, Paris/Aldershot, UNESCO/Dartmouth, 1998, pages 1-153.
[FN4] IACHR, loc. cit. supra No. (2), Joint Separate Opinion by Judges A.A. Cançado Trindade, M. Pacheco-Gómez and A. Abreu-Burelli, paras. 9-10.
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4. The notion of culture, —originating in the Roman "colere", which means to till, to consider, to care for and to preserve— was originally embodied in agriculture (taking care of the land). With Cicero, the concept came to be applied to matters of the spirit and the soul (cultura animi) [FN5]. As time went by, it became associated with humanism, with the attitude of preserving and taking care of the things in the world, including those in the past [FN6]. The peoples —the human beings and their social environment—, faced with the mystery of life, develop and preserve their cultures in order to understand and relate with the outside world. Hence the importance of cultural identity, as a part or an addition of the fundamental right to life itself.

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[FN5] H. Arendt, Between Past and Future, N.Y., Penguin, 1993 [reprint], pages 211-213.
[FN6] Ibid., pages 225-226.
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5. Both the aforementioned Inter-American Court Judgments, in the cases of the “Street Children” (Villagrán Morales et al.) and of the Mayagna Awas Tingni Community, have really pioneered regarding the two core matters hereinabove referred to, and they have been given a warm welcome by the international law scholars of today [FN7]; in my opinion, they also are a correct expression of the Law, and today they are part of the history of international protection of human rights. Both precedents blazed the trail as far as the matters they dealt with are concerned.

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[FN7] Cf., specifically as related to the one of the “Street Children” (Villagrán-Morales et al. v. Guatemala), i.e., the books: CEJIL, Crianças e Adolescentes - Jurisprudência da Corte Interamericana de Direitos Humanos, Rio de Janeiro, CEJIL/Brasil, 2003, pages 7-237; Casa Alianza, Los Pequeños Mártires..., San José de Costa Rica, Casa Alianza/A.L., 2004, pages 13-196; and cf. as well, i.e., K. Quintana Osuna and G. Citroni, "I minori d'età di fronte alla Corte Interamericana dei Diritti dell'Uomo", 2 Pace Diritti Umani - Università di Padova (2005) pages 55-101, pages 69-72; among several other publications on the same case., and specifically concerning the case of the Mayagna Awas Tingni Community v. Nicaragua, the book: Felipe Gómez Isa (ed.), El Caso Awas Tingni contra Nicarágua: Nuevos Horizontes para los Derechos de los Pueblos Indígenas, Bilbao, Universidad de Deusto, 2003, pages 9-279; and cf. as well, i.e., C. Binder, "The Case of the Atlantic Coast of Nicaragua: The Awas Tingni Case", in International Law and Indigenous Peoples (eds. J. Castellino and NO. Walsh), Leiden, Nijhoff/R. Wallenberg Institute, 2005, pages 249-267; among several other publications on the same case.
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6. When I verified, with particular unhappiness, in the subsequent Judgment on the merits of this Court, in the case of the Indigenous Community Yakye Axa v. Paraguay (merits, 2005), a serious step backwards in connection with the wide scope of the right to life, and besides a regrettable inconsistency by the Court in its new and restrictive construction, I put on the record my corporation opposition to what appeared to me —and still appears to me— an inadmissible regression. The clear warning against such step backwards in a Dissenting Opinion given in the abovementioned case of the Indigenous Community Yakye Axa (merits) [FN8], appears to have echoed in the minds of the Court majority, that was careful not to repeat its mistake (that of operative paragraph No. 4 of such Judgement) and to rectify its untenable position in the instant Judgment on the case of the Sawhoyamaxa Indigenous Community.

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[FN8] Joint Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura-Robles, paras. 1-24.

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7. In my recent Separate Opinion on the Interpretation of the Judgment on the case of the Indigenous Community Yakye Axa (2006), I underscored the importance I attach, in the circumstances of the case, to the final conveyance of their ancestral lands to the members of that Community (paras. 2-3 and 6-7), among other things, to the protect and preserve "their own cultural identity and, in the last resort, their fundamental right to life lato sensu (para. 13). In the instant Judgment in the case of the Sawhoyamaxa Community, the Court has correctly underscored the positive measures to protect and to preserve the underogable right to life (paras. 148-153), and in ordering reparations (including the return of the ancestral lands, paras. 206-211), it has borne in mind the pressing need to preserve the cultural identity of the Community in question (paras. 218-219, 226 and 231).

II. The Historical Roots to be Found in the Situation of Want Affecting the Members of the Community.

8. In fact, the injustice the members of the Sawhoyamaxa Community suffer is rooted in history. In its application of February 2, 2005, the IACHR reported that

"An Anglican missionary wrote in 1910 that the Enxet in [the Chaco] area by then still lived as owners of all their territory, unaware of the fact that the Paraguayan State had sold their land to foreigners, without consulting them on the matter, let alone offering them compensation for it" [FN9].

In their independent brief on arguments, petitions and evidence, of May 5, 2005, the representatives of the victims (from the [non governmental] organization Tierraviva), added that

"By the year 1950, practically all the Enxet territory was divided into estates and some minor land holdings bought by the Anglicans. The extensive system of land use established in Chaco tolerated indigenous presence on cattle-raising ranches, as either actual or potential cheap labor" [FN10].

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[FN9] Page 9, para. 38 of the abovementioned application.
[FN10] Page 8 of the abovementioned brief.

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9. As a consequence of the sale of the ancestral lands of the indigenous Enxet people, they found themselves forcibly displaced. In its abovementioned application, the IACHR pointed out that

"In view of the deplorable life conditions, memebers of the Sawhoyamaxa Community [of the Enxet people] who lived in villages located inside private estates decided to move to a public roadside, facing the reclaimed lands, while waiting for the State to decide on their petition for recognition of part of their ancestral territory " [FN11].

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[FN11] Page 12, paragraph 50 of the abovementioned application.

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10. In fact, members of the Sawhoyamaxa Community of the Enxet people are, to this day, living in infra-human conditions [FN12], —or surviving, or in several cases, dying — on the side of the road known as Coronel Franco road, in the Santa Elisa and Kilómetro 16 settlements [FN13]. This —as the representatives of the victims remark in their abovementioned brief— in spite of the fact that

"The Enxet people historically preexists the Paraguayan State, as it has acknowledged on its own accord, and therefore its rights over its territories are, in consequence, previous to such State (...). (...) The area reclaimed by the Sawhoyamaxa Indigenous Community is part of its traditional habitat, a fact not contested by the Paraguayan State. In spite of that, the State has not guaranteed the community and its members the possession and the ownership of such territory " [FN14].

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[FN12] Described in paragraph 73.61-75, subparagraphs "e" and "f", of the instant Judgment.
[FN13] And other estates; cf. page 23 of the abovementioned independent brief on arguments, petitions and evidence by the representatives of the victims.
[FN14] Ibid., page 22.

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11. In its answer to the application, of July 13, 2005, the agent of the respondent State admits that the aforementioned indigenous peoples

"exist as cultures from before the Paraguayan State was formed, as it is acknowledged in the National Constitution" [FN15] and it furthermore “accepts the legislation on the subject to be perfectible" [FN16], and it "deeply regrets the demise" of 31 members of the Sawhoyamaxa Community, but contests the responsibility of the State for such deaths. [FN17]

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[FN15] Page 21, para. 47, of the abovementioned answer to the application.
[FN16] Ibid., page 70, para. 8.
[FN17] Cf. ibid., pages 52-60, paras. 143-163.
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12. The sufferings of the members of the Sawhoyamaxa Community have lasted in time. To their struggle for survival, and for the preservation of their modus vivendi, the pain of facing indifference and oblivion from the social environment must be added. The conditions in which they survive seem to deprive them of their own history, Do the poor and the bereft have a history? That was the question posed in an International Forum organized, in March 1988, by UNESCO and the Universal Academy of Cultures. There, a reflection developed by J. Wresinski, founder of the ATD Fourth World movement, was remembered in its eloquent terms:

"The other day I passed that way again, but I did not even recognize the place where the shanties had once been, nor the location of the old town. Nevertheless, how many tears have soaked that ground, how many sufferings have hundreds of families had to endure in such places! How many shrieks have pierced the sky! There is nothing external to remind us of that pain (...). In those places humanity has suffered as nowhere else. We have seen children begging, covered in disgrace. We have witnessed great humiliations. We have seen highhandedness dominate unhindered. We have been present when legions of the poor have been debased to death by shame. Who will get to know about this? Who will bear witness to it? (...)
The poorest often tell us: it is not just to go hungry or not to be able to read, not even to be out of work, which is the worse misfortune that can befall man, the most terrible thing is to know that we do not count at all, to the point that our suffering itself is unknown. The worst thing is to be scorned by our fellow citizens. Because it is such scorn that leaves us out of every right, that makes people reject us, and bars us from being recognized as worthy and capable of responsibilities. The greater misfortune of extreme poverty is to be some kind of living dead during all our existence. " [FN18].

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[FN18] Cit. in: J. Tonglet, "Tienen Historia los Pobres?", in Por Qué Recordar? - Foro Internacional "Memoria e Historia" (UNESCO/La Sorbonne, marzo de 1998, ed. F. Barret-Ducroq), Barcelona, Granica, 2002, pages 51-52 and 54-55.
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13. The indigenous peoples continue to fight desperately to preserve, not only their culture, but their own history. And there is a great wisdom in this the irritating “moderns” no longer have and the even more irritating “post-moderns” have still less. In his little known pieces on the Greek Herostratus and the Quest for Immortality and Non-permanence (circa 1927), the great universal writer Fernando Pessoa accurately judged that the man who does not know his environment and his past is a “barbarian”, that is to say a “totally modern” man, with no notion of the civilization which preceded and formed him, and who limits himself to find pleasure in “novelty”; but true and lasting innovation, he added,

"is that which has taken all the threads of tradition and woven them again into a pattern tradition could not have followed.” [FN19]

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[FN19] F. Pessoa, Eróstrato y la Búsqueda de la Inmortalidad, Buenos Aires, Emecé Ed., 2001 [reed.], pages 21-22.

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III. Forced Internal Displacement as a Matter of Human Rights.

14. The problem of internally displaced people, of which the instant case of the Sawhoyamaxa Indigenous Community is a case in point, is actually a human rights problem. Displaced people are in a vulnerable situation precisely because of the fact they are under the jurisdiction of the State [FN20] (their own State) that did not adopt enough measures to avoid or prevent the situation of virtual desertion they came to suffer. The situation of the internally displaced people may perfectly be —and should be— resolved in the light of the rules in the human rights treaties such as the Inter-American Convention. As I pointed out in my Separate Opinion (para. 17) in the case of the Moiwana Community v. Surinam (Judgment on the merits of June 15, 2005), the 1998 United Nations Guiding Principles on Internal Displacement referred to, determine that the displacement cannot take place in a way that violates the rights to life, to dignity, to freedom and security of the affected persons; they also assert other rights, such as the right to respect for family life, the right to an adequate standard of living, the right to equality under the law, the right to education. The basic idea underlying the whole document is in the sense that the internally displaced persons do not lose their inherent rights, as a result of displacement, and can invoke the pertinent international norms of protection to safeguard their rights determine that displacement cannot be effected in violation of the right to life —including therein the right to an adequate standard of living, the right to live— of the right to personal dignity, to liberty and to security of the affected persons; of the right to respect for family life; of the right to education; of the right of being equal under the law. [FN21]

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[FN20] M. Stavropoulou, "Searching for Human Security and Dignity: Human Rights, Refugees, and the Internally Displaced", in The Universal Declaration of Human Rights: Fifty Years and Beyond (eds. Y. Danieli, E. Stamatopoulou and C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pages 181-182.

[FN21] Principles 8 and the following, 17-18, 20 and 23, respectively; cf. UN document E/CNO.4/1998/53/Add.2, of February 11, 1998, pages 6-10.

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15. The fact of its being a human rights problem does not mean that the protective rules in International Human Rights Law be enough to solve it in each and every circumstance. As a matter of fact, in circumstances different from those in the instant case, Humanitarian International Law and Refugee International Law may have —and have had— direct incidence and have converged in the search for a solution to safeguard the rights of the human person. The matter of return [FN22] (home, to the ancestral lands), for example, common both to internally displaced people victims of the violations of human rights (such as those in the cases of the Yakye Axa and Sawhoyamaxa Indigenous Communities, 2005-2006, regarding Paraguay) and to refugees (such as those in te recent case of the Moiwana Community v. Surinam, 2005-2006);

here the question of the ownership of ancestral land becomes one of the very essence, including the preservation of the right to life in a broad sense, which encompasses the conditions of a life with dignity and the necessary preservation of cultural identity.

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[FN22] C. Phuong, The International Protection of Internally Displaced Persons, Cambridge, University Press, 2004, pages 27 and 47-48, and cf. pages 57, 62, 117, 191 and 212.

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16. In the instant case, the sufferings of the members of the Sawhoyamaxa Indigenous Community have been for long known for a public, true and notorious fact. Half a decade ago, for example, an IACHR Report on the general situation warned about the pressing need and the urgency "of solving the land claims is the inhuman situation suffered by the community of Sawhoyamaxa. [FN23]" In the case of which the Court has just disposed by handing down the instant Judgment, the representatives of the victims (of the non-governmental organization Tierraviva), in their final arguments brief of February 16, 2006, argued that the failure to adopt positive measures by State created the conditions contributing to the death of several members of the Sawhoyamaxa Community (page 45), and pointed out that

"Most of the boys and girls who died (...) died of diseases all of which may be prevented (dysentery, tetanus, enterocolitis, pneumonia, dehydration, measles) or medically treated (...). (...) In spite of the State being acquainted with the special vulnerability condition of the members of the Sawhoyamaxa Community settling alongside the road, the State has not adopted the measures necessary to avoid the existence of objective conditions preventing the full enjoyment of the right to life of its members [FN24]."

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[FN23] OAS/Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Paraguay, doc. OAS/Ser.L/V/II.110/doc.52, of March 9, 2001, page 134, para. 48.

[FN24] Pages 46-47 of the abovementioned final arguments brief, and cf. pág. 45.

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17. For its part, the Commission, in its final arguments brief, warned that "the Sawhoyamaxa Community is totally destitute", and reaffirmed what it had pointed out in its application in the sense that

"31 members of the Community, most of them children of both sexes, had demised died of diseases that could have been prevented and cured, or better still, avoided (...). (...) Unfortunately, the number of deceased persons in the Community for lack of medical care and as a direct consequence of the infra-human conditions and total want in which they lived is larger than the one stated in the application. Therefore, the Commission considers it to be proven in the instant case that the deaths of the members of the Sawhoyamaxa Community that resulting from lack of medical care and form infra-human living conditions are attributable to the State." [FN25]

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[FN25] Page 10 of the abovementioned final arguments brief, paras. 38-39.

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18. Some of the members of the Sawhoyamaxa Indigenous Community died when they were only days, or weeks, or months, old. [FN26] They died in total want, as they had lived, in the humiliation of total want (that is the deprivation of all human rights), along the roadside (between Pozo Colorado and Concepción), most probably unable to develop a life project. Everywhere today, in different latitudes, there is an increase in the numbers of those who are cast aside, of those who die, or perhaps just survive, in want, facing the indifference or the callousness of the public power system (rather oriented towards serving private interests, totally distorting the aims of the State), giving a new ring to Montesquieu's lament in his Lettres persanes (1721):

"il faut pleurer les hommes à leur naissance, et non pas à leur mort " [FN27].

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[FN26] Cf. Report in paragraphs 61 and 66 of the instant Judgment.
[FN27] Montesquieu, Lettres persannes, Paris, Garnier-Flammarion, 1964 [reed.], page 77.

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19. Or giving a new ring to the final words Machado de Assis unbosoms, in his piercing Memórias Póstumas de Brás Cubas (1881):

"Não tive filhos, não transmiti a nenhuma criatura o legado da nossa miséria." [FN28]

Or still ringing in the more recent (1998) complaint by Elie Wiesel, 1986 Nobel Peace Prize, against indifference towards the suffering of others:

"the two great mysteries —birth and death— are that which all human beings have in common. It is just the path going from one to the other that is different. And it is up to us to make it human. (…) Every human being has a right to dignity. To infringe such right is to humiliate the human being. (…) the struggle has to be against indifference. It helps but the oppressor, never the victim [FN29]."

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[FN28] Machado de Assis, Memórias Póstumas de Brás Cubas, 4a. ed., São Paulo, Ateliê Ed., 2004 [reed.], page 254.
[FN29] E. Wiesel, "Contre l'indifférence", in Agir pour les droits de l'homme au XXIe. siècle (ed. F. Mayor), Paris, UNESCO, 1998, pages 87-90.

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IV. Inadmissibility of the Probatio Diabolica.

20. In its application of February 2, 2005 in the instant case of the Sawhoyamaxa Indigenous Community, the Inter-American Commission on Human Rights aptly reminded us the

jurisprudence constante of this Court in the sense that the procedural system if a means to achieve justice, and justice cannot be sacrificed to propitiate mere formalities, as long as legal certainty and the procedural equality among the parties is not affected (para. 29). In a situation such as the one in the instant case, to burden the ostensibly weaker party, wanting the means for surviving with a minimum of dignity, a higher evidence standard, would amount to, in my opinion, incurring in the unfortunate mistake of requiring a probatio diabolica.

21. The latter was so labeled in Roman law, percisely in the area concerning the evidence of possession (to obtain title), and owed its name of probatio diabolica to the high degree of difficulty with which the litigating party had to cope. [FN30] Such undue burden of proof standard was invoked in the Middle Ages, and has even been objected in contemporary litigation among states. [FN31] As I see it, probatio diabolica is entirely inadmissible in the area of International Human Rights Law.

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[FN30] H.F. Jolowicz, Historical Introduction to the Study of Roman Law, Cambridge, University Press, 1967, page 156.

[FN31] As in the example set in the preliminary objections made by France in the case brought against it and other States by Yugoslavia, concerning the NATO bombings in 1999; International Court of Justice, preliminary objections of France of July 5, 2000, pages 4 and 16, paras. 25 and 33.

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22. The majority of this Court, therefore, has committed a great mistake in its previous Judgment in the case of the Indigenous Community Yakye Axa v. Paraguay (of June 17, 2005), in its operative paragraph No. 4, not only as to the substantive applicable law (regarding the wide scope of the fundamental right to life, and the right to cultural identity, supra), buy also as far as procedure is concerned. However, it has rectified such mistake in the Judgment the Court has just handed down in the instant case of the Sawhoyamaxa Indigenous Community, thus taking up again the line of its wisest precedents on the point.

23. In cases of continuing human rights breaches, and specifically, of the right to life, such as in those in the cas d'espèce, additional evidence is not needed, the cause-effect link being established (cf. infra). State obligations are of diligence and of result, not just of conduct (such as adopting insufficient and unsatisfactory legislation). In fact, the distinction between obligations of conduct and of result [FN32] has tended to be examined from a purely theoretical standpoint, asuming variations in the conduct of the State, which can even include a succession of acts by the latter [FN33], —and without giving enough and due consideration a situation in which an irreparable harm to the human person suddenly occurs (i.e., the deprivation of the right to life for want of due diligence by the State).

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[FN32] Mainly in the light of the work by the International Law Commission on the International Responsibility of States.

[FN33] Cf. A. Marchesi, Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali, Milano, Giuffrè, 2003, pages 50-55 and 128-135.

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V. The Question of the Causal Connection: The Lack of Due Diligence by Public Authorities.

24. In the instant case of the Sawhoyamaxa Indigenous Community, the facts are most clear, and no additional evidence is required (which would amount to an inadmissible probatio diabolica, supra) in respect to the breach of the fundamental right to life. Such right was violated by the infra-human living conditions to which the members of such Community were subjected, forcibly displaced from their ancestral lands. The demise of several members of the Sawhoyamaxa Community is, in my opinion, a special circumstance making the breach more serious, because spiritual death was followed by physical or biological death, in breach of Articles 4(1) and 1(1) of the Inter-American Convention.

25. In my view, the causal connection —that regrettably seems to keep disorienting the majority of this Court— is clearly established as well, on account of the lack of due diligence by the State as regards the living conditions of all the members of the Sawhoyamaxa Community. The international responsibility of the State arising therefrom is, then, objective on the grounds I already found in my Separate Opinion, to which I will here take leave to refer (paras. 1-40) —in the case of the case of "The Last Temptation of Christ" (Olmedo-Bustos et al). v. Chile. Judgment of February 5, 2001.

26. In the cas d'espèce —as it was correctly pointed out in a Joint Dissenting Opinion in the Case of the Indigenous Community Yakye Axa (2005)— [FN34] the causal connection is clearly established, in order to determine the international responsibility of the State and to fix the amount of non-pecuniary damages, by the serious and infra-human living —or surviving— conditions to which the members of the Sawhoyamaxa Community have been subjected for many years now, on account of the lack of due diligence by the State, which conditions have led to the —entirely feasible— demise of several of them.

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[FN34] Joint Dissident Opinion of Judges A.A. Cançado Trindade and M.E. Ventura-Robles, paras. 11-13.

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27. In present-day melancholic "postmodernity", the purposes of the State, basically identified, in the long run, with achieving the common good. The common good is the good of all (including those left out at present) and not the good of just some. This takes us back to the historical origins, both of the national State, that exists for the human being —and not the other way round— and of International Law itself, that was not originally a strictly interstate law, but rather the law of nations. [FN35] Achieving the common good implies that all States guarantee all the individuals under their respective jurisdictions conditions allowing them to live with dignity.

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[FN35] A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New Jus Gentium", in Recueil des Cours de l'Académie de Droit International (2005), capítulos I-XXVII, 997 pages (in print).
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VI. Right to life and Cultural Identity.

28. The right to life is, in the instant case of the Sawhoyamaxa Community, viewed in its close and unavoidable connection with cultural identity. Such identity is formed over time, along the historical development of community life. Cultural identity is a component of, or an addition to, the fundamental right to life in its wider sense. As regards members of indigenous communities, cultural identity is closely linked to their ancestral lands. If they are deprived of them, by means of forced displacement, it seriously affects their cultural identity, and finally, their very right to life lato sensu, that is, the right to life of each and every member of each community.

29. In its jurisprudence constante, this Court has underscored the fundamental character of the right to life, even for the enjoyment of all the other rights, [FN36] and has noticed that its observance appears in “special ways” in certain circumstances [FN37], particularly when the individuals in question are found in a situation of serious vulnerability. That is precisely what happens in the instant case, where the Court failed to reason further —as it should have— on the fundamental right to life in the socially marginal and abandonment circumstances of the cas d'espèce.

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[FN36] In its Judgments, for example, in the cases of the “Street Children” (Villagrán-Morales et al., 1999), Bulacio (2003), Juan Humberto Sánchez (2003), Myrna Mack Chang (2003), "Juvenile Reeducation Institute" (2004), 19 Merchants (2004), Huilca Tecse (2005).
[FN37] IACHR, Case of the Gómez-Paquiyauri Brothers (2004), para. 124.
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30. In its final arguments brief, of February 16, 2006, in the instant case of the Sawhoyamaxa Community, the representatives of the victims pointed out that

"Not being allowed to live on their land has prevented members of the Community, among other practices, from burying their dead pursuant to their rites and beliefs." [FN38]

Their cultural identity has thus been seriously affected. Living on their ancestral lands is essential to cultivate and preserve their values, including communication with their forebearers.

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[FN38] Page 48 of said brief.
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31. With regard to this, in my long Separate Opinion (paragraphs 60-61) in the case of Moiwana Community v. Suriname (Judgment of 06.15.2005), I allowed myself to recall that

respecting the relationships between the living and their dead was present in the very origins of the law of nations, as asserted by H. Grotius, in the XVII century, in chapter XIX of book II of his classic work De Jure Belli ac Pacis (1625), dedicated to “the right of burial”, which is inherent to all human beings, as a precept of “virtue and humanity." [FN39] And the principle of humanity itself, - as rightly remembered by erudite legal philosopher G. Radbruch, - owes a lot to ancient cultures, having been associated, over time, with the very spiritual formation of human beings [FN40].

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[FN39] H. Grocio, Del Derecho de la Guerra y de la Paz [1625], volume III (books II and III), Madrid, Edit. Reus, 1925, pages 39, 43 and 45, and cf. page 55.
[FN40] G. Radbruch, Introducción a la Filosofía del Derecho, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pages 153-154.

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32. In my next Separate Opinion (of February 8, 2006), in the same Moiwana Community case (Interpretation of Judgment), I insisted on the need for reconstruction and preservation of cultural identity (paragraphs 17-24), on which the project of life and the project of after-life of each member of the community largely depends; the universal juridical conscience – I added – has evolved in such a manner that it recognizes this urgent need, as illustrated in

"the significant triad of the Conventions of UNESCO, formed by the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage,, and more recently, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
The 1972 UNESCO Convention warns in its preamble that the deterioration or disappearance of any item of the cultural or natural heritage regrettably weakens the cultural heritage of ‘all the nations of the world’, because that heritage is of the most significant interest and needs to be preserved as a ‘part of the world heritage of mankind as a whole’; and from there on to establish ‘an effective system of collective protection of the cultural and natural heritage of outstanding universal value.’' [FN41] The 2003 UNESCO Convention seeks the safeguard of the intangible cultural heritage (for this it invokes the international instruments on human rights), and conceptualizes this latter as ‘the practices, representations, expressions, knowledge, skills (...) that communities, groups, and in some cases individuals, recognize as part of their cultural heritage’ [FN42].
The recent 2005 UNESCO Convention was preceded by its 2001 Universal Declaration on Cultural Diversity, which conceptualizes cultural diversity as the common heritage of humanity, and it expresses its aspiration for greater solidarity on the basis of recognition of cultural diversity, of the ‘awareness of the unity of humankind' [FN43]. After the 2001 Declaration, the 2005 Convention, which was adopted (10.20.2005) after debates in depth [FN44], reaffirmed the idea of cultural diversity as a common heritage of humanity, explaining that "culture takes diverse forms across time and space" and this diversity is incorporated `in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity' [FN45]. The Convention added that cultural diversity can only be protected and promoted through the safeguard of human rights [FN46].

It is my understanding that the universal juridical conscience has evolved towards a clear recognition of the relevance of cultural diversity for the universality of human rights, and vice-versa. Additionally, it has evolved toward the humanization of International Law, and the creation, at this beginning of the XXI century, of a new jus gentium, a new International Law for humankind, and the aforementioned triad of UNESCO Conventions (of 1972, 2003, and 2005) are in my view one of the many contemporary manifestations of the human conscience to this effect." [FN47] (paragraphs 21-24).

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[FN41] Whereas clauses 1 and 5.
[FN42] Preamble and Article 2(1).
[FN43] Preamble and Article 1 of the 2001 Declaration.
[FN44] Cf., for example, UNESCO/General Conference, document 33-C/23, of 08.04.2005, pages 1-16, and Annexes; and cf. G. Gagné (ed.), La diversité culturelle: vers une Convention internationale effective?, Montréal/Québec, Éd. Fides, 2005, pages 7-164.
[FN45] Preamble, whereas clauses 1, 2 and 7 of the 2005 Convention.
[FN46] Article 2(1) of the 2005 Convention. Cf., in general, for example, A.Ch. Kiss and A.A. Cançado Trindade, "Two Major Challenges of Our Time: Human Rights and the Environment", in Human Rights, Sustainable Development and Environment (Seminar of Brasilia of 1992, ed. A.A. Cançado Trindade), 2nd. ed., Brasilia/San José de Costa Rica, IIDH/BID, 1995, pages 289-290; A.A. Cançado Trindade, Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional, Porto Alegre/Brasil, S.A. Fabris Ed., 1993, pages 282-283.
[FN47] Cf. A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New Jus Gentium", Recueil des Cours de l'Académie de Droit International de la Haye (2005), ch. XIII (in print).
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33. Even before the adoption of the last two Conventions of the above mentioned triad, there was already an understanding at UNESCO that the affirmation and preservation of cultural identity, including that of minorities, contributes to the “liberation of peoples”:

"Cultural identity is a treasure which vitalizes mankind's possibilities for self-fulfillment by encouraging every people and every group to seek nurture in the past, to welcome contributions from outside compatible with their own characteristics, and so to continue the process of their own creation." [FN48]

An attack against cultural identity, as is the case with the Sawhoyamaxa Community, is an attack against the right of life lato sensu, the right to live, with the aggravating circumstances of those who actually died. A State cannot release itself from the due diligence duty to safeguard the right to live [FN49].

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[FN48] J. Symonides, "UNESCO's Contribution to the Progressive Development of Human Rights", 5 Max Planck Yearbook of United Nations Law - Heidelberg (2001) page 317. Regarding the projection of culture in time, cf., for example, A.Y. Gurevitch, "El Tiempo como

Problema de Historia Cultural", in Las Culturas y el Tiempo, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pages 261-264, 272 and 280.
[FN49] Cf., for example, [Several Authors,] Actes du Symposium sur le droit à la vie - Quarante ans après l'adoption de la Déclaration Universelle des Droits de l'Homme: évolution conceptuelle, normative et jurisprudentielle (eds. D. Prémont and F. Montant), Genève, CID, 1992, pages 1-91; J.G.C. van Aggelen, Le rôle des organisations internationales dans la protection du droit à la vie, Bruxelles, E. Story-Scientia, 1986, pages 1-89; [Several authors,] The Right to Life in International Law (ed. B.G. Ramcharan), Dordrecht, Nijhoff, 1985, pages 1-314. – The great Romanian dramatist Eugène Ionesco held that "in nuestro mundo desespiritualizado, la cultura es todavía lo último que nos permite sobrepasar el mundo cotidiano y reunir a los hombres. La cultura une a los hombres, la política los separa"; E. Ionesco, El Hombre Cuestionado, Buenos Aires, Emecé Ed., 2002 [reed.], page 34.
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34. May I now move beyond and into the field of legal deontology. As I asserted last year (2005) in my “General Course on Public International Law”, at the International Law Academy of the Hague, humanity as such has emerged as a subject of International Law [FN50]. Unfortunately, humanity can be victimized, and has therefore marked its presence, of late, in the most lucid jusinternationalist doctrine. Thus, I believe that the big challenge for legal writers who belong to the new generations lies in conceiving and formulating the conceptual construction of the legal representation of humanity as a whole (encompassing both present and future generations), seeking to consolidate its international juridical personality, against the backdrop of the new jus gentium of our times [FN51].

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[FN50] As can be deduced, for example, from the content of some international instruments, especially in the fields of international environmental law, outer space law and international law of the sea, as well as from the case law of ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda.
[FN51] A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New Jus Gentium", in Recueil des Cours de l'Académie de Droit International de la Haye (2005), ch. XI (in print).
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VII. The suffering of the Innocent and the Central Position of the Abandoned Victim as a Subject of International Human Rights Law.

35. The instant case of the Sawhoyamaxa Community reveals the central position not of the State that invokes circumstances presumably extenuating its responsibility, but rather of the victims that, in a situation of high vulnerability, even though they are surviving in conditions of total want, and virtual abandonment, have managed to have their case examined by an international human rights court in order to determine the responsibility of the State in question. The central position of the victims, in the most adverse of circumstances, as subjects of International Human Rights Law, sheds light on their right to Law, their right to justice under the Inter-American Convention, which includes the right to judicial protection (Article 25), together with the right to a fair trial (Article 8). Such right encompasses full jurisdictional protection, all

the way down to the strict compliance with the international Judgment (the right to access international justice lato sensu), duly backed by legal thinking and grounded in the law applicable to the cas d'espèce. Article 25 of the Inter-American Convention is in effect a pillar of the Rule of Law in a democratic society, closely related to the right to a fair trial (Article 8), duly expressing the universally recognized general principles of law, that are part of international jus cogens.

36. As I pointed out in my recent Separate Opinion in the Case of the Pueblo Bello Massacre v. Colombia (Judgment of January 31, 2006),

"My contention that Articules 25 and 8 of the Inter-American Convention cannot be dissociated (supra) implies characterizing access to justice, understood as its full enforcement, as part of jus cogens, that is that the full scope of all the rights to judicial protection and to a fair trial in the sense of Articles 25 and 8 taken as a whole is intangible as a matter of jus cogens. There can be no doubt that fundamental guarantees, common to International Human Rights Law and International Humanitarian Law, are meant for universal enforcement in all and any circumstances, are imperative law (being part of jus cogens), and impose erga omnes protection obligations.
In the wake of its historical Advisory Opinion OC-18/03 on “Legal Status and Rights of Undocumented Migrants” in 2003 [FN52], the Court could have already taken that other qualitative leap forward in its case law. I dare entertain the hope that the Court will do it as soon as possible if it really goes ahead with its ground-breaking case-law, —instead of trying to halt it— and makes more headway after the advance achieved with solid grounds and courage in its abovementioned Advisory Opinion number 18 along the line of the ongoing expansion of the substantive contents of jus cogens" (paras. 64-65).

This is the construction emancipating the human being that I uphold, with the aim of putting an end either to the highhandedness, or to the omissions, or to the lack of due diligence on the part of the State, the role of which is to guarantee the rights of all the individuals under its jurisdiction.

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[FN52] In which the Court upheld that the equality and the non-discrimation principles are part of international jus cogens.
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37. Seven years after the Judgment on the Merits by this Court in the paradigmatic case of the "Street Children” (Villagrán Morales et al.) v. Guatemala, Judgment of September 19, 1999, [FN53] the abandoned, the forgotten of this world once again reach an international human rights court in quest for justice, in the cases of the members of the Yakye Axa (Judgment of June 17, 2005) and Sawhoyamaxa (the instant Judgment) Communities. In the cas d'espèce, the people forcibly displaced from their homes and their ancestral lands, and socially marginalized and excluded, have actually reached an international jurisdiction before which they have finally found justice.

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[FN53] And also cf. the Judgment on reparations in the same case, of May 26, 2001.
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38. A decade ago, in the Judgments of this Court on preliminary objections of January 30 and 31, 1996, in the cases of Castillo Páez and Loayza Tamayo, respectively, regarding Perú, I advanced, in my Separate Opinions, the following considerations, which were followed by the changes amended into the third and fourth (and current) Rules of the Court, that today —as I always upheld— grants the petitioners locus standi in judicio in all the stages of the adjudicatory proceedings before the Court:

"(...) Without the locus standi in judicio of both parties any system of protection finds itself irremediably mitigated, as it is not reasonable to conceive rights without the procedural capacity to vindicate them directly.
In the universe of the international law of human rights, it is the individual who alleges violations of his human rights, who alleges having suffered damages, who has to comply with the requirement of prior exhaustion of domestic remedies, who actively participates in an eventual friendly settlement, and who is the beneficiary (he or his relatives) of eventual reparations and indemnities. (…)
In our regional system of protection, the spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court, a true capitis diminutio, arose from dogmatic considerations, belonging to another historical era, which tended to avoid his direct access to the international judicial organ. Such considerations, in my view, in our time lack support or meaning, even more so when referring to an international tribunal of human rights.

In the inter-American system of protection, de lege ferenda one gradually ought to overcome the paternalistic and anachronistic conception of the total intermediation of the Commission between the individual (the true complaining party) and the Court, according to clear and precise criteria and rules, previously and carefully defined. In the present domain of protection, every international jurist, faithful to the historical origins of his discipline, will know to contribute to the rescue of the position of the human being as a subject of international law (droit des gens), endowed with international legal personality and full capacity" (paras. 14-17).

39. In that same year 1996 such locus standi was granted at the stage dealing with reparations, under the third amendment to the Rules of the Court of which I was the Rapporteur, and four years later, under the fourth amendment of the Rules of the Court (2000), adopted during my term as President of the Court, such locus standi was extended to the petitioners at all stages of the proceedings before the Court. In effect, the international legal entity of human persons necessarily entails the legal capacity to act, to claim their rights, at the international level. This is materialized through their direct access —understood lato sensu— to international justice, which implies a true right to Law (droit au Droit). Consolidation of their legal capacity marks the emancipation of individuals from their own State, which is illustrated by their jus standi before the international human rights courts (something which is a reality before the European Court). The right to access (lato sensu) international justice has finally crystalized as the right to have justice really done at the international level.

40. At the time when the (1996) third Rules of the Court were already in force in the Judgment of the Court (on preliminary objections) in the Case of Castillo Petruzzi et al. v. Perú, of September 4, 1998, in an extensive Concurring Opinion I allowed myself to highlight the fundamental nature of the right of individual petition (Article 44 of the American Convention) as "the cornerstone of the access of the individuals to the whole mechanism of protection of the American Convention" (paras. 3 and 36 – 38). By means of such right of individual petition, “a definitive conquest of the International Law of Human Rights” the “historical rescue of the position of the human being as subject of the International Law of Human Rights, endowed with full international procedural capacity” (paras. 5 and 12).

41. After reviewing the historia juris of such right of petition (paras. 9-15), I dwelt on the expansion of the notion of “victim” in international case law under the human rights treaties (paras. 16-19), as well as on the autonomy of the right of individual petition vis-à-vis the domestic law of the States (paras. 21 and 29), and added:

“The denationalization of the protection and of the requisites of the international action of safeguard of human rights, besides sensibly enlarging the circle of protected persons, rendered it possible to individuals to exercise rights emanated directly from international law (derecho de gentes), implemented in the light of the above-mentioned notion of collective guarantee, and no longer simply "granted" by the State. With the access of individuals to justice at international level, by means of the exercise of the right of individual petition, concrete expression was at last given to the recognition that the human rights to be protected are inherent to the human person and do not derive from the State. Accordingly, the action in their protection does not exhaust - cannot exhaust - itself in the action of the State.
(…) Had it not been for the access to the international instance, justice would never have been done in their concrete cases. (…)without the right of individual petition, and the consequent access to justice at international level, the rights enshrined into the American Convention would be reduced to a little more than dead letter. It is by the free and full exercise of the right of individual petition that the rights set forth in the Convention become effective. The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. (…) The right of individual petition is undoubtedly the most luminous star in the universe of human rights”. " (paras. 33 and 35).

42. Since the jurisdictional solution constitutes the “most perfected and evolved” way to protect human rights, I held is the aforementioned Concurring Opinion that individuals have the right of direct access [to the Court] independently of the acceptance of an optional clause” such as that in Article 62 of the Inter-American Convention Human Rights, by their respective States (para. 40). That is to say, in my opinion both the right of individual petition and the jurisdiction of the Inter-American Court should be automatically mandatory for all States Parties to the Inter-American Convention (para. 41). And, I next considered that

"This means to seek to secure, not only the direct representation of the victims or their relatives (locus standi) in the procedure before the Inter-American Court in cases already forwarded to it by the Commission (in all stages of the proceedings and not only in that of reparations), but rather the right of direct access of individuals before the Court itself (jus standi), so as to bring a case directly before it, as the sole future jurisdictional organ for the settlement of concrete cases

under the American Convention. To that end, individuals would do without the Inter-American Commission, which would, nevertheless, retain functions other than the contentious one [FN54], prerogative of the future permanent Inter-American Court. [FN55]

(...)Above all, this qualitative advance would fulfill, in my understanding, an imperative of justice. The jus standi - no longer only locus standi in judicio, - without restrictions, of individuals, before the Inter-American Court itself, represents, - as I have indicated in my Opinions [FN56] in other cases before the Court, - the logical consequence of the conception and formulation of rights to be protected under the American Convention at international level, to which it ought to correspond necessarily the full juridical capacity of the individual petitioners to vindicate them.

The jurisdictionalization of the mechanism of protection becomes an imperative as from the recognition of the essentially distinct roles of the individual petitioners - the true complainant party - and of the Commission (organ of supervision of the Convention which assists the Court). Under the American Convention, the individuals mark presence at the beginning of the process, in exercising the right of petition in view of the alleged damages, as well as at the end of it, as beneficiaries of the reparations, in cases of proven violations of their rights; there is no sense in denying them presence during the process. The right of access to justice at international level ought in fact to be accompanied by the guarantee of procedural equality (equality of arms/égalité des armes) in the proceedings before the judicial organ, an element essential to any jurisdictional mechanism of protection of human rights, without which such mechanism will be irremediably mitigated.

(...)The jus standi of individuals before the Court is a measure to the benefit not only of the petitioners but also of themselves (those which become respondent States), as well as of the mechanism of protection as a whole. And this by virtue of the jurisdictionalization, an additional guarantee of the prevalence of the rule of law in the whole contentieux of human rights under the American Convention.

If we really wish to act at the height of the challenges of our times, it is to the consolidation of such jus standi that we ought to promptly devote ourselves, with the same clear vision and lucid boldness with which the draftsmen of the American Convention originally conceived the right of individual petition. With the conventional basis which was conveyed to us by Article 44 of the American Convention, we do not need to wait half a century to give concrete expression to the jus standi above referred to. With the consolidation of this latter, it is the international protection that, ultimately, in the ambit of our regional system of protection, will have thereby attained its maturity" (paras. 42-46).

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[FN54] Such as undertaking missions for in loco observation and the reporting.

[FN55] Enlarged, functioning in chambers, and with considerably larger human and material resources.

[FN56] Cf., en that sense, my Separate Opinions in the cases of Castillo-Páez (Preliminary Objections, Judgment of January 1, 1996), paras. 14-17, and Loayza-Tamayo (Preliminary Objections, Judgment of 31.01.1996), paras. 14-17, respectively.

Cf.

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43. In 2001, I drafted and submitted, in my capacity as President and Rapporteur of the Court, to the Organization of American States (OAS), as the next stride to be taken isn such direction (and as I have been insisting for some time), a proposal to grant jus standi to individuals, so that they be able to file their claims directly before the Court, under the form of a basis for a Draft Protocol to the American Convention on Human Rights to strengthen its mechanism for protection [FN57]. I consider it is essential for the advances in the rules be consolidated into such a Protocol, to avoid future involutions and to secure a real commitment by the States Parties, on the basis of a treaty, with the cause of internationally protected human rights [FN58].

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[FN57] A.A. Cançado Trindade, “Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Mechanism for Protection” - Volume II, San José de Costa Rica, Inter-American Court of Human Rights, 2001, pages 1-669 (2nd ed., 2003).[FN58] Cf. A.A. Cançado Trindade, El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos, Bilbao, Universidad de Deusto, 2001, pages 9-104; A.A. Cançado Trindade, El Derecho Internacional de los Derechos Humanos in el Siglo XXI, Santiago, Editorial Jurídica de Chile, 2001, pages 15-455 (2a. ed., 2006). And cf. A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000) and Su Proyección Hacia el Futuro: La Emancipación del Ser Humano como Sujeto del Derecho Internacional", in XXVIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - OAS (2001) pages 33-92.

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44. As I purported in my speech of June 10, 2003 to the OAS General Asambly in Santiago de Chile [FN59], the Inter-American Court, in its procedural and case law evolution, has made a relevant contribution to "consolidating the new paradigm of International Law, the new jus gentium of 21st century, holding the human being to have international rights independently" [FN60]. The Draft Protocol I drew up and submitted to the OAS has invariably been on the agenda of the OAS General Assembly (as appearing from the Sessions held in San José de Costa Rica in 2001, in Bridgetown/Barbados in 2002, in Santiago de Chile in 2003, and in Quito in 2004), and is still present in the OAS pertinent 2005-2006 documents [FN61]. I hope for it to bear real fruit in the near future.

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[FN59] Shortly after an historical session away from headquarters of the Inter-American Court had teken place in that city.

[FN60] Cf. Speech [by the President of the Inter-American Court of Human Rights, Judge Antônio A. Cançado Trindade], to the XXXIII General Assembly of the Organization Of American States (OAS) (Santiago de Chile, June, 2003) - Actas and Documentos, vol. II, Washington D.C., Secretaría General de la OAS, pages 168-171.

[FN61] OAS, document AG/RES.2129 (XXXV-0/050), del 07.06.2005, pages 1-3; OAS, document CP/CAJP-2311/05/Rev.2, del 27.02.2006, pages 1-3.

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45. In mi Concurrent Opinion in the first adjudicatory case that fully proceeded under the new fourth Rules of the Court, that of the Five Pensioners v. Peru (Judgment of February 28, 2003), I considered, along the same line of thought, that

"In fact, the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the 20th century. The time has come to overcome the classic limitations of the legitimatio ad causam in International Law, which have so much hindered its progressive development towards the construction of a new jus gentium. An important role is here being exercised by the impact of the proclamation of human rights in the international legal order, in the sense of humanizing this latter: those rights were proclaimed as inherent to every human being, irrespectively of any circumstances [FN62].

Statements in this sense are to be found in recent precedents of this Court, not only adjudicatory, but advisory as well, for example its Advisory Opinion No. 17 on the Juridical Condition and Human Rights of the Child (of August 28, 2002), which went along the line of affirming the legal emancipation of the human being by emphasizing the consolidation of children as persons before the law, as true subjects in law and not simple objects of protection; that was the Leitmotiv permeating all the Advisory Opinion No. 17 of the Court [FN63].

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[FN62] Not so long ago I recalled what I had purported then in my Concurring Opinion (para. 7) on Provisional Protection Measures in the case of two Children and Adolescents Deprived of their Freedom in the Tatuapé FEBEM Complex v. Brasil (Order of November 30, 2005).
[FN63] And eloquently affirmed in paragraphs 41 and 28 therein.

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46. Before that, the aforementioned adjudicatory leading case of the “Street Children “ (Villagrán Morales et al.) v Guatemala, 1999-2001) revealed the importance of direct access of individuals to international jurisdiction, enabling them to vindicate their rights against the acts of arbitrary power, and giving an ethical content both to the internal public law rules and to those of international law. The relevance of such right appeared clearly in the proceedings of that historical case, wherein the mothers of the murdered minors, as poor and bereft as their children, accessed international jurisdiction and appeared before the Court [FN64] and, thanks to the Judgments on the merits and reparations of this Court [FN65], that protected them, they could at least regain faith in human Justice [FN66].

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[FN64] Public Hearings of January 28-29, 1999 and March 12, 2001 before this Court.
[FN65] Of November 19, 1999 and of May 26, 2001, respectively.
[FN66] In my extensive Separate Opinion (paras. 1-43) in that case (Judgment on reparations, of May 26, 2001), I made precisely that point, besides another one that has been so far practically unexplored by interntional legal scholars and case law, to wit: the triad of victimization, human suffering and victim rehabilitation.

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47. Four years later, the case of the Juvenile Reeducation Institute v. Paraguay showed once more, as I pointed out in my Separate Opinion (paras. 3-4), that the human being, even in the most adverse of conditions, barges in as a subject of International Human Rights Law, endowed with full international legal and procedural capacity. The Judgment of the Court in the latter case duly recognized the high relevance of the historical amendments introduced by the Court in its current Rules (paras. 107, 120-121 and 126), in force as from 2001 [FN67], in favor of the individuals as holders of the protected rights, granting them locus standi in judicio at all stages of the adjudicatory procedure before the Court. The aforementioned cases of the "Street Children" and of the Juvenile Reeducation Institute bear eloquent testimony of such right holders affirming and exercising their personality before this Court, even in the direst of circumstances [FN68].

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[FN67] Cf., on the matter, A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme: quelques réflexions sur la condition de l'individu comme sujet du Droit international", in Libertés, justice, tolérance - Mélanges in hommage au Doyen G. Cohen-Jonathan, vol. I, Bruxelles, Bruylant, 2004, pages 351-365.

[FN68] As, in the case of the "Juvenile Reeducation Institute", the ones suffered by the inmates of the "Panchito López", Institute, even in the midst of three fires (wherein inmates were injured or dead by burning), and further facing the legal standing limitations by reason of their being children (under age), even so, their entitlement to rights directly inuring to them from international law remained intact, and their case reached an international human rights court.

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48. During the last five years, individual petitioners have come to participate actively in all the stages of the adjudicatory proceedings before the Inter-American Court, with very positive results during these last three years. Furtehrmore, the have also come to participate most actively in the consulting proceedings as well, as is illustrated by the developments related to the history-making Advisory Opinion No. 16, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law (of October 1, 1999), and Advisory Opinion No. 16, on the Juridical Condition and Rights of the Undocumented Migrants (of September 17, 2003).

49. Direct participation by individuals in all the procedures before the Court, has not been limited to adjudicatory cases and advisory opinions. It has likewise extended to provisional measures of protection, in cases with which the court was already seized, starting with the cases of the Constitutional Court (2000), and of Loayza-Tamayo (2000), both concerning Peru. The foregoing shows, not only the feasibility, but also the importance of the individual accessing directly, with no intermediaries, the Inter-American Court of Human Rights, more so in an extremely serious and urgent situation. We are, actually, in the midst of a historical, and legally revolutionary, process where an early 21st century ius gentium new paradigm is in the making.

50. The instant case of the Sawhoyamaxa Indigenous Community, preceded by the case of the Indigenous Community Yakye Axa, are inscribed along the lines of the emancipation of human beings vis-à-vis his own State so that they may lay claim to the rights inherent to them that, furthermore precede and supersede such State. The members of the aforementioned indigenous communities, abandoned on the roadside, had their case examined and solved (albeit

not in a fully satisfactory way) by an international tribunal such as the Inter-American Court of Human Rights. Perhaps such a universal human conscience development could not have been anticipated by the so-called “realists” a few years back. Something has actually changed in the world, and in this particular matter, for the better.

51. The impact of International Human Rights Law seems to have awakened human conscience to the suffering of those abandoned on the streets and roadsides of the world. Human beings start understanding that they cannot live in peace with themselves in the face of the silent suffering of others, including those around them. It is possible, and so I hope, that, by means of the instant Judgment of the Court, the “dark night [FN69]” of the members of the Sawhoyamaxa Community be drawing to an end. The respondent State showed signs, in parts of both the briefs it filed with the Court in the instant case, of its disposition to comply faithfully with the Judgment of the Court.

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[FN69] To paraphrase the famous meditations by St. John of the Cross, in the 16th century.

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52. Human suffering still is a mystery interwoven into the existence of each and every one of us. Though the centuries, it has been reflected upon by theologists, philosophers, and writers (and, on a lower scale, even by jurists). However, in my view, they have not achieved a convincing explanation, or found a satisfactory answer to its presence all along human existence. Some —mostly theologists and philosophers— have found some consolation in dwelling on its temporary or passing character (given the brief time span life tends to have), and the quest for transcendental support to withstand it.

53. But how can we explain the suffering of innocent children? How can we understand the fate of a child born on the roadside, who fleetly passes through this life and the dies on the same roadside? More than an absurdity, it is a great injustice, a suffering caused by man to his fellow men. Great part of human suffering is caused by man; that was what was pointed out, for example, by C.S. Lewis in his study on The Problem of Pain (1940), wherein he reminds us the views by Aristotle and Thomas Aquinas on the importance of knowing the existence of evil, in order to face it and not letting it take over [FN70]. Almost a century before that, in his considerations On the Suffering of the World (1850), A. Schopenhauer warned on the sad predicament of those who "lived tormented lives in poverty and wretchedness, without recognition, without sympathy", while all the advantages and benefits "went to the unworthy" [FN71], —in order to express his own lack of conformity with such a situation:

"(...) Existence is typified by unrest. In such aworld, where no stability of any kind, no enduring state is possible, where everything is involved in restless change and confusion and keeps itself on its tightrope only by continually striding forward, — in such a world, happiness is not so much as to be thought of [FN72].”

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[FN70] C.S. Lewis, The Problem of Pain, N.Y., Harper Collins, 1996 [reed.], pages 123-124, and cf. pages 86 and 117.

[FN71] A. Schopenhauer, On the Suffering of the World, London, Penguin, 2004 [rred.], page 132.
[FN72] Ibid., page 18.
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54. It would be hard to find an explanation for human suffering. Those intellectually honest are likely to spend their life searching for it, and this search is all they may aspire to do. Recently a 91-years-old theologist decided to make public an account of the personal dialogues he had with Albert Camus, 40 years after the tragic death of this great 20th century writer, an agnostic and profound researcher on the human soul. In his account, he told of the desperate, and fruitless, search by A. Camus (moved by his faith, more human than religious) for an explanation of the unfortunate human condition, and of his outburst once:

"The silence of the universe led me to the conclusion that the world is meaningless. This silence points to the evils of war, poverty and the suffering of the innocent. (...) All I can do is write about it and keep writing about it [FN73]."

After transcribing these words by A. Camus, the abovementioned theologist added that "one of the hardest problems facing human beings is the existence of evil. It is not an exclusively religious problem. Any feeling person is disturbed by evil and by pain [FN74]."

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[FN73] Quoted in H. Mumma, Albert Camus e o Teólogo, São Paulo, Carrenho Edit., 2002, page 30.
[FN74] Ibid., pages 31-32.
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55. I could not avoid giving, in this Separate Opinion, recognition to the suffering of the silent victims in the instant case of the Sawhoyamaxa Community — as well as those of the previous related case of the Indigenous Community Yakye Axa — and addressing, in particular, the memory of the innocent who lost their lives along a roadside, and the pain of their surviving next of kin who survive, along the same roadside, in the distress imposed on them by human greed and stinginess. As I pointed out in my Separate Opinion in the Judgment on reparations int he case of the "Street Children " (Villagrán Morales et al.) v Guatemala, Judgment of May 26, 2001, the triad formed by victimization, human suffering and rehabilitation of the victims has not been sufficiently considered by contemporary international legal experts and in contemporary international case law, and there is a pressing need to do so, based on the integrality of the personality of the victims (paras. 2-3 and 23 of the Opinion), taking into account even their cultural identity.

56. In the same Separate Opinion in the Case of the "Street Children" (reparations), I also noted that:

"(…) But even if those responsible for the established order do not perceive it, the suffering of the excluded ones is ineluctably projected into the whole social corpus. The supreme injustice of the state of poverty inflicted upon the unfortunate ones contaminates the whole social milieu

(…). Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close next of kin, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others." (para. 22).

57. Thanks to the existence of international human rights jurisdiction, the silence of the innocent in the instant case, has, however, echoed at the international level. The instant case of the Sawhoyamaxa Community shows that their legal entity and capacity were affirmed and exercised beyond question. This is particularly meaningful in the circumstances of the case, dealing with members of an indigenous community.

VIII. Final Considerations.

1. The Rights of the Indigenous Peoples in the Formation and the Development of the Law of Nations (Jus Gentium).

58. In recent years, draft declarations and studies are being developed in the framework of international organizations (both the United Nations and the Organization of American States — OAS), tending to recognize the jus standi of the indigenous peoples (either before the conventional human rights organs of the United Nations, or before international human rights tribunals — the Inter-American Court or the European Court). In the context of the assertion of the international legal personality of the members of the indigenous communities, and of their practicing their international legal capacity, their rights to their ancestral lands have acquired special importance [FN75].

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[FN75] A. Meijknecht, Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law, Antwerpen/Groningen, Intersentia-Hart, 2001, page 227, and cf. pages 134, 172, 175 and 213.

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59. It has been suggested that such endeavors have resulted from an ethical imperative, in order to acquit a historical debt the international community feels it owes the indigenous peoples, to make up for the injustices caused them at both the material and spiritual levels. More so than in the case of other minorities, awakening human conscience, universal legal conscience, to the need for enshrining the jus standi of the indigenous peoples takes the form of a true ethical imperative to acquit an historical social debt [FN76]. It is therefore not at all surprising that studies oriented towards the protection of the rights of the indigenous peoples are currently spawning in the most encouraging way [FN77].

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[FN76] Ibid., pages 228 and 232-233.

[FN77] Cf., inter alia, for example, R. Stavenhagen and D. Iturralde, Entre la Ley y la Costumbre - El Derecho Consuetudinario Indígena in América Latina, México, Instituto Indigenista Interamericano/IIDH, 1990, pages 15-388; R. Stavenhagen, Derecho Indígena y Derechos

Humanos in América Latina, México, El Colegio de México/IIDH, 1988, pages 9-353; A.A. An-Na'im, Human Rights in Cross-Cultural Perspectives - A Quest for Consensus, Philadelphia, University of Pennsylvania Press, 1992, pages 189-384; P. Thornberry, International Law and the Rights of Minorities, Oxford, Clarendon Press, 1992, pages 329-382; P. Thornberry, Indigenous Peoples and Human Rights, Manchester, University Press/Juris Publ., 2002, pages 1-429; P. Pérez-Sales, R.B. Herzfeld and T. Durán Pérez, Muerte and Desaparición Forzada in la Araucanía - Una Aproximación Étnica, Santiago de Chile, Ed. LOM/Universidad Católica de Temuco, 1988, pages 7-300; S.J. Anaya, Indigenous Peoples in International Law, 2a. ed., Oxford, University Press, 2004, pages 3-291; N. Rouland, S. Pierré-Caps and J. Poumarède, Direito das Minorias e dos Povos Autóctones, Brasilia, Edit. Universidad de Brasilia, 2004, pages 9-608; J. Castellino and N. Walsh (eds.), International Law and Indigenous Peoples, Leiden, Nijhoff, 2005, pages 89-116 and 249-267; S. Tristán Donoso, Régimen de Propiedad de Pueblos Indígenas, Panamá, Centro de Asistencia Legal Popular, 1993, pages 3-62; J.E.R. Ordóñez Cifuentes (coord.), Análisis Interdisciplinario de la Declaración Americana de los Derechos de los Pueblos Indígenas, México, UNAM, 2001, pages 1-160.

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60. The breaches of the human rights of the indigenous peoples, and the reparations due them are to be found, in fact, at the roots of the historical process whereby the law of nations, jus gentium, was formed. The renowned Relecciones Teológicas by Francisco de Vitoria, specifically the famous De Indis — Relectio Prior (1538-1539), as well as the Tratados Doctrinales (1552-1553) by Bartolomé de las Casas, provide overwhelming evidence thereof, dating back to the 16th century. Both authors developed their solid arguments in defense of the rights of the indigenous peoples on the grounds provided by natural law.

61. In his renowned 16th century Relecciones, F. de Vitoria insisted on the need of faithfully observing the humanity principle (recalling comments by Cicero), to face the "many atrocities and cruelties well beyond all humanity " [FN78]. F. de Vitoria affirmed that indigenous people may not be prevented from “having true and lawful ownership, be it private, public or political”, and added that the essential purpose of Law is

“the dignity of the individual as a rational being. Men come to be moral persons and subjects able to of have rights and obligations due to their rationality, for, by using their rational capacity and their consequent freedom, they acquire control over their own actions and are also free to choose their own destiny (…). Rational capacity is, therefore, at the root of the formal grounds making man capable of acquiring dominion and rights.” [FN79]

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[FN78] Cf. F. de Vitoria, Relecciones del Estado, de los Indios y del Derecho de la Guerra, 2a. ed., México, Ed. Porrúa, 1985 [reed.], pages 95-96 and 98-99.

[FN79] T. Urdanoz (ed.), Obras de Francisco de Vitoria - Relecciones Teológicas (Francisco de Vitoria’s Works, Theological Lectures), Madrid, BAC, 1960, page 521, and cf. page 552.

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62. Eloquent in his defense of natural law [FN80], F. de Vitoria contended that natural law conforms to recta ratio, being therefore derived from reason and not from will and aimed at

achieving common good above all [FN81]. As I pointed out in a recent book, even long before F. Vitoria, recta ratio was very well apprehended into a notion by Plato and Aristotle and later, unsurpassedly, by Cicero and Tomás Aquinas, to be right afterwards duly placed at the foundations of jus gentium, precisely by F. Vitoria, besides F. Suárez and H. Grotius [FN82]. In effect, the common good imperative is deeply rooted in the thinking of Francisco de Vitoria, for whom it constitutes a "superior purpose" of the civitas maxima, and the very evolution of the law of nations shall be the "collective work of the human community " as a whole [FN83].

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[FN80] Cf. ibid., pages 564 and 675.

[FN81] F. de Vitoria, La Ley [De Lege - Commentarium in Primam Secundae, 1533-1534], Madrid, Tecnos, 1995 [reed.], pages 5, 23 and 77. On recta ratio as the ultimate grounds of jus gentium, cf. A.A. Cançado Trindade, A Humanização do Direito Internacional, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pages 3-29.

[FN82] A.A. Cançado Trindade, A Humanização do Direito Internacional, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pages 3-29.

[FN83] Yves de la Brière, "Introduction", in Vitoria et Suarez - Contribution des théologiens au Droit international moderne, Paris, Pédone, 1939, pages 5 and 10.

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63. On his part, Bartolomé de las Casas, in his Doctrinal Treatises, written in the same 16th century, denounced the “depopulation of over two thousand leagues of land”, carried out with “cruelty and inhumanity” by “the Spanish in the Indies”, brought about “the perdition and death of an infinite number of peoples,” [FN84] in addition to the

"destruction of their State and of all of the well-being of that world, and against the right of private individuals, and against natural law, taking away and robbing and tyrannizing not only property, but also the freedom, the lives and the people to give them to others.” [FN85]

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[FN84] B. de las Casas, Tratados (Treatises), Volume I, Mexico, Fondo de Cultura Económica, 1997 [reed.], page 219

[FN85] B. de las Casas, Tratados (Treatises), Volume II, Mexico, Fondo de Cultura Económica, 1997 [reed.], page 761.

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64. According to the teachings of B. de las Casas, no person can lawfully dispossess others, do others such wrong, thus infringing natural law and the law of nations. [FN86] This prompted the author to make a distinction between the primary law of nations —to preserve compacts, freedom and common good— and the secondary law of nations —facing "the evil of men”, wars and captivity. [FN87] The role of each agent of public authority, —he added,— should be to enable all rational creatures to “attain their purpose" (especially, the spiritual one) as a human being. [FN88] When expressing his indignation at the depopulations, slaughters, bondages, and other cruelties perpetrated against indigenous people, B. de Las Casas —like F. de Vitoria,— expressly invoked right reason and natural law. [FN89]

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[FN86] Ibid., Volume II, page 1249.
[FN87] Ibid., Volume II, page 1255.
[FN88] Cf.Ibid., Volume II, page 1263.
[FN89] Cf. B. de las Casas, Brevísima Relación de la Destrucción de las Indias (Short Account of the Destruction of the Indies) [1552], Barcelona, Ediciones 29, 1997 [reed.], pages 7-94, esp. pages 9 and 41.

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65. The penetrating discourses of F. Vitoria and B. de las Casas in the 16th century continue to echo in the human conscience and are, sadly, topical issues today. [FN90]. With the passing centuries, the victimizers changed, but the victims are still the same, the indigenous peoples in a situation of high vulnerability, as it is illustrated by the instant case of the Sawhoyamaxa Community in this early 21st century. Yet, human conscience has evolved to the point that in this time and day it makes a difference: there exists an international human rights jurisdiction, the last hope for those excluded and forgotten within national jurisdictions.

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[FN90] On the absurdity and "essential evil" of relations of dominance and oppression, cf. for example, Simone Weil, Reflexiones sobre las Causas de la Libertad y de la Opresión Social Barcelona, Publ. Paidós/Universidad Autónoma de Barcelona, 1995, pages 81-84 and 130-131.

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66. In the instant case of the Sawhoyamaxa Community, once again, universal legal conscience awakens, — as the ultimate material source of all Law, as I have kept insisting in my many Opinions in this Court [FN91], — making it possible once again, after the cases of the "Street Children" (1999-2001) and that of the Indigenous Community Yakye Axa (2005), for the forgotten and the abandoned people of the world, surviving in the direst of circumstances, in the midst of the total want their fellow-men have thrust upon them, to resort to international jurisdiction in quest for having justice done.

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[FN91] Cf. My Concurring Opinion in pioneering Advisory Opinion No. 16, on The Right to Information on Consular Assistance. in the Framework of the Guarantees of the due Process of Law (1999), paras. 3-4, 12 and 14; Concurring Opinion on the Provisional Protection Measures in the Case of Haitians and Dominicans of Haitian-origin in the Dominican Republic (2000), para. 12; Separate Opinion in the Case of Bámaca-Velásquez v. Guatemala (merits, 2000), paras. 28 and 16; Concurring Opinion in Advisory Opinion No. 18 on the Condition and Rights of the Undocumented Migrants (2003), paras. 23-25 and 28-30, esp. par. 29; among others.

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2. The Great Lesson to be learned from the instant case of the Sawhoyamaxa Indigenous Community.

67. To my mind, in the instant case of the Sawhoyamaxa Community, as well as in its sister case of the Indigenous Community Yakye Axa, international responsibility of the State for the

creation, and perpetuation in time, of a situation of infra-human living conditions leading to the death of several members of both such Indigenous Communities was proven beyond doubt. Running contrary to the findings of the majority of the Court in the case of the Indigenous Community Yakye Axa, no additional evidence was needed "to facilitate adjudication of the case" (the probatio diabolica) and the alleged absence of (additional) evidence will never be understood (as the majority of the Court wrongly found in the case of the Indigenous Community Yakye Axa) as proving the international responsibility of the State for the death of some members of the Indigenous Community Yakye Axa not to have arisen. In their endeavors to decide hastily such case (and others), the majority of the Court set aside the Tribunal's own case law, both on the point of substantive law —regarding the fundamental and inderogable right to life— and on the point related to the law of evidence.

68. Fortunately, nine months after such a regrettable mistake, the majority of the Court rectified their position in the instant Judgment in the case of the Sawhoyamaxa Community, and returned to the more enlightened case law of the Tribunal. But the fact remains that the next of kin to the demised members of the Indigenous Community Yakye Axa did no obtain full justice before this Inter-American paramount juurisdiction, while those belonging to the Sawhoyamaxa Community did.

69. It would be worthless, to avoid admitting such a noticeable mistake, to try and suggest that both cases are not "similar" or "identical." It would be but an unacceptable piece of sohistry. It is plainly apparent as undeniable evidence, that both in the case of the Indigenous Community Yakye Axa and in that of the Sawhoyamaxa Community, the breaches of the Inter-American Convention are the same; the evidence is the same; the expert (Mr. P. Balmaceda-Rodríguez) [FN92] is the same ; those victimized in both Communities belong to the same Indigenous People (Enxet-Lengua) [FN93] and come from the same sub-group of ancestors (Chanawatsam) [FN94]; the infra-human conditions of survival in want are the same for the members of both Communities; the allegations by the State (regarding the alleged provision of foodstuffs and medical care) are, in the cases concerning the two Communities, the same [FN95]; the representatives of the victims in both cases are [FN96] the same [FN97]; the executive order regarding the emergency of both communities (expressly mentioned jointly in such executive order) is the same; the Department (Presidente Hayes) where both Communities are located is the same; and even the road (from Pozo Colorado to Concepción), on the side of which the members of both Communities are still surviving in conditions of chronic poverty [FN98], is the same.

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[FN92] Cf. paragraph 34(h) of the instant Judgment.
[FN93] Cf., for example, paragraph 115(f) of the instant Judgment.
[FN94] And two families who were members of the Indigenous Community Yakye Axa joined the Sawhoyamaxa Community.
[FN95] Cf., for example, el paragraph 57 of the instant Judgment.
[FN96] Except CEJIL, that only participated in the adjudicatory Case of the Indigenous Community Yakye Axa.
[FN97] The members of the non-governmental organization Tierraviva.
[FN98] Distant 43 km from one another.

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70. In fact, the only things that are not the same are, surprinsingly enough, the diverging criteria established by the majority of the Court in the two cases, to weigh the evidence determining the international responsibility of the State for the breach of the right to life. The decision of the majority of the Court in the sister case of the Indigenous Community Yakye Axa is on the verge of absurdity, for it found the right to life to have been infringed to the detriment of the survivors, but did not find the right to life to have been infringed to the detriment of those who actually died! Summum jus, summa injuria.

71. The great lesson to be derived from this regrettable case law deviation, remedied and overcome in the instant Judgment in the case of the Sawhoyamaxa Community, is clear to me. An international human rights tribunal cannot get lost in technicalities belonging in domestic tribunals (especially in criminal matters). An international human rights tribunal cannot try to halt its own case law, for we act in a protection area that forbears no backstepping, as I had already warned firmly in my extensive Dissident Opinions (paras. 1-49, and 1-75, respectively) in the Case of the Serrano Cruz Sisters v. El Salvador (Judgments on preliminary objections of September 23, 2004, and on the merits and reparations, of March 1, 2005). An international human rights tribunal can never let istself lower the international protection standards, more so when the parties are in a flagrantly vulnerable position, if not abandoned, condemned —many of them since birth— by their fellow-men to social exclusion, and to chronic poverty, which, as I see it, constitutes [FN99], the deprivation of all human rights.

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[FN99] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol.., Porto Alegre/Brasil, S.A. Fabris Ed., ...; A.A. Cançado Trindade, Direitos Humanos e Meio Ambiente - Paralelo dos Sistemas de Proteção Internacional, Porto Alegre/Brasil, S.A. Fabris Ed., 1993, pages ... .

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72. Last but not least, in the instant Judgment in the case of the Sawhoyamaxa Community, the Court has, sponte sua, correctly decided, applying the jura novit curia principle, to examine for the first time the right to recognition of personality before the law (Inter-American Convention, Article 3), in the light of the circumstances in the cas d'espèce. Bearing in mind that the male and female children of the aforementioned Community did not have the benefit of a "birth certificate, death certificate or any other kind of identification document" (para. 73(73), the Court rightfully established the breach of Article 3 —as related to Article 1(1)— of the Convention in the instant case. It is not my intention to discuss, at the end of this Separate Opinion, the relevance of the personality before the law of human beings, both at the domestic law and the international law levels.

73. I will just refer to some of my writings on the subject [FN100], pointing out an important aspect springing from the instant case: even though the State fails to recognize the personality before the law of the human being as a legal subject, able to exercise his rights within the framework of the domestic legal system, not even so is the human being deprived of personality before the law, for the right to such personality is a right inherent to the human being. The

impact of International Human Rights Law on the national or domestic legal systems is hereby evidenced once more. Face with the shortcomings of the latter, International Human Rights Law comes to the rescue of the individuals, to secure for them the full force and effect of the basic right to personality before the law, of which no one can be deprived. Individuals, — as I have been contending over the past four decades, —- are subjects of both domestic and international law, vested in both legal systems with personality before the law, and with the appurtenant legal and procedural ability to lay claim to the rights inherent to them.

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[FN100] A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in Jornadas de Direito Internacional (Cidade do México, dez. de 2001), Washington D.C., Subsecretaría de Asuntos Jurídicos de la OAS, 2002, pages 311-347; A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 Revue québécoise de droit international (2001) No. 2, pages 207-239; A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", 16 Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional - Madrid (2003) pages 237-288; A.A. Cançado Trindade, "Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios in el Sistema Interamericano de Protección de los Derechos Humanos", 37 Revista del Instituto Interamericano de Derechos Humanos (2003) pages 13-52; A.A. Cançado Trindade, "El Derecho de Acceso a la Justicia Internacional and las Condiciones para Su Realización in el Sistema Interamericano de Protección de los Derechos Humanos", 37 Revista del Instituto Interamericano de Derechos Humanos (2003) pages 53-83; A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme: quelques réflexions sur la condition de l'individu comme sujet du Droit international, in Libertés, justice, tolérance - Mélanges in hommage au Doyen G. Cohen-Jonathan, vol. I, Bruxelles, Bruylant, 2004, pages 351-365; A.A. Cançado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", in Les droits de l'homme à l'aube du XXIe siècle - K. Vasak Amicorum Liber, Bruxelles, Bruylant, 1999, pages 521-544; A.A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", 6/7 Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro (1998-1999) pages 425-434.

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74. Hence, once more, my sorrow at the fact of the Court omitting, already in the sister case of the Indigenous Community Yakye Axa, to take this positive step regarding Article 3 of the Inter-American Convention it took in the instant Judgment in the case of the Sawhoyamaxa Community (paras. 186-194). Here, once more, the different criteria applied by the majority of the Court in the two sister cases have increased the flagrant imbalance in the legal treatment of the protection given the victimized from the two dos indigenous Communities in point, who are in the same situation, enduring the same state of want and the same sufferings. This unjustifiable imbalance is likely to happen when, in judicial deliberations, the badly needed patience and reflexion lose ground to haste and precipitation, against which I have been taking up a position during the past months, with a vox clamantis in deserto, within the Court.

Antônio Augusto Cançado Trindade

Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE VENTURA-ROBLES

1. I have concurred with great satisfaction with my vote to the unanimous adoption of the instant Judgment in the Case of the Sawhoyamaxa Indigenous Community v. Paraguay, because it meant a substantial shift in the criteria of the majority of the Court who, in an identical case, i.e. Case of the Indigenous Community Yakye Axa v. Paraguay, did not find that Article 4(1) of the Convention had been violated to the detriment of the members of said community who died as a result of the living conditions to which they were subjected, something they indeed have done in the instant case, for Article 4(1) (Right to Life), in relation to Article 1(1) (Obligation to Respect Rights) and Article 19 (Rights of the Child), all of them of the American Convention on Human Rights, have been found to have been violated to the detriment of the demised victims.

2. This change in the criterion of the Court is meaningful, for these two cases are identical. The only difference between the Case of the Yakye Axa Community and the Sawhoyamaxa Community is the name of the victims, since all other aspects are the same. Two indigenous communities, the Yakye Axa and the Sawhoyamaxa, which demand from the same Paraguayan State the return of their ancestral lands; both indigenous communities evolved from a common ancestry: the Chanawatsan; both communities are located along the road from Pozo Colorado to Concepción, in the "Presidente Hayes" Department; both communities were declared in state of emergency by means of Executive Order No. 3789/99 of June 23, 1999 as a result of the precarious living conditions these communities were enduring, and still are enduring, which have resulted in, among other things, the loss of human lives, especially among children.

3. The lack of acknowledgment of the strict liability of the State as sufficient grounds to find the State responsible for the death of human beings in the Case of the Indigenous Community Yakye Axa v. Paraguay on the part of the majority of the judges of the Inter-American Court, prompted Judge Cançado Trindade and myself to give a joint dissenting opinion holding the State liable for the violation of Article 4(1) of the American Convention. Judge Abreu-Burelli followed suit with his dissenting opinion.

4. In that case, the majority of the Court judges did not find a causal connection on the basis of which the death of ten members, mostly children, of the Indigenous Community Yakye Axa could be attributed to the Paraguayan State, when the only causal connection to be found was the one with the poor living conditions attributable to the State by having failed to quickly resolve the claim of the Yakye Axa Community regarding their ancestral land and to efficiently address the problem of supplying water, food, and medicine to said Community, pursuant to the provisions of Executive Order No. 3789, which had declared it to be in a state of emergency.

5. In said case, the burden of proof should have been shifted to the State, for it to prove that it was not responsible for the death of those persons, establishing another causal connection with other specific causes that could have relieved the State of all liability.

6. This thesis regarding the need to shift the burden of proof to exonerate the State of responsibility was obliquely advanced by the Court in the instant case in paragraph 176 of the judgment:

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

7. The same situation in the Case of the Yakye Axa Community is present in the Case of the Sawhoyamaxa Community. The lack of timely restitution of ancestral lands, failure by the State to supply the Community with water, food and medicines, and the lack of timely and comprehensive provision of health care has caused, in the instant case, the death of the following persons (para. 178): NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres-Chávez, Diego Andrés Ayala, Francisca Brítez, Silvia Adela Chávez, Esteban Jorge Alvarenga, Arnaldo Galarza and Fátima Galarza.

8. From the analysis of the specific circumstances surrounding each one of these deaths, we find that the illnesses suffered by Rosana López, Esteban González, NN Yegros, Guido Ruiz-Díaz, Luis Torres-Chávez, Francisca Brítez and Diego Andrés Ayala were not treated (para. 172). They simply died in the Community. The State has produced no evidence to the contrary, in spite of having been requested to do so by the Court (paras. 55 and 57). Consequently, said deaths had to be attributed to the lack of adequate prevention and of adoption of enough positive measures by the State, which was aware of the situation of the Community and was reasonably expected do something about it.

9. Likewise, despite extreme poverty, some people got to health centers and received some kind of medical care, but it was insufficient, untimely or incomplete. The newborns NN Galarza and NN González both suffering from tetanus, were released by their respective treating doctors since "nothing could be done" for them. They died in the Community "with the typical rigidity of those who suffer from tetanus." The brothers Eduardo and Eulalio Cáceres died of pneumonia. The former was admitted in the Concepción hospital, but did not get any medicines because "the mother could not buy them." He died in hospital eight days after admission. After Eduardo's death, "the mother was requested to take away Eulalio from the hospital if she was not going to buy the medicines and they issued the hospital certificate of discharge." Six days after this, Eulalio died in the Community. The girls González-Aponte and Jenny Toledo were discharged from the medical center they were in "with scarce health improvement" the former, and the latter "without any medication." The González-Aponte girl died 8 days after this, of enterocolitis / dehydration, whereas Jenny, who was apparently in good conditions, had a relapse and "there was no opportunity to take her back" to hospital. She died of dehydration. Esteban Jorge Alvarenga, a newborn, who suffered from dyspnoea and respiratory failure could be taken to the

Concepción hospital but he was not admitted there. The treating doctor provided a medical prescription that, "due to her scant resources, it was impossible for his mother to buy, and the newborn died a few days later." Silvia Adela Chávez, a newborn, was assisted by a "medical delegation" which did not provide her with any medicines and recommended her mother to get such medicines form a "Sanitary Registry." The newborn died a month later. Belén Galarza, the mother of Arnaldo and Fátima Galarza had a post-delivery haemorrhage that extended for over fifteen days, for which reason she was admitted to hospital together with Arnaldo and Fátima, who had "a malnutrition condition," since they had not had any intake "for at least a week." Arnaldo could never recover his strength and died. Fátima, though showing a certain improvement, died a month after her brother.

10. The reason or reasons to determine the international responsibility of the State in the Case of Sawhoyamaxa Community are explicitly indicated by the Court itself in the Villagrán-Morales et al. v. Guatemala (Case of the "Street Children" Judgment on the Merits of November 19, 1999, para. 144), cited in the joint opinion which I pronounced with Judge Cançado Trindade in the Case of Indigenous Community Yakye Axa v. Paraguay, and which I transcribe hereinbelow:

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 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, in particular, the duty to prevent its agents from violating it.

11. Such interpretation of the right to life, enshrined in Article 4 of the American Convention, which the Court advanced in the famous case of the "Street Children", was not restrictive, as it was in the case of Yakye Axa. The right to life should never be accorded restrictive interpretations since, as asserted by the Court in other cases,
[FN1] it is the basic and fundamental right, without which all other rights protected under the American Convention may not be exercised. The failure by the State to adopt positive measures in order to ensure the life of the members of the Sawhoyamaxa Community generates, in my opinion, a violation of Articles 4(1) and 1(1) of the Convention. In other words, the State's lack of due diligence to prevent the problems of shortage of land, water, food and medicines, as well as the insufficient or non-existent health care, which resulted the deaths, generates in the instant case the international responsibility of the State, and hence the deaths of the members of the Sawhoyamaxa Community can be attributed to it.

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[FN1] Cf. Case of the Pueblo Bello Massacre. Judgment of January 31, 20.06. Series C No. 140, para. 120; Case of 19 Merchants. Judgment of July 5, 2006. Series C No. 109, para. 153; Case of Myrna Mack-Chang, Judgment of November 25, 2003, Series C No. 101, para. 152; Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 110, and Case of the "Street Children" (Villagrán-Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 144.

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12. The expert report prepared by Dr. Pablo Balmaceda, which was submitted to this Court by means of a statement rendered before a public official whose acts command full faith and credit (affidavit), speaks for itself:

To start with, we must clarify that the [C]ommunity has no source of drinking water. The most reliable source of water may be the rainwater they gather, but it is always very scarce because of inadequate storage facilities. The main source of water are the small earth dams located inside the wire-fenced lands that they claim for their own, so the members of the community have to enter private property to be able to get the vital liquid. These small earth dams are exposed to contact with animals and their water is used both for human consumption and for personal hygiene. Rainwater washes all kinds of waste into these small earth dams. Entry into the property is expressly forbidden by its current holders. In November 2002, the members of the Community received a 5,000-liter fiberglass water tank supplied by tank trucks from the Centro Nacional de Emergencia [National Emergency Center] with water from some small earth dam or other, that is to say non-drinking water. In January 2003, they received another high-capacity fiberglass tank. Currently[,] one of the tanks is broken because it was wrongly laid down. The other one is unused. Water has not been supplied for several months and they again depend on water carried in from the nearby small earth dams.
The 24 huts comprising the [C]ommunity are made from karanda'y[,]a palm tree found in the Chaco region […]. People use the word karanda'y to refer to the trunk of this palm tree, generally cut in half lengthwise. In order to build the roof they carve out the inside of the trunk to form a chute. The walls or roofs of several huts are completed with pieces of plastic or any waste material, others had parts of the roof covered with zinc plates[,] and those that have been recently rebuilt had roofs made from reed. None of the huts have floors made of some solid material, all of them have untamped earth floors [,] only some of them are above ground level. Many of them are precariously divided into two rooms. Fire for cooking is made outdoors. When it rains they must make it inside the only izba they have […]. It must be clarified that all the constructions described above are precariously built; the walls have big chinks, the roofs leak; if they have doors, they are very difficult to close, if they […]can close them at all.
[…]
The data collected confirm what can be painfully observed when visiting the [C]ommunity. There is not much to say about the conclusive figures before us. All the [C]ommunity has been living in severely straitened circumstances for many years, in huts that in no case could ever be called dwellings, in extremely cramped conditions defying description, without even one latrine, worthy of the name throughout the entire [C]ommunity, without drinking water, there is not even enough water to meet the mininum basic needs. They have no chance whatsoever to live their lives according to the traditional practices of the Enxet, i.e. hunting, gathering and small-scale agriculture. In addition[,] State presence is non-existent, there are no representatives of police, judicial, or welfare authorities, such as health care authorities. As can be observed in most of the deaths[,] people died without medical care. The few that managed to get to a health care center or professional, either did so when it was too late or were very deficiently treated, or more precisely, they were treated in a manner that is degrading to the human condition. During the last visit (07/01/06), one could see, at a glance, how the dwellings had deteriorated since the previous visits. The room they use as a school is leaning and about to collapse. Nothing had changed,

except for those who had died as a result of the neglect by the Paraguayan State and their families. In the face of this, I can only say that: The Sawhoyamaxa Community lives in extreme poverty." (emphasis in original)

13. In the instant case, the living conditions of the Sawhoyamaxa Community affect both their personal and cultural identity. The fact that I pointed out in my separate opinion in the Case of the Serrano-Cruz Sisters v. El Salvador, [FN2] that the disappearance of the girls violated their right to personal and cultural identity, is even more apparent in the instant case of the Sawhoyamaxa Community, in which the identity of its members and their culture is closely tied to the land, all of which determines their way of life and beliefs. The fact of having had to leave their ancestral lands and of lacking the possibility of hunting, fishing or gathering fruit constitutes a direct causal connection with the loss of their personal and cultural identity.

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[FN2] Dissenting Opinion of Judge Ventura-Robles, Case of the Serrano-Cruz sisters v. El Salvador. Judgment of March 1, 2005.

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14. By way of conclusion, regarding the violation of Article 4(1) in relation to Articles 1(1) and 19 of the American Convention, the Court stated:

Considering the aforesaid, the Court finds that the State violated Article 4(1) of the American Convention, as regards Article 1(1) thereof, since it has not adopted the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of the Sawhoyamaxa Community. The Court considers that the deaths of 18 children members of the Community, to wit: NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Esteban Jorge Alvarenga, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza (supra para. 73(74)) are attributable to the State, precisely for the lack of prevention, which furthermore additionally violates Article 19 of the Convention. Likewise, the Court finds that the State violated Article 4(1) of the American Convention, as regards Article 1(1) thereof, due to the death of Luis Torres-Chávez, who died of enterocolitis, without any kind of medical care (supra para. 73(74).

15. By entering an unanimous judgment in the case of the Sawhoyamaxa Community, the Inter-American Court rectified a judgment — Case of the Indigenous Community Yakye Axa — in which a restrictive interpretation of the right to life had prevailed, and returned to the path, taken in previous judgments, specifically in the Case of the Street Children, [FN3] in which a broad interpretation of human rights violations, especially the breach of the right to life, had at all times guided the Court’s decisions. And this should have always been the case.

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[FN3] IACHR. Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Judgment of November 19, 1999.

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Manuel E. Ventura-Robles
Judge

Pablo Saavedra-Alessandri
Secretary