In the case of the Xákmok Kásek Indigenous Community,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court," or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and to Articles 30, 32, 59, and 60 of the Court Rules of Procedure [FN1] (hereinafter "the Rules of Procedure"), delivers this Judgment.

[FN1] As stipulated in Article 79(1) of the Court's Rules of Procedure that entered into force on June 1, 2010, "[c]ontentious cases submitted to the consideration of the Court before January 1, 2010, will continue to be processed in accordance with the preceding Rules of Procedure until the delivery of to judgment." Consequently, the Court's Rules of Procedure mentioned in this judgment correspond to the instrument approved by the Court at its forty-ninth regular session, held from November 16 to 25, 2000, partially amended at its eighty-second regular session held from January 19 to 31, 2009.

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On July 3, 2009, the Inter-American Commission of Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), in keeping with Articles 51 and 61 of the Convention, presented an application against the Republic of Paraguay (hereinafter "the State" or "Paraguay"), which gave rise to the present case. The initial petition was presented before the Commission on May 15, 2001. On February 20, 2003, the Commission approved Report No. 11/03, [FN2] declaring the petition admissible. Later, on July 17, 2008, it approved Report on the Merits No. 30/08, [FN3] pursuant to Article 50 of the Convention, which contained particular

recommendations for the State. The State was notified of this report on August 5, 2008. After examining several reports issued by the State and the comments made by the petitioners, on July 2, 2009, the Commission ruled to bring the present case before the jurisdiction of the Court, "in virtue of the fact that it did not find that the State complied with that found in the Report on the Merits." The Commission appointed then-Commissioner Paolo Carozza and Executive Secretary Santiago A. Canton as delegates and Deputy Executive Secretary Elizabeth Abi-Mershed and Executive Secretariat Specialists Karla I. Quintana Osuna, Isabel Madariaga and María Claudia Pulido as legal advisors. Later, because the mandate of Commissioner Carozza had concluded, the Commission appointed Commissioner María Silvia Guillén.

[FN2] In Admissibility Report No. 11/03, the Commission concluded that it had jurisdiction to hear the case presented by the petitioners and that the application was admissible, pursuant to Articles 46 and 47 of the Convention. Based on the factual and legal arguments, and without prejudging the merits in question, it deemed the petitioner's complaint admissible regarding the alleged violation of Articles 2, 8(1), 21, and 25 (Domestic Legal Effects, Right to Fair Trial, Right to Property) of the American Convention and 1(1) (Obligation to Respect Rights) of said treaty, for the eventual noncompliance of the obligation to adopt domestic legal effects, to the detriment of the Xákmok Kásek Community of the Enxet Village and its members.
[FN3] In the Merits Report No. 30/08, the Commission concluded that the State did not comply with the obligations imposed in Articles 21 (Right to Property), 8(1) (Right to Fair Trail [Judicial Guarantees]), and 25 (Judicial Protection), all in relation to Articles 1(1) and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua Village and its members. Moreover, in application of the iure novit curia principle, the Commission concluded that the State of Paraguay did not comply with its obligations imposed by Article 3 (Right to Juridical Personality), 4 (Right to Life), and 19 (Right of the Child), all in relation with Articles 1(1) and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua Village and its members.
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2. The application relates to the State's alleged international responsibility for the alleged lack of a guarantee of the Xákmok Kásek Indigenous Community (hereinafter "the Xákmok Kásek Indigenous Community," "the Xákmok Kásek Community," "the Indigenous Community," or "the Community") and its members' (hereinafter, "the members of the Community") right to their ancestral property, considering that a request for replevin of the Community's land has been in proceedings since 1990 "without any satisfactory result as of this date." According to the Commission, "[t]his has meant that in addition to being impossible for the Community to access the property and take possession of their territory, due to the characteristics of the Community, the Community is kept in a vulnerable state as far as food, medicine, and sanitary needs are concerned, continuously threatening the Community's integrity and the survival of its members."

3. The Commission requested that the Court rule the State responsible for the violation of the rights consecrated in Articles 3 (Right to Juridical Personality), 4 (Right to Life), 8(1) (Right to a Fair Trial [Judicial Guarantees]), 19 (Rights of the Child), 21 (Right to Property), and 25 (Judicial Protection) of the Convention, in relation to the obligations established in Articles 1(1)

(Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention. The Commission asked the Court to order the State to undertake certain measures of reparation. The State and the representatives of the alleged victims were notified of the application on August 17, 2009.

4. On October 17, 2009, Oscar Ayala Amarrila and Julia Cabello Alonso, members of the organization Tierraviva a los Pueblos Indígenas del Chaco [Living Land of the Indigenous Peoples of Chaco] (hereinafter "the representatives"), presented their written brief of pleadings, motions and evidence (hereinafter "brief of pleadings and motions") on behalf of the Community. The representatives adhered in totum to the Commission's application and, in addition to the Articles of the Convention invoked by the Commission, requested that the Court find the State responsible for violating the right enshrined in Article 5 (Right to Humane Treatment [Personal Integrity]). Finally, they requested certain measures of reparation.

5. On December 31, 2009, the State filed its brief in response to the application and with observations on the brief of pleadings and motions (hereinafter "answer to the application"). The State disputed the facts alleged and the legal claims put forward by the Commission and the representatives. The State appointed Mr. José Enrique García as its Agent and Mrs. Inés Martínez Valinotti as its Deputy Agent. [FN4]

[FN4] When the application was notified to the State, it was informed of its right to an Ad hoc Judge for the consideration of the case. On September 16, 2009, the State named Mr. Augusto Fogel Pedrozo as Ad hoc Judge.

II. PROCEEDING BEFORE THE COURT

6. At the request of the Commission and its representatives, on October 29, 2009 the expert opinions provided by Messers. José Braunstein, Bartemeu Melia i Lliteres, Enrique Castillo, and José Aylwin in the case of Yakye Axa Indigenous Community v. Paraguay. [FN5] were added to the case file. Those expert witness testimonies were sent to the State that same day in order for the State to be able to file any observations deemed pertinent.

[FN5] Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 38.a, b, c, and d, and 39.

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7. Through an Order dated March 8, 2010, [FN6] the President of the Court (hereinafter "the President") ordered reception of statements made before a public notary (affidavit) by the alleged victims, witnesses, and experts offered by the parties. Additionally, the parties were convened to a public hearing to hear the testimonies proposed by the Commission, the State, and the representatives, as well as their final oral arguments on the merits and eventual reparations and costs. Finally, the President set a deadline of May 24, 2010, for the parties to file briefs with their final written arguments.

[FN6] Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Order of the President of the Court on March 8, 2010.

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8. On March 29th and 30th, the representatives, the Commission, and the State submitted statements given before a public notary (affidavit).

9. On March 29, 2010, Mr. Amancio Ruiz and Mrs. Eduvigis Ruiz, alleged victims called by the President to give statements before a public notary (supra para. 7), submitted a statement indicating that Mr. Roberto Eaton, owner of the ranch claimed by the Community and the employer of Mr. Amancio Ruiz, would be "organizing the testimonies on behalf of the State of Paraguay." According to the aforementioned alleged victims, Mr. Eaton "is the person who has most opposed to [their] [C]ommunity's replevin claim; the person who persecuted them and always showed a deep lack of respect for [their] just claim. The person whose rights were always placed above our own by the Paraguayan State; he is a permanent ally of the State to the detriment of [their] life, [their] culture, [their] people."

10. On April 5, 2010, the State, as called to do so by the Court, presented its observations on the presented by Mr. Amancio Ruiz and Mrs. Eduvigis Ruiz. It indicated that "the representatives of the State [had] accept[ed] the proposal of Mr. Roberto Carlos Eaton, […] in good faith, […] to assume the expenses for transportation and lodging of the [aforementioned witnesses], so that these individuals could give their version on the issues in question, in the presence of a public notary, who would provide a guarantee that the statements would be spontaneous and free." It also stated that "this fact was not communicated to the organization Tierraviva, and as such, the [alleged] victims proceeded to give statements through signed documents or affidavits drafted by them." It concluded by indicating that "in sum, the problem was one of a lack of communication because having Mr. Eaton as an intermediary caused certain distrust among the indigenous, which [was] unfounded." The State clarified that it had not "intimidated the victims" and had not "made alliances with any parties in the conflict." Finally, it indicated that it withdrew the offered statements.

11. The public hearing was held on April 14, 2010, during the XLI Extraordinary Period of Sessions held in the city of Lima, in the Republic of Peru. [FN7]

[FN7] Present at this public hearing, were the following: a) for the Inter-American Commission: María Silva Guillén, Commissioner; Elizabeth Abi-Mershed, Executive Deputy Secretary; Karla I. Quintana Osuna, agent and, Federico Guzmán, agent; b) for the alleged victims: Julia Cabello Alonso, representative; Oscar Ayala Amarilla, representative and, Nicolás Soemer, assistant, and c) for the State: Ambassador Modesto Luis Guggiari, Ambassador of the Republic of Paraguy in Peru; Inés Martínez Valinotti, Alternate Agent and Human Rights Director of the Ministry of Foreign Relations, and Abraham Franco Galeano, appointed attorney of the Attorney General's Office of the Republic.

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12. On May 4, 2010, following the instructions of the President of the Court, the State, the Commission, and the representatives were required to produce documentary evidence.

13. On May 25, 2010, the Commission, the State and the representatives issued their respective briefs containing final written arguments. The representatives and the State attached part of the required documentary evidence. Moreover, the representatives attached various documents to the brief of final written arguments.

III. JURSIDICTION

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

IV. EVIDENCE

15. Based on the provisions of Articles 46 and 47 of the Rules of Procedure, as well as on the Court's jurisprudence regarding evidence and its assessment, [FN8] the Court will examine and evaluate the documentary probative elements submitted by the parties at different procedural occasions, as well as the testimony rendered by affidavit and public hearing. To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding normative framework. [FN9]

[FN8] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 50; Case of Chitay Nech et al.v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 47, and Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, and Reparations. Judgment of May 26, 2010. Series C No. 213, para. 53.

[FN9] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 76; Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 47, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 53.

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1. Declarations received

16. Written statements were received from the following witnesses, experts, and alleged victims: [FN10]

1) Clemente Dermontt, Community leader, alleged victim offered by the Commission. Testified, inter alia, on the "legal procedures carried out before domestic courts for the restoration of the Xákmok Kásek Community's land";
2) Marceline López, Community leader, alleged victim offered by the representatives. Testified, inter alia, on: i) "the legal procedures followed by domestic courts for the restitution of

[the Community's] land," and ii) "individuals belonging to the Community who migrated or otherwise left";
3) Gerardo Larrosa, a member of the Community and health promoter, alleged victim offered by the representatives. Testified, inter alia, on the "health conditions of the [C]ommunity, both past and present";
4) Tomas Dermott, Community member, alleged victim offered by the representatives. Testified, inter alia, on "the peoples of the ancestral lands and the history of displacement from the Xákmok Kásek [Community] lands";
5) Roberto Eaton, owner of the "Salazar Ranch," witness proposed by the State. Testified, inter alia, on "the factual and legal situation of the land claimed by the Community";
6) Rodolfo Stavenhagen, anthropologist and sociologist, former UN Special Rapporteur on the Human Rights and Fundamental Freedoms of the Indigenous, expert witness proposed by the Commission. Testified, inter alia, on: i) "the situation of the Chaco indigenous peoples in Paraguay"; ii) "the importance for indigenous peoples that their land and ancestral territories be recognized and protected," and iii) "the consequences of the lack of State recognition";
7) Antonio Spiridonoff Reyes, forestry engineer, expert witness proposed by the representatives. Testified, inter alia, on: i) "the classification of the area being claimed by the Xákmok Kásek [I]ndigenous [C]ommunity as appropriate for human settlement and demographic expansion," and ii) the "kinds of economic activity possible on the land and in all the traditional territory," and
8) Sergio Iván Braticevic, geographer, masters in economic sociology and doctorate in philosophy and letters, Department of Anthropology, expert proposed by the State. Drafted, inter alia, a brief entitled "Brief territorial study on the Xákmok Kásek Community of Chaco Paraguayo."

[FN10] On March 29, 2010, the Commission indicated that Mar. Juan Dermott could not render his declaration because he was ill. Moreover, on March 30, 2010, the State abandoned the declarations Amancio Ruiz Ramírez, Eduvigis Ruiz Dermott and Oscar Centurión (supra para. 6).
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17. Regarding the evidence submitted during the public hearing, the Court heard the declarations of the following individuals:

1) Maximiliano Ruiz, teacher and member of the Community, alleged victim proposed by the Commission and the representatives. Testified, inter alia, on i) the Community's social situation due to the lack of their ancestral land; ii) the current social and educational conditions in the Community; iii) the situation of the Community's children, and iv) the living conditions on the Salazar Ranch during the time that Community members stayed there;
2) Antonia Ramirez, Community member, alleged victim proposed by the Commission and the representatives. Testified, inter alia, on: i) the Community's current situation, particulary with regard to the situation of the Community's women and children living without their traditional habitat, and ii) the living conditions on the Salazar Ranch during the time that Community members stayed there;

3) Rodrigo Villagra Carron, doctor in social anthropology, witness proposed by the Commission and the representatives. Testified, inter alia, on: i) colonization and loss of Enxet territory; ii) the initial process carried out by different communities of this People to recover the land; iii) the specific situation of the land replevin claim by the Xákmok Kásek people and the applicable national legislation regarding the claims of the indigenous peoples of Paraguay, and iv) the relationship between the current territorial claims, including that of the Xákmok Kásek, and the socio-adaptive process facing the Nation-State;
4) Lidia Acuña, current President of the INDI, witness proposed by the State. Testified, inter alia, on "the steps taken to resolve the problem presented by the Xákmok Kásek Community," and
5) Fulgencio Pablo Balmaceda Rodríguez, medical doctor, an expert witness proposed by the Commission and the representatives. Testified, inter alia, on the health and sanitary situation of the Community, specifically on the causes of death of people who have passed away.

2. Admissibility of the evidence

18. In this case, as in others, [FN11] the Court accepts the probative value of the documents that were presented at the appropriate opportunity by the parties and that were not contested or objected, and whose authenticity was not questioned. Likewise the Court accepts those documents requested as evidence to facilitate adjudication of this case and those that refer to supervening facts.

[FN11] Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 50, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 56.
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19. Regarding the testimonies and the expert opinions, the Court considers them pertinent to the extent that they correspond to the purpose defined by the President in the order requiring them (supra para. 7), which will be assessed in the corresponding chapter. With regard to the statements of the alleged victims, since they have an interest in this case, their testimony must not be assessed alone, but rather jointly with all the evidence in the proceedings. [FN12]

[FN12] Cf. Case of Loayza Tamayo v. Perú. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Radilla Pacheco v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 93, and Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 24, 2009. Series C No. 211, para. 63.
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20. Regarding the evidence from expert witnesses offered by the State to carry out the "anthropological study of the traditional lands of the Xákmok Kásek Community," the State informed the Court of the appointment of Mr. Sergio Iván Braticevic through a brief submitted on April 6, 2010. Finally, on May 17, 2010, the State issued the aforementioned expert opinion.

21. Through briefs filed on April 19 and June 1, 2010, the Commission presented its comments on the appointment of Mr. Sergio Iván Braticevic and on the expert opinion submitted. It stated, inter alia, that: "the report was [not] signed by Mr. Braticevi[c] and that in the notarized document provided by the State in which, allegedly, said report is transcribed, a third party is presented, Mr. Jose E. Garcia Avalos, apparently a State official, whom requested the transcription of the document before a notary"; the expert witness was not a specialist in anthropology but rather in geography; he had only published on the Chaco in Argentina; he was not a specialist in indigenous peoples; his publications focused on development projects and the expansion of production; in drafting his report, he only met with State officials and based his research on draft documents; and he does not have the necessary experience to do these kinds of appraisals. Based on all this, the Commission argued that the expert opinion did not fulfill the purpose for which it was proposed and that the expert witness's statements was not relevant since it would not help clarify the facts.

22. In a brief filed on June 1, 2010, the representatives presented their comments on the expert opinion of Mr. Sergio Iván Braticevic. They said the fact that the study was based on the case's documentation and on interviews with government officials without taking the Community into account was wrong, and suspected that the study's intention was to "give a technical appearance or veneer to the State's intention to [avoid] responsibility for the restitution of the 10,700 hectares of land claimed."

23. In this regard, the Court notes that though the expert opinion rendered is not signed by Mr. Braticevic, it is formalized, and the observations of the Commission and the representatives refer to the probative value and not its admissibility. As a consequence, the Court admits the expert opinion of Mr. Braticevic because it is useful for the case, which will be examined together with all the evidence and in keeping with the rules of sound judicial discretion, and the observations will be assessed, where pertinent, while examining the merits of the controversy.

24. On April 16, 2010, following the public hearing, the State submitted documentary evidence referencing the supply of provisions and humanitarian assistance. On May 24, 2010, the representatives stated that this evidence "is not related [to] the legal questions of the case, making it irrelevant," and in addition had been submitted only in recent months. Concerning this, the Court admits the documentary evidence submitted by the State and adds it to the body of evidence due to the fact that it will be useful for resolving the case. The Court will follow the principles of sound judicial discretion within the corresponding normative framework. [FN13]

[FN13] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations and Costs, supra note 9, para. 76; Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 47, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 53.

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25. In regard to the documentation presented by the expert Pablo Balmaceda and the witnesses, Rodrigo Villagra Carron and Lida Acuña at the end of the public hearing held in the present case, as well as that documentation presented by the representatives with their final

griten brief, the Court admits them in application of Article 47(1) of the Court Rules of Procedure, as they are useful in resolving the present case and they were not objected to nor their authenticity questioned.

26. As for the documentation requested by the Court on May 4, 2010, (supra para. 12), which was submitted by the Parties, the Court ruled to admit it due to its usefulness, in keeping with Article 47(1) of the Rules of Procedure.

V. OFFERING OF A FRIENDLY SETTLEMENT, ACQUIESCENCE, AND REQUEST FOR SUSPENSION OF PROCEEDINGS

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

27. Upon answering the application, the State indicated that it "has not violated the Xákmok Kásek's right to community property, enshrined in domestic legislation, but it recognizes that due to factual circumstances, it has not been able, to date, to satisfy the right." Likewise, the State requested that the Court "reject the arguments made" by the Commission and the representatives, and offered a "friendly settlement," an offer that it repeated during the public hearing. Likewise, the State indicated that "the request for reparation was acquiesced to."

28. The representatives indicated that they would not accept an amicable settlement because it would “according to Community’s experience, unnecessarily delay the Court’s ruling on the merits of this case.” They indicated that in previous years the Community was “open to the possibility of amicably resolving the case, on several occasions, and in every case the State failed to even minimally comply with what was discussed.”

29. The Commission observed that on several occasions the State had offered what is known as a “friendly settlement.” It noted that although the State made those offers during the proceeding, the conciliatory intention never translated into the implementation of concrete measures.

30. In keeping with articles 56(2) and 57 of the Rules and in exercise of its authorities regarding the international protection of human rights, the Court can determine if a friendly settlement or an acquiescence offered by a defendant State offers enough reason, in the terms of the Convention, to continue to hear the merits and determine the eventual reparations and costs. Given that the proceedings before this Court refer to the guardianship of human rights, a question of international public order that transcends the will of the parties, the Court must determine whether such actions will be acceptable for the ends that the Inter-American System seeks to accomplish. In this work, the Court does not limit itself strictly to verifying the formal conditions of the aforementioned actions; rather, it must consider them together with the nature and seriousness of the alleged violations, the demands and interests of justice, the particular circumstances of the specific case, and the attitudes and positions of the parties. [FN14]

[FN14] Cf. Case of Kimel v. Argentina. Merits, Reparations, and Costs. Judgment of May 2, 2008. Series C No. 177, para. 24; Case of Kawas Fernández v. Honduras. Merits, Reparations,

and Costs. Judgment of April 3, 2009. Series C No. 196, para. 24, and Case of González et al. ("Cotton Field") v. México. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, para. 25.

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31. Regarding the offer of a "friendly settlement," such an arrangement is carried out in keeping with the will of the parties. In this case, the representatives have not accepted the conditions put forward by the State in its proposal. The Court therefore continues in the analysis of the case.

32. Regarding the aforementioned "acquiescence" of the State, the Court observes that Paraguay denies the facts and the violations of the Convention of which it is accused. There is therefore no recognition of international responsibility and the entirety of the controversy regarding the merits of the matter remains. Only in the area of reparations does the State accept several of the measures requested by the Commission and the representatives. For this reason, the Court rules to hear the dispute based on its facts and on the law. Should the State be convicted of violating a human right, the Tribunal will take into account the State's acceptance of the requested measures of reparation, but will set forth the measures that best accomplish the full reparation of the victims, in accordance with the evidence that has been submitted and the violations declared.

2. The State's request for the suspension of these proceedings

33. The State requested "the suspension of these proceedings" because the contradictions found in the Community's denomination and ethnic ties would prevent titling land on its behalf and would not meet "the requirements of the Indigenous Statutes and international law." The State pointed to briefs filed by the representatives, internal legal documents, and statements of Community members that, in its opinion, would cause confusion as to the identification or ethnic membership of the Community because in some cases it appears they belong to the Enxet people, in others as Enxet-Lengua, and in others as Sanapaná. The State explained that belonging to an ethnicity or people is an "essential element for the transfer of property." Likewise, the State indicated that due to confusion over the name of the Community, its leaders were registered as the leaders of the "Zalazar Community," [FN15] which would make titling land in their names impossible "until they fix that documentation."

[FN15] In various documents presented by the parties, the ranch is mentioned as the "Salazar" or "Zalazar" areas. In this Judgment, when the Court cites that which is argued by to party or provided in to document, it will use the original text. Nevertheless, when the Court motu propio refers to said ranch or area, it will use the text "Salazar."

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34. The representatives argued that the Community is a multiethnic one. They indicated that since first filing the case with the Commission they have expressed that the Community is made up of Sanapanás and Lenguas, these being denominations accepted by the Community, as well as "by the scientific community and society in general, which characterizes [these ethnicities] as

belonging to a common people, the Enxet people." They explained that when the Lenguas began to be known as the Enxet there was some confusion among those "who had not followed the scientific progression of these populations."

35. The Commission argued that the fact that the Community is made up of families that belong to different ethnicities "does not constitute […] an obstacle for this indigenous community to have the right to its ancestral territory." It highlighted that the "multi-ethnic integration of the [C]ommunity […] is due to its history" and that the indigenous peoples are dynamic human groups whose cultural makeup "is restructured and reconfigured with the passage of time without causing the loss of specific indigenous status." It held that, independent from the different ethnicities that make up the Community, "it is clearly identified as far as its location and general composition."

36. The Court observes that the two different arguments on the identification of the Community reference, on one hand, the multi-ethnic character of the Community and, on the other hand, its denomination.

2.1. Multi-ethnic character of the Xákmok Kásek Community

37. First, the Court highlights that neither the Court nor the State determines the Community's denomination or ethnic identity. As the State itself recognizes, "the denomination of Indigenous Communities cannot be […] unilaterally assigned or denied, as this act is up to the Community at issue." The identity of the Community, from its name to its membership, is a historical and social fact that is part of its autonomy. This has been the Court's standard in similar situations. [FN16] Therefore, the Court and the State must limit themselves to respecting the way in which the Community self-identifies itself.

[FN16] Cf. Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 164.

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38. Notwithstanding the foregoing, this Court recognizes that in Paraguay there are 20 ethnicities that belong to five linguistic families: Enlhet-Enenlhet, formerly known as Maskoy or Lengua Maskoy, Mataco Mataguayo, Zamuco, Guaicurú, and Guaraní. [FN17] In the Chaco region there are up to 17 different ethnicities represented from all five linguistic families. [FN18]

[FN17] Cf. Expert testimony of Rodolfo Stavenhagen authenticated by public notary (case file on the Merits, tome II, folio 620); Expert testimony of Sergio Iván Braticevic before to public notary (case file of annexes to the State's final arguments, tome X, folio 4238); declaration of Rodrigo Villagra Carron rendered at the public hearing on April 14, 2010, during the XLI Extraordinary Period of Sessions in the city of Lima, Republic of Peru, and declaration of Lida Acuña rendered at the public hearing on April 14, 2010, during the XLI Extraordinary Period of Sessions in the city of Lima, Republic of Peru.

[FN18] Cf. Expert testimony of Iván Braticevic, supra note 17, folio 4238; declaration of Rodrigo Villagra Carron, supra note 17, and declaration of Lida Acuña, supra note 17.

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39. The Enlhet-Enenlhet [FN19] linguistic family is made up of six peoples: Enxet (Lenguas or Enxet – South), Enlhet (Enlhet – North), Sanapaná, Angaité, Toba Maskoy, and Guaná. The Enlhet-Enenlhet have traditionally inhabited the Paraguayan Chaco, [FN20] particularly the central region, [FN21] and are historical figures that have socially and linguistically rebuilt on a foundation that is broader and made of a more heterogeneous collection of groups, villages, and bands distributed throughout that territory. [FN22] According to the expert testimony presented by the State, the Enlhet-Enenlhet have inhabited the Chaco area since time immemorial and "at least three or four generations of the Sanapaná, Enxet, and Angaité indigenous peoples have inhabited the surrounding areas known as Pozo Colorado, Zalazar, and Cora-í. [FN23]

[FN19] Cf. Declaration of Rodrigo Villagra Carron, supra note 17; Declaration of Lida Acuña, supra note 17, and Kalish, Hannes and Unruh, Ernesto. 2003. "Enlhet-Enenlhet. Una familia lingüística chaqueña", [A linguistic chaqueno family] in Thule Rivista di studi americanisti, n. 14/15, aprile/ottobre 2003 (case file of annexes to the written brief of pleadings and motions, annex 16, tome VII, folio 2915).
[FN20] Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of March 29, 2006. Series C No. 146, para. 73(5), and Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 50(1).
[FN21] Kalish, Hannes, and Unruh, Ernesto. 2003. "Enlhet-Enenlhet. Una familia lingüística chaqueña", supra note 19, folio 2915.
[FN22] Cf. Expert testimony of José Alberto Braunstein rendered in the Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5 (case file on the Merits, tome I, folios 270 to 702).
[FN23] Cf. Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4243.

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40. The process of colonization of the Chaco and the establishment of ranches forced many of the surrounding indigenous villages to cluster around the ranches. The specific history of the Xákmok Kásek Community, derived from the submitted evidence, reveals that members of the Sanapanás and Enxet villages, who are traditionally found in the area where the Salazar Ranch was later founded, left their original places and began settling around the farmhouse and surrounding buildings of the ranch; "little by little the people began mixing and intermarrying." [FN24] Rodrigo Villagra explained that the Sanapaná and the Enxet "are related peoples linguistically, ethnically, and geographically." [FN25] This geographic continuity was also evidenced in the various maps presented to this Court by the representatives, which were not denied or contradicted by the State at any time. [FN26]

[FN24] Declaration of Tomás Dermott rendered before to public notary (case file on the Merits, tome II, folio 597), and Declaration of Rodrigo Villagra Carron, supra note 17.
[FN25] Declaration of Rodrigo Villagra Carron, supra note 17.

[FN26] Cf. Plan of the land belonging to the mercantile society of Quebrachales Paraguayos (case file of annexes to the brief of motions and pleadings, tome VII, annex 15, folios 2902 to 2905); 1908 map of Paraguay (case file of annexes to the written brief of pleadings and motions, tome VII, annex 15, folios 2898 to 2901), and map of the indigenous villages of Chaco de Alfred Métraux (case file of annexes to the written brief of pleadings and motions, tome VII, annex 15, folio 2913).

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41. Additionally, the Court notes that even though the State argued that it was only through the expert opinion of Sergio Iván Braticevic that it was able to sort out the alleged confusion generated by the ethnic makeup of the Community, the Atlas of Indigenous Communities of Paraguay, prepared in 2002 by State bodies, established that the Xákmok Kásek Community is composed of 73.7% Sanapanás, 18.0% South Enxet, 5.5% North Enlhet, 2.4% Angaité and 0.4% Toba-Qom. [FN27]

[FN27] Cf. "Atlas of the Indigenous Communities of Paraguay": II National Indigenous Census: Xákmok Kásek Community –Salazar Ranch available in: http://www.dgeec.gov.py/Publicaciones/Biblioteca/Web%20Atlas%20Indigena/Atlasindigena.htm, (last visit, August 2010).

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42. Finally, the Community in this case identifies itself as the Xákmok Kásek Community, mostly composed of members of the Sanapaná and South Enxet (previously known as Lenguas) peoples. [FN28]

[FN28] In the final arguments, the Commission noted that "the Community is clearly identified in regard to its location and general composition; its members identify themselves as originating from Xákmok Kásek" (case file on the Merits, tome III, folio 1025). On their behalf, the representatives noted that "we are before a community of a multi-ethnic background, where the families of Enxet (lengua south) and Sanapana predominate", and this "has never been unknown to [the] representatives," and they turned to that presented in the brief of observations on the Merits before the Commission (case file on the Merits, tome III, folios 1055 and 1056 and case file of annexes to the application, appendix III, tome IV, folios 1486 and 1487). Cf. Declaration of Rodrigo Villagra Carron, supra note 17; Declaration of Maximiliano Ruíz rendered at the public hearing on April 14, 2010, during the XLI Extraordinary Period of Sessions in the city of Lima, Republic of Peru, and Declaration of Antonia Ramírez rendered at the public hearing on April 14, 2010, during the XLI Extraordinary Period of Sessions in the city of Lima, Republic of Peru.

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43. As a consequence, this Court considers the multiethnic composition of the Community as an accredited fact, which the State knew or should have known previously. The different references to the Community as belonging to the Enxet people or as descendants of the Sanapaná

people owe themselves to historical reasons and circumstances. [FN29] The State's argument, therefore, does not provide enough reason to suspend this case.

[FN29] Witnesses presented by the State as well as by the representatives reported the anthropologist, Stephen Kidd, as an authority in the study of the Enxet, who explained that "[w]ithin the linguistic family of the Maskoy, the Sanapaná, and Angaité, they also refer to themselves as Enxet." Kidd, Stephen: "Amor and odio entre la gente sin cosas", 1999 (case file of annexes to the written brief of pleadings and motions, tome VII, annex 16, folio 3124). Moreover, the representatives added that "when the Anglican missionaries arrived to these lands, it was common that the various ethnicities would identify themselves, simply as enlhet-enenlhet or enxet[,] according to the text used, that translated means 'person, people,' and they made reference to their neighbouring villages with more specific names." Cf. Brief of final arguments of the representatives (case file on the Merits, tome III, folio 1056).

2.2. Name of the Community

44. As far as the name of the Community, the evidence submitted indicates that in November 1986, the Instituto Paraguayo del Indígena [Paraguayan Institute for the Indigenous] (hereinafter the "INDI") recognized the "leaders of the Sanapaná Indigenous Community, located in the place known as Zalazar." [FN30] Later, in November of 1987, the President of Paraguay granted legal standing to the Zglamo Kacet Community, recognizing it as "belonging to the Maskoy ethnicity." [FN31] That denomination was a differently spelled version of that which is currently-used, Xákmok Kásek. [FN32] Finally, in April of 1994, the INDI recognized the current leaders of the Community as leaders of "the 'Zalazar' indigenous community, belonging to the Sanapaná ethnicity," and expressly annulled the prior recognition of leadership. [FN33]

[FN30] Cf. Order No. 44/86 issued by the INDI on November 4, 1986 (case file of annexes to the application, appendix 3, tome II, folio 782).
[FN31] Cf. Decree No. 25.297 of the President of the Republic on November 4, 1987 (case file of annexes to the application, appendix 3, tome II, folio 786).
[FN32] Cf. Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4242.
[FN33] Cf. Order P.C. No. 30/94 issued by the INDI on April 25, 1994 (case file of annexes to the application, appendix 3, tome IV, folio 1695).

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45. With respect to this, the Court notes that, effectively, to formalize the public deed that corresponds to the lands currently occupied by the Community (infra para. 77), the Government Notary required "the normalization of the [C]ommunity's legal representation" which "must be processed by the stakeholders." [FN34] Nevertheless, it is stated that in contrast to what is argued by the State, the normalization required by the Government Notary refers to the name of the Community, due to the fact that in the order recognizing current leaders (supra note 30) the Community was named "Zalazar" and not Xákmok Kásek. For this reason, the Government Notary's note to the INDI indicated that the recognition of leaders "must correspond to those that

represent the current [C]ommunity, with the denomination in use to date." The INDI therefore must submit "the order corresponding to the recognition of [current] leaders of the Xákmok Kásek [I]ndigenous [C]ommunity." Likewise, due to the different spelling in the decree that recognized the legal status of the Community (supra nota 31), it requested the INDI provide "clarification that said names belong[ed] to the same and identical community." [FN35]

[FN34] Cf. Record of April 6, 2010, issued by Government Notary of Paraguay (case file of annexes to the State's final arguments, tome X, folio 4207).
[FN35] Cf. Note E.M.G. No. 065 of the Government Notary on April 7, 2010, addressed to the President of the INDI (case file of annexes to the State's final arguments, tome X, folio 4208).

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46. At the same time, according to the evidence submitted, the Court notes that on November 2, 2009, the Community's representatives requested the aforementioned change of the Community's name in the order recognizing its leaders, indicating that the denomination Salazar "refer[ed] to the [C]ommunity's former settlement." [FN36] Furthermore, regarding the representatives' request, the legal counsel of the INDI indicated that the modification of the Order would be carried out "only with relation to the correct name of the [C]ommunity, which should be 'Xákmok Kásek Indigenous Community' of the Sanapaná Ethnicity […]," leaving the names of the Community's leaders unchangeable. [FN37] However, the order has, to date, not been changed.

[FN36] Cf. Communication of the representatives on November 2, 2009, addressed to the INDI (case file of annexes offered by the State at the public hearing, tome IX, folio 3710).
[FN37] Cf. Report No. 88/09 of November 6, 2009, issued by the Legal Office of the INDI (case file of annexes offered by the State in the public hearing, tome IX, folio 3709).

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47. In contrast to what the President of the INDI stated during the public hearing, neither the Government Notary nor the legal counsel of the INDI requested the correction of the Community's ethnicity in order to continue with the conveyance of land title. [FN38] What both State bodies did request was the correction of the Community's denomination, which in spite of the corresponding request by the Community through it representatives, still has not been carried out by the State.

[FN38] Cf. Declaration of Lida Acuña, supra note 17.

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48. The Court observes that the State argued that the representation of the Community is in question because of the different ethnicities attributed to the Community in different documents, among others, the order recognizing its leadership and the communication where the representatives requested the change of the Community's name in that order. However, taking into account the multi-ethnicity of the Community (supra para. 43), the Court notes that this

argument is not enough to dismiss the conventional representation of the Community exercised for more than 20 years, in a proceeding before the State. If there were serious questions as to the representation of the Community, the State would have had to take actions to clarify them, and there is no evidence of that before this Court.

49. Therefore, it is currently up to the State, through the designated bodies, to rectify the order that according to the State represents an insuperable obstacle to the compliance of its obligations to the Xákmok Kásek Community, for which reason it would not be reasonable to accept the State's request regarding the suspension of this case.

50. Due to the aforementioned considerations, the Court decides not to proceed with the request for suspension of the proceedings submitted by the State, and will therefore proceed to exam the merits of the case.

VI. RIGHT TO COMMUNITY PROPERTY, FAIR TRIAL [JUDICIAL GUARANTEES], AND JUDICIAL PROTECTION (ARTICLES 21(1), 8(1) AND 25(1) OF THE AMERICAN CONVENTION)

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

52. The representatives also insisted that as of this date, the State has not resolved the Community's petition, despite the fact that it complies with all the requirements under Paraguayan law. They argue that the State has recognized the violation of the Community's right to property, but that the measures that it has adopted have not been adequate to restore the land it claims.

53. The State holds that it guaranteed the Community access to all the available legal measures for exercising its right to communal property, but it has "not been able to fully satisfy [that right] as of this date [due to] situations of fact that have not been resolved domestically." The State highlighted that domestic law protects the right to private property and that "the owners of the property of which the Community alleges is their ancestral property, hold titles that are duly registered," and as such, the State "is between the two protected human rights." The State added that the Community "claims [the territory] without possessing or holding title on the claimed property." According to the State, "the [Community's] traditional property includes an area greater than that being claimed in replevin and is not limited to the Salazar Ranch," which is a "fully functioning and operational establishment." For this reason, the State says, an alternative solution must be sought. Finally, Paraguay insisted that "pertinent measures are being taken to reestablish the communal property of the Xákmok Kásek," which it argues is evinced by the State's intention to hand over 1,500 hectares to the Community.

54. In this chapter, the Court will examine if the State has guaranteed and given effect the Community's property rights to its traditional lands. To do this, the Court will determine the facts that are proven and will consider the relevant law.

55. The Court will analyze the facts related to the Community's right to property and its replevin claim to the traditional land after March 11, 1993, the date when the State recognized the Court's the compulsory jurisdiction. However, as it has done in prior cases, [FN39] the Court will point to prior facts only so they can be considered as background for the case, not to derive any legal purpose based on them.

[FN39] Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 154, para. 82; Dos Erres Massacre v. Guatemala, supra note 12, para. 178, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 46.

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1. Facts

1.1. Regarding the indigenous communities in Paraguay

56. Before the colonization of the Chaco, the indigenous peoples lived in small, flexible communities. [FN40] For members of the indigenous peoples of the Chaco, the economy was based mainly on hunting, gathering, and fishing. They also cultivated small plots of land and had some domesticated animals. [FN41] They roamed their lands, using nature as the seasons and cultural technology allowed, which meant that they dispersed and occupied a large area of territory. [FN42]

[FN40] Cf. Kidd, Stephen: "Los Indígenas Enxet: condiciones laborales", 1994 (case file of annexes offered by the State in the public hearing, tome IX, folio 3678 and case file of annexes to the written brief of pleadings and motions, folios 2740 to 2759), and Declaration of Rodrigo Villagra Carron, supra note 17.
[FN41] Cf. Kidd, Stephen: "Los Indígenas Enxet: condiciones laborales", supra note 40, folio 3678.
[FN42] Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 73.2.

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57. At the start of the XVIII century, the indigenous peoples of the Chaco were still independent and were not tied to the interests of Spanish colonization. They remained relatively out of contact with European and criolla culture until the end of the XIX century. [FN43]

[FN43] Cf. Expert testimony of Rodolfo Stavenhagen, supra note 17, folios 620 to 651.

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58. Between 1885 and 1887, the State sold two thirds of the Chaco [FN44] land on the London stock exchange to pay Paraguay's debt after the so-called War of the Triple Alliance. The division and sale of the lands was carried out without the knowledge of the populations that inhabited the area, which at said time was exclusively indigenous. [FN45]

[FN44] Cf. Expert testimony of Rodolfo Stavenhagen, supra note 17, folios 620 to 651, and Kidd, Stephen: "Los Indígenas Enxet: condiciones laborales", supra note 40, folio 3678.
[FN45] Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 73(1), and Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 50(10).

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59. Economically speaking, the structure of the Chaco space during the last two centuries has been primarily organized through the expansion of the agricultural frontier, through various kinds of crops, logging, and ranching. [FN46] The settlement of the Chaco by a great number of businesspeople and ranchers in their capacities as the owners of large estates increased considerably at the beginning of the XX century. [FN47] Parallel to that, several religious missions settled different areas of the region, with the purpose of "Christianizing" the indigenous. [FN48]

[FN46] Cf. Expert testimony of Rodolfo Stavenhagen, supra note 17, folio 623, and Expert testimony of Sergio Iván Braticevic, supra note 17, folios 4238, 4240, and 4251.
[FN47] Cf. Expert testimony of José Alberto Braunstein, supra note 22, folio 279.
[FN48] Cf. Expert testimony of José Alberto Braunstein, supra note 22, folio 279; Expert testimony of Rodolfo Stavenhagen, supra note 17, folios 620 to 651, and Kidd, Stephen. Los Indígenas Enxet: condiciones laborales, supra note 40, folio 3678.

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60. The establishment of the International Products Corporation on the right bank of the Paraguay River with Puerto Pinasco as a base, its extension toward the west, its gradual division into ranches, its alliance with Anglican missionaries for the "religious pacification" and work-related training of the indigenous, and its application of methods for controlling the indigenous population, caused the progressive concentration of the peoples of mixed ethnic origin into villages with Anglican missions or ranches from the company or other owners nearby. [FN49] Since then, the lands of the Paraguayan Chaco have been transferred to private property owners and progressively divided.

[FN49] Cf. Titled Map of "International Product's Corporation" of 1950 (case file of annexes to the written brief of pleadings and motions, tome VII, annex 15, folios 2906 to 2909); Titled Map of "Historic villages of Angaité, Anglican Missionaries of IPC," elaborated by Fortis and Villagra, of 2008 (case file of annexes to the written brief of pleadings and motions, tome VII, annex 15, folio 2910); Magazine "The Magazines of the South American Missionary Society" of

October 1930 (case file of annexes to the written brief of pleadings and motions, tome VII, annex 14, folio 2875); Magazine "The South American Missionary Society Magazines" of January and February 1941 (case file of annexes to the application, appendix 3, tome I, 3, folio 368); Magazine "The Magazines of the South American Missionary Society" of January and February 1944 (case file of annexes to the written brief of pleadings and motions, tome VII, annex 14, folio 2895), and Declaration of Rodrigo Villagra Carron, supra note 17.

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61. The progressive extermination of animals, the large-scale introduction of cattle, and the fencing off that left hunters subject to the permission of landowners as a consequence, increasingly forced the indigenous to play the role of cheap manual labor for the new companies [FN50] and take temporary residence on the different ranches in the area to continue practicing their subsistence activities, although with significant changes due to the restrictions of private property. [FN51]

[FN50] Cf. Kidd, Stephen: "Los Indígenas Enxet: condiciones laborales", supra note 40, folio 3678.

[FN51] Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 73(4), and Expert testimony of Rodolfo Stavenhagen, supra note 17, folio 620 to 627.

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62. Although the indigenous continued to occupy their traditional lands, the economic market activities in which they were included had the effect of restricting their mobility, resulting in sedentarization. [FN52]

[FN52] Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 73(3).

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63. According to the II Nation Census of the Indigenous, carried out in 2002, 45% of the 412 communities consulted still did not enjoy legal and definitive settlement. [FN53] Currently, even though the registered indigenous communities have risen to 525, 45% still "do not have access to their own land to settle and develop favorable living conditions." [FN54]

[FN53] In 2002, 45% of the registered communities represented 185 communities, whose land pertained mostly to government institutions or to ranches or companies. Cf. Expert testimony of Rodolfo Stavenhagen, supra note 17, folio 629, and II National Indigenous Census of Population and Homes 2002 elaborated by the DGEEC of Paraguay (case file of annexes to response, tome VIII, annex 6(1), folios 3602 and 3603).

[FN54] Cf. Public Policy Proposal for Social Development Social 2010-2020, elaborated on February 25, 2010 (case file of annexes offered by the State at the public hearing, tome IX, annex XIX, folio 4091).

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

64. The process of colonizing the Paraguayan Chaco also affected the Xákmok Kásek Community. In 1930, the Anglican Church established the "Campo Flores" mission in order to continue with the "Christianization" of the Enxet. In 1939, it founded the Xákmok Kásek missionary substation in the place where that community was settled until 2008 [FN55] (infra para. 77). According to the history of this particular Community, told by one of their current leaders, the Sanapaná were in the area where the Salazar Ranch [FN56] was later founded "since long ago," including long before the Chaco War (1932 – 1935), and before the arrival of the first foreign resident "there was the Enxet Lengua and the indigenous camp of the Xákmok Kásek." [FN57]

[FN55] Cf. Anthropological Report of the Center for Anthropological Studies of the Universidad Católica Nuestra Señora de la Asunción (hereinafter "CEADUC"), signed by Miguel Chase Sardi, on December 21, 1995 (case file of annexes to the application, appendix 3, tome II, folios 736 to 749 and appendix 3 tome IV, folios 1732 to 1746); Magazine "The Magazine of the South American Missionary Society" of January 1939 (case file of annexes to the application, appendix 3, tome IV, folio 365); Magazine "The South American Missionary Society Magazine" of January and February 1941, supra note 49, folio 371, and Declaration of Rodrigo Villagra Carron, supra note 17

[FN56] Cf. Declaration of Tomás Dermott, supra note 24, folios 597 to 599; Socio-Anthropological Report of the Xákmok Kásek Community by the Legal Office of the INDI (case file of annexes to the application, appendix 3, tome II, folio 841), and Declaration of Maximiliano Ruíz, supra para 28. The Salazar Ranch was formed around 1945, in the area of the Central Chaco, and came to encompass an area of 110,000 hectares. Following subsequent landslides (aprox. 71.142 has), it went on to encompass an area of approximately 26.434 hectares. (Cf. Eaton and Cía. S.A. "Frente to un pedido de expropiación", case file of annexes offered by the State in the public hearing, tome IX, annex X, 3785 to 3811, and Declaration of Roberto Carlos Eaton Kent, rendered before to public notary (case file on the Merits, tome II, folios 659-664).

[FN57] Cf. Declaration of Tomás Dermott, supra note 24, folio 597.

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65. Pursuant to the evidence provided, the Xákmok Kásek Community, currently comprising 66 families and a total of 268 individuals, [FN58] grew from members of the Sanapaná villages who traditionally inhabited and roamed the area later occupied by the Salazar Ranch, and members of the Enxet village whom settled in that place who gave their name to the Community, which means "lots of little parrots," [FN59] as well as by the Dermott family, of Enxet descent, who arrived to the area in 1947. [FN60]

[FN58] Cf. Community Census updated on October 16, 2009, (case file of annexes to the written brief of pleadings and motions, tome VI, annex 10, folios 2762 to 2783); Census of the Xákmok Kásek Community, settled in the 1,500 hectares, without date, (case file of annexes to the

answer, annex 6(2), tome VIII, folios 3618 to 3626); Census of the Indigenous Community elaborated by the representatives, updated on August 30, 2008 (case file of annexes to the application, appendix 3, tome I, folios 320 to 336), and Indigenous Census Salazar February 2008 (case file of annexes to the answer, annex 6(2), tome VIII, folios 3221 to 3617).
[FN59] On other occasions, it was translated as "parrots nest" (application brief, case file on the Merits, folio 23); in other occasions, "birds nest" (Declaration of Maximiliano Ruíz, supra note 28.). Moreover, the private land owners explained that the Salazar Ranch has been known to have several names, among them, "Laguna Koncit Ranch," that, in Enlhet, seems to mean, "place of many parrots." Cf. A brief historic recap of the Kent, Mobsbye, Eaton in the Chaco. Fortin Juan de Salazar and Espinoza (case file of annexes offered at the public hearing by the State, annex X, tome IX, folio 3836).
[FN60] Cf. Declaration of Tomás Dermott, supra note 24, folios 594 to 596. The State identified that the Xákmok Kásek Community was relatively new and had stemmed from a previously existent community, "whose place of origin of residence, consisted of a place known as Misión Inglesa and 'El Estribo.'" Nevertheless, it did not provide evidence of said argument. (answer to the application, case file on the Merits, tome 1, folios 370 and 371).

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66. When the indigenous from different villages concentrated near the ranch house and surrounding buildings of the Salazar Ranch, close to the place called Xákmok Kásek, little by little they began to intermix (supra para. 40). Between 1953 [FN61] and March of 2008, the Community's main settlement was among the central buildings of the Salazar Ranch, located on Km. 340 of the Transchaco Highway, in the district of Pozo Colorado, President Hayes department, in the western Region of the Chaco. [FN62]

[FN61] Cf. Socio-Anthropological Report of the Xakmok Kasek Community, supra note 56, folio 841, and Declaration of Tomás Dermott, supra note 24, folio 597.
[FN62] Cf. Anthropological Report of the CEADUC, supra note 55, folio 735; Socio-Anthropological Report of the Xákmok Kásek Community, supra note 56, folios 838 to 853; Site Visit carried out by Engineer Pastor Cabanellas on May 17, 1991 (case file of annexes to the application, appendix 3, tome II, folios 791 to 793), and Report of the extended site visit on September 22, 1992 (case file of annexes to the application, appendix 3, tome III, folio 883).

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67. On December 28, 1990, [FN63] the Community's leaders opened an administrative proceeding before the Instituto de Bienestar Rural [Rural Wellbeing Institute] IBR (currently, Instituto de Desarollo Rural y de la Tierra, [Rural and Land Development Institute], hereinafter "IBR" or "INDERT"), with the purpose of recovering their traditional lands, in accordance with the provisions in Law No. 904/81 regarding the "Indigenous Communities Statute." [FN64]

[FN63] According to the representatives in 1986, Mr. Ramón Oviedo, leader of the indigenous community, requested 200 hectares from the INDI as part of its ancestral lands; however, said petition was not processed to the extent necessary by the INDI. This affirmation was not denied or objected to by the State (case file of Merits, folio 231). Moreover, according to the leaders of

the Community, Marcelino López and Clemente Dermott, witnesses before this Tribunal, the brief that corresponds to the initial request was lost, and as such, was reinitiated in 1990. Cf. Declaration of Marcelino López rendered before to public notary (brief of pleadings and motions, case file on the Merits, tome II, folios 231 and 582, and Declaration of Clemente Dermott, rendered before a public notary on March 25, 2010 (case file on the Merits, tome II, folio 645).

[FN64] Cf. Law 904/81 Indigenous Community State of December 18, 1981 (case file of annexes to the application, annex 7, folios 2399 to 2425).

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68. The Community claimed a section of 10,700 hectares within the Salazar Ranch as their traditional territory, in the outskirts of an area known as First Retreat or Mompey Sensap in the Community's language. [FN65] The Community's main settlement until the beginning of 2008 (supra para. 66), is not part of that section of 10,700 hectares being claimed, although it forms part of the Community's traditional territory.

[FN65] The Community originally requested 6,900 hectares, then it added to its request 20,000 hectares, and ultimately reduced its request to 10,700 hectares, "because it seemed that if we reduced it, the State would be more inclined to return the land to us and also because people in the [C]ommunity who couldn't stand it any more, left." Declaration of Marcelino López, supra note 63, folio 582. Also, Communications by the leaders of the Community addressed to the President of the IBR on November 11, 1993 (case file of annexes to the application, appendix 3, tome III, folio 898), and request of the Community before the IBR on September 28, 1990 (case file of annexes to the application, appendix 3, tome II, folio 780).

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69. At the time of the request for recovery, the land in question formed part of a farm owned by Eaton y Cía. S.A. [FN66] Toward the end of 2002, part of the territory claimed (3,293 hectares) was acquired by the Chortitzer Komitee Mennonite Cooperative. [FN67] For this reason, the territory claimed by the Community is currently the property of Eaton y Cía. S.A. and the Chortitzer Komitee Mennonite Cooperative. [FN68]

[FN66] Cf. Site visit report carried out by Engineer Pastor Cabanellas, supra note 62, folios 791 to 795.

[FN67] Cf. Declaration of Roberto Carlos Eaton Kent, supra note 56, folio 662; Declaration of Clemente Dermott, supra note 63, folio 647: press release of April 3, 2003 titled, "Sawatzky dice que desconocía reclamo de Enxet" [Sawatzky sais not aware of Enxet replevin claim] (case file of annexes to the application, appendix 3, tome IV, folio 1584); press release of April 1, 2003, titled "Menonitas ofrecen al Indi tierra reclamada por nativos" [Menonites offer the Indi land being claimed in replevin by natives] (case file of annexes to the application, appendix 3 tome IV, folio 1583); press release of January 7, 2003 titled "Eaton and Cía. vendió tierra reclamada por indígenas" [Eaton and Cia. sell land being claimed by the indigenous] (case file of annexes to the application, appendix 3, tome IV, folio 1576), and press release of February 7, 2003 titled

"Nativos insisten en recuperar tierras vendidas to menonitas" [Natives insit in reclaiming land sold to menonites] (case file of annexes to the application, appendix 3, tome IV, folio 1575).
[FN68] Cf. Declaration of Roberto Carlos Eaton Kent, supra note 56, folio 662; Declaration of Marcelino López, supra note 63, folio 581; Expert testimony of Sergio Iván Braticevic, supra note 17, folios 948 and 949, and Expert testimony of Antonio Spiridinoff rendered before a public notary (case file on the Merits, tome II, folio 614).
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70. Once the administrative approach had failed, the Community's leaders went directly to the Congress of the Republic on June 23, 1999, to request the expropriation of the lands being claimed. [FN69]

[FN69] Cf. Expropriation request made by the Community on June 23, 1999, addressed to the Chamber of Senators of the Congress of the Republic (case file of annexes to the application, appendix 3, tome IV, folios 1837 to 1846).
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71. Faced with that request, the private property owner presented a report to Congress, which said that the expropriation of the land was not necessary because "the heart of the ranching establishment [was] settle[d] on this section of land" and that "there were lands available and abutting the sought after section." [FN70]

[FN70] Cf. Report named "Salazar Ranch frente to un pedido de expropiación" supra note 56, folio 3792).
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72. On November 16, 2000, the Chamber of Senators of Paraguay rejected the bill to expropriate the land claimed by the Community. [FN71]

[FN71] Cf. Order No. 693 of the Chamber of Senators of the National Congress (case file of annexes to the application, annex 5, folio 2384). On September 23, 2000, the Commission of Agrarian Reform and Rural Wellbeing of the Chamber of Senators recommended the approval of the expropriation in favor of the Community, nevertheless, on November 9, 2000, it retracted said report (Cf. Report No. 11-2000/2001 of November 9, 2000, de la Commission of Agrarian Reform and Rural Wellbeing, case file of annexes to the application, annex 5, folio 2382); Bill presented before the Chambr of Senators on June 25, 1999, case file of annexes to the application, annex 5, folio 2381, and Report No. 18-2000-2001 of the Commission of Agrarian Reform and Rural Wellbeing (case file of annexes to the application, annex 5, folio 2383).
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73. According to the President of the INDI, there is "a resistance [in society in general] to cede, in this way, to those seeking recovery of indigenous lands." He added that "historically, the [N]ational [C]ongress has opposed expropriations." [FN72]

[FN72] Cf. Declaration of Lida Acuña, supra note 17, and Declaration of Rodrigo Villagra Carron, supra note 17.

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74. The life of the Community living within the Salazar Ranch was conditioned by land use restrictions due to the private ownership of the lands occupied. In particular, the members of the Community were prohibited from raising or having livestock. [FN73] However, in spite of being settled on a small portion of their traditional territory, they roamed their lands [FN74] and practiced certain activities such as hunting, although it was difficult. [FN75] Likewise, many of the members of the Community worked on the Salazar Ranch. [FN76]

[FN73] Cf. Anthropological Report of the CEADUC, supra note 56, folios 741 and 743, and Declaration of Tomás Dermott, supra note 24, folio 598.
[FN74] Cf. Declaration of Marcelino López, supra note 63, folio 580.
[FN75] Cf. Declaration of Gerardo Larrosa rendered before to public notary on March 25, 2010 (case file on the Merits, tome II, folios 604 to 609), and Declaration of Tomás Dermott, supra note 24, folio 595).
[FN76] Cf. Declaration of Maximiliano Ruíz, supra note 28; Declaration of Marcelino López, supra note 28, folio 586, e Report of the CEADUC, supra note 55, folio 712 and 713.

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75. However, according to the testimony given before this Court, in recent years the Community was ever more restricted from carrying out their way of life. Their mobility within the section of the Salazar Ranch was also restricted. Several of those giving testimony said that hunting had been completely prohibited, [FN77] and that the private property owner hired private security guards that controlled their entrance, exits, and movements. [FN78] Neither could they practice other activities like fishing or gathering food. [FN79]

[FN77] Cf. Declaration of Marcelino López, supra note 63, folio 580; Declaration of Gerardo Larrosa, supra note 75, folio 605, and Declaration of Lida Beatriz Acuña, supra note 17, Declaration of Maximiliano Ruíz, supra note 28, and Declaration of Antonia Ramírez, supra note 28 folio 1151.
[FN78] Cf. Declaration of Gerardo Larrosa, supra note 75, folio 505, Declaration of Marcelino López, supra note 63, folio 580, Declaration of Antonia Ramírez, supra note 28, folios 1151, 1152 and 1156, and Declaration of Clemente Dermott, supra note 63, folio 650.
[FN79] Cf. Declaration of Gerardo Larrosa, supra note 75, folio 605, Declaration of Rodrigo Villagra Carron, supra note 17.

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76. Faced with these difficulties, the Nepoxen, Saria, Tajamar Kabayu and Kenaten Communities, all of Angaité origin (hereinafter “the Angaité Communities”) agreed on April 16, 2005, to cede 1,500 hectares to the Xákmok Kásek Community. [FN80] The INDI had restored

15,113 hectares to these communities in 1997. [FN81] In September of 2005, the Community's leaders requested that the INDI title that section of land in its favor, [FN82] however "they confirm[ed] [their] determination to continue in the struggle for the restoration of [their] remaining territory, which is 10,700 hectares in total." [FN83]

[FN80] Cf. Act of Agreement of April 16, 2005 signed by the leaders of the communities of Nepoxen, Saria, Tajamar Kabayu, Kenaten, and Xákmok Kásek (case file of documentos offered at the public hearing by the State, tome IX, annex VI, folios 3731 and 3732); Declaration of Maximiliano Ruíz, supra note 28. Said communities were also known as the Cora-í (Cf. Testimonial declaration of Rodrigo Villagra Carron, supra note 17).
[FN81] Cf. Declaration of Roberto Carlos Eaton Kent, supra note 56, folio 659, and Declaration of Rodrigo Villagra Carron, supra note 17.
[FN82] Cf. Communication of the Community on September 9, 2005 addressed to the INDI (case file of documentos offered at the public hearing by the State, tome IX, annex VI, folio 3730).
[FN83] Cf. Gathering Act of the Community on May 2, 2009 (case file of annexes to the written brief of pleadings and motions, annex 7, tome VI, folio 2736).
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77. On February 25, 2008, due to the increase in the difficulties on the Salazar Ranch an in spite of not having received title to the 1,500 hectares, the Community moved and settled in the area ceded by the Angaité Communities, presently known as "25 de Febrero," [FN84] which is outside the lands being claimed. [FN85]

[FN84] Cf. Declaration of Marcelino López, supra note 63, folio 580; Declaration of Gerardo Larrosa supra note 75, folio 605; Declaration of Maximiliano Ruíz, supra note 28; Declaration of Clemente Dermott, supra note 63, and Declaration of Antonia Ramírez, supra note 28.
[FN85] Rodrigo Villagra Carron explained that the settlement of "25 of febrero" was 35 Km. away from the Salazar Ranch; while Clemente Dermott explained that it was 35 Km. From the Transchaco Route. Cf. Declaration of Rodrigo Villagra Carron, supra note 17, and Declaration of Clemente Dermott, supra note 63, folio 645.
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78. As of this date, the "25 de Febrero" lands have not been titled to the Xákmok Kásek Community.

79. Upon leaving their old settlement, some members of the Community left and moved to be with other communities. [FN86]

[FN86] Cf. Declaration of Marcelino López, supra note 63, folios 586 and 587.

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

80. On January 31, 2008, the Office of the President of the Republic declared 12,450 hectares of the Salazar Ranch as a private wildlife reserve for a period of five years. [FN87] Of the land affected, 4,175 hectares are part of the 10,700 hectares the Community has been trying to claim since 1990. [FN88]

[FN87] Cf. Decree No. 11.804 of the President of the Republic where the land is declared Protected Private Wildlife Reserve named "Salazar Ranch" on January 31, 2008 (case file of annexes to the application, annex 7, folios 2429 to 2435 and 2429 to 2435).[FN88] Cf. Motion of unconstitutionality filed by the Community before the Supreme Court of Justice on July 31, 2008 (case file of annexes to the answer, annex 1.9, tome VIII, folio 3416); Map of the private wildlife reserve "Salazar Ranch" (case file of annexes to the written brief of pleadings and motions, annex 4, tome VI, folio 2711), and Map of the Traditional Lands of Xákmok Kásek Community and Revindicated Lands (case file of annexes to the brief of pleadings and motions, annex 4, tome VI, folio 2712).

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81. The nature reserve declaration was made without consulting the Community or taking their replevin claim into account. [FN89] This fact was confirmed by the Legal Counsel to the Environmental Secretariat, which concluded that the process through which part of the Salazar Ranch was declared a nature reserve suffered from serious irregularities. Among them was the fact that it had not taken the existence of the Community's replevin claim into account, for which reason it should be considered invalid. [FN90]

[FN89] Cf. Declaration of Marcelino López, supra note 63, folio 584, and Declaration of Clemente Dermott, supra note 63, folio 648.
[FN90] Cf. Report of the Legal Aid to the Secretary of the Environment on December 24, 2009 (case file of annexes to the answer, annex 1.8, tome VIII, folios 3382 to 3388).

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82. According to Law No. 352/94, which establishes the legal regime applicable to the Protected Wildlife Areas, the reserves that are under private supervision cannot be expropriated during the time that the declaration is valid. [FN91] Also, the Law establishes restrictions on the reserve's use and control. Among them, occupation of the land is prohibited, as are the Community's traditional activities like hunting, gathering, and fishing. [FN92] This regulation punishes the transgression of these prohibitions [FN93] and assigns park guards who can be armed [FN94] and make arrests. [FN95]

[FN91] Cf. Article 56 of Law No. 352/1994 (case file of annexes to final written arguments, tome X, folio 4543).
[FN92] Cf. Article 24(b), 27 and 64 of Law No. 352/1994, supra note 91, folios 4537 to 4546; Report of the Legal Aid to the Secretary of the Environment, supra note 90, folios 3382 to 3388,

and Cuadernillo on the private wildlife reserve “Salazar Ranch” (case file of annexes to the answer, annex 3(1), tome VIII, folio 3469).
[FN93] Cf. Article 58 of Law No. 352/1994, supra note 91, folios 4543 and 4544.
[FN94] Cf. Article 44 of Law No. 352/1994, supra note 91, folio 4541.
[FN95] Cf. Article 45 of Law No. 352/1994, supra note 91, folio 4541.

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83. On July 31, 2008, the Community filed a motion of unconstitutionality with the Supreme Court of Justice against the aforementioned natural reserve declaration. [FN96]

[FN96] Cf. Motion of unconstitutionality filed by the Community, supra note 88, folios 3415 to 3427..

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84. The Attorney General was notified of the filing of that motion, and on October 2, 2008, she requested the suspension of the deadline for answering the motion due to the necessity of adding the administrative case file on the Community's land claim to the motion. [FN97] That deadline was effectively suspended on October 24, 2008, and despite the fact that the Community's representatives submitted an authenticated copy of the administrative case file on December 14, 2009, [FN98] the proceeding is still suspended. [FN99]

[FN97] Request for the suspension of the deadline for answering the motion before the Supreme Court of Justice (case file of annexes to the answer to the application, annex 1(8), tome VIII, folio 3428).
[FN98] Cf. Brief of the representatives on December 14, 2009, addressed to the Constitutional Chamber (case file of annexes to the answer, annex 1(9), tome VIII, folio 3435).
[FN99] Cf. Note S.J. I No. 211 of May 21, 2010 signed by the Legal Secretary I of the Supreme Court of Justice addressed to the Office of Human Rights of the Supreme Court of Justice (case file of annexes to the State’s final arguments, annex 24, tome VIII, folio 4593).

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2. The right to communal property

85. This Court has ruled that the close link that indigenous peoples have to their traditional lands, to the natural resources found that are part of their culture, and to the lands' other intangible elements, should be safeguarded by Article 21 of the American Convention. [FN100]

[FN100] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 137; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 118, and Case of the Saramaka People v. Suriname, supra note 16, para. 88.

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86. Moreover, the Court has taken into account that amongst the indigenous,

There exists a communitarian tradition of a communal manner regarding collective property of land, in the sense that ownership does not pertain to an individual, but rather to the group and the community. Indigenous peoples, as a matter of survival, have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations. [FN101]

[FN101] Cf. Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations, and Costs. Judgment of August 31, 2001. Series C No. 79, para. 149; Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 118, and Case of the Saramaka People. v. Suriname, supra note 16, para. 90.

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87. Moreover, the Court has indicated that the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession "does not focus on individuals but on the group and the community." [FN102] This concept of ownership and possession of lands does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the Convention. The failure to recognize the different versions of the right to use and enjoy goods that come from the culture, uses, customs, and beliefs of different peoples would be equivalent to arguing that there is only one way for things to be used and arranged, which in turn would make the protection granted by Article 21 of the Convention meaningless for millions of individuals. [FN103]

[FN102] Cf. Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 149; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 120, and Case of the Saramaka People v. Suriname, supra note 16, para. 89.
[FN103] Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 120.

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88. In this case, it is not disputed that Paraguayan law recognizes the existence of indigenous peoples as groups that predate the formation of the State, or that it recognizes the cultural identities of these peoples, the relationship that they have with their respective habitats and the community characteristics of their possession of land, granting them also a series of specific rights that serve as a foundation for this Court to define the reach and content of Article 21 of the Convention.

89. The State does not deny that the Xákmok Kásek community has a right to its traditional land as community property, or that hunting, gathering, and fishing are elements that are essential to its culture. The conflict in this case centers on the specific need to restore the lands claimed by the Community and on the fulfilling of the right to property, both questions that the Court will move on to examine infra.

2.1. Questions related to the lands being claimed

2.1.1. Traditional character of the lands being claimed

90. The Court notes that despite indicating that it "does not deny its obligation to restore these peoples' rights," the State questions the ancestral characteristic of the lands being claimed by the Community. Paraguay argued that the ancestors of the victims "inhabited a larger territory than the one being claimed in this application, within which it roamed and kept in a constant state of internal migration." It argued that "the Xákmok Kásek community was spread throughout its vast, ancestral territory, and settled on the Salazar Ranch for reasons of choice," and that "[t]he truth is that the ranch land now being claimed as an ancestral settlement was never the [C]ommunity's definitive settlement." According to the State, due to the "condition of nomadic peoples, at some point they have passed accidentally by those lands, but that does not empower them to claim as theirs the ranch land that is being used for production."

91. The Commission indicated that "while the Xákmok Kásek [C]ommunity refers to the ancestral community territory and claims it specifically, the State refers to the ancestral territory of the Enxet-Lengua as a whole, and based on [that] argues that it can grant an alternative piece of land within that wider ethnic territory." It explained that the 10,700 hectares claimed by the Community correspond to its "specific ancestral territory," which is evidenced by the Community's own criteria, the toponymy of the territory, and the carrying out of traditional cultural practices on the territory, including in clandestine manners; by technical official documents or documents that have been prepared by the State; and by the historic occupation of that territory. It highlighted that the State's position "intends to fail to recognize that the indigenous peoples of the Chaco are made up of multiple communities, some of a multi-ethnic composition […], each one of which has a specific and particular history that has produced clear links to a certain portion of Chaco territory." The Commission indicated that the Xákmok Kásek Community "throughout history built a cultural affiliation with a certain territory - the First Retreat of the Salazar Ranch, which it is claiming."

92. The representatives indicated that the Community "is only claiming the restitution of a small part of its ancestral territory," which is clearly identified and is known to the members of the Community as Mompey Sensap (today First Retreat) and Makha Mompena (today Kuñataí Retreat). They emphasized that the lands being claimed have been identified in "the collective memory, still alive in the [C]ommunity and its members who clearly and systematically link and associate events, places, memories and practices of traditional economy to the geographic spaces referenced."

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

a) Occupation and trajectory of the traditional territory

94. The Court finds that the original nomadic character of the people to which the Community belongs has been proven, as is the fact that its traditional territory is larger than the area being claimed (supra paras. 56 and 65). Neither of these points have been disputed by the parties. Now, Braticevic the expert witness explained that the nomadic nature of the area's peoples implied that they roamed their territories radially or circularly, following a cycle or an annual time period. [FN104] The expert witness Braunstein testified to the same. [FN105]

[FN104] Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4244.
[FN105] Expert testimony of José Alberto Braunstein, supra note 22, folios 276 to 277.

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95. The places indicated by the members of the Community as villages, hunting, and fishing grounds, burial grounds, sources of medicinal plants, and sites relevant to their history follow this pattern of travel and possession presented by the expert witnesses before this Court. [FN106] In this way and heeding to the scientific standards presented, the specific traditional territory of the Xákmok Kásek Community can be determined. Although the Court does not know the precise range of the territory, since it was not provided in the case file, the Court observes that it coincides with the territory that has always been indicated by the Community as traditional territory – that is to say, the Salazar Ranch and its surroundings. This territory is smaller than the 175,000 hectares of ancestral territory corresponding to the ethnic peoples to which the Community belongs. [FN107] It is worth highlighting that for the purposes of protecting the Community's right to communal property the relevant traditional territory is not the territory belonging to the Community's ancestors but to the Community itself.

[FN106] Cf. Map entitled Place Names and Geographic Points pursuant to the Declaration of Tomás González Dermott of Xákmok Kásek (case file on the Merits, tome II, folio 602), and Map titled Traditional Lands of the Xákmok Kásek Community and Revindicated Lands, supra note 88, folio 2712.
[FN107] Cf. Report of the CEADUC, supra note 55, folio 735 and 741.

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96. The expert witness Braticevic stated that the Enlhet-Enenlet family "inhabited this area of the Chaco since time immemorial" and there are no objections as far as the identification of the ancestral territory of the Xákmok Kásek Community around the aforementioned ranch." [FN108] This identification finds additional support in the map of the Enlhet-Enenlet villages presented by the representatives, where an area called Lha'acme-Caasec is identified as one of its villages. [FN109]

[FN108] Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4243.
[FN109] Cf. Map Apcaoclha Chaco ("Chaco Region in the Enlhet language) (case file of annexes to the written brief of pleadings and motions, tome VII, annex 15, folio 2912).

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97. Likewise, in keeping with the history of the indigenous communities in the Paraguayan Chaco (supra paras. 56 to 63), many indigenous villages, among them the Community's ancestors, settled around the aforementioned religious missions and by the buildings and houses of the cattle ranches. [FN110] In the particular case of the Xákmok Kásek Community, a religious mission was founded in 1939 in the place that gave its name to the Community (supra para. 64). Tomas Dermott explained that "the Enxet and their village were there in Xákmok Kásek," long before the arrival of the first foreign occupant (supra para. 64). [FN111] Likewise, the witness Rodrigo Villagra explained that when the Salazar Ranch was founded, the private property owner ordered the various indigenous villages of the area to mix together and go live near the Ranch's main buildings in order to have greater control over them. [FN112] At that time, as Tomás Dermott explained, the Sanapaná who "camped and roamed as they wished, had small farms [and] hunted," "left their villages and went to look for work," with some of them grouping together close to the Ranch's main buildings (supra paras. 40, 65, and 66). [FN113] The testimony from the expert witness presented by the State follows this telling of the facts. [FN114]

[FN110] Declaration of Rodrigo Villagrán Carron, supra note 17.
[FN111] Cf. Declaration of Tomás Dermott, supra note 24, folio 597.
[FN112] Cf. Declaration of Rodrigo Villagra Carron, supra note 17.
[FN113] Cf. Declaration of Tomás Dermott, supra note 24, folio 597.
[FN114] Specifically, Sergio Ivan Braticevic stated that "the Salazar Ranch was a central place for the communities settled around it, without denying a habitual phenomena in the area, the migration in search of work." Expert testimony of Sergio Ivan Braticevic, supra note 17, folio 4245.

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98. From the settlement of the center of the Salazar Ranch up until recent times (supra paras. 74 and 75) the indigenous continued roaming this traditional territory and making use of its resources, with certain limitations put in place by the private property owners. It was when the restrictions on mobility and traditional subsistence activities became too burdensome that the Community decided to leave and locate itself in the place known as "25 de Febrero" (supra paras. 75 to 78).

99. Likewise, the Court observes that the area currently being claimed by the Community around First Retreat (supra para. 68) comprises a portion of that larger traditional territory roamed by the Community and includes sites that are important to the Community's life, culture, and history. [FN115]

[FN115] Tomás Dermott states that in Makha Mompena (a place located within the 10.700 claimed hectares) "there are and were many medicinal plants for [s]hamanic study. Many of the Sanapaná shamans would go there in search of these plants, ingest them and learn to heal, there there are many panaktema 'remedies. The Sanapanás also had many farms in the area, Retiro Primero, and they would go there to hunt, and near there, there is a large ravine Mompey Sensap,

'Mariposa Blanca'. The people had farms there." Cf. Declaration of Tomás Dermott, supra note 24, folio 595.

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b) Toponymy of the area according to the Community

100. With regard to the area's toponymy, the Court recalls that the main evidence of traditional occupation of territory by the indigenous peoples of the Chaco is the names given to certain places within the territory, such as places of periodic settlement, wells, lakes, woods, palm groves, espatillares, areas for gathering and for fishing, cemeteries, etc. [FN116]

[FN116] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 50(4).

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101. In the case of this Community, from the start of its process to claim the land, the Community has identified the places it uses as references of its traditional lands with names in its own language. For example, in the original request before the IBR (supra para. 67), the leaders of the Community indicated that those lands must include "the Mopae Sensap, Yagkamet Wennaktee, Naktee Sagye and Mosgamala sites, and must reach to Xakmaxapak in the south." [FN117] Moreover, in its only internally-prepared anthropological report, it was concluded that "within the territory [being] claimed, the indigenous [had] a profound knowledge of the traditional places and their names." [FN118]

[FN117] Cf. Request of the Community on December 28, 1990, supra note 65, folio 780. As a matter of fact, when the Community withdrew its request in 1994, Turing a settlement negotiation, it noted that "measurements to determine the exact land claim¨ should be made,"to determine the exact location of the claim [because] the locations claimed, are known only by traditional name[s] used by the indigenous". Cf. Act No. 7 of the public hearing between the parties on February 11, 1994 (case file of annexes to the application, appendix 3, tome 3, folios 905 to 908).

[FN118] Cf. Anthropological Report of the CEADUC, supra note 55, folio 740.

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c) Technical studies

102. Regarding the technical studies prepared on the traditional character of the lands claimed, first of all the Court observes that, although they are few, the documents prepared and research carried out during the process of claiming the lands domestically have affirmed the traditional character of the lands being claimed by the Community. [FN119] Second of all, the expert witness testimonies of Antonio Spiridinoff and Sergio Iván Braticevic confirm the traditional character of the lands claimed. [FN120]

[FN119] Cf. Anthropological Report of the CEADUC, supra note 55, folio 747; Report No. 2476 of the Head of Indigenous Affairs of the IBR on November 5, 1991 (case file of annexes to the application, appendix 3, tome II, folio 864), and Memorandum of the President of the INDI on August 22, 1995 (case file of annexes to the application, appendix 3, tome II, folios 859 and 860).
[FN120] Cf. Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4235 to 4252, and Expert testimony of Antonio Spiridinoff, supra note 68, folios 613 to 616.

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d) Suitability of the lands being claimed

103. Finally, regarding the suitability of the lands claimed, the anthropological report prepared by the Center for Anthropological Studies of the Universidad Católica Nuestra Señora de la Asunción (hereinafter "CEADUC") specifically concludes that the lands claimed are appropriate and suitable for the development of the Community. [FN121]

[FN121] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1736.

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104. Moreover, in his expert witness testimony, Antonio Spiridinoff observes that the technical justification on which the declaration of a private Nature Reserve in Salazar Ranch is based, beyond standing in the way of the indigenous land claim, also justifies the land's potential for use by an indigenous community. [FN122] Meanwhile, Sergio Iván Braticevic does not deny the greater suitability of the lands claimed over other possibilities. In fact, the expert witness expressly states that "[the] portion of land [claimed]" should be "prioritized" and that in the event that the motion of unconstitutionality against the private natural reserve declaration is not upheld and "all the legal alternatives are exhausted," only at that point should the Community turn to lands different from the ones claimed. [FN123]

[FN122] Cf. Expert testimony of Antonio Spiridinoff, supra note 68, folio 615.
[FN123] Cf. Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4248.

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105. In the same way, the witness Villagra explained that the lands claimed were chosen because "there is a specific link to cemeteries in those lands, because the Sanapaná ancestors had several villages in that area, and because those lands are more amenable for living, [since] […] between Xákmok Kásek and Mopey Sensap there is greater biological diversity to allow for supporting the family." [FN124]

[FN124] Declaration of Rodrigo Villagra Carron, supra note 17.

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106. In addition to the foregoing, the Court notes that the State has not questioned the alleged suitability of the land being claimed. The State's defense has been limited to stating the impossibility of granting those lands to the Community – a point that will be examined infra – without denying the foregoing. Likewise, the State limits itself to insisting on granting alternative lands without questioning the statements of the Community, its representatives or the Commission.

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107. The Court therefore finds that, based on the Community's history of occupying and roaming the territory, the toponymy of the area put in place by the victims, the conclusions of the technical studies done on this aspect, and the considerations relative to the suitability of the lands within the traditional territory, the portion of 10,700 hectares in and around First Retreat or Mompey Sensap and Kuñataí Retreat or Makha Mompena, claimed by the Community are the Community's traditional lands and are the most suitable for its settlement.

2.1.2. Possession of the lands being claimed in replevin and the demand for recognition of communal property

108. With regard to the possession of the lands being claimed, the Commission argues that the State is obligated to recognize and respond to the Community's claim "even when it does not have full possession of the [lands] and they are in private hands." The representatives argued that the Community "has maintained partial possession of the lands claimed and their surroundings as far as access to natural resources." They added that the members of the Community have carried out their traditional activities on the lands claimed "since before the transfer of the lands to the company Eaton y Cía., up through the beginning of 2008[,] when those activities were banned with the establishment of the private [nature] reserve." The State holds that "the petitioners do not have the property duly registered in the Property Registry, nor do they possess the property in question."

109. The Court recalls its case law regarding communal property on indigenous lands, [FN125] according to which: 1) the indigenous' traditional possession of their lands has the same effect as a full land title granted by the State; [FN126] 2) traditional possession grants the indigenous the right to demand official recognition of their property and its registration; [FN127] the State must delimit, demarcate, and grant collective title of the lands to members of the indigenous communities; [FN128] 4) the members of the indigenous peoples who have involuntarily lost possession of their lands maintain a right to their land, even without legal title, expect when the land has been legitimately transferred to an innocent third party in good faith, [FN129] and 5) the members of the indigenous peoples who for reasons beyond their control have lost possession of their lands, and the lands have been legitimately transferred to innocent third parties, have the right to recover those lands or obtain other lands of the same size and quality. [FN130]

[FN125] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, paras. 131; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 128, and Case of the Saramaka People. v. Suriname, supra note 16, para. 89.
[FN126] Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 151, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 128
[FN127] Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 151, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 128..
[FN128] Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 101, para. 164; Case of Yakye Axa Indigenous Community v. Paraguay, supra note 45, para. 215, and Case of the Saramaka People v. Suriname, supra note 16, para. 194.
[FN129] Cf. Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 15, 2005. Series C No. 124, para. 133, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 128.
[FN130] Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, paras. 128 to 130.
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110. In addition, as has been established in the cases of the Yakye Axa and Sawhoyamaxa indigenous communities, [FN131] Paraguay recognizes indigenous peoples' right to request the that their lost traditional lands be returned to them, including when they are under private ownership and when the indigenous peoples do not have full possession of them. [FN132] Effectively, Paraguay's Indigenous Communities Statute enshrines the procedure to follow for the restoration of lands under private ownership, [FN133] which is the case here.

[FN131] Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, paras. 138 to 139, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 129.
[FN132] Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, paras. 135 to 149, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, paras. 127 and 130.
[FN133] Cf. Articles 24, 25, 26, and 27 of Law 904/81 Statute of the Indigenous Communities, supra note 64, folios 2399 to 2425.
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111. In this case, although the Community does not have possession of the lands being claimed, in keeping with the case law of this Court and Paraguayan domestic law, it has the right to recover them.

2.1.3. Applicability of the right to claim traditional lands

112. Regarding the possibility of recovering traditional lands, on prior occasions [FN134] the Court has established that the spiritual and physical foundation of the identities of indigenous peoples is based mainly on their unique relationship with their traditional lands. As long as that

relationship exists, the right to recover those lands remains applicable. Should that relationship cease to exist, so would the right.

[FN134] Cf. Case of the Moiwana Community v. Suriname, supra note 129, para. 133; Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, paras. 131, 135 and 137, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, paras. 127 and 131.

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113. In order to determine the existence of the indigenous' relationship with their traditional lands, the Court has established that: i) it can be expressed in different ways depending on the indigenous people in question and the circumstances they are in, and ii) the relationship with the lands must be possible. Some ways of expressing this relationship could include traditional presence or use, via spiritual or ceremonial ties; settlements or sporadic farming; hunting, fishing, or seasonal or nomadic gathering; use of natural resources tied to customs; and any other element characteristic of a culture. [FN135] The second element is that the members of the Community are not blocked by factors outside their control from carrying out those activities that reveal the persistency of their relationship with their traditional lands. [FN136]

[FN135] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 154, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, paras. 131 to 132.

[FN136] Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 132.

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114. In this case, the Court notes that the Community's relationship to its traditional territory is manifested, inter alia, in its carrying out of traditional activities on those lands (supra paras. 65, 66, 74, and 75). In this respect, the anthropologist Chase Hardi stated in his report prepared in 1995 that the Community continued "occupying its territory and practicing traditional economic practices, despite the conditions [imposed by] private property." [FN137] It was of particular relevance that even before the restrictions imposed on the Community, "they still enter[ed] secretly to hunt." [FN138] Likewise, some members of the Community indicated that when they lived on the Salazar Ranch, they still practiced traditional medicine, the shamans collected medicinal plants in the countryside, [FN139] and the Community buried its dead according to its customs, though all these practices were seriously limited. [FN140]

[FN137] Cf. Anthropological Report of the CEADUC, supra note 55, folio 741.

[FN138] Declaration of Gerardo Larrosa, supra note 75, folio 605.

[FN139] Cf. Declaration of Gerardo Larrosa, supra note 75, folio 607, and Declaration of Maximiliano Ruíz, supra note 28.

[FN140] Cf. Declaration of Maximiliano Ruíz, supra note 28.

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115. In addition, for reasons beyond its control, since 2008 the Community has been completely prevented from carrying out traditional activities on the land being claimed due to the creation of the Private Nature Reserve on part of it (supra paras. 80 and 82).

116. Due to the aforementioned considerations, the Court finds that the right of the members of the Xákmok Kásek Community to recover their lost lands remains in effect.

2.1.4. Alleged satisfaction of the Community's right with alternative lands

117. The State argued that the Community's right could be satisfied with lands different from the ones being claimed, since the traditional lands are not limited to the ones being claimed. However, the State has not indicated which lands would be the alternative lands of the same size and quality to satisfy the Community's claim. Although it submitted a list of properties available in the areas nearby the Community's current settlement, it did not indicate the characteristics or qualities of the land that could meet the quality required for the sustainability of the Xákmok Kásek. [FN141]

[FN141] List of properties for sale (case file of annexes offered by the State in the public hearing, annex 2, tome IX, folios 3769 to 3774).

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118. It is not enough that there exist other available properties. As the expert witness presented by the State testified, in order to grant lands alternative to the ones being claimed, they must at the least have certain "agro-ecological aptitudes" and be submitted to a study to determine their potential for being developed by the Community. [FN142]

[FN142] Cf. Expert testimony of Sergio Iván Braticevic, supra note 17, folio 4248.

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119. In this sense, the Court observes that the Community has rejected the alternative portions of land offered on different occasions during the domestic proceedings precisely because they do not meet the necessary quality requirements. At no time did the State refute this argument or take any measures to confirm or deny it (infra note 148).

120. Moreover, regarding the 1,500 hectares where the Community is currently settled, the Court finds that it would be difficult to consider this portion of land as sufficient and therefore as fulfilling the Community's right to communal property, as it does not even meet the legal minimum established in Paraguay. Effectively, according to Paraguayan law, the members of the Community have a right to a minimum of 100 hectares per family. [FN143] Since the Community is currently made up of 66 families, an area of 1,500 hectares would not be large enough, especially considering that some expert reports state that not even the Paraguayan legal minimum is enough for a community like Xákmok Kásek to carry out traditional activities and ways of life. [FN144]

[FN143] Cf. Article 18 of Law No. 904/81, supra note 64, folio 2404.

[FN144] In the report presented in 1995 by the CEADUC, within the administrative revindication of lands proceeding initiated by the Community, the extension of 178 hectares per family that was being revindicated by the Community at said time was considered insufficient for conservation and development purposes of the specific lifestyle of the Community. (Cf. Anthropological Report of the CEADUC, supra note 55, folios 735 to 750). The expert Rodrigo Villagra Carron expressed himself in a similar manner (Cf. Declaration of Rodrigo Villagra Carron, supra note 17).

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121. Second, although the Court recognizes that the Community's traditional territory is not limited to the land being claimed, it recalls that neither does that traditional territory extend to all of the Central and Lower Chaco. In this regard, the Court reiterates its aforementioned considerations (supra paras. 94 to 107) according to which the portion of land claimed by the Community are the traditional lands that are optimal for a settlement and development. Therefore, the State should have and must still take action to fulfill the Community's right to property as regards that land.

2.2. Actions taken to claim the traditional land

122. Now that it has been concluded that the land being claimed is the optimal traditional land for the Community's settlement, that its possession is not necessary, and that the right to recovery of that traditional land is applicable, the Court will move on to examine the actions taken by the State to guarantee the Community's recovery of that land.

123. The Commission argued that "[t]he inefficiency of the procedures established in Paraguayan law to fulfill indigenous peoples' right to property have meant in practice that the State does not guarantee the Community's right to […] its ancestral property." Moreover, it stated that the nonexistence of an affective remedy against the violations of rights recognized by the Convention constitutes in itself a violation of Paraguay's obligations under the Convention. Additionally, the Commission indicated that "the delay in the administrative procedure […] is due to delayed actions in the system and the deficiencies of State authorities." The Commission insisted that from a procedural and practical perspective, the Paraguayan legal framework has not permitted nor will it permit the due recognition of the Community's rights.

124. The representatives stated that "the State has not changed its mechanism for restoring indigenous territory," despite the Court's order in the cases on the indigenous communities Yakye Axa and Sawhoyamaxa. For this reason, "in this case, the same legal situation [against] a different indigenous community […] is alleged," a situation where the inefficiency of the procedure established in Paraguayan law has prevented the fulfillment of the right to property. representatives emphasized that "it would be difficult to consider the period of 20 years during which the instant case has been in progress as reasonable."

125. The State explained that it has done everything within its power through its different administrative authorities to ensure that the Community is in a position to claim its rights. For this reason, "[i]t would be unjust to find that Paraguay has violated the right of protection or right to a fair trial [judicial guarantees] from a broad interpretive perspective." It expressed that it has taken specific actions to grant property titles to a variety of indigenous communities. According to Paraguay, this demonstrates that "the system for the protection of indigenous rights, such as it is established in current law, is perfectly compatible with the Convention[; as long as] there is a consensus among the indigenous, property owners and the State, resolving problems of a lack of access to communal land is perfectly possible."

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

2.2.1. Due diligence in the administrative procedure

127. The Court observes that during the entire duration of the administrative procedure, which started in 1990, no major steps were taken. During the 17 years that the procedure lasted following the recognition of the Court's jurisdiction, an anthropological study was requested, [FN145] some meetings were carried out to try to bring the parties to an agreement, and the private property owners and the Community exchanged offers on at least five occasions. [FN146] Prior to the recognition of the Court's jurisdiction, two visual inspections were carried out. [FN147]

[FN145] The INDI requested the CEADUC to carry out a scientific report of the tradicional lands of the Community. Cf. Note P.C. No. 396/95 of the President of the INDI to the Director of the CEADUC on August 22, 2005 (case file of annexes to the application, appendix 3, tome II, folio 734).

[FN146] Between 1990 and 1994, the Community insisted upon the claimed lands, meanwhile the private owner Retiro Winchester (Cf. Brief of the attorney of the Community, Florencio Gómez Belotto addressed to the President of the IBR on February 19, 1993, case file of annexes to the application, appendix 3, tome III, folio 894; Act No. 7 of the public hearing held on February 11, 1994, supra note 117, folios 905 to 908, and sale of lands to the IBR for the indigenous Lengua, Sanapaná, and Angaité on February 21, 1994, case file of annexes to the application, appendix 3, tome III, folios 909 to 913). Moreover, in November 1995 the private owners offered, in place of the revindicated lands, extensions of land in a sector called Cora-í or alternatively in the area called Potrero Pañuelo (Cf. Brief of the attorney from Eaton and Cía. S.A. on November 7, 1995, case file of annexes to the application, appendix 3, tome II, folios 755 to 756). After the meeting in March, 1996, the leaders of the Community offered to modify their request, withdrawing their request for a portion of the revindicated lands, substituting them with lands known as "Retiro Cuñata-í" (Cf. Brief of the representatives of the Community on April 2, 1996, case file of annexes to the application, appendix 3, tome II, folio 772). In 1998, the private land owners offered the Salazar Ranch for sale, and in 2000, they offered "to whomever wanted to purchase" the land called Cora'í. In March 2003, Chortitzer Komitee offered 3.293 hectares for sale of the land being claimed. (Cf. Declaration of Roberto Carlos

Eaton Kent, supra note 56, folio 662; press release of April 1, 2003, titled "Menonitas ofrecen al Indi tierra reclamada por nativos", [Menonites offer Indi, land being claimed by natives] case file of annexes to the application, appendix 3, tome IV, folio 1583). Lastly, in 2004, Mr. Eaton offered the Community the Magallanes Ranch (Cf. Declaration of Roberto Carlos Eaton Kent, supra note 56, folio 660).

[FN147] Cf. Site visit carried out by Pastor Cabanellas, supra note 62, folios 791 to 795, and Order P. No. 651 of the President of the IBR on August 21, 1992 (case file of annexes to the application, appendix 3, tome III, folio 891).

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128. The few steps that the State did make began either at the insistence of the Community or due to propositions from the private property owner. Nevertheless, none of these steps were significant for obtaining a definitive resolution of the Community's claim, a claim that persists to this day. Likewise, faced with the Community's complaint that the land offered as an alternative to its traditional land was not suitable for settlement, [FN148] neither the IBR nor the INDI requested that technical studies be done to prove or disprove the Community's claims, even though those state institutions are under a legal obligation to provide "land that is suitable and at least of equal quality" to the land that the Community occupies." [FN149]

[FN148] After the extension of the on-site visit, the attorney of the Community requested a geological study of the Retiro Winchester offered by the private landowner. Nevertheless, said request was not responded to. In August 1993, due to an on-site visit to another indigenous community to which said lands were also offered, a site visit of the Retiro Winchester was carried out and in it, the conclusion was that it was not suitable for the development of the Community. (Cf. Communication with no date of the attorney of the Community to the IBR, case file of annexes to the application, appendix 3, tome III, folio 888, and report of the expedition carried out in the Chaco on the 12, 13, 14 of August, 1993, case file of annexes to the application, appendix 3, tome III, folio 959 to 960). On its behalf, the lands of the Magallanes Ranch were apparently inspected by employees of the INDI who concluded that they were not suitable for settlement by the Community (Cf. Act of reunion on August 12, 2004, of the Xákmok Kásek Community, case file of annexes to the application, appendix 3, tome IV, folio 1286); Declaration of Marcelino López, supra note 63, folio 587, and Declaration of Clemente Dermott, supra note 63, folio 647).

[FN149] Article 15 of Law No. 904/81, supra note 64, folio 2403.

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129. Moreover, the Court takes note of the long periods of inactivity in the case file. From the time it was passed to the INDI in June of 1994, there is no action from that body toward bringing the procedure to a resolution until July of 1995, when the Community representatives requested information regarding the actions taken. [FN150] Likewise, following a meeting between the parties in February of 1996 called at the initiative of the Community there were no new actions taken until 1998, when the private property owner offered the lands being claimed. [FN151] However, the State did not accept the offer. During the following six years, from 2000 to 2006, the only actions recorded on the record started with offers made by the private property owners

to State authorities. [FN152] Of even more seriousness, the administrative case file had to be reconstructed because the documents had been lost. [FN153]

[FN150] The administrative brief was forwarded to the INDI in June 1994, and the subsequent actions of which are known, regard a request of the Community in July 1995, in which a memorandum was issued and a request for an anthropological study was made. (Cf. Report 1474 of the Chief of Indigenous Matters of the IBR on June 20, 1994, case file of annexes to the application, appendix 3, tome II, folio 730, and Memorandum of the President of the INDI of August 22, 1995, supra note 119 folio 860).

[FN151] After the members of the Community offered to modify their request regarding the portion of lands being revindicated (brief of the representatives of the Community on April 2, 1996, supra note 141), the following action was an offer, in 1998, by the private landowners to sell the Salazar Ranch in its entirety (supra note 141).

[FN152] The only actions evinced in the case file were those carried out in regard to Koraí/Cora'í, the portion of land being revindicated, property of Chortitzer Komitee, and the Magallanes Ranch (Cf. Declaration of Roberto Carlos Eaton Kent, supra note 141) until the request for copies and reconstitution of the brief by the Community in (Cf. Request of the representatives of the Community on July 6, 2006, addressed to the INDERT, case file of annexes to the application, annex 5, folio 2377, and request by the representatives on August 23, 2006, case file of annexes to the application, annex 5, folios 2379 to 2380).

[FN153] In 2006, the representatives of the Community had to request reconstitution of the administrative case file because it had "gone missing on two occasion" in the INDERT (Cf. Request of the representatives of the Community on July 6, 2006, supra note 152, folio 2377, and Declaration of Clemente Dermott, supra note 63, folio 645). In her testimonial declaration, the current President of the INDI, noted that in 2008, "many documents were lost, [which] to date were being reconstituted in the case file of the Xakmok Kasek village," due to the occupation of the INDI by indigenous groups (Cf. Declaration of Lida Acuña, supra note 17).

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130. Finally, the Court notes that the IBR made a request in June of 1994 that the INDI rule on the request for expropriation made by the Community, on the consideration that the administrative route had been exhausted. However, it is not recorded in the case file whether the INDI responded to that request. On the contrary, the actions of this body reveal that it sought to continue with the administrative route, a fact that was confirmed by the INDI President, who stated that "[t]he actions of the Office of [this] President [had] been focused on trying once more […] to bring this administrative case to a conclusion through negotiation." [FN154]

[FN154] Memorandum of the President of the INDI of August 21, 1995, supra note 119, folio 859.

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131. Based on these considerations, the Court finds that the procedure started by the Community for claiming its lands in replevin was not carried out with due diligence. As a consequence, the Court concludes that the actions of the State authorities have not been

compatible with the standards of diligence enshrined in articles 8(1) and 25(1) of the American Convention.

2.2.2. Principle of reasonable time in an administrative procedure

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

133. As one of the elements of due process, Article 8(1) of the Convention establishes that those procedures that are undertaken to determine the rights of individuals under civil, labor, criminal, or any other jurisdiction, must be carried out within a reasonable time. The Court has considered four elements for determining the reasonability of a time period: i) complexity of the matter, ii) conduct of the authorities, iii) the affected party's involvement in the procedure [FN155] and iv) the legal situation's effect on the person involved in the procedure. [FN156]

[FN155] Cf. Case of Genie Lacayo v. Nicaragua. Merits, Reparations, and Costs. Judgment of January 29, 1997. Series C No. 30, para. 77; Case of Garibaldi v. Brasil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 23, 2009, para. 133, and Case of Radilla Pacheco v. México, supra note 12, para. 244.

[FN156] Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, para. 155; Case of Garibaldi v. Brazil, supra note 155, para. 133, and Case of Radilla Pacheco v. México, supra note 12, para. 244.

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134. Regarding the first element, as it has done on previous occasions in regard to this remedy, [FN157] the Court recognizes that the matter in this case is complex. However, it notes that the delays in the administrative procedure were not due to the complexity of the case, but rather to deficient action and delays on the part of State authorities (second element). As was put forward previously, the behavior of the State bodies in charge of resolving the Community's territorial claim was characterized during the administrative procedure by passivity, inactivity, little diligence, and lack of responsiveness.

[FN157] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 87.

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135. Regarding the third element, the procedural involvement of the stakeholders, the Court observes that far from hindering the processing of the remedy, many of the actions during the process were started at the insistence of the Community.

136. As far as the fourth element, in order to determine the reasonableness of the time period, the effect of the length of the procedure on the legal situation of the individual involved must be taken into account, considering – among other elements – the issue that is the subject of the controversy. The Court has established that if the passage of time affects in some relevant way

the legal status of the individual, it will be necessary for the procedure to move forward with greater diligence in order for the case to be resolved in a shorter time period. [FN158] In this case, the delay in producing a definitive solution to the problem of the Community's land has directly affected its way of life. This situation will be examined in detail in Chapter VII infra.

[FN158] Cf. Case of Valle Jaramillo et al. v. Colombia, supra note 156, para. 155; Case of Kawas Fernández, supra note 14, para. 115, and Case of Garibaldi v. Brazil, supra note 155, para. 138.

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137. In addition, the Court recalls that in the cases of the Yakye Axa and Sawhoyamaxa indigenous communities, both against Paraguay, this Court found that the time periods of more than 11 and 13 years, respectively, which those land reclamation periods lasted, were not compatible with the principle of reasonable time. [FN159] Therefore, the time period of more than 17 years in the present case (supra para. 127) leads to the same conclusion.

[FN159] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 89; Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 97 and 98.

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

2.2.3. Effectiveness of the administrative remedy in the replevin claim of indigenous land

139. Article 25(1) of the Convention sets forth States Parties' obligation to guarantee to all individuals under their jurisdiction a legal recourse that is effective against acts that violate their fundamental rights. [FN160] The existence of this guarantee "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention." [FN161] Alternatively, it could be said that the nonexistence of those effective remedies places a person in a state of defenselessness. [FN62]

[FN160] Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No.1, para. 91; Dos Erres Massacre v. Guatemala, supra note 12, para. 104, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 190.

[FN161] Cf. Case of Castillo Páez v. Perú. Merits. Judgment of November 3, 1997. Series C No. 34, para. 82; Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, para. 195, and Case of Usón Ramírez v. Venezuela Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2009. Series C No. 207, para. 128.

[FN162] Cf. Case of Palamara Iribarne v. Chile. Merits, Reparations, and Costs. Judgment of November 22, 2005. Series C No. 162, para. 183, and Case of Usón Ramírez v. Venezuela, supra note 161, para. 128.

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140. In order for the State to comply with the provisions of Article 25 of the Convention, it is not enough for the remedies to formally exist. It is crucial that the remedies be effective according to the terms of that provision. [FN163] This effectiveness means that, in addition to their formal existence, the remedies must produce results or responses to violations of recognized rights, whether those rights are recognized by the Convention, the Constitution, or domestic law. [FN164] The Court has reiterated that this obligation means that the remedy must be suitable for confronting the violation and effective in its application by the relevant authority. [FN165] In this sense, remedies that turn out to be illusory under the general conditions of the country or the particular circumstances of a specific case cannot be considered effective remedies. [FN166]

[FN163] Cf. Case of Ximenes Lopes v. Brazil. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139, para. 4; Case of Radilla Pacheco v. México, supra note 12, para. 196, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 202.[FN164] Cf. Case of Tribunal Constitucional v. Perú. Merits, Reparations, and Costs. Judgment of January 31, 2001. Series C No. 71, para. 90; Case of Usón Ramírez v. Venezuela, supra note 161, para. 129, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 202.
[FN165] Cf. Case of Acosta Calderón v. Ecuador. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129, para. 93; Case of Radilla Pacheco v. México supra note 161, para. 291, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 202.
[FN166] Cf. Habeas corpus in Emergency Situations (Arts. 27.2, 25 and 8 of the American Convention on Human Rights).Advisory Opinion OC-9/87 of October 6, 1987. Series to No. 9, para. 24; Case of Usón Ramírez v. Venezuela, supra note 161, para. 129, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 202..

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141. In addition, Article 25 of the Convention is intimately linked with the general obligations contained in articles 1(1) and 2 of the Convention, Articles that attribute protective functions to the domestic law of States Parties. From there it follows that the State has the responsibility to design and enshrine in law an effective remedy, as well as ensure the due application of said remedy by its judicial authorities. [FN167] In this sense, in the terms of Article 25 of the Convention, domestic law should ensure the due application of effective remedies before the competent authorities that entail the determination of the rights and obligations with the purpose of protecting all individuals under its jurisdiction against acts that violate their fundamental rights. [FN168]

[FN167] Cf. Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 237; Case of Usón Ramírez v. Venezuela, supra note 161, para. 130, and Case of Radilla Pacheco v. México, supra note 12, para. 295.

[FN168] Cf. Case of Suárez Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, para. 65; Case of Usón Ramírez v. Venezuela, supra note 161, para. 130, and Case of Radilla Pacheco v. México, supra note 12, para. 295.

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142. Regarding indigenous peoples, the Court has held that in order to guarantee their right to communal property, States must establish "an effective means with due process guarantees […] as a guarantee of their right to communal property." [FN169]

[FN169] Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 96, and Case of the Saramaka People, supra note 16, para. 178.

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143. The Court observes that the right to the reclamation of communal indigenous lands in Paraguay is guaranteed in law by the Constitution of the Republic. [FN170] The specific remedy for the replevin claim of said lands is provided for by Law No. 904/81, which establishes the Indigenous Communities Statute. In the specific case of the Xákmok Kásek Community, the applicable laws are the ones that are relevant to indigenous community settlements on privately owned land. [FN171]

[FN170] Cf. Article 64 of the Constitution of Paraguay (case file of annexes to the application, annex 7, folio 2437).
[FN171] Cf. Articles 22, 24, 25, and 26 of Law No. 904/81 Statute of the Indigenous Communities, supra note 64, folios 2405 to 2406.

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144. The Court recalls that in the cases of the Yakye Axa and Sawhoyamaxa indigenous communities, the Court found that the domestic administrative procedure for the reclamation of traditional lands was ineffective. [FN172] It therefore did not offer a real possibility for indigenous communities to recover their traditional lands should they be found under private ownership.

[FN172] Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 98, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 108.

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145. Considering that the instant case deals with the same remedy, as the State has not changed the law with regard to it, [FN173] the Court upholds its case law in the sense that the administrative procedure in question has the following structural problems that prevent it from being effective: a) restrictions to the means of expropriation means; b) the subjugation of an administrative procedure to the existence of a voluntary agreement between the parties; and c) the absence of technical or scientific inquests intended to find a definitive solution to the problem.

[FN173] Cf. Declaration of Rodrigo Villagra Carron, supra note 17.

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a) Restriction to the means of expropriation

146. In the first place, the reference to the Agrarian Statute represents a deficiency in the existing remedy, as it limits the possibilities for expropriating land that is being claimed in replevin by indigenous communities to cases involving land that is not being used to produce, [FN174] without giving consideration to particular aspects of the indigenous peoples, such as the special meaning that the land has for them. [FN175] As the witness Rodrigo Villagra indicated, "after 100 years of colonization, these lands will in some way be used." The Court recalls that the argument that the indigenous cannot under any circumstances claim traditional land when it is being used for production looks at the indigenous question exclusively from the agrarian perspective of land productivity, which is insufficient considering the unique characteristics of these peoples. [FN176]

[FN174] Cf. Article 94 of Law No. 1.863/02, Agrarian Statute (case file of annexes to the application, annex 7, folio 2472).

[FN175] According to the State, for the expropriation to be carried out without error, all of the legal requisites demanded must be complied with[, n]amely, the expropriation must entail an improductive large estate or social utility purposes. "Agrarian legislation in force in the country, considers the rentable use of the land, as well as the productivity of the land owner in order to determine the likelihood of expropriation." (Cf. Answer to the application, folios 386 and 399).

[FN176] Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 139.

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147. Despite the fact that the arguments in the foregoing paragraph have already been established in prior cases against Paraguay, in this case the State argued once again that it "has not been able to fully satisfy" the right to communal property because the land being claimed belongs to private property owners, is being used, and the State is therefore factually and legally prevented from transferring it to the Community.

148. With regard to this issue, the Inter-American Commission argued that the factual and legal impossibility that the State invokes in its defense is not an argument that frees it from its international responsibility. The representatives added that "the mercantilist perspective of the value of land, which views it only as a means of production in order to generate 'wealth,' is inadmissible and inapplicable when it comes to the indigenous question, as it assumes a limited vision of reality, upon failing to consider the possibility of a concept different from our 'western' way of seeing issues of indigenous rights and upon arguing that there is only one way to use and dispose of goods. This view would nullify the definition of Paraguay as a multicultural and multi-ethnic State, tearing down the rights of thousands of individuals who inhabit Paraguay and are enriched by its diversity."

149. The Court repeats once more that when it comes to land being used for production, it is the State's responsibility through the competent national bodies to determine and take into account the special relationship that the indigenous community has for the land it is claiming at the moment of deciding between the two rights. Otherwise, land replevin claim rights would make no sense and not offer the real possibility of recovering traditional lands. In limiting the effective fulfillment of the indigenous communities' right to property in this way, the State not only violates its obligations derived from the provisions of the Convention related to the right to property, but also fails to fulfill its responsibility regarding the guarantee of an effective remedy, constituting discriminatory treatment that produces social exclusion.

150. Additionally, the Court's attention is raised by the fact that the expropriation of the land being claimed would be denied based on its agrarian use and the alleged affect it would have on the company's production (supra para. 71 and 72) when of the 10,700 hectares being claimed, a total of 7,468 were taken out of production either because they were sold to another property owner (supra para. 69) or because they were found within the area declared as a private natural reserve that establishes serious restrictions on usage (supra paras. 80 and 82).

b) Subjugation of administrative procedure to the existence of a voluntary agreement between the parties

151. On the other hand, instead of calling for a legal or administrative ruling to resolve the conflict, a conflict that will always exist in issues of traditional indigenous lands under private ownership, a condition for the solution was that the parties reach a voluntary agreement. The INDI is only given the authority to negotiate the direct purchase of land from private property owners and to negotiate the resettlement of the members of indigenous communities. As the State explained, "as long as there is agreement among the indigenous, property holders and the State, it is perfectly possible to resolve problems related to lack of access to communal property."

152. On this issue, the expert witness Enrique Castillo stated in the Yakye Axa case that the administrative procedure for indigenous community land replevin claims has had positive results in cases where the landholders have agreed to negotiate a transfer of the land being claimed, but has been clearly ineffective in cases where negotiating with property owners is not viable. [FN177]

[FN177] Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 38(b).

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c) Lack of technical and scientific inquests toward finding a definitive solution to the problem.

153. Finally, the third problem that has been observed with the domestic administrative procedure is the absence of technical and scientific inquests that decisively contribute to a

definitive solution to the problem. In spite of the fact that the Paraguayan legislation requires the INDERT and the INDI to submit definitive solutions to the requests it receives, [FN178] during the more than 17 years that this procedure has lasted, the only technical inquests carried out by the administrative authorities were two visual inspections and an anthropological report that concluded that the land being claimed by the Community formed part of its traditional territory and was suitable for settlement (supra para. 103). However, that study was apparently not sufficient, as one could deduce from the simple fact that as of the present day the conflict over the Xákmok Kásek's communal property continues. Likewise, no other inquest intended to verify the suitability or unsuitability of other lands within the traditional territory was every carried out.

[FN178] Article 4 of Law No. 43/89. To which provisions of Law n° 1.372/88 are modified; "that it establish a regime for the regulation of the settlements of the indigenous community," on December 21, 1989 (case file of annexes to the application, appendix 2, tome 1, folio 252).

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154. Therefore, the Court repeats once again that the administrative land replevin claim procedure has been ineffective and has not demonstrated a real possibility of allowing the Xákmok Kásek community to recover its traditional land. Likewise, this lack of effective remedy for the recovery of indigenous land represents the State's lack of compliance with its duty, established in Article 2 of the Convention, to adjust its domestic laws to guarantee in practice the right to communal property.

2.3. Regarding the decree that declares part of the area being claimed in replevin as a wildlife refuge

155. The representatives argued that if there had been a mechanism for consultation that had to be followed in order for the land to be declared a private nature reserve, "the rights of the Xákmok Kásek Community would have been guaranteed, [since] it would have allowed for a debate on the private project." Also, they highlighted that almost two years since filing the motion of unconstitutionality against the decree that created the wildlife reserve on land that the Community was claiming (supra para. 83 and 84), the State "has [not] reached a definitive result on the matter."

156. The State indicated that it has submitted a request to revoke the nature reserve declaration and presented the ruling of the Environmental Secretariat recommending it be revoked (supra para. 81).

157. Regarding this, the Court finds that in order to guarantee the indigenous peoples' right to property, in keeping with Article 1(1) of the Convention, the State must ensure the effective participation of the members of the Community, in keeping with their customs and traditions, regarding any plans or decisions that might affect their traditional lands that can bring restrictions of use and enjoyment of said lands in order to prevent those plans or decisions from

denying an indigenous people from their subsistence. [FN179] This is in keeping with the provisions of Convention 169 of the ILO, to which Paraguay is a State Party.

[FN179] Cf. mutatis mutandis, Case of the Saramaka People v. Suriname, supra note 16, para. 129.

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158. In this case it is duly demonstrated that the indigenous' claim to lands that were declared as a natural reserve was not taken into account at the moment Decree No. 11.804 was issued and the technical justification was passed declaring the land a nature reserve; that the Community was not even informed about the plans to declare part of the Salazar Ranch a private nature reserve; and that said declaration was detrimental to the Community's way of life (supra paras. 80 and 82).

159. Separately, according to the evidence submitted by the State itself, the motion of unconstitutionality filed by the Community has been paralyzed since October 24, 2008, when "the deadline that the State Attorney General had to respond to the filing of the motion […] this being the last full action recorded." [FN180]

[FN180] Cf. Note S.J. I No. 211 of May 21, 2010, supra note 99, folio 4593.

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160. Moreover, the Court notes that that deadline was suspended due to the need to add the administrative case file related to the Community's land replevin claim. The case file was submitted to the Supreme Court by the representatives on December 14, 2009 (supra para. 84). [FN181] However, despite this and the favorable ruling on the partial challenge of the respective decree from the Legal Counsel of the Environmental Secretariat (supra para. 81), the procedure of unconstitutionality remains suspended. [FN182]

[FN181] Cf. Brief of the representatives of December 14, 2009, addressed to the Constitutional Chamber, supra note 98, folio 3435.

[FN182] Cf. Note S.J. I No. 211 of May 21, 2010, supra note 99, folio 4593.

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161. The Court finds that it would be difficult to consider a remedy whose processing has taken almost two years since the filing of a motion of unconstitutionality, in regard to the decree that will be in effect for five years as an effective one, evidence that the State authorities have noted acted with due diligence, taking into account that the State's own technical bodies have said that the aforementioned declaration of the nature reserve needs to be annulled because "it nullifies the existence of the indigenous' claim" and "threatens the right to communal property and traditional habitat recognized [in the] Constitution of the Republic." [FN183] Likewise, regarding the issuing of this decree, the President of the INDI said, "[i]t is sad that institutions always acted as if we shared estancos" and that the INDI, the institution in charge of applying

public policy on the indigenous, should have sent this background so that the other ministers of the [social cabinet] [would] be up to date on the claims made by the indigenous peoples." [FN184]

[FN183] Cf. Report of the Legal Aid to the Secretary of the Environment on December 24, 2009, supra note 90, folios 3383 and 3385.
[FN184] Cf. Declaration of Lida Acuña, supra note 17.

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162. Due to the aforementioned considerations, the Court finds that the motion of unconstitutionality filed in this case has not served the Community as an effective remedy for protecting their right to property over their communal lands.

2.3. Alleged failure to file legal motions

163. The State argued that the representatives have not made use of adequate remedies found within domestic law, since in cases like this one it is the courts who must "determine who has the right" between "those who invoke the right to ancestral property against those who have title and position and who are making economic use of the land."

164. The representatives indicated that "the methods described by the State correspond to procedures for acquiring land, not restoring indigenous territory." Moreover, as far as the possibility of turning to the courts to mount a challenge against an administrative resolution, they indicated that it "assumed the existence of an administrative resolution that could be challenged," and this was not the case for the Xákmok Kásek Community because the administrative resolutions were favorable to the Community. The problem was "their lack of effectiveness for obtaining the land."

165. The Commission highlighted that the State "did not indicate exactly which judicial remedy was the appropriate one in this case" and that contrary to the State's assertions, the Community "had claimed its land with all available measures."

166. The Court observes that Paraguay has not indicated which legal remedies are supposedly available and effective for guaranteeing the indigenous' right to communal land, nor has it submitted evidence of its existence in domestic law.

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

[Law 904/81] establishes a procedure within Administrative Law for claiming indigenous land that also removes the issue from Ordinary Jurisdiction, that is, the civil processes for replevin of property. In this way, the claims before the State of indigenous property are submitted and processed before administrative bodies […]. Within this legal framework and within the practice of the courts, claims of indigenous lands processed through the Ordinary Justice System do not exist." [FN185]

[FN185] Cf. Expert testimony of Enrique Castillo rendered in the Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5 (case file on the Merits, tome I, folio 296).

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168. Therefore, the Court concludes that Paraguay has not demonstrated the existence of another procedure that would be effective for offering a definitive solution to the land claim presented by the Xákmok Kásek Community.

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169. Considering the aforementioned, the Court finds that the arguments that the State has submitted to justify its lack of fulfillment of the victims' right to property have not been enough to relieve it of its international responsibility. In fact, certain actions and omissions by the State, far from contributing to the fulfillment of the Community's right to property, have obstructed and impeded it. Such actions and omissions include the declaration of a private nature reserve on part of the territory being claimed by the Community (supra para. 80), which not only obstructed them in carrying out their traditional activities on the land, but also blocked the land's expropriation and occupation under any circumstance (supra para. 82). It is of particular concern to the Court that the wildlife refuge could be a new and sophisticated method adopted by the owners of private property being claimed in replevin by indigenous communities to "block the original peoples' claim on the territory […] under the cover of the law and even invoking purposes as pure as the conservation of the environment." [FN186]

[FN186] Cf. Expert testimony of Rodolfo Stavenhagen, supra note 17, folio 640.

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170. Consequently, the Court concludes that the administrative procedure begun for claiming the 10,700 hectares that are the Community's most suitable traditional lands was not carried out with due diligence, was not processed in a reasonable amount of time, was ineffective, and did not offer the Community a real possibility for recovering its traditional lands. Likewise, the Paraguayan domestic authorities, especially in the Congress of the Republic, have considered the issue of indigenous territory exclusively from the prospective of land productivity and did not recognize the particularities of the Xákmok Kásek community and its special relationship with the territory being claimed. Finally, the State completely ignored the indigenous claim when it declared part of that traditional territory a private nature reserve; the motion of unconstitutionality filed to resolve the situation has been ineffective. All of this represents a violation of the right to communal property, to a fair trial, and to judicial protection, recognized respectively in articles 21(1), 8(1), and 25(1) of the Convention, in relation to articles 1(1) and 2 of the Convention, to the detriment of the Xákmok Kásek Community.

3. Impact on the Community's cultural identity do to the failure to restore their traditional land

171. The Commission indicated that when "restrictions to the indigenous population's access to its traditional lands were increased, [it resulted in] significant changes to the indigenous population's subsistence practices." It indicated that "several families from the Xákmok Kásek Community have decided to leave […] due to the difficult living conditions and to seek solutions to their needs."

172. The representatives argued that the Community is facing "collective cultural exhaustion" due to the violation of its right to property. They added that the lack of communal land deprives the Community "of the basic foundation for developing its culture, its spiritual life, its wholeness, and its economic survival." According to the representatives, there is a close relationship between the Community's collective spiritual practices and its link to ancestral lands. Additionally, they indicated that the lack of land has affected the initiation rites for men, women, and shamans.

173. The State has not issued any statement on this.

174. The culture of indigenous communities is part of a unique way of living, of being, seeing, and acting in the world, formed due their close relationship with their traditional lands and natural resources, not only because it is their main means of subsistence, but also because the relationship is an integral element in their cosmology, their religion, and therefore their cultural identity. [FN187]

[FN187] Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 135; Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 118, and Case of the Saramaka People v. Suriname, supra note 16, para. 120.

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175. When it comes to indigenous tribes or peoples, the traditional possession of their lands and the cultural patterns that arise from this close relationship form part of their identities. This identity has a unique character due to the collective understanding that they receive as a group, their cosmology, their collective imaginations, and the relationship with the land where they live their lives. [FN188]

[FN188] UN Committee on Economic, Social and Cultural Rights. General Comment No. 2, December 21, 2009. E/C.12/GC/21.

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176. For the members of the Xákmok Kásek Community, cultural features like their own language (Sanapaná and Enxet), their shaman rituals, their male and female initiation rituals, their ancestral shamanic knowledge, their ways of commemorating the dead, and their relationship with the land are essential for developing their cosmology and unique way of existing.

177. All these cultural features and practices of the Community have been affected by lack of access to their traditional lands. According to the testimony of the witness Rodrigo Villagra, the Community's displacement from its traditional territory has resulted in "the fact that the people cannot burry [their family members] in their chosen places, […] that [they] cannot return [to those places], that those places have also in some ways become unsanctified […]. [This] forced process means that none of that emotional relationship can exist, neither symbolically nor spiritually." [FN189]

[FN189] Declaration of Rodrigo Villagra Carron, supra note 17.

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178. Mr. Maximiliano Ruiz indicated that the religion and the culture have "been almost totally lost." Mr. Rodrigo Villagra explained the difficulties that the Community's members have in their male and female initiation rituals, [FN190] as well as the steady loss of shamanism. [FN191]

[FN190] The expert Rodrigo Villagra Carron, in the public hearing, addressed the makeup of the initiation rituals:

for example, in the male initiation, Shaman or the Cayá would commence to sing all night and invites people. First, this must be a good season, a season where the people can collect sufficient fruit and food to invite people to the grand festivities. In this process of initiation, the youth are subject to trials of certain plants, which means they could faint […] and they are kept awake by a shaman or other principal shamans, which help them dominate the power, the knowledge that is in the plants, which will then make the plant owner of the knowledge which will help cure. […] [I]t is like a social festivity were […] a shaman sings, and at the same time, the women and men dance […]. The men wear feathers with specific drawings, and several villages come. The party allowed for a large social integration which reduced conflict. […] [T]here were sports competitions, as well as table games […] sports games, specific dances, which not only allowed for social integration with other villages, but also of gender relations between men and women.

[FN191] In regard to shaman practices, the expert Villagra Carron stated that:

the reality is that today there are far less shamans. [F]or example, in the ["Huanca"] ritual, the ritual in which people come to obtain said knowledge, […] this implies having access to specific places, were plants are located, or where the studies are carried out, far from people, because it is a dangerous study given the implications for the person being initiated. [For these reasons], there are not more [initated] shamans. […] [T]he last shamans are dying.

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179. Another feature of the Community's cultural integrity is their language, a symbolic representation of identity and culture. During the course of the public hearing, Mr. Maximiliano Ruiz stated that on the Salazar Ranch, they only spoke Spanish and were only taught to speak in Spanish or Guaraní, not in their own language. Likewise, upon being asked by the state during the hearing if she spoke the Sanapaná language, Mrs. Antonia Ramírez said that she did, but that her children and grandchildren did not speak Sanapaná, but rather Guaraní.

180. Likewise, the lack of access to their traditional lands and the limitations put in place by private property owners had an impact on the Community's subsistence practices. Hunting, fishing, and gathering became constantly more difficult to the point that the indigenous decided to leave the Salazar Ranch and relocate in "25 de Febrero" or in other places, fragmenting part of the Community (supra para. 75 to 77, 79 and 98).

181. All these impacts increased with the passage of time and with the Community members' perception that their claims were not being addressed.

182. In sum, this Court observes that the Xákmok Kásek Community has suffered several effects to its cultural identity that are fundamentally results of the Community's lack of territory and the natural resources that come with it, which represents a violation of Article 21(1) of the Convention in relation with Article 1(1).. These effects are one more indication of the importance of land for the indigenous and of the insufficiency of the view that land as merely "for production" when considering the conflict of interests between the indigenous and owners of private lands being claimed in replevin.

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

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

184. The representatives argued that "The State [did] not […] change the conditions that aggravate the difficulties that [C]ommunity members face in accessing a dignified existence, given the Community's situation of particular vulnerability." For the representatives, the "failure to restore the ancestral lands and traditional habitat of the Community […] has made it impossible for its members to hunt, fish, and gather on the lands and the habitat being claimed, thereby affecting their cultural and religious identity and placing them in a situation of extreme vulnerability." Finally, they requested that the State be assigned international responsibility for the deaths of various members of the Community.

185. The State maintained that it has offered nutritional and sanitary assistance. It also indicated that "there is no relationship between the land and physical survival […] as a cause of the alleged lack of preservation of the right to life." It added that "at no time did agents of the State force the indigenous to leave their lands. On the contrary, they have made considerable efforts to find other places [for the Community] within the ancestral territory." It emphasized that it was not possible to assign responsibility for the aforementioned deaths.

186. The Court has indicated that the right to life is a fundamental human right, whose full enjoyment is a prerequisite for the enjoyment of all other human rights. [FN192] Should this right be disrespected, all other rights are meaningless. Therefore, restrictions on this right are not admissible. [FN193]

[FN192] Cf. Case of the ”Street Children” (Villagrán Morales and et al.) v. Guatemala. Merits, supra para. 167, para. 144; Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 5, 2006, Series C. No. 150, para. 63, and Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 166, para. 78.

[FN193] Cf. Case of Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Merits, supra note 167, para. 144; Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra note 192, para. 63, and Case of Zambrano Vélez et al. v. Ecuador, supra note 192, para. 78.

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187. For this reason, States have the obligation to guarantee the creation of the conditions that are required to prevent violations of this inalienable right and, in particular, the duty to prevent its agents from threatening that right. The observance of Article 4 with relation to Article 1(1) of the Convention not only assumes that no person should be arbitrarily deprived of life (a negative obligation), but that in addition, it requires States to take all appropriate measures to protect and preserve the right to life (a positive obligation), [FN194] in keeping with the duty to guarantee the full and free exercise of the rights of all individuals under their jurisdiction, without discrimination. [FN195]

[FN194] Cf. Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Merits, supra note 167 para. 144; Case of Kawas Fernández v. Honduras, supra note 14, para. 74, and Case of González et al. (“Cotton Field”) v. México, supra note 14 para. 245.

[FN195] Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of January 31, 2006. Series C No. 140, para. 120; Case of Kawas Fernández v. Honduras, supra note 14 para. 74, and Case of González et al. (“Cotton Field”) v. México, supra note 14, para. 245.

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188. The Court has been emphatic in that a State cannot be responsible for every situation that puts the right to life at risk. Taking into account the difficulties presented by the planning and adoption of public policy and the operational choices that must be made based on priorities and resources, the State’s positive obligations must be interpreted in such a way that a disproportionate burden is not placed on the authorities. [FN196] In order for this positive obligation to be applicable, it must be established that at the moment the facts occurred, the authorities knew or should have known of the existence of a situation of real and immediate risk to the life of an individual or a particular group of individuals and that the authorities did not take the measures necessary within the scope of their duties that, reasonably speaking, one could expect to include preventing or avoiding those risks. [FN197]

[FN196] Cf. Case of the Pueblo Bello Massacre, supra note 195, para. 124, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 155.

[FN197] Cf. Case of the Pueblo Bello Massacre, supra note 195, paras. 123 and 124, and Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 155.

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189. In the present case, on June 11, 1991, [FN198] and on September 22, 1992, [FN199] INDI officials confirmed the state of vulnerability and necessity in which the members of the Community were found because they did not have title to their land. On November 11, 1993, the indigenous leaders repeated to the IBR that their request to claim land was a priority given that "they [were] living in very difficult, precarious conditions and [did] not know how long they [could] hold up." [FN200].

[FN198] Cf. Handwritten record of procedures carried out in the on-site inspection of June 11, 1991, of the Xákmok Kásek Community in relation with the land being claimed en (case file of annexes to the application, appendix 3, tome II, folio 790), and report of on-site visit carried out by Pastor Cabanellas, supra note 62, folios 791 to 794).

[FN199] Cf. Extension of On Site Visit of September 22, 1992, supra note 62, folios 883 and 884).

[FN200] Communication of the Community addressed tot he President of the IBR on November 11, 1993, supra note 65 (case file of annexes to the application, annex 5, folio 2351).

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190. The States Attorney on Labor for the First Circuit carried out an inspection of the Salazar, Cora-í, and Maroma Ranch. This States Attorney confirmed "the precarious situation in which [the Community] lives […] on not having the minimum standards as far as hygiene, clothing, and space per number of inhabitants. Also, [the] houses […] do not have insulated walls or tile roofs and were built in such a way that they threatened the physical wellbeing and the health of the indigenous; the floors [were] of earth." [FN201] Likewise, the report indicated "that they received rations […] but very few." [FN202] During that visit, irregularities in terms of the labor exploitation suffered by the members of the Community were verified.

[FN201] Cf. Substantial Report by Labor Office of the Primer Turno, no date (case file of annexes to the application, appendix 3, tome IV, folio 1808).

[FN202] Cf. Substantial Report by Labor Office of the Primer Turno, no date, supra note 201, folio 1810.

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191. On April 17, 2009, the Office of the President of the Republic and the Ministry of Education and Culture, issued Decree No. 1830. [FN203] The decree declared a state of emergency in two indigenous communities, [FN204] one of them the Xákmok Kásek Community. The pertinent part of Decree No. 1830 states that:

Due to situations beyond their control, these communities are prohibited access to the traditional means of subsistence within the territory being claimed as part of their ancestral territories that are tied to their colonial identity […] [For this reason] the normal living activities of said

communities are made difficult […] due to the lack of access to minimum and indispensible food and medical care. This is a concern for the Government that demands an urgent response […].
[Consequently, it ruled that]
The [INDI], together with the ministries of the interior and public health and social wellbeing, will take the necessary actions to immediately provide medical care and food to the families who form part of [the Xákmok Kásek Community] during the time that the legal and administrative procedures regarding the legalization of the land being claimed as part of the Community's traditional habitat last. [FN205]

[FN203] Cf. Decree No. 1830 on April 17, 2009 (case file of annexes to the answer to the application, annex 7, folios 3643 to 3646).
[FN204] The referenced Decree No. 1830 of April 17, 2009, supra note 203, also refers to the Kelyenmagategma Community of the Enxet and Y´ara Marantu villages.
[FN205] Cf. Decree No. 1830, supra note 203.

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192. In sum, in this case the domestic authorities knew of the existence of a situation of real and immediate risk to the members of the Community. Consequently, they suggested certain actions of prevention that obliged the State – pursuant to the American Convention (Article 4, with relation to Article 1[1]) and its domestic law (Decree No. 1830) – to take the measures one could reasonably expect were necessary to prevent this risk.

193. In keeping with the foregoing, the Court must weigh the measures taken by the State to comply with its duty to guarantee the right to life of the members of the Xákmok Kásek Community. In doing this, the Court will examine the alleged violation of this right in two parts: 1) the right to a dignified existence, and 2) the State's alleged international responsibility for the deaths.

1. The right to a dignified existence

1.1. Access to and quality of water

194. Pursuant to that stated by Mr. Pablo Balmaceda since 2003, the members of the Community did not have water distribution services. [FN206] Starting in April 2009, [FN207] thanks to Decree No. 1830, the State supplied water to the members of the Community settled in "25 de Febrero" in the following quantities: 10,000 liters on April 23, 2009, [FN208] 20,000 liters on July 3, 2009, [FN209] 14,000 liters on August 14, 2009, [FN210] and 20,000 liters on August 10, 2009. [FN211] The State indicated that on February 5, 2009, it had given a reservoir of 6,000 m3 to the Community. [FN212]

[FN206] Cf. Medical-sanitary report of the Enxet of Xákmok Kásek Community, carried out by Dr. Pablo Balmaceda during 2002 - 2003 (case file of annexes to the application, annex 4, folio 2305).

[FN207] Cf. Water distribution table, Secretary of National Emergency (case file of annexes to the answer to the application, annex 1.7, folios 3378 to 3381).
[FN208] Cf. Water distribution table, Secretary of National Emergency , supra note 207, folio 3378.
[FN209] Cf. Water distribution table, Secretary of National Emergency , supra note 207, folio 3380.
[FN210] Cf. Water distribution table, Secretary of National Emergency , supra note 207, folio 3381.
[FN211] Cf. Water distribution table, Secretary of National Emergency , supra note 207, folio 3379.
[FN212] Cf. Act of February 5, 2005 (case file of annexes offered by the State in the public hearing, annex XIV, folios 3959 to 3962).
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195. The Court observes that the water supplied by the State during the months of May to August 2009 was no more than 2.17 liters per person per day. [FN213] In this regard, according to international standards, most people need a minimum of 7.5 liters per day per person in order to meet all their basic needs, which included food and hygiene, including under extreme conditions. [FN214] Also according to international standards, the quality of the water must be above a tolerable level of risk. Under these standards, the State has not demonstrated that it is supplying water in quantities sufficient to meet the minimum requirements. Furthermore, the State has not submitted up to date evidence on provision of water during 2010, nor has it demonstrated that the Community has access to safe sources of water on the "25 de Febrero" settlement where it is currently located. On the contrary, in testimony given during the public hearing, Community members indicated with regard to the provision of water that "currently if it's requested, it is not supplied. Sometimes it takes a long time, sometimes there is no more water," and that "[they] suffer a lot during droughts, because where they move[d], in '25 de Febrero' there is no reservoir, there are no lakes, nothing, just forest and that's all." [FN215] They indicated that during droughts, they go to a reservoir located seven kilometers away. [FN216]

[FN213] To obtain this data, the Court accounted for: (total amount of liters of water given by the State / number of members of the Community who lived in February 25) =N1; N1 / period of time in which said assistance was offered on calendar days = quantity of liters of water per person per day.
[FN214] Committee on Economic, Social, and Cultural Rights, UN. General Comment No. 15. Right to Water (Articles 11 and 12 of the Protocol), (29º Period of Sessions 2002), U.N. Doc. HRI/GEN/1/Rev.7 at 117 (2002). para. 12. See J. Bartram and G. Howard, "Domestic water quantity, service level and health" WHO, 2002. WHO/SDE/WSH/03.02: "Based on estimates of requirements of lactating women who engage in moderate physical activity in above-average temperatures, a minimum of 7.5 liters per capita per day will meet the requirements of most people under most conditions. This water needs to be of a quality that represents a tolerable level of risk." See also: P.H. Gleick, (1996) "Basic water requirements for human activities: meeting basic needs", Water International, 21, pp. 83-92.
[FN215] Cf. Declaration of Maximiliano Ruíz, supra note 28.

[FN216] Cf. Declaration of Maximiliano Ruíz, supra note 28.

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196. The Court therefore considers that the actions that the State has taken following the issuing of Decree No. 1830 have not been sufficient for providing the members of the Community with water of sufficient quantities and adequate quality. This has exposed the members of the Community to risks and disease.

1.2. Diet

197. In regard to access to food, the members of the Community suffered, " serious restrictions […] on behalf of those with title to [the] lands [being claimed in replevin]. One was that they did not have their own hacienda (cattle) as this was prohibited by the patron, [and] they were prohibited from cultivating [and hunting]" [FN217] (supra paras. 74 and 75). Therefore, their sources of food were limited. [FN218] Similarly, the diet was imited and poor. [FN219] On the other hand, if the members of the Community had money, they could purchase food at the Ranch or at the food trucks on the Traschaco route. Nevertheless, these options depended on their limited monetary means. [FN220]

[FN217] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1740. See also: Declaration of Tomás Dermott, supra note 24, folio 597; 63, folio 585; Declaration of Gerardo Larrosa, supra note 75, folio 605, and Declaration of Maximiliano Ruíz, supra note 28.
[FN218] Cf. Health Evaluation regarding four Enxet Communities, May and June 2007 (annexes to the brief of pleadings and motions, tome VI, folio 2650).
[FN219] Generally, composed and characterized by a cactus of edible fruit, some small gardens where papaya and Karanda'y palm were grown, and fishing was done in the ponds. Cf. Health evaluation of the four Enxet Communities, supra note 218, folio 2642.
[FN220] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2642.

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198. The Court recognizes that in compliance with Decree No. 1830, the State carried out at least eight food deliveries [FN221] between the months of May and November of 2009, as well as between February and March of 2010, and that in each one of those deliveries it supplied kits to Community members with food rations. [FN222] Nevertheless, the Court must weigh the accessibility, availability, and sustainability [FN223] of the food given to the members of the Community and determine if the assistance provided satisfies the basic requirements of an adequate diet. [FN224]

[FN221] Cf. Note of the Secretary of National Emergency (SEN-SE No. 1467/09) on December 23, 2009 (case file of annexes to the answer to the application, tome VIII, annex 1.7, folios 3332 and 3333, and Acts of provision of goods given by the Secretary of National Emergency (case file of annexes to la answer to the application, tome VIII, folios 3349, 3354, 3362, 3364, 3369, 3374).

[FN222] Cf. Acts and tables of assistance for those affected, by the Secretary of National Emergency of the Presidency of the Republic (case file of annexes to the answer to the application, folios 3322 to 3377) and (case file of annexes to the written final arguments of the State, folios 4284 to 4303).
[FN223] Cf. UN Committee on Economic, Social and Cultural Rights. General Comment No. 12, May 12, 1999, E/C.12/1999/5. Paras. 6 to 8.
[FN224] It is worth mention, that the Committee on Economic, Social, and Cultural Rights "[t]he right to adequate nutrition should not be interpreted […] in a narrow or restrictive sense equating it to a combination of calories, proteins, and more, specific nutritional elements." (General Comment No. 12, supra note 223, para. 6).
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199. In this regard, the State indicated that it "planned for [a] 47-kilogram food kit to last a month, supplying one kit per family." [FN225] However, the delivery of the food is inconsistent, the food rations supplied have nutritional deficiencies, [FN226] and the majority of the members of the Community eat only one meal per day, basically rice or noodles. Only rarely is that complemented "with fruits, potatoes, fish, or meat from hunting." [FN227] On this aspect the expert opinion is conclusive as far as the health of the Community. It revealed that in 2007, "17.9% of the sample (children between 2 and 10 years of age) showed a certain degree of being severely underweight." [FN228] The expert witness Pablo Balmaceda declared that the malnutrition manifests itself "by short height." [FN229] In the same sense, the victims declared that although it is true that the State has supplied some food, "the food is not received on a regular basis" [FN230] and they indicated that "the food is not enough" and that "there is little food." [FN231]

[FN225] Cf. Note of the Secretary of National Emergency (SEN-SE No. 1467/09), supra note 221.
[FN226] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2650, and Expert testimony of Pablo Balmaceda rendered at the public hearing held on April 14, 2010, during the XLI Extraordinary Period of Sessions in the city of Lima, Republic of Peru.
[FN227] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folios 2650 to 2651.
[FN228] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2650.
[FN229] Cf. Expert testimony of Pablo Balmaceda, supra note 226.
[FN230] Cf. Declaration of Antonia Ramírez, supra note 28.
[FN231] Cf. Declaration of Gerardo Larrosa, supra note 75, folio 607, and Declaration of Maximiliano Ruíz, supra note 28.
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200. The Court notes that the total amount of food provided between May 12, 2009, and March 4, 2010, was 23,554 kilograms. [FN232] Based on this information, one can deduce that the quantity of food provided by the State is approximately 0.29kg per person per day, taking into account the census provided. [FN233] The Court therefore finds that the amount of food provided is insufficient for even remotely satisfying the basic daily dietary needs of any individual. [FN234]

[FN232] Cf. Acts and tables of assistance for those affected, by the Secretary of National Emergency of the Presidency of the Republic, supra note 222 and annexes to the final written arguments case file of annexes to the final written arguments, folios 4284 to 4303).
[FN233] To obtain this data, the following formula was applied: 23.554 (total of kilos given pursuant to the tables of assistance for those affected, of the Secretary of National Emergency of the Presidency of the Republic) / 268 (number of members in the Community) = 87.89 Kg per person. This result 87.89 kg / 300 days, the period of time in which the State offered assistance = 0.29 Kg per day per person during this time.
[FN234] The Committee on Economic, Social, and Cultural Rights considers that the basic right adequate food is: "The availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture" (UN Committee on Economic, Social and Cultural Rights. General Comment No. 12, supra note 223, para. 8).

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201. The nutritional inadequacy of the food provided to the members of the Community has affected the growth of the children, as "the minimum prevalence of growth atrophy was 32.2% […], more than double what would be expected for the population in question (15.9%)." [FN235] Likewise, the Community's health official indicated that at least "90% of the children are malnourished." [FN236]

[FN235] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2649.
[FN236] Cf. Declaration of Gerardo Larrosa, supra note 75, folio 606.

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202. Consequently, in spite of what the State has indicated, there is no evidence that the assistance provided has met the nutritional necessities that existed according to Decree No. 1830 (supra para. 191).

1.3. Health

203. As far as access to healthcare services, the Commission argued that the children "suffer from malnutrition" and that the members of the Community in general suffer from illnesses like tuberculosis, diarrhea, Chagas disease, and other occasional epidemics. Likewise, it indicated that the Community has not had adequate medical care and the children do not receive the necessary vaccines. The representatives agreed with the Commission's allegations and added that the new settlement, known as "25 de Febrero," is located 75 kilometers from the closest health center, a center which itself is "deficient and does not have a vehicle that could, eventually, get to the [C]ommunity." As a result, "the seriously ill must be attended to at the Hospital in the city of Limpio, which is more than 400km from the [C]ommunity's settlement and whose bus fare is beyond the means of the Community members."

204. The State commented that the "complaints of the leaders of the Xákmok Kásek regarding medicine and medical attention have been attended to" and indicated that public healthcare in Paraguay is free. The State reported that in October 2009, it hired an Indigenous Healthcare Promoter to offer services to the Community, and that the Promoter was assigned a Family Health Unit. [FN237] Additionally, the State said that it had given healthcare assistance to the Community in its habitat and that the General Directorate of the Vulnerable has given medical assistance and designed a healthcare policy to be implemented.

[FN237] Cf. Report of December 16, 2009, signed by María Filomena Bejarano, General Director of the General Directorate of Assistene to Vulnerable Groups (case file of annexes to the answer to the application, annex 1(4), folios 3307 to 3308).

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205. The case file indicates that prior to Decree No. 1830, the members of the Community had "receiv[ed] […] minimal healthcare assistance" [FN238] and that the healthcare centers were very far apart and limited. In addition, for years "no medical care or children's vaccination assistance [was] receive[d]." [FN239] Regarding access to healthcare services, "only those who worked on the ranches [could] access the [Healthcare Provider Institution], and even [then], the use of this insurance has not been possible because the cards are not delivered or [the Community members] do not have the resources to go stay in the Hospital de Loma Plata, which is the closest one." [FN240] Also, "a sanitary census of the National Health Services – SENASA (1993) […] confirmed that a large percentage of the Xákmok Kásek population carried the Chagas disease virus." [FN241]

[FN238] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.
[FN239] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.
[FN240] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.
[FN241] Cf. Anthropological Report of the CEADUC, supra note 55, folio 1742.

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206. In regard to the current conditions, the Court has noted that an indigenous community health agent was hired on November 2, 2009. [FN242] Also, following the issue of Decree No. 1830 on April 17, 2009, the State has carried out a total of 9 healthcare days with the Community. [FN243] During those visits, 474 consultations were done, with treatment and medication provided in some cases. [FN244] Likewise, the State submitted documentation on a construction project to build a Medical Dispensary for the Community. The dispensary has an estimated cost of Gs. 120,000,000 (one hundred and 20 million guaranís). [FN245]

[FN242] Cf. Communication MSPyBS/DGAPS No. 865/2009 of December 18, 2009 (case file of annexes to the answer to the application, annex 1.4, folio 3306).
[FN243] Cf. Report of the General Directorate of Assistene to Vulnerable Groups of December 16, 2009, supra note 237.

[FN244] Cf. Information presented by the Ministry of Public Health and Social Wellbeing on December 16, 2009, that contains the information on medical attention provided between May 1, 2009 to November 4, 2009, and the data recorded in the lists sent to the Office of Assistance to Vulnerable Groups of the Ministry of Public Health and Wellbeing (case file of annexes to the answer to the application, tome VIII, annex 4, folios 3292 to 3305), and tables on attention provided in January and February 2010 (case file of annexes to the written final arguments of the State, folios 4423 to 4435).
[FN245] Cf. Report describing "medical clinic – for indigenous settlement of the XV sanitary region of President Hayes" (case file of annexes to the answer to the application, annex 4, folios 3315 to 3321).
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207. However, according to Marcelino Lopez, a Community leader, and Gerardo Larrosa, the Community's healthcare promoter, the healthcare situation is very critical. They indicated that "there are indigenous people who die because of a lack of transportation [or] medication" [FN246] and from their perspective, "the majority of the indigenous people affected are because of the […] government." [FN247] Specifically, Gerardo Larrosa indicated that "the assistance from the medical teams almost never comes, except on occasion," and "[t]here is no stock of basic medications available for primary care, not even an adequate place for storage." [FN248]

[FN246] Declaration of Marcelino López, supra note 63, folio 587.
[FN247] Declaration of Marcelino López, supra note 63, folio 587.
[FN248] Declaration of Gerardo Larrosa, supra note 75, folio 606.
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208. The Court recognizes the progress made by the State. However, the measures taken subsequent to Decree No. 1830 in 2009 are characterized as temporary and transitory. In addition, the State has not guaranteed the Community members' physical or geographical accessibility to a healthcare establishment. Also, according to the evidence submitted, there is no indication that positive actions were taken to guarantee that the medical goods and services provided would be accepted, nor were there any educational measures taken on matters of healthcare that were respectful of traditional uses and customs.

1.4. Education

209. As far as access to educational services, the Commission said that the Inter-American Commission's Rapporteurship on the Rights of Indigenous Peoples "noted the precarious conditions in a school where around 60 boys and girls of the Community attend classes." He indicated that the "school has a floor space of approximately 25 [m2] without a roof that is adequate for providing protection from the rain. There is no floor and no desks, chairs, or educational materials." Also, the Rapporteur indicated that "the boys and girls are absent from school more and more due to lack of food and water." The representatives agreed with the facts alleged by the Commission and added that "the teaching is done in Guaraní and Spanish, not Sanapaná or Enxet, which are the languages of the Community's members.

210. The State indicated that it had delivered "teaching materials and school lunches [through the] Ministry of Education," and that it has a "plan to build a school in the center of the Community once the land titling procedures are finished." It maintained that it carried out a "building reinforcement" at the Dora Kent de Eaton Elementary School. [FN249] Likewise, according to the body of evidence, on October 26, 2009, it carried out a teacher training day for teachers who are working in the schools of various Communities, Xákmok Kásek being one among them. The National Directorship of Indigenous School Education concluded that "the teachers have a great need to continue with their training, and to work on the recovery of the language and the revitalization of the culture." [FN250]

[FN249] The Study noted that it had administered 23 individual months per student, 23 desks per student, 23 chairs per student, a desk for the professor, a chair for the professor, and a cabinet (case file of annexes to the answer to the application, tome VIII, annex 1(6), folio 3323).
[FN250] Cf. Report of October 26, 2009, to the General Directorate of Indigenous School Education regarding the Indigenous Teacher Training Day with a report at the Inter-American Court of Human Rights (case file of annexes to the answer to the petition, annex 1(6), folios 3324 to 3328).

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211. According to international standards, States have the duty to guarantee accessibility and sustainability to free basic education. [FN251] Particularly when it comes to satisfying the right to basic education in the heart of indigenous communities, the State must provide this right from an ethno-educational perspective. [FN252] This means taking positive measures to make the education culturally acceptable from the perspective of a unique ethnicity. [FN253]

[FN251] See Article 13(3)(a) of the Protocol of San Salvador, on Economic, Social, and Cultural Rights, which states that "primary education should be obligatory and accessible to at no expense."
[FN252] Cf. ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, Article 27(1).
[FN253] Cf. UN Committee on Economic, Social and Cultural Rights. General Comment No. 13, December 8, 1999, E/C.12/1999/10., para. 50

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212. In the instant case, Mr. Maximiliano Ruiz, a teacher in the Community, indicated that there are "85 students […] the majority of whom [belong to the] Sanapaná [ethnicity]. However, the Education Ministry's own educational program is taught." He indicated that there was truancy due to the current situation. Although Mr. Marcelino Ruiz recognized that the State gives "school lunches," he indicated that the State does so sporadically and not monthly.

213. Of the evidence collected, the Court observes that although some conditions with regard to the State's provision of education have improved, there are not enough facilities for the education of children. The State itself provided a number of photos where it is observed that the

classes are given under a roof with no walls in the open air. [FN254] Likewise, the State did not mention any kind of program to prevent truancy.

[FN254] Cf. Photographs of the Primary School No. 11531 (case file of annexes to the State's final arguments, tome X, folio 4415).

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214. In sum, this Court highlights that the State assistance provided due to Decree No. 1830, issued April 17, 2009, has not been enough to overcome the condition of acute vulnerability that the Decree indicated the Xákmok Kásek Community was experiencing.

215. In contrast to what the State argues, the Community's situation of social exclusion is closely tied to its loss of its traditional land. Because the Community members are not able to supply and support themselves using their ancestral traditions, they have to depend almost exclusively on the State's actions and are forced to live not just in a way that is different from their cultural guidelines, but in misery. As Marcelino López, a Community leader, said, "If we have our land, everything else will improve as well, and overall we will be able to live openly as indigenous people. Otherwise, it will be very difficult." [FN255]

[FN255] Declaration of Marcelino López, supra note 63, folio 585.

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216. It should be taken into account on this point that, as the United Nations Committee on Economic, Social and Cultural Rights said, "in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to effectively enjoy their own culture." [FN256]

[FN256] UN Committee on Economic, Social and Cultural Rights. General Comment No. 21, December 21, 2009, E/C.12/GC/21, para. 38.

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217. Consequently, the Court declares that the State has not provided the basic assistance necessary for protecting a particular group of individuals' right to a dignified existence when faced with these conditions of a special, real, and immediate risk, which constitutes a violation of Article 4(1) of the Convention, in relation to Article 1(1) of the Convention, to the detriment of all the members of the Xákmok Kásek Community.

2. The deaths that have occurred in the Community

218. The representatives requested that the State be declared internationally responsible for the deaths of several members of the Community. In contrast, the Commission indicated that "evidence is not available for determining if each one of the deaths described by the representatives is indirectly related to the possibility of the Xákmok Kásek Community being able to access its ancestral territory." The State objected that it could not be declared internationally responsible and stated its opposition to the representatives' allegations.

219. The Commission presented three lists in its application that contain the names of various individuals from the Community who have passed away. The representatives also presented a list that contained the names of 44 individuals, of which 38 were also found on the list indicated by the Commission. [FN257] They noted that "there could have been more dead that the ones presented by the [Commission]" or even than the ones they themselves presented.

[FN257] Benigno Corrientes Domínguez, who was said to have died in 1991 at the age of one, does not appear in the list presented by the representatives in the brief of pleadings and motions, but does appear in the application and in the census of 2007 (annexes to the application, folio 2394).

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220. As far as the evidence demonstrating the probable cause of death of those individuals, along with date and information on prior medical care, the State said that the expert opinion of Mr. Pablo Balmaceda "lacks the seriousness and foundation necessary in a study of this importance," adding that "it does not include the required documentary support, since it neither refers to nor includes death certificates, autopsy protocols, or any other pertinent document that would provide evidence of a death and the causes of that death."

221. Upon giving his testimony, Mr. Pablo Balmaceda said that it was difficult "to collect the information regarding the deaths, [since] there are no places to register newborns, much less the dead, so only in the memory of the Community is where the recollections of these individuals exists." The expert also added that his report corroborated "the epidemiological information that exists, that is maintained in Paraguay, in which the indigenous population has the worst health indicators." Finally, the representatives submitted two death certificates [FN258], which were consistent with the information provided by them previously.

[FN258] Cf. Death Certificate of Felipa Quintana of May 13, 2008, case of death: septic shock (case file on the Merits, tome III, folio 1140), and death certificate of Sara Esther Gonzáles López of August 25, 2008, where cause of death was: gastroenteritis, infectious dehydration and convulsions (case file on the Merits, tome III, folio 1142).

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222. Considering the absence of documentary evidence contradicting the evidence procured by the procedure before this Court – that is to say, the expert witness testimony of Mr. Balmaceda, the medical-sanitary report on the Community prepared in 2002 and 2003, [FN259] and the two death certificates submitted by the representatives – and taking into account the proven lack of

State healthcare (supra paras. 205, 207, and 208), as well as the nonexistence of State registries to keep track of that information (infra paras. 252 and 253), which are the responsibility of the State, the Court will consider the facts alleged by the representatives to be true and supported in the report prepared by the expert witness Pablo Balmaceda. [FN260] The Court emphasizes that these facts have not been challenged by the State in any strict sense.

[FN259] Expert testimony of Pablo Balmaceda, supra note 226, and Medical-sanitary report of the Xakmok Kasek Community, supra note 206.
[FN260] Cf. Medical-sanitary report of the Xakmok Kasek Community, supra note 206.

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223. The Court observes that the lists presented by the Commission and the representatives mention the deaths of Community members that happened before Paraguay recognized the jurisdiction of the Court, which is to say, before March 11, 1993. As such, the Court does not have jurisdiction to analyze the following cases: Eulalio Dermott Alberto (NN), Avalos (twin 1), (NN) Avalos (twin 2), whom died in 1981; Adolfino López Dermott and Lorenza López Segundo, whom died in 1983; Narciso Larrosa Dermott (m), who died in 1984; Nelly Gonzáles Torres (f), who died in 1987; Élida Dermott Ramírez (f), Benigno Corrientes Domínguez (m), and Herminio Corrientes Domínguez (m), whom died in 1991; (NN) González Dermott (m) and Betina Avalos (f) or Betina Rios Torres, whom died in 1992; Esteban López Dermott (m), who died in February 1993; Luisa Ramírez (f) and Rufino Pérez (m), whom died in 1993. [FN261]

[FN261] The Court does not have the elements to determine if the death certificate was issued subsequent to acknowledgment of the Court's contentious jurisdiction.

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224. Also, the Court recalls that with regard to the facts that are the subject of this proceeding, it is not possible for the representatives to allege new facts that are different from the ones submitted in the application without being subject to those that allow for explanation, clarification, or rejection of the facts that have been mentioned previously. It is different in the case of the supervening facts, which can be presented by any of the parties at any point in the proceeding before the judgment is handed down. [FN262]

[FN262] Cf. Case of the "Five Pensioners" v. Perú, Merits, Reparations, and Costs. Judgment of February 28, 2003, Series C No. 98, para. 154; Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 67, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 49.

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225. Of the list of deaths indicated by the representatives, the Court notes that the deaths of Luisa Ramírez Larrosa, who died in January 2009 at 62 years of age, without a known cause of death and without knowledge of whether medical attention was received, as well as Rosa Larrosa Domínguez, who died in October 2009 at 100 years of age of natural death and without

knowledge of whether she received medical attention, took place subsequent to the presentation of the application by the Commission, in view of which they will not be examined by the Court as they constitute supervening facts.

226. In keeping with the aforementioned, the Court has jurisdiction to examine 28 deaths that took place during its jurisdiction, that is, the following cases:

No.	Name and Sex	Age at time of death	Probable date of death	presumed cause of death	Information on Medical Care (MC)
1	Luisa Ramírez Larrosa (f)	62 years	01-2009	No information	No information
2	Rosa Larrosa Domínguez (f)	100 years	10-2009	Natural death	No information
3	Sara Gonzáles López (f)	1 year and 5 months	25-07-2008	Gastroenteritis – Dehydration	Did not receive MC
4	Felipa Quintana (f)	64 years	13 – 05 - 2008	Septic shock	Did receive MC
5	Gilberto Dermott Quintana (m)	46 years	2007	Tuberculosis	Did receive medical care from a volunteer nurse
6	(NN) Jonás Avalos (m) or Jonás Rios Torres	No information	2007	No information	No information
7	Rosa Dermott (f)	80 years	02-10-2007	Stopped eating	Did not receive MC
8	Remigia Ruiz (f)	38 years	2005	Complications giving birth	Did not receive MC
9	Yelsi Karina López Cabañas (f)	1 year	2005	Pertusis (whooping cough)	Did not receive MC
10	Tito García (m)	46 years	2005	Cardiac murmur	Did receive MC
11	Aída Carolina González (f)	8 months	04-06-2003	Anemia, possible hypoalbuminaemia	Did not receive MC
12	Abundio Inter. Dermot (m)	2 months	2003	Pneumonia	Did not receive MC
13	(NN) Dermott Larrosa[FN263] (f)	5 days	2003	Diarrhea and vomiting possible causes	Received MC in the Filadelfia Hospital
14	(NN) Corrientes Domínguez (m)	Unborn	No information	Fetal problem[FN264] (p.2308, AD)	No information

15	(NN) Ávalos (m) or Rios Torres	No information	2002/1999	Hemorrhage	No information
16	(NN) Dermott Martínez (f)	8 months	2001	Enterocolitis	No information
17	(NN) Dermott Larrosa (f)	5 days	2001	Anemia	Received MC in the Filadelfia Hospital
18	(NN) García Dermott (f)	1 month	2000	Pertusis	Did not receive MC
19	Adalberto González López (m)	1 year and 2 months	2000	Pneumonia	Did not receive MC
20	Roberto Roa Gonzáles	55 years	2000	Tuberculosis	Did not receive MC
21	(NN) Ávalos (m) or Rios Torres	3 days	1999	Hemorrhage	Did not receive MC
22	(NN) Ávalos (m) or Rios Torres	9 days	1998	Tetanus	Did not receive MC
23	(NN) Dermott Ruiz (m)	Unborn	1998	Undetermined	No information
24	(NN) Dermott Ruiz (m)	1 day	1996	Fetal illness	Did not receive MC
25	Mercedes Dermott Larrosa (f)	2 years	1996 (Date ESAP p.247)	Enterocolitis – dehydration	Did receive MC, volunteer nurse
26	Sargento Giménez (m)	No information	1996	No information	Did not receive MC
27	Rosana Corrientes Dominguez (f)	10 months	1993[FN265]	Pertusis	Did receive MC in 25 Leguas Health Center
28	(NN) Wilfrida Ojeda Chávez(f)	8 months	01.05.1994	Enterocolitis – dehydration	Did not receive MC

[FN263] In the application, the Commission stated that "(NN) Dermott (f)," can refer to the same person, given that it is the same year of death and surname. They are distinct only in that one notes death occurred at the time of birth, while the other at one year of age, without specifying the cause of death.

[FN264] In the brief presented in 2009 by the representatives subsequent to the issuance of the report on the Merits of the IACHR on 30/08 of July 17, 2008, the year of the death is 2003. It is possible that it relates to the same person. Moreover, in the medical report, it appears as "Corrientes" and cause of death as fetal distress.

[FN265] In the lists presented by the Commission, she appears deceased in 1993 with the following notation: "[i]n the [R]eport on the Merits, a Rossana Corrientes of 10 months is

included, who died in 1996 of Pertussis. It is possible that this is the same person." (case file on the Merits, tome I, folio 33, note 78).

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227. The Court clarifies that the fact that the State is currently providing emergency aid (supra paras. 191 to 194 and 198) does not exempt it from international responsibility for having failed to take measures in the past to prevent the risk of a violation to the right to life from materializing. The Court therefore must examine which of the deaths are attributable to the State for failing in its duty to prevent them. This examination will be stem from a perspective that allows for the situation of extreme and particular vulnerability, the cause of death, and the corresponding causal link between them to be connected, without placing on the State the undue burden of overcoming an indeterminate or unknown risk.

228. As far as the specific cases of deaths, in their list, the representatives noted the names (NN) Corrientes Domínguez, unborn, whom died from fetal distress, and (NN) Dermott Ruiz, unborn, who died in 1998 for unknown reasons. Regarding this, the Court notes that the representatives and the Commission have not presented arguments regarding the alleged violation of the right to life of the "unborn." Without a foundational basis, the Court lacks the legal elements for determining the State's responsibility in these cases.

229. Regarding Luisa Ramírez Larrosa, Rosa Larrosa Domínguez, (NN) Jonás Avalos (m) or Jonás Rios Torres, Rosa Dermott (f), (NN) Ávalos (m) or Rios Torres, and Sargento Giménez (m), in which the cause of death is not known or the individuals died due to natural causes or accidents, the State cannot be responsible for their deaths, given that elements for determining State responsibility do not exist and a causal link between the alleged cause of death and the Community's vulnerable situation has not been demonstrated.

230. With regard to the deaths of Felipa Quintana, who died in May 2008 at 64 years of age, due to septic shock and received medical attention; Gilberto Dermott Quintana, who died in 2007 of tuberculosis at 46 years of age and received medical attention from a volunteer nurse; Tito García, who died in 2005 at 46 years of age from a cardiac murmur, likely related to Chagas disease, [FN266] and received medical attention; NN Dermott Larrosa, who died in 2003 upon birth, and the possible cause is vomiting and diarrhea and received medical care; NN Dermott Larrosa, who died in 2001 five days after birth from anemia and received medical care at the Filadelfia Hospital; [FN267] Mercedes Dermott Larrosa, who died in 1996 at two years of age from enterocolitis and dehydration and received medical care from a volunteer nurse, and Rosana Corrientes Dominguez, who died in 1996 10 months after birth from pertusis and received medical attention at the 25 Leguas Healthcare Center, the Court finds that responsibility cannot be placed on the State considering that it has not been demonstrated that the medical care given was insufficient or that there was some causal link between the deaths and the Community's situation of vulnerability.

[FN266] The expert Pablo Balmaceda noted that "Tito García […] was a man with Chagas disease which is a sickness endemic to the area or to practically all of South America, but he never received any adequate medical attention for his illness," supra note 226.

[FN267] Nevertheless, in the Medical-sanitary report of the Xakmok Kasek Community, carried out by Dr. Pablo Balmaceda, supra note 206, folio 2311, the same person is noted, but it states he never received medical attention.

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231. As far as the other individuals, the Court observes that many died from illnesses that were easily preventable with periodic and constant care from a health program. [FN268] It is enough to point out that the main causes from which the majority died were tetanus, pneumonia, tuberculosis, anemia, pertussis, serious cases of dehydration, enterocolitis, or from complications during labor. Likewise, it is worth highlighting that the main victims were children in the early stages of their lives, individuals for whom the State has greater duties of protection. This will be examined further infra para. 259.

[FN268] Pursuant to the statement rendered by the expert Pablo Balmaceda during the public hearing held on April 14, 2010, "many of the deaths that took place in the Community were due to causes such as diarrhea or lung syndrome, that generally speaking, worsened due to the lack of adequate immediate medical attention and death ensued due to dehydration and serious lung problems already evident in their lives." He also noted that "the children […] would die due to vomiting, diarrhea, and ultimately dehydration and also due to lung problems that would commence with a cold that would worsen in days and finally cause death due to lack of medical attention," supra note 226.

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232. Regarding the death of Remigia Ruíz, who died in 2005 at 38 years of age, and who was pregnant and did not receive medical attention, evinces many of the signs relevant to maternal deaths, namely: death while giving birth without adequate medical care, a situation of exclusion or extreme poverty, lack of access to adequate health services, and a lack of documentation on cause of death, among others.

233. With regard to this case, the Court highlights that extreme poverty and the lack of adequate medical care for pregnant women or women who have recently given birth result in a high maternal mortality rate. [FN269] Because of this, States must put in place adequate healthcare policies that allow it to offer care through personnel who are adequately trained to handle births, policies to prevent maternal mortality with adequate prenatal and postpartum care, and legal and administrative instruments regarding healthcare policy that allow for the adequate documentation of cases of maternal mortality. All this is because pregnant women need special measures of protection.

[FN269] Cf. Paul Hunt. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, A/HRC/14/20/Add.2, April 15, 2010. A maternal death is the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes.

WHO, International Statistical Classification of Diseases and Related Health Problems, Tenth Revision, vol. 2, Instruction Manual, 2nd ed. (Geneva, 2005), p. 141.

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234. Taking the foregoing into account, the Court finds that the State violated the right provided in Article 4(1) of the American Convention, in relation to Article 1(1) of the Convention, in detriment to the individuals mentioned in this paragraph, because it did not take the positive measures necessary within the realm of its responsibilities, which would be reasonably expected to include preventing or avoiding risk to the right to life. As a consequence, the deaths of the following individuals are attributed to the State: Sara Gonzáles López, who died in July 2008, from gastroenteritis and dehydration and did not receive medical care; Yelsi Karina López Cabañas, who died in 2005 at the age of one, of pertussis and did not receive medical attention; Remigia Ruiz, who died in 2005 at 38 years of age from complications while giving birth and did not receive medical care; Aida Carolina Gonzáles, who died in June 2003 at eight months of age from anemia and did not receive medical assistance; NN Ávalos or Ríos Torres, who died in 1999, three days after birth from tetanus and did not receive medical care; Abundio Inter Dermott, who died in 2003, two months after birth from pneumonia and did not receive medical care; NN Dermott Martínez, who died in 2001 at eight months of age from enterocolitis and it is not known if he or she received medical care; NN García Dermott, who died in 2001, at one month of age, from pertussis and did not receive medical care; Adalbaerto Gonzáles López, who died in 2000 at one year and two months of age, from pneumonia and did not receive medical care; Roberto Roa Gonzáles, who died in 2000 at 55 years of age from tuberculosis and did not receive medical care; NN Ávalos or Ríos Torres, who died in 1998, nine days after birth from tetanus and did not receive medical care; NN Dermontt Ruiz, who died in 1996 at birth and did not receive medical care, and NN Wilfrida Ojeda Chavez, who died in May 1994 of dehydration and enterocolitis and did not receive medical care.

VIII. RIGHT TO HUMANE TREATMENT [PERSONAL INTEGRITY] (ARTICLE 5(1) OF THE AMERICAN CONVENTION)

235. The representatives alleged the violation of Article 5(1) of the Convention in detriment to the Community for the "deaths of family members and also for the precarious situation they face upon not having access to their lands. For this reason, the right to personal cultural integrity and to collective personal integrity [have been violated]." They maintained that the suffering of family members who have lost loved ones has been sharp, especially considering the cultural characteristics of the Community. Moreover, they indicated that the deaths of the loved ones affected the Community, considering their cultural patterns related to the remembrance of the dead and burial methods. They emphasized that, "the members of the Xákmok Kásek Community have experienced physical, mental and moral suffering, suffering that has threatened their right to personal integrity."

236. The State has not commented on this.

237. The Court reiterates that the alleged victims and their representatives may invoke the violation of other rights different from the ones already included in the application, as they are the ones who possess the rights enshrined in the Convention, as long as they refer to the facts

already included in the application. [FN270] Effectively, the application forms the factual framework of the proceeding before the Court, for which reason new facts different from the ones already alleged in that document are not admissible. This does not invalidate those new facts that help explain, clarify, or dismiss facts that have been mentioned in the application or that respond to the plaintiff's claims. [FN271] The exceptions to this principle are the facts that qualify as supervening. Supervening facts can be submitted to the Court at any point in the proceeding up until the issuing of the judgment. [FN272] On the other hand, the moment in which the alleged victims or their representatives fully exercise that right of locus standi in judicio is the brief of pleadings and motions. [FN273] Finally, the alleged victims must be named in the application, which should correspond to the report from the Inter-American Convention that makes reference to Article 50 of the Convention. [FN274]

[FN270] Cf. Case of "the Five Pensioners" v. Perú, supra note 262, para. 155; Case of Barreto Leiva v. Venezuela. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, para. 94, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 49.
[FN271] Cf. Case of "The Five Pensioners" v. Perú, supra note 262, para. 153; Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 42, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 49..
[FN272] Cf. Case of "The Five Pensioners" v. Perú, supra note 262, para. 154; Case of Perozo et al. v. Venezuela, supra note 262, para. 67, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 49.
[FN273] Cf. Case of the Mapiripán Massacre v. Colombia. Merits, Reparations, and Costs. Judgment September 15, 2005. Series C No. 134, para. 56; Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 136, and Case of González et al. ("Cotton Field") v. México, supra note 14, para. 232.
[FN274] Cf. Case of the Ituango Massacre v. Colombia. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2006. Series C No. 148, para. 98; Case of Radilla Pacheco v. México, supra note 12, para. 108, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 44.

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238. In this case, the representatives requested in their brief of pleadings and motions that a violation of Article 5(1) be declared, which is to say, they presented their request at the proper procedural moment.

239. As far as the submission of the factual framework presented in the application, the Court notes that although the Commission did not directly allege a violation of Article 5(1) of the Convention, it indicated in its application that "the lack of an effective guarantee of the Community's right to property has placed the Community's members in a situation of extreme vulnerability, which has as a consequence put the Community members' rights to life and personal integrity at risk." Likewise, the Commission indicated that the Community has been subject to "suffering, anguish, and indignities […] during the years they have waited for an effective response to their land replevin claim from the State of Paraguay." In light of this, the

Court finds that the arguments of the representatives are supported by the factual framework put forward by the Commission in its application.

240. Finally, with regard to the identification of the victims of the violations alleged by the representatives, the Court notes that the family members of the individuals who have died were not identified as victims by the Commission in its report on the merits, nor in its application. Consequently, the Court will not examine the alleged effects on the family members of the individuals who have died. Given the abovementioned, it befalls on the Court to determine whether the members of the Community are victims of a violation to their right to personal integrity.

241. Now that the formal requirements have been dealt with, the Court will move on to examine the merits of the matter.

242. Regarding the alleged effects on "cultural integrity," in paragraphs 174 to 182 supra, the Court examined the consequences of not restoring the Community's traditional territory. Likewise, in the chapter on Article 4 of the Convention, the Court examined the living conditions of the Community members. In this sense, the Court finds that the facts put forward on this point by the representatives are not pertinent to Article 5 of the Convention but rather to Articles 4 and 21 – a relationship the Court has already examined – and to the reparations that the Court will order infra based on Article 63(1) of the Convention.

243. With regard to mental and moral integrity, the Court recalls that in the case Moiwana Community v. Surinam, it found that "the separation of the members of the [C]ommunity from their traditional lands" was a fact that, together with the impunity surrounding the deaths caused in the heart of the Community, caused the victims to suffer in such a way that it constituted a violation by the State of Article 5(1) of the American Convention to their detriment. [FN275]

[FN275] Cf. Case of the Moiwana Community v. Suriname, supra note 129, paras. 101 to 103.

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244. In this case, several of the victims who gave testimony before the Court expressed the sorrow that they and their Community feel over the failure to recover their traditional lands, the gradual loss of their culture, and the long wait that they have had to endure during the inefficient administrative procedure. In addition, the miserable living conditions that the Community suffers, the deaths of several members, and the Community's general state of abandon, cause suffering that necessarily affects the mental and moral wellbeing of all the members of the Community. All this constitutes a violation of Article 5(1) of the Convention, to the detriment of the members of the Xákmok Kásek Community.

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

245. The Commission argued that the State has not implemented mechanisms that allow the members of the Community easy access to "the identification documents necessary to exercise

their right to recognition of juridical personality." It indicated that, according to the 2007 census, 57 of the 212 individuals interviewed did not possess documents of identification. Approximately 48 of them are children. According to the 2008 census, at least 43 of the 273 members of the Community did not possess identification documents. Of those, at least 32 are minors. [FN276] Likewise, the representatives indicated that according to the latest community census dated October 16, 2009, 35% of the Community's members do not have documents.

[FN276] Cf. Census of the Xákmok Kásek Community on August 30, 2008, supra note 58, folios 2248 to 2264.

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246. The representatives added "the high number of Xákmok Kásek individuals who do not have documents […] blocks these individuals from legally demonstrating their existence and identity." They indicated that "none of the children who died at a young age were registered at birth. Because of this, at the moment of their deaths they did not have birth certificates, which prevented the provision of death certificates to their family members."

247. The State indicated that it had carried out "documentation and registration activities […] in the Community," and provided evidence of this. It indicated that on December 14, 2009, the INDI and the Civil Registration Office carried out documentation days in the Community's settlement and "receive[d] 35 requests for a national identification card (first time) and 10 requests for renewal." [FN277] Moreover, it described "the expediting of 66 indigenous identification cards, of which 26 were for individuals of legal age and 40 were for minors." [FN278] Additionally, the Civil Registration Office had provided birth certificates for 25 minors and provided 43 birth certificate copies. [FN279] The State said it "has complied with its obligation regarding the right to juridical personality and likewise has respected the Community members' right to identity, as it has provided identification documents that allow for the exercise of any right."

[FN277] Cf. Report of the Identification Department of the National Police on December 21, 2009 (case file of annexes to the answer to the application, annex 1(3), folios 3278 to 3280).
[FN278] Cf. Report of Miriam Acosta, fieldworker of the INDI, on December 21, 2009 (case file of annexes to the answer to the application, annex 1(3), folio 3281).
[FN279] Cf. Report of Zunilda López, Civil Registry Officer, on December 20, 2009 (case file of annexes to the answer to the application, annex 1(3), folio 3283).

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248. The Court has ruled previously that the content of the right to recognition of juridical personality recognizes the individual

everywhere as a person having rights and obligations, and enjoying the basic civil rights[, which] implies the capacity to be the holder of rights (capacity of exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of [these civil and basic] rights and obligations. [FN280]

[FN280] Cf. Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70, para. 179; Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 191, para. 69, and Case of Anzualdo Castro v. Perú. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 22, 2009. Series C No. 202, para. 87.

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249. This right is a parameter for determining if an individual is a bearer or no of the rights in question and if the individual can execute them. Therefore, failure to provide this recognition makes the individual vulnerable to the State and to private parties. [FN281] In this way, the contents of the right to recognition of juridical personality refers to the State's correlating general duty to provide the means and legal conditions for this right to be freely and fully enjoyed by its bearers. [FN282]

[FN281] Cf. Case of the Girls Yean and Bosico v. Dominican Republic. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 8, 2005. Series C No. 130, para. 179; Case of Anzualdo Castro v. Perú, supra note 280, para. 88, and Case of Radilla Pacheco v. México, supra note 12, para. 156.

[FN282] Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 189; Case of the Saramaka People. v. Suriname, supra note 16, para. 167, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 101.

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250. However, in the interests of the principle of effectiveness and of the need for protection in cases of vulnerable individuals and groups, this Court has observed the broadest legal interpretation of this right, as it finds that the State is especially "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." [FN283] For example, in the case of the Sawhoyamaxa Indigenous Community, the Court found that its members had "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 juridical personality." [FN284]

[FN283] Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 189, and Case of the Saramaka People. v. Suriname, supra note 16, para. 166.

[FN284] Case of Sawhoyamaxa Indigenous Community v. Paraguay, supra note 20, para. 192.

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251. This case presents the same failings that the Court found in the Sawhoyamaxa case. Several of the individuals who died did not have birth certificates, or at least they were not provided. The respective death certificates where not even provided, as the victims did not have the identification documents necessary for determining civil rights.

252. As a consequence, the Court concludes that although the State may have made an effort to correct the situation of lack of registration faced by the members of the Community, the body of evidence indicates that adequate access to civil registration procedures was not guaranteed for expediting their identification documents in response to the unique living situation that the Community members faced.

253. Nevertheless, the Community members lacking identification documents were not identified to the Court. The only persons identified by name are those that died and are mentioned in Section 2 of Chapter VII of the present Judgment, related to the right to life. It is important to note, that the Court required the State to provide identity documents and birth certificates. In this regard, the representatives presented some identity documents, [FN285] yet the State did not provide any documents, which leads the Court to conclude that the documents were not provided because they do not exist.

[FN285] Of the documental evidence argued by the parties, the following documents are available regarding death certificates, identity documents, and birth certificates: copy of death certificate of Felipa Quintana of May 13, 2008 (case file on the Merits, tome III, folio 1140); copy of death certificate of Sara Gonzáles of August 25, 2008 (case file of Merits, folio 1142, tome III); copy of civil identity license of Felipa Quintana (case file on the Merits, tome III, folio 1139); copy of live birth certificate of Sara Gonzáles (case file on the Merits, tome III, folio 1141); copy of civil identity license of Gilberto Dermott Quintana (case file on the Merits, tome III, folio 1143); copy of civil identity license of Remigia Ruíz (case file on the Merits, tome III, folio 1144); copy of birth certificate of Wilfrida Ojeda Chávez (case file on the Merits, tome III, folio 1146); copy of civil identity license of Luisa Ramírez Larrosa (case file on the Merits, tome III, folio 1147), and copy of civil identity license of Rosa Larrosa Domínguez (case file on the Merits, tome III, folio 1148).

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

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255. The representatives also indicated that “the State is violating the Community's right to juridical personality by denying its ethnic composition.” With respect to this argument, the Court already examined the representatives' allegations in Chapter V.2 and VI. Also, although said facts constitute obstacles to conveying title to the land, as well as having an a negative impact on the Xákmok Kásek Community's abilities of self-determination, no one has presented evidence and reasoning sufficient to allow the Court to declare a an autonomous violation of Article 3 of

the Convention to the detriment of the Community with regard to the collective aspect of the right to recognition of juridical personality.

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

256. The Commission indicated that children "have suffered in a particularly acute manner due to the subhuman living conditions to which the Community is subjected." The representatives held that "[a]ll the rights alleged as violated by the State have children among their victims" and that they "were not the object of special protective measures that their condition of vulnerability, due to their ages, so requires." The State maintained that it has offered "comprehensive attention" to the children and that it would therefore not be responsible of the alleged violation of Article 19 of the Convention.

257. The Court recalls that children possess the same rights as all other human beings and have, in addition, special rights derived from their condition, rights that correspond to the specific duties of the family, the society, and the State. [FN286] The precedence of the superior right of the child should be understood as the need to satisfy all the rights of children, a need that obliges the State and effects the interpretation of all the other rights found in the Convention when the case refers to minors. [FN287] Likewise, the State must pay special attention to the needs and the rights of children, considering their unique situation of vulnerability. [FN288]

[FN286] Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series to No. 17, para. 54; Case of Dos Erres Massacre v. Guatemala, supra note 12, para. 184, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 156.
[FN287] Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, supra note 286, paras. 56, 57, and 60; Case of Dos Erres Massacre v. Guatemala, supra note 12, para. 184, and Case of González et al. ("Cotton Field") v. México, supra note 14, para. 408.
[FN288] Case of Dos Erres Massacre v. Guatemala, supra note 12, para. 184, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 164.

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258. This Court has established that the education and the healthcare of children requires various measures of protection and forms the pillars that are fundamental for guaranteeing the child's enjoyment of a dignified existence, given that due to their condition, a child does not have the means to effectively defend his or her own rights. [FN289]

[FN289] Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02, supra note 286, para. 86.

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259. In this case, the Court refers back to its previous statements regarding the Community's access to water, food, health, and education (supra paras. 194 to 213). Likewise, the Court observes that that the Community's demonstrated condition of extreme vulnerability had a particular effect on the children. As previously mentioned, the lack of adequate food has affected

their development and growth, has increased rates of atrophied growth, and has resulted in a high rate of malnutrition among them (supra para. 201). Likewise, from the evidence provided, it is noted that in 2007, the children of the Community "either had not receive all their vaccinations, or were not vaccinated according to international standards, or did not have any certification regarding the vaccinations received." [FN290]

[FN290] Cf. Health Evaluation regarding four Enxet Communities, supra note 218, folio 2643.

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260. Moreover, it is worrisome that 11 of the 13 members of the Community, whose deaths are attributable to the State (supra para. 234), were children. What is more worrisome, the Court notes that the cases of those deaths could have been prevented with adequate medical care or help from the State. Because of this, it would be difficult to say that the State has taken the special protective measures owed to the children of the Community.

261. Regarding the cultural identity of children in indigenous communities, the Court warns that Article 30 of the Convention on the Rights of the Child [FN291] establishes an additional obligation complementary to Article 19 of the American Convention that consists of the obligation to promote and protect the right of indigenous children to live by their own culture, their own religion, and in their own language. [FN292]

[FN291] Convention on the Rights of the Child, A.G. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) p. 167, ONU Doc. A/44/49 (1989), in force since September 2, 1990. The State of Paraguay signed said Convention on April 4, 1990 and ratified it on September 25, 1990. Article 30 states:
In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.
[FN292] Cf. Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 167.

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262. Likewise, this Court finds that within the States' general obligation to promote and protect cultural diversity is a special obligation to guarantee indigenous children's right to a cultural life. [FN293]

[FN293] Cf. Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 168.

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263. In this sense, the Court finds that the loss of traditional practices like male and female initiation ceremonies and the Community's languages, as well as the damage from the lack of territory, have a particularly negative effect on the development and cultural identity of the Community's children, who will never be able to develop a special relationship with their

traditional territory and the way of life unique to their culture if the measures necessary to guarantee the enjoyment of these rights are not implemented.

264. Based on the aforementioned considerations, the Court finds that the State has not taken the measures necessary for the protection of the children of the Community, in violation of the right enshrined in Article 19 of the American Convention, with regard to Article 1(1) of the Convention.

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

265. The Commission argued that "this case illustrates the persistence of structural factors of discrimination in the Paraguayan legal system relating to the protection of [indigenous peoples'] right to ancestral territory and the resources found there." The Commission added that "despite the fact that the Paraguayan State shows general progress in its legal system toward recognizing the rights of indigenous peoples as evidence of compliance with its obligations under Article 2 of the Convention […], it should be highlighted that there remain legal provisions in civil, agrarian, and administrative law that apply to this case and that cause the State system to function in a discriminatory way by privileging the protection of the right to 'reasonably productive' private property over the protection of the territorial rights of an indigenous population."

266. The representatives indicated that there is "a policy of discrimination that follows a systematic, easily-observable pattern and that enjoys a high level of consensus in Paraguay, which is rapidly leading to extreme deterioration of the living conditions of indigenous communities in general, as well as in the [particular] case […] of the Xákmok Kásek [Community]." "The Community has had to survive in a context […] in which the indigenous saw themselves treated as objects with neither voice nor opinion." "The State has not taken specific measures designed to eradicate discrimination against the indigenous peoples, even though it has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (domestic Law 2128/03)." They added that "the supposed factual and legal impossibility [of titling the land] that the State of Paraguay alluded to is nothing more than the deliberate application of a racist and discriminatory policy […]. It is an inveterate situation that has not substantively changed to this day, a fact evidenced by the positions taken by the government in this case."

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

268. The Court has established that Article 1(1) of the Convention is a general rule whose content extends to all the provisions of the treaty. The Article sets forth the obligation of States Parties to respect and guarantee the full and free exercise of the rights and liberties recognized in the Convention "without any discrimination." That is to say, no matter its origin or the form it takes, any treatment that could be considered discriminatory with respect to the exercise of any of the rights guaranteed in the Convention is per se incompatible with the Convention. [FN294] This failure on behalf of the State, through any discriminatory practice, to comply with their general obligation to respect and guarantee human rights makes it internationally responsible.

[FN295] Because of this, there is an indissoluble link between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.

[FN294] Cf. Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series to No. 4, para 53.
[FN295] Cf. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series to No. 18, para. 85.

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269. The principle of equal and effective protection under the law and of non-discrimination constitutes an outstanding element of the system for the protection of human rights enshrined in various international instruments [FN296] and developed through doctrine and case law. In the current developmental stage of international law, the basic principle of equality and non-discrimination has entered the realm of jus cogens. On this principle rests the juridical structure of the national and international public order, permeating, as it does, all legal systems. [FN297]

[FN296] Some international instruments are: Charter of the OAS (Article 3(l)); American Convention on Human Rights (Articles 1 and 24); American Declaration on the Rights and Duties of Man (Article II); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 3); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém Do Pará" (Articles 4(f), 6 and 8(b)); Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (Articles I(2)(a), II, III, IV, and V); United Nations Charter (Article 1(3)); Universal Declaration of Human Rights (Articles 2 and 7); International Covenant on Economic, Social and Cultural Rights (Articles 2(2) and 3); International Covenant on Civil and Political Rights (Articles 2(1) and 26); International Convention on the Elimination of All Forms of Racial Discrimination (Article 2); Convention on the Rights of the Child (Article 2); Declaration of the Rights of the Child (Principle 1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Articles 1(1), 7, 18(1), 25, 27, 28, 43(1), 43(2), 45(1), 48, 55, and 70); Convention on the Elimination of All Forms of Discrimination against Women (Articles 2, 3, 5, 7 to 16); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Articles 2 and 4); Declaration of the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-up (2(d)); Convention No. 97 of the International Labour Organization (ILO) on Migrant Workers (revised) (Article 6); Convention No. 111 of the International Labour Organization (ILO) concerning Discrimination in Respect to Employment and Occupation (Articles 1 to 3); Convention No. 143 of the International Labour Organization (ILO) concerning Migrant Workers (Supplementary Provisions) (Articles 8 and 10); Convention No. 168 of the International Labour Organization (ILO) concerning Employment Promotion and Protection against Unemployment (Article 6); Proclamation of Teheran, International Human Rights Conference in Tehran, May 13, 1968 (paras. 1, 2, 5, 8, and 11); Declaration and Programme of Action, World Conference on Human Rights, 14 to 25 June 1993 (I(15); I(19); I(27); I(30); II(B)(1), Articles 19 to 24; II(B)2, Articles 25 to 27); Declaration on the Rights of Persons

Belonging to National or Ethnic, Religious and Linguistic (Articles 2, 3, 4(1), and 5); World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Declaration and Programme of Action, (paragraphs of the Declaration: 1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66, and 104); Convention Relative to the Struggle against Discrimination in Education (Articles 1, 3, and 4); Declaration on Race and Racial Prejudice (Articles 1, 2, 3, 4, 5, 6, 7, 8, and 9); Declaration on Human Rights of Individuals Who are not Nationals of Country Living (Article 5(1)(b) and 5(1)(c); Charter of Fundamental Rights of the European Union (Articles 20 and 21); European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14); European Social Charter (Article 19(4), 19(5) and 19(7)); Protocol No.12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1); African Charter on Human Rights and Peoples' Banjul Charter (Articles 2 and 3), Arab Charter on Human Rights (Article 2), and Cairo Declaration of Human Rights in Islam (Article 1).

[FN297] Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, supra note 295, para. 101 and Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 23, 2005. Series C No. 127, para. 184.

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270. With regard to indigenous peoples, the Court, in its case law has specifically established that "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." [FN298]

[FN298] Case of Yakye Axa Indigenous Community v. Paraguay, supra note 5, para. 63; Case of the Saramaka People. v. Suriname, supra note 16, para. 178, and Case of Tiu Tojín v. Guatemala. Merits, Reparations, and Costs. Judgment of November 26, 2008. Series C No. 190, para. 96.

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271. Also, the Court has indicated that, "States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination." [FN299] States are obliged "to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies a special obligation to protect, which the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations." [FN300]

[FN299] Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, supra note 295, para. 103.

[FN300] Cf. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03, supra note 295, para. 104, and UN, Human Rights Committee, General Comment No. 18, Non-discrimination, 37º Period of Sessions, October 11, 1989, HRI/GEN/1/Rev.7.

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272. Nevertheless, the Court, in reference to articles 1(1) and 24 of the Convention, has indicated that, "the difference between the two Articles lies in that the general obligation contained in Article 1(1) refers to the State's duty to respect and guarantee 'non-discrimination' in the enjoyment of the rights enshrined in the American Convention[. I]n other words, if the State discriminates upon the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1) and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur." [FN301]

[FN301] Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84, supra note 294, paras. 53 and 54, and Case of Apitz Barbera et al. ("Corte Primera of lo Contencioso Administrativo") v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 5, 2008. Series C No. 182, para. 209.

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273. In this case it has been established that the Community's situation of extreme and special vulnerability owes itself, inter alia, to the lack of adequate and effective remedies that protect the rights of the indigenous in practice and not just formally; the weak presence of State institutions that are obliged to provide goods and services to the Community, particularly in regard to food, water, healthcare, and education; and to the preeminence of a view of property that grants greater protection to private property owners over indigenous territorial claims, thereby failing to recognize their cultural identity and threatening their physical subsistence. Likewise, the fact that the declaration of a private nature reserve on part of the land claimed by the Community did not take into account the Community's claim, nor was the Community consulted regarding the declaration.

274. All this points to de facto discrimination against the members of the Xákmok Kásek Community, which has been marginalized in its enjoyment of the rights that the Court has declared violated in this Judgment. Likewise, it is evident that the State has not taken the positive measures necessary to reverse that exclusion.

275. Therefore, and pursuant to the rights violations previously declared, the Court finds that the State has not taken sufficient and effective measures to guarantee, free from discrimination, the rights of the Xákmok Kásek Community and its members, pursuant to Article 1(1) of the Convention, in relation with the rights recognized in Articles 21(1), 8(1), 25(1), 4(1), 3, and 19 of the Convention.

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

276. Pursuant to the provisions of Article 63(1) of the Convention, the Court has stated that all violations of international obligations that result in harm entail the duty to provide adequate reparations, [FN302] and that this provision "codifies a rule of common law that is one of the fundamental principles of contemporary international law on State responsibility." [FN303]

[FN302] Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Judgment of of 21 of julio of 1989. Series C No. 7, para. 25; Case of Chitay Nech et al.v. Guatemala supra note 8, para. 227, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 211.
[FN303] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 62; Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 227, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 211.
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277. The Court will therefore proceed to examine the requests of both the Commission and the representatives, as well as the arguments of the State on the matter, with the purpose of issuing measures capable of repairing the damage caused by the violations declared in this Judgment.

1. Injured party

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

2. Restitution measures

279. The Commission and the representatives requested that the State be ordered to quickly take the measures necessary for fulfilling the property right of the Community and its members to possession of their ancestral land, "in particular by demarking, delimiting, and titling their land, in accordance with their values, use, customs, and consuetudinary right," and they also requested that the Court order "the adoption of the measures necessary for provisionally [turning over] the habitat being claimed by the Indigenous Community while the demarking, delimiting and conveyance of title of said ancestral land in the Community's name has not been carried out[,] […] specifically with regard to those measures intended to prevent immediate and irreparable harm due to the actions of third parties." Likewise, they stated that only "in the case of objective and well founded reasons that make it impossible for the State to allocate the land that has been identified as the Community's traditional land, will the State be allowed to provide lands of a sufficient size and quality; also, those lands will be chosen by consent." Moreover, the representatives requested the restitution of the land be ordered, in sufficient size and quality, pursuant to that requested in the Community's claim, in the area identified as part of their traditional habitat, along with the handover of the title to this land.

280. In its answer to the application, the State acquiesced on this and recognized the "Xákmok Kásek Indigenous Community's right to communal land in the manner of and under the conditions established by the National Constitution and the current laws of the Republic of Paraguay." In particular, it stated that it confirmed "its willingness to provide a free land title to the Community […], pursuant to the National Constitution and the current laws of the Republic of Paraguay." In particular, the State confirmed its "willingness to deliver free title to the Community […], as provided for in the National Constitution and current legislation, to a quantity of land according to the stable and permanent number of [its] members […] within the land delimited in the Paraguayan Chaco as the traditional settlement of the Enxet-Lengua people

[…] without affecting the rights of third parties and their justified rights to property and production." Finally, it requested that the Court "authorize the State to seek a piece of property within the historical territory of the Enxet Lengua where it can grant property to the new Xákmok Kásek Community, something that the State has never opposed." Also, the State indicated that regarding the conveyance of title of the 1,500 hectares, "the transfer of the property is being processed before the Government Notary in order to formalize the registration of the public deed in the Community's name."

2.1. Return of the traditional land claimed

281. In light of the conclusions in the chapter relative to articles 8(1), 21(1), and 25(1) of the Convention, the Court considers that the return to the Xákmok Kásek Community of their traditional land is the reparatory measure that comes closest to restitutio in integrum, and for this reason, the State must to take all legislative, administrative, and any other measures necessary to ensure the Community members' right to property as regards their traditional land, thereby also ensuring their right to the land's use and enjoyment.

282. The Community's link to those lands is fundamental and unbreakable for its human and cultural survival, which is why returning it is so important. Contrary to what the State has argued, the land to be returned to the Community is not just any piece of real estate "within the Enxet Lengua's historical territory," but rather the land that the Community has, in this case, demonstrated is its specific traditional territory and the most suitable for an indigenous settlement (supra para. 107).

283. Consequently, the State is obliged to return to the Community the 10,700 hectares identified as Mopey Sensap (today First Retreat) and Makha Mompena (today the Kuñataí Retreat) that the Community is claiming in replevin. The specific identification of this land and its borders must be carried out by the State within one year of the notification of this Judgment. The State shall use the specialized technology designed for this purpose and the process must include the participation of the Community leaders and their freely selected representatives.

284. Once the Community's traditional territory is fully identified in the manner and within the time period indicated in the prior paragraph, if it is owned by private parties – whether natural or legal personalities – the State must decide whether expropriation of the land through the appropriate authorities for the indigenous ensues. In order to resolve this question, the State authorities must follow the standards established in this Judgment (supra paras. 85 to 170), taking very much into account the special relationship that the indigenous have with their lands for preserving their culture and survival. At no time should the domestic authorities' decision be based solely and exclusively on whether the land is in private hands or being used for production, due to the considerations put forward in paragraph 149 of this Judgment. To do this would be to completely ignore this ruling and would constitute a violation of Paraguay's sovereign commitments.

285. The State has three years as of the notification of the present Judgment to return the traditional lands to the members of the Community, to which it should resolve the expropriation matter, and where necessary, execute it. The State must carry out, within these terms, the

necessary procedures to obtain this objective. Moreover, within this period, the State must push forward, where necessary, the negotiations to purchase the corresponding lands.

286. If for objective and well-founded reasons – which, it should be recalled, cannot be based on whether the land is in private hands or being used for production – the Paraguayan authorities opt to give priority to private parties' right to property over the Community's right to communal property, it must provide the Community with alternative land within the traditional territory of its ancestors. The selection of these lands must be carried out with the consensus of the Community, in keeping with its own ways of making decisions. It should be recalled that the offer of alternative lands will proceed only once it has been adequately demonstrated, in keeping with the provisions of this Judgment, that the expropriation cannot move forward and that negotiations for the purchase of the land have failed.

287. Based on a well-founded request from the State, the Court will be able to grant a deadline extension of one year for it to continue with the respective domestic proceedings opened for the return of the traditional land. The request for a deadline extension must be presented to the Court at least three months before the expiration of the three-year deadline set in paragraph 285 of this Judgment. If the State does not present its request for a deadline extension in the period of time stated above, the Court will understand that it has waived its option to request it. The Court will reject any request that is time-barred. Should the request for a deadline extension be presented in a timely fashion, the Court will forward it to the Commission and the representatives of the victims so that they can make any comments they feel are pertinent. The Court will decide whether or not to grant the deadline extension, taking into account the reasons put forward by the State in its request, the comments of the Commission and the representatives, and the actions already taken by the State toward complying with its duty to hand over the land to the Community. The Court will not grant the deadline extension if, according to its criteria, the State has not taken enough action to comply with this reparatory measure. Lastly, the State must report in a specific manner every six months on the actions carried out regarding the return of the traditional lands to the victims.

288. Taking this into account, the Court rules that if the three-year deadline in this Judgment expires, or as the case may be, if the deadline extension provided for in paragraph 287 expires or is denied by the Court, and the State still has not turned over the traditional land or, as the case may be, the alternative land, in keeping with the provisions of paragraphs 283 to 286, the State will have to pay the Community the amount of US$ 10,000.00 (ten thousand dollars of the United States of America) for each month of delay. The Court views this reparation as compensation to the victims for the State's failure to comply with the deadlines set by this Judgment and the subsequent material and non-material harm that failure to comply causes, for which reason it does not represent compensation that replaces the return of traditional or alternative land to the Community.

289. The count of the months for which the State must compensate the Community for its delay in complying with this Judgment will stop when the traditional land, or as the case may be, the alternative land, is definitively turned over.

290. In this Judgment's monitoring of compliance procedure, the Court will set forth the dates on which the State must make the respective payments to the Community for the delay in complying with this reparation measure. These payments must be made in keeping with the guidelines stipulated in the "method of payment" section of this Judgment (infra paras. 332 to 336). Should the State fail to comply with the dates that the Court sets for making these payments, it must pay interest as a penalty, in keeping with the provisions of paragraph 336 infra. The appropriate amounts will be delivered to the Community's duly recognized leaders, who will distribute the money according to how the Community chooses through its own method of making decisions.

2.2. Protection of land claimed

291. The State must not carry out any act that impedes to a greater extent, the effects of this Judgment. In this sense, so long as the land has not been turned over to the Community, the State shall ensure that the land is not harmed by the actions of the State itself or of private third parties. As such, the State shall insure that the area is not deforested, that sites that are culturally important to the Community are not destroyed, that the land is not transferred, and that the land is not exploited in such a way as to cause irreparable damage to the area or to the natural resources found there.

2.3. Conveyance of title of the "25 de Febrero" land

292. The State indicated that it was committed to carrying out the conveyance of title of the 1,500 hectares of the place known as "25 de Febrero," where the Community is currently located. However, certain obstacles to the conveyance of title and registration of land arose due to formal problems with representation and registration of community leaders.

293. With regard to this, the Court finds that all the formal obstacles to the conveyance of title of this land should be resolved by the State itself, in keeping with the provisions of paragraphs 48 and 49. Specifically, via the appropriate authorities, the State shall guarantee the correction of the discrepancies regarding the registration of Community leaders by whatever legal means necessary. The State has a time period of six months in which to do this, counting as of the notification of this Judgment.

294. On the other hand, this Court also orders the State to convey title of the 1,500 hectares transferred to the Xákmok Kásek Community by the Angaité communities within the time period of one year counting from the notification of this Judgment (supra paras. 76 to 78). This will ensure that its members will have a transitional territory on which to survive while the Community's traditional land is demarcated and title is conveyed. It is relevant for the Court to highlight the solidarity and unity that the Angaité Communities have expressed with the Xákmok Kásek Community.

295. The Court highlights that the conveyance of title to the aforementioned 1,500 hectares in no way affects or influences the return of the traditional land to which the Community has a right, in keeping with paragraphs 281 and 290 of this Judgment.

3. Measures of Satisfaction

3.1. Public act of acknowledgement of international responsibility

296. The representatives requested that a public act of acknowledgement of responsibility be carried out on the Community's main settlement, according to their customs and traditions, and that it be disseminated via means of communication. The State indicated that it "has no objections to providing public recognition as long as the contents of the claims expressed by the Community are defined […] and […] it is carried out similar to the way in which it was carried out in the Yakye Axa and Sawhoyamaxa cases."

297. As the Court has ordered in other cases, [FN304] the Court deems it necessary, with the aim of redressing the damage caused to the victims, for the State to conduct a public act of acknowledgment of its responsibility in connection with the violations found in this Judgment. This act must be previously agreed upon with the Community. The act must be conducted at the current seat of the Community, at a public ceremony attended by senior State officials and the members of the Community, including the ones living in other areas, for which purpose the State shall provide the means necessary to facilitate transportation. The act must involve the participation of the Community leaders. Likewise, the State shall conduct said act both in the Community's language and in Spanish or Guaraní, and make it known to the public by means of a broadcast station widely coverage in the Chaco. For this, the State has a year to do this as of the notification of this Judgment.

[FN304] Cf. Case of Huilca Tecse v. Perú. Merits, Reparations, and Costs. Judgment of March 3, 2005. Series C No. 121, para. 111; Case of the "Dos Erres" Massacre v. Guatemala, supra note 12, para. 261, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 222.

3.3. Publication and broadcast of the Judgment

298. Although the representatives did not request this measure of reparation, the Court finds that it is relevant and important as a measure of satisfaction due to the long period of time that the Community has spent claiming its rights. For this reason, as the Court has ordered in other cases, [FN305] the State shall publish once in the official daily paragraphs 1 to 5, 32, 42, 43, 48 to 50, 64 to 84, 89, 95, 99, 101, 102, 106, 107, 109 to 116, 119 to 121, 127 a 131, 134 to 138, 143 to 145, 149 to 154, 158, 161, 162, 166, 168 to 170, 182, 189 to 193, 195, 196, 200 to 202, 205, 206, 208, 213 to 217, 222, 223, 225 to 234, 240, 244, 251 to 255, 259 to 260, 263, 264, 273 to 275, and 278, all including the headings of each chapter and the respective section - without footnotes - as well as the operative part of the present Judgment. In another daily newspaper with national circulation, the official summary of this Judgment prepared by the Court must be published. In addition, as the Court has ordered in other cases, [FN306] this Judgment must be published in its entirety on an official web page and be available for one year. For the publication of this Judgment in newspapers and on the Internet, deadlines of six and two months are set, respectively, to commencing running as of the notification of this Judgment.

[FN305] Cf. Case of Barrios Altos v. Perú. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87, Operative Paragraph 5(d)); Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 244, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 220.

[FN306] Cf. Case of Serrano Cruz Sisters v. El Salvador. Merits, Reparations, and Costs. Judgment of March 1, 2005. Series C No. 120, para. 195; Case of Chitay Nech et al. v. Guatemala, supra note 8, para. 244, and Case of Manuel Cepeda Vargas v. Colombia, supra note 8, para. 220.

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299. Also, as has been done before, [FN307] the Court finds it appropriate for the State to publicize the official summary of the Judgment issued by the Court via a radio broadcast station with wide reception in the region of Chaco. In doing this, the State shall have the official summary of the Judgment translated into the Sanapaná, Enxet and Guaraní languages. The radio broadcasts must be carried out on the first Sunday of the month at least four times. The State shall submit a recording of the broadcasts to the Court once they are carried out. The State has six months to complete this, as of notification of this Judgment.

[FN307] Cf. Case of Yatama v. Nicaragua, supra note 297, para. 253; Case of Tiu Tojín v. Guatemala, supra note 298, para. 108, and Case of Chitay Nech et al. v. Guatemala, supra note 8, para. 245.

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4. Rehabilitation measures: Provision of goods and basic services

300. The Commission requested that the State be ordered to "immediately provide" the members of the Community with adequate goods and services, including water, education, sanitary services, and access to the food necessary for subsistence. The representatives agreed with the request. The State indicated that it was "resolving […] the request for the establishment of a healthcare facility and a secondary school, as well as the provision of potable water and sanitary infrastructure for the Community."

301. Pursuant to the conclusions in Chapter VII related to Article 4 of the American Convention, the Court orders the State to take up the following immediate, periodic, and permanent measures while the Community's traditional or alternative land is in the process of being handed over: a) provision of enough potable water for Community members' consumption and personal hygiene; b) provision of medical and psycho-social care for all the Community's members, especially the children and the elderly, along with periodic vaccination and deparasitization campaigns that respect their ways and customs; c) provision of special medical care for the pregnant women, both pre- and post-natal and during the first few months of the baby's life; d) delivery of food that is of a quality and quantity sufficient to ensure an adequate diet; e) the installation of latrines or any other adequate kind of sanitary system in the Community's settlement, and f) supplying the school with the materials and human resources necessary to guarantee the Community's children access to basic education, paying special attention to make sure that the education provided respects their cultural traditions and

guarantees the protection of their language. In doing all this, the State shall carry out the necessary consultations with the Community.

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

303. Without prejudice to the foregoing, in order for the provision of basic goods and services to be adequate and regular, the State shall prepare a study within six months of the notification of this Judgment that establishes the following:

a) regarding the provision of potable water: 1) the regularity with which the deliveries should be made; 2) the method to be used to deliver the water and ensure the preservation of its purity; and 3) the quantity of water to be delivered per person and/or per family;
b) regarding the medical and psycho-social care, as well as the delivery of medication: 1) the necessary regularity of medical personnel's visits to the Community; 2) the principle ailments and illnesses suffered by the members of the Community; 3) the medications and treatments necessary for those ailments and illnesses; 4) the necessary pre- and post-natal care; and 5) the manner and regularity with which the vaccinations and deparasitizations should be carried out;
c) regarding the delivery of food: 1) the kinds of food to be delivered to the Community in order to guarantee a nutritious diet; 2) the regularity with which the deliveries must be made; 3) the quantity of food to be delivered per person and/or family.
d) with regard to the effective and salubrious management of biological waste: the kind sanitary system to be put in place and the number of units, and
e) with regard to the supply of materials and human resources to the Community's school: 1) the physical and human materials that the school needs to guarantee an adequate bilingual education; 2) the materials that each student needs for an adequate education, and 3) the materials that the school's teachers need in order to give their classes.

304. To carry out the study mentioned in the prior paragraph, the specialists in charge of it must have the specific technical knowledge required for each task. Likewise, the specialists must always include the Community's point of view, expressed in keeping with their methods of making decisions. Said study could be carried out by the Interinstitutional Commission (CICSI). [FN308]

[FN308] Cf. Decree No. 1.595 del 26/02/2009, "[b]y which it created and includes an Interinstitutional Commission responsible for implementing the actions necessary for compliance with the International Judgement (CICSI), issued by the Inter-American Court of Human Rights (IA Court of HR) and the recommendations of issued by the Inter-American Commission on Human Rights (IACHR)" (annexes to the answer to the application, annex 5(5), take VIII, pages 3591 to 3595).

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305. Once the specialists submit their report to the Court, it will be passed on to the Commission and to the representatives in order for them to give the comments they feel are pertinent. Taking the opinions of the parties into account, the Court could order the State to have

its specialists add to the information provided. At that time the State will have to adapt its deliveries of basic goods and services to the Community - ordered in paragraph 301 to the conclusions that the specialists draw in their report.

306. Finally, given the difficulties that the Community's members face in accessing health centers (supra para. 208), the State shall establish a permanent healthcare center in the settlement where the Community is temporarily located – "25 de Febrero" - with the medications and supplies necessary to provide adequate healthcare. To do this, the State has six months as of the notification of this Judgment. Likewise, it must immediately establish a system of communication in the settlement that allows the victims to contact the relevant healthcare authorities for care in the event of an emergency. Should it be necessary, the State will provide transportation to the individuals who need it. Later, the State shall also ensure that the healthcare center and communication system are moved to the place where the Community settles permanently.

5. Guarantees of non-repetition

5.1. Implementation of registration and documentation programs

307. The representatives and the Commission requested that a system be implemented to make it possible to register births and issue identification cards to the Community's children "without having to travel to the Capital." The State reported on the work carried out in the Community regarding birth registration and the issuance of identification cards and ethnic identification cards to the members (supra para. 247).

308. In view of the conclusions contained in the chapter related to Article 3 of the Convention, the Court orders the State to implement, within a maximum period of one year of notice of the present Judgment being served, a registration and documentation program aimed at offering the members of the Community the possibility to register and to obtain their identification documents.

5.2. Adjusting domestic law to the Convention

309. Given the Court's conclusions in Chapter VI of the present Judgment, the Court finds that it is necessary for the State to guarantee the effective enjoyment of the rights recognized in its National Constitution and in its laws, pursuant to the American Convention. For the Court, the State's international responsibility in this case is partly due to not having adapted the law to guarantee indigenous communities' property rights to their traditional lands, as well as the fact that institutional practices limit or fail to fully guarantee the effective application of the rules formally established to guarantee the rights of indigenous communities. In the Courts opinion, the social interest of the property, in what regards the indigenous community, should be understood as lands that hold an ancestral quality for the indigenous, which should be reflected in both he substantive and procedural forums.

310. As a consequence, pursuant to Article 2 of the American Convention, within two years the State shall pass into domestic law the legislative and administrative measures, as well as

measures of any other character, necessary to create an efficient mechanism for indigenous peoples to claim their ancestral or traditional lands, making effective their right to property. This mechanism must enshrine substantive rights that guarantee: a) that the importance of traditional lands for the indigenous is taken into account, and b) that it is not sufficient that the claimed land is under private ownership and is being used for production to reject the claim for revindication of the land. Moreover, this system should entail that a judicial figure is the authority competent to resolve the conflict between the right to property of private parties and the indigenous peoples.

5.2. Regarding the decree that declares part of the land claimed by the Community as a wildlife refuge

311. With regard to judicial practices, this Tribunal has established that it is aware that the domestic judges and tribunals are subject to the rule of law and that, therefore, they are compelled to apply the regulations in force within the legal system. [FN309] But once a State has ratified an international treaty such as the American Convention, its judges, as part of the State's apparatus, are also subject to it, which compels them to make sure that the provisions of the Convention are not affected by the application of laws that are contrary to its objective and purpose, and that they do not lack legal effects from their creation. In other words, the Judiciary shall exercise a "control of conventionality" ex officio between domestic regulations and the American Convention, evidently within the framework of its respective competences and the corresponding procedural regulations. Within this task, the Judiciary shall take into consideration not only the treaty but also the interpretation the Inter-American Court, final interpreter of the American Convention, has made of it. [FN310]

[FN309] Cf. Case of Almonacid Arellano et al. v. Chile, supra note 39, para. 124; Case of La Cantuta v. Perú. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 173, and Case of Radilla Pacheco v. México, supra note 12, para. 339.
[FN310] Cf. Case of Almonacid Arellano et al. v. Chile, supra note 39, para. 124; Case of La Cantuta v. Perú, supra note 308, para. 173, and Case of Radilla Pacheco v. México, supra 12, para. 339.

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312. In this case, Decree No. 11.804, issued on January 31, 2008, which declares part of the land claimed by the Community as a wildlife refuge protected by private domain, completely ignores the indigenous claim on the land filed with the INDI. According to the State's own specialized domestic bodies, it should be considered null (supra para. 181 and 161).

313. As a consequence, the State shall take the measures necessary to ensure that Decree No. 11.804 is not an obstacle to returning to the Community its traditional land.

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314. Regarding the other means of reparation requested by the representatives in their brief of pleadings and motions, [FN311] the Court considers that the issuing of the present Judgment and

the reparations ordered in this chapter are sufficient and adequate for the reparation of the consequences of the violations suffered.

[FN311] The representatives requested: i) establishment a scholarship fund for high school and college for young people of the Xákmok Kásek Community ii) establishment of a fund for projects aimed at strengthening the culture and languages of the Enxent, Angaité, and Sanapaná Villages of the Paraguayan Chaco, carried out with the participation of the Xákmok Kásek Community et al. Communities of the Lower Chaco, and iii) establishment of a consultation mechanism for villages and / or indigenous communities, so as to regulate the provisions of ILO Convention 169 to ensure their participation in State proceedings affecting their interests.

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6. Compensation

6.1. Pecuniary damage

315. The Court has developed in its jurisprudence the concept of pecuniary damages and has established that pecuniary damage entails "the loss or detriment to the income of the victim, the costs incurred due to the facts, and the consequences of a pecuniary nature that have a causal link with the facts of the case." [FN312]

[FN312] Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Dos Erres Massacre v. Guatemala, supra note 12, para. 275, and Case of Chitay Nech v. Guatemala, supra note 8, para. 261.

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316. The Commission indicated that in order to determine the pecuniary damage, the Court must take into account the Community's cosmovision and the effect that not having possession of their traditional habitat has had on the Community's cosmovision and on its members. Those effects include being blocked from carrying out their traditional subsistence activities. The representatives requested that the Court set, in equity, an amount for pecuniary damages that takes into account that the members of the Community and their leaders have had to take many actions and travel a great deal during the years that the land claim procedure has lasted. The State argued that there is no relation between the Community's petition related to the damages claimed and the facts reported.

317. The Court finds that the actions and steps taken by the Community generated expenses that must be considered as consequential damage, in particular with regard to the actions or steps taken in claiming their land, to which the leaders or members have had to move around in order to carry out said procedures. However, the Court observes that documents and receipts were not submitted to demonstrate the expenses incurred.

318. As a consequence, the Court, in equity, sets compensation at US$10,000.00 (ten thousand Dollars of the United States of America), as compensation for travel related expenses. This sum

must be delivered to the Community's leaders within two years as of the notification of the present Judgment, in order for the Community to invest the money however they wish, in accordance with their own way of making decisions.

6.2. Non-pecuniary damage

319. The Court has developed in its jurisprudence the concept of non-pecuniary damage and has established that non-pecuniary damage entails, "not only the suffering and harm caused directly to the victim and the victim's relatives, the erosion of important value to people, such as alterations, of a non-pecuniary nature, to the conditions in which the victim and the family exist." [FN313]

[FN313] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs, supra note 303, para. 84; Case of Dos Erres Massacre v. Guatemala, supra note 12, para. 255 and Case of Chitay Nech v. Guatemala, supra note 8, para. 273.

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320. The Commission argued that "non-pecuniary damages are caused not only by the loss of a loved one, but also by the inhumane conditions [that affected] the members of the Xákmok Kásek Community, a factor that in this case is especially important as that situation has been due to the lack of a guarantee […] of the Community's right to its ancestral land." It requested "that the State be ordered […] to pay a sum of money to the Community and its members in virtue of the non-pecuniary damages that they have suffered as a direct consequence of the violations […] of the American Convention." Likewise, the Commission requested that the Court "order the State to pay an amount, determined in equity, to the family members of the members of the Community who have died." The representatives were in agreement with the Commission.

321. In establishing the amount of non-pecuniary damage, this Court will weigh the special meaning that land has for indigenous peoples in general and for the Xákmok Kásek Community in particular (supra paras. 107,149 and 174 to 182). This means that all denial of the enjoyment or exercise of land rights does damage to values that are very important for those peoples, as they experience the risk of losing their identities and cultural heritage that they would pass on to future generations, or of experiencing damage that would be irreparable within their lifetimes.

322. Likewise, the Court takes into consideration the fact that the State has committed itself "[to] the comprehensive development of this [C]ommunity by designing and executing collective projects in order to make the property handed over profitable, with those projects to be funded either domestically or from international sources."

323. Based on the above and as it has done in prior cases, [FN314] the Court considers it appropriate, on equitable grounds, to order the State to establish a community development fund as compensation for the non-pecuniary damage that the Community has suffered. This fund and the programs it will support will be implemented on the land that is turned over to the Community in keeping with paragraphs 283 to 286 and 306 of this Judgment. The State shall allocate the amount of US$ 7,000,000.00 (seven hundred thousand dollars of the United States of

America) to this fund, which will be used to implement educational, housing, agricultural, diet, 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.

[FN314] Case of Yakye Axa Indigenous Community Vs Paraguay, supra note 5, para. 234; Case of Escué Zapata v. Colombia. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 164, para. 16, and Case of the Saramaka People. v. Suriname, supra note 16, paras. 201 and 202.

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324. The abovementioned committee will be in charge of defining the ways in which the development fund is to be implemented and will be, in a period of six months as of delivery of the lands to the members of the Community, made up of three members: a representative appointed by the Community, 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, the Court will decide.

325. Also, based on the conclusions found in the chapter of this ruling on Article 4(1) of the Convention, the Court considers it proper - on equitable grounds and based on a sensible assessment of the non-pecuniary damages - for the State to pay the compensatory amount of US$ 260,000.00 (two hundred and sixty thousand dollars of the United States of America) to the leaders of the Xákmok Kásek Community. This compensation for pecuniary damage for the members of the Xákmok Kásek Community who died (supra para. 234) shall be put at the Community's disposal within one year of the notification of this Judgment, so that pursuant to their customs and traditions, they distribute the amounts due to each of the family members of the individuals who died or invest the money as they see fit, in keeping with its own decision making procedures.

7. Costs and expenses

326. The Commission and the representatives requested that the State be ordered to pay the costs and expenses incurred in processing the domestic judicial, administrative, and legislative proceedings brought by the victims or their representatives, as well as the costs and expenses incurred internationally in bringing the case before the Commission and the Court.

327. The representatives, in their final arguments, requested a total of US$32,534.17 (thirty-two thousand, five hundred and thirty-four dollars and 17/100), which includes items for field work, travel to the Inter-American Commission, travel to litigate before the Court, and courier expenses.

328. The State indicated that with regard to the request for payment of costs and expenses related to the domestic proceeding, "all the proceedings brought by [the] attorneys were insufficient and inconclusive." They also indicated that "the [C]ommunity's representation is

abusive, given that in addition to its negligence in the professional task entrusted to them, they add this absurd petition to order the State to cover costs that they do not deserve because of the poor service provided."

329. The Court has indicated that "the victims' or their representatives' claims in terms of the costs and expenses, and the receipts that support them, must be presented to the Court at the first procedural moment granted to them, that is, in the brief of pleadings and motions, which does not preclude these claims from being updated at a later time, in conformity with the new costs and expenses incurred in the proceeding before this Court." [FN315] Likewise, the Court reiterates that "the submission of evidentiary documents is not sufficient; the parties are required to argue the relationship of the evidence with the fact being considered represented, to which, when related to claimed economic disbursements, the areas and justifications of the expenses should be established with clarity." [FN316]

[FN315] Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, para. 275; Case of the "Las Dos Erres" Massacre v. Guatemala, supra note 12, para. 302, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 284.
[FN316] Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra note 314, para. 277; Case of the "Las Dos Erres" Massacre v. Guatemala, supra note 12, para. 301, and Case of Chitay Nech et al.v. Guatemala, supra note 8, para. 284.

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330. The Court has held that the representatives incurred expenses in appearing before this Court including transportation, courier, and communication services, among others. For these expenses, the representatives submitted some receipts together with the brief of final arguments. However, the representatives did not submit detailed evidence on the rest of the expenses that they have supposedly incurred, though it is logical to assume that the domestic proceeding and the proceeding before the Inter-American Commission implied certain expenses.

331. In consideration of the foregoing, the Court sets, in equity, the total of amount expenses incurred during this litigation at US$25,000.00 (twenty-five thousand dollars of the United States of America). This quantity must be paid by the State to the Community's leaders, who will in turn pay Tierraviva what the Community finds appropriate in compensation for expenses incurred by this organization. In the monitoring of the compliance of this Judgment, the Court may provide the State's reimbursement to the victims or their representatives of the reasonable costs duly proven.

8. Means of compliance with the payments ordered

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

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

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

335. The amounts assigned in this Judgment must be delivered to the Community in full, in keeping with the provisions of this Ruling, with no taxes deducted.

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

XIII. OPERATIVE PARAGRAPHS

337. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To reject the State's request for the suspension of these proceedings, in the terms of paragraphs36 to 50 of this Judgment.

DECLARES,

By seven votes to one, that

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

By seven votes to one, that

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

By seven votes to one, that

4. The State violated the right to life contained in Article 4(1) of the American Convention, in connection to Article 1(1) thereof, to the detriment of Sara Gonzáles López, Yelsi Karina López Cabañas, Remigia Ruiz, Aida Carolina Gonzáles, NN Ávalos or Ríos Torres, Abundio Inter Dermott, NN Dermott Martínez, NN García Dermott, Adalberto Gonzáles López, Roberto Roa Gonzáles, NN Ávalos or Ríos Torres, NN Dermontt Ruiz, and NN Wilfrida Ojeda, the terms of paragraphs 231 to 234 of this Judgment.

Unanimously, that

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

By seven votes to one, that

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

Unanimously, that

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

Unanimously, that

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

By seven votes to one, that

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

Unanimously, that

10. The State expressed its acceptance of certain reparation measures, pursuant to that stated in paragraph 32 of the Judgment, which has been assessed by the Court, in the terms of said paragraph of the present Judgment.

AND ORDERS,

Unanimously, that

11. This Judgment constitutes per se a form of reparation.
12. The State shall return to the Community the 10,700 hectares it is claiming in the manner and time period established in paragraphs 281 to 290 of this Judgment.
13. The State shall immediately take action to ensure that the territory claimed by the Community is not damaged due to actions of the State itself or private third parties, in keeping with the provisions of paragraph 291 of this Judgment
14. The State shall, within six months of the notification of this Judgment, remove the formal obstacles to conveying title of the 1,500 hectares of "25 de Febrero" to the Xákmok Kásek Community, in keeping with the provisions of paragraph 293 of this Judgment.
15. The State shall, within a period of one year from the notification of this Judgment, title the 1,500 hectares of "25 de Febrero" to the Xákmok Kásek Community, in keeping with the provisions of paragraphs 294 and 295 of this Judgment.
16. The State shall carry out a public act of acknowledgement of responsibility within a period of one year of the notification of this Judgment, in the terms of paragraphs 297 of this Judgment.
17. The State shall carry out the publications ordered in paragraph 298 of this Judgment, in the manner and time period indicated in the paragraph.
18. The State shall, through a radio broadcaster with wide coverage in the Chaco region, publicize the official summary of the Judgment issued by the court in the manner and within the time period indicated in paragraph 301 and 302 of this Judgment.
19. During the process of turning over the traditional land or alternative land to the Community, the State shall take immediate, regular, and permanent action to adopt the measures indicated in paragraph 301 and 302 of this Judgment.
20. The State shall prepare the study indicated in paragraph 303 within six months of the notification of this Judgment and in the terms set forth in paragraphs 304 and 305 of this ruling.
21. The State shall establish a permanent healthcare center in "25 de Febrero," equipped with the medications and supplies necessary to provide adequate healthcare, within six months of the notification of this Judgment, in the terms of paragraph 306 of this Judgment.
22. The State shall immediately establish the system of communication in "25 de Febrero" indicated in paragraph 306 of this Judgment.
23. The State shall ensure that the healthcare center and the system of communication indicated in operative paragraphs 21 and 22 supra are moved to the location of the Community's definitive settlement once it has recovered its traditional land, in keeping with the order given in operative paragraph 12 supra.
24. The State shall, within a period of one year from the notification of this Judgment, implement a program for registration and documentation, in the terms of paragraph 297 of this Judgment.

25. The State shall, within two years as of the notification of this Judgment, adopt into its domestic law the legislative, administrative, and any other kind of measures that maybe necessary to create an effective mechanism for indigenous peoples to claim ancestral or indigenous land, a mechanism that allows for the fulfillment of their right to property, in the terms of paragraphs 309 and 310 of this Judgment.
26. The State shall immediately adopt those measures necessary to ensure that Decree No. 11.804, which declares part of the land claimed by the Community as a wildlife preserve, will not be an obstacle to returning the traditional lands, in keeping with the provisions of paragraphs 311 and 313 of this Judgment.
27. The State shall, within a year of the notification of this Judgment, pay the amounts established in paragraphs 318, 325, and 331 in the quality of compensation for pecuniary and non-pecuniary damages and the payment of the costs and expenses that apply under the conditions set forth in paragraphs 317, 321, 322, and 330 of the present Judgment.
28. The State shall create a community development fund, pursuant to the terms set forth in paragraphs 323 of this Judgment, as well as to create a committee for the implementation of the fund, in the terms and in the period established in paragraph 324 of this Judgment.
29. The Court will monitor full compliance with this Judgment in exercise of its powers and in compliance with its obligations under the American Convention, and will consider the case closed when the State has complied in full with all the provisions herein. Within a period of six months as of notification of the Judgment, the State shall provide the Court with a report on the measures adopted to comply with it.

Judge Vio Grossi presented before the Court a Concurring Opinion, and Judge Ad-Hoc Augusto Fogel Pedrozo presented before the Court his Concurring and Dissenting Opinion, those of which accompany the present Judgment.

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

Diego García-Sayán
President

Leonardo A. Franco
Manuel E. Ventura Robles
Margarette May Macaulay
Rhadys Abreu Blondet
Alberto Pérez Pérez
Eduardo Vio Grossi

Augusto Fogel Pedrozo
Ad hoc Judge

Pablo Saavedra Alesandri
Secretary

So Ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

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

1. I concur in my vote with the present Judgment, not only because I agree with that noted in it, but also because it heads in a direction that I consider to be in line with Law and Justice and in accordance with the progressive development of International Law in what regards indigenous peoples, that which I believe should be further elaborated.

2. On prior occasions, the Inter-American Court of Human Rights –hereinafter the I/A Court of H.R. –has ruled that there have been human rights violations in regard to members of indigenous peoples, interpreting Article 1(2) of the American Convention on Human Rights [FN317] - for the purposes of this Convention, “person” means “every human being,” entitled to the rights therein.

[FN317] Article 1: “Obligation to Respect Rights
1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.”

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3. Hence, the I / A Court of H.R. has consistently declared human rights violations to the detriment of the members of the indigenous peoples, without doing so, however, at least directly and explicitly, with regard to the latter, as an entire whole or distinct ethnic group or human community with an international juridical subjectivity in this area. [FN318]

[FN318] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66; Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. Series C No. 125, and Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of March 29, 2006. Series C No. 146.

I.- RIGHT OF THE MEMBERS OF THE INDIGENOUS PEOPLES.

A.- Traditional Orientation.

4. Given this opportunity, the I/A Court of H.R. has consolidated its jurisprudence in this regard, when considering the members of the Xákmok Kásek [FN319] Community as victims in this case, and in ruling, to their detriment and as a consequence, the violations of the human rights enshrined in the Convention [FN320] when it declared that 10,700 hectares of claimed [FN321] land be returned and in ordering other diverse measures in their favor. [FN322]

[FN319] Example: paragraphs 54, 55, 78, 79, 109, 116, 120, 121, 154, 168, 169, 182, 193, 197, 208, 217, 242, 243, 244, 252, 275, 278, 281, 282, 283, 284, 285, 286, 291, 294, 295, 301, 306, 308, 309, 313, 318, 321, 323, etc.
[FN320] Operative paragraphs 2, 3, and 5.
[FN321] Operative paragraph 12.
[FN322] Operative paragraphs 13, 15, 19, and 23, even though in these operative paragraphs, the direct reference made to “the Community,” in referring to considering paragraphs 291, 294 y 295, 301, and operative paragraph 12, respectively, said mention should be carried out in regard to “the members of the Community.”

B.- Inter-American Doctrine. [FN323]

[FN323] While under this subtitle, reference is made to the orders of two organs of an international organization, the OAS, in that it could be considered that it would deal with expressions of the auxiliary source of international law, the denominated “Orders of Declarative Law of International Organizations,” they are cataloged, however, as doctrine, another auxiliary source of international law, considering that one is a proposed Declaration not yet adopted to which it corresponds, and the other contains observations on the first and in both cases are issued by advisory bodies of that international organization.

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5. This perspective seems to be shared by Inter-American doctrine, as demonstrated by the Draft Declaration on the Rights of Indigenous Peoples, prepared by the Inter-American Commission on Human Rights, of 1997, [FN324] wherein it states:

"Indigenous peoples have the collective rights that are indispensable for the full enjoyment of human rights of its individual members." [FN325]

[FN324] AG/RES.1479 (XXVII-O/97).
[FN325] Article II(2). First phrase.

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6. On its behalf, the Comments of the Inter-American Juridical Committee to said Draft, in 1998 [FN326] goes in the same direction, when affirming that:

“International law in the field of human rights protects, with few exceptions, individual rights, while recognizing that in some cases the exercise of individual rights can only be effectively exercised collectively."

[FN326] OEA/Ser.Q CJI/doc.29/98 rev.2

II.- RIGHTS OF INDIGENOUS PEOPLES.

A.- Possible new perspective.

7. Nevertheless, it is also true that the I/A Court of H.R., in the same judgment of orders, has made reference to the Xákmok Kásek Community as the subject claiming the rights, particularly in what regards the right to territory [FN327] and the “communal property” that corresponds to it, [FN328] and also, expressly states that the Community is the beneficiary of the measures ordered, [FN329] even though in some of these last cases, it does so addressing the reasoning in the orders where, in turn, it refers to the members of the collective, [FN330] and in others, it does so indistinctly, referring to those and to the Community. [FN331]

[FN327] Examples: paragraph 64 and et seq. and 80 et seq.
[FN328] Examples: paragraph 85 et seq.
[FN329] Operative Paragraphs 13 to 15, 23, 25, and 26.
[FN330] See supra note 6 in relation to Operative Paragraphs 13, 15, and 23.
[FN331] Operative Paragraphs 25 and 26.

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8. Thus, with these references, the I/A Court of H.R., without parting from its traditional posture, appears to leave open the possibility that in the future it could take a new approach on the matter, particularly when it affirms, in paragraph 85 of the Judgment in consideration, that it

“has ruled that the close link that indigenous peoples have to their traditional lands, to the natural resources found that are part of their culture, and to the lands' other intangible elements, should be safeguarded by Article 21 of the American Convention.” [FN332]

[FN332] Article 21. “Right to Property
1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

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

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9. In the same sense, in paragraph 86 of the same Judgment, the I/A Court of H.R. reproduces what it has stated in other occasions, [FN333] in that amongst the indigenous peoples

"[t]here exists a communitarian tradition of a communal manner regarding collective property of land, in the sense that ownership does not pertain to an individual, but rather to the group and the community. Indigenous peoples, as a matter of survival, have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations."

[FN333] Cfr. Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra note 2, para. 149; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 2, para. 118, and Case of the Saramaka People. v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 90.

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10. And, in paragraph 87 of said Judgment, the I/A Court of H.R. adds that

"[m]oreover, the Court has indicated that the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession "does not focus on individuals but on the group and the community." This concept of ownership and possession of lands does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the Convention. The failure to recognize the different versions of the right to use and enjoy goods that come from the culture, uses, customs, and beliefs of different peoples would be equivalent to arguing that there is only one way for things to be used and arranged, which in turn would make the protection granted by Article 21 of the Convention meaningless for millions of individuals."

B.- Case of Paraguay.

11. In order to understand the effects of the recently drafted paragraphs and in addition to the thesis that the I/A Court of H.R. appears to be envisioning an orientation that is removed from the classic position held in this area, it must be considered that in regard to orders, both the Inter-American Commission on Human Rights and the representatives of the victims repeatedly noted that the rights violated by Paraguay were as much the rights of the Xákmok Kásek Community, as they were of the rights of its members, without the respondent State of Paraguay, - hereinafter the State – challenging the nature of the Community as subject of collective rights. [FN334]

[FN334] Example: Paragraph 2.

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12. Similarly, and in the same order of ideas, it is appropriate to add, in consideration of the case in question, that the State ratified, and by means of Law No. 234/93, [FN335] incorporated into its domestic law, Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries 1989, which, in its Article 3(1) states that:

"Indigenous and tribal peoples shall enjoy full human rights and fundamental freedoms without hindrance or discrimination. The provisions of this Convention shall apply without discrimination to male and female members of these peoples."

[FN335] Law No. 234/93 ratified by the Convention No. 169 of the ILO.

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13. On the other hand and in line with that previously mentioned, it must be stated that the Constitution of Paraguay enshrines rights in favor of indigenous communities as collectives [FN336] and that said State has an Indigenous Statute that recognizes the juridical personality of the communities. [FN337]

[FN336] National Constitution, Articles 62 and 63.
[FN337] Law No. 904/81, Statute of the Indigenous Communities (f. 376 p1, merits; f 378 p2); Law No. 1.372/88 (f376 p2 merits).

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14. These reasons led the I/A Court of H.R. to indicate, in the case of Yakye Axa, [FN338] that:

"For Paraguayan legislation, the indigenous community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity."

[FN338] Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. Series C No. 125, para. 83.

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15. It seems clear, then, that, at least in the case of Paraguay, both international law and domestic law will recognize the rights of indigenous peoples as such, not only recognizing the rights of its members.

C.- Progressive development of International Law.

16. This situation is placed, as a consequence, in the same process of change that is resulting in General International Law regarding this area, and that coincides with the new perspective that the I/A Court of H.R. could apply in the future when dealing with this subject matter [FN339] and that is being manifested, particularly, by that stipulated in the Convention No. 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries 1989.

[FN339] Article 31 of the Vienna Convention on the Law of Treatises. "General Rule of Interpretation.
A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
…
3. There shall be taken into account, together with the context:
…
c) any relevant rules of international law applicable in the relations between the parties."

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a.- Orders of international organizations.

Indeed, this process of change is expressed, for example, in the United Nations Declaration on the Rights of Indigenous Peoples 2007, which states in Article 1 that:

"Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

17. In a same sense, worth mention is that noted in 2005 by the United Nations' Committee on Economic, Social, and Cultural Rights, regarding the right to benefit from the protection of moral and material interests that ensue due to scientific, literary, or artistic productions, also aid the indigenous peoples in their nature as collective subjects, and not only aid its members as individuals subject to rights. [FN340]

[FN340] General Comment 17, paras. 7, 8, and 32.

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18. Subsequently and in the same order of ideas, said Committee, in its General Comment No. 21 of 2009, interpreted that the expression "everyone" contained in Article 15(1)(a) of the International Covenant on Economic, Social, and Cultural Rights, [FN341]

"May denote the individual or the collective; in other words, cultural rights may be exercised by a person a) as an individual, b) in association with others, or c) within a community or group, as such." [FN342]

[FN341] Article 15
"1. The States Parties to the present Covenant recognize the right of everyone:
a) To take part in cultural life;
b) To enjoy the benefits of scientific progress and its applications;
c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."
[FN342] General Comment 21, para. 9.
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b.- Inter-American Doctrine.

19. In addition, the Inter-American doctrine is inclined to side with this universal trend, as demonstrated by Article II(1) of the abovementioned Draft of the American Declaration on the Rights of Indigenous Peoples, in stipulating that

"Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other international human rights law; and nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with the instruments of international law including human rights law."

20. Said concept is reiterated in Article XVIII(2). of the Draft, when it notes that

"Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood."

21. In turn, the previously mentioned Comments of the Inter-American Juridical Committee to the recently mentioned Draft, note, in parragraph 3(6), that:

"It is with no doubt that the indigenous peoples and its members have the right to full and effective enjoyment of the human rights recognized universally, and the Declaration should reaffirm them […]"

c.- Other instruments.

22. Another international legal instrument, but of a regional character, the African Charter on Human and People's Rights, of 1996, falls in the same predicament when it establishes the special protection of certain rights of the indigenous peoples based on the exercise of their collective rights. [FN343]

[FN343] African Charter on Human and Peoples Rights: Article 20 that protects the right to existence and the inalienable right to self-determination; Article 21 that protects the right to natural resources and ownership of their lands, and Article 22 that guarantees the right to development.

III.- REACH OF THE HUMAN RIGHTS OF INDIGENOUS PEOPLES AND ITS MEMBERS.

A.- Specific rights.

23. It could then be argued that international texts, autonomous sources of International Law, such as treaties and other supporting sources thereof, such as orders of the organs of international organizations, make reference to the human rights of indigenous peoples and of its members when specific rights are entailed, be it of the collective or of its members, and as a consequence, distinct or different than those in force for all human beings, given that were it not this way, said special or peculiar proclamation by the noted legal instruments would not be logical or justified, those of which seek precisely to provide legal effect, namely, to establish or determine the international legal obligations derived from the rights thereby proclaimed.

24. All of the above, for now, allows for a broader understanding of that provided in Article 1 of the Convention, [FN344] in that the obligation to respect and guarantee the right to all persons to exercise the rights enshrined in the Convention, also includes collective groups or communities, such as indigenous peoples, to the extent that at least some rights are extended to such entities, those of which, its members may only effectively enjoy by means of it and because they form part of it, thereby implying that they are not exclusively of an individual nature.

[FN344] See note 1.

CONCLUSION.

25. In other words, in account of that explained above and in application of Article 29(b) and 29(d) of the Convention, [FN345] it can be concluded that, pursuant to the progressive development of the International Law of Human Rights, it follows, on the one hand, to include the term "person" contained in various Articles of the Convention and as victims of human rights violations enshrined in it, not only the members, considered individually, of indigenous peoples, but also in regards to them as such, and on the other hand, consequently to consider among those rights those that pertain to said peoples, because justice would not only be served, but, in

addition, the jurisprudence would situated, more clearly and without margin for error, in the modern trend that is surfacing with more clarity in International Law that regulates this subject matter.

[FN345] Article 29:
"No provision of this Convention shall be interpreted as:
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
… and,
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

EVG.-
Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING AND DISSENTING OPINION OF JUDGE AUGUSTO FOGEL PEDROZO

I have participated in the ruling of the Judgment ordered by the Court in the case of XÁKMOK KÁSEK and I have dissented in regard to some operative paragraphs of the Judgment, based on the foundations established in the deliberations of the case, which consist of the following considerations:

I. Concurring Opinion. Dismissal of the Request of the State regarding the suspension of the proceedings

1. In item 1 of Chapter XIII "Operative Paragraphs," I expressed my agreement with the dismissal of the State's request regarding the suspension of the present contentious proceeding, in the terms expressed in paragraphs 36 to 50, and also because if the different denomination of the ethnic group argued by the representatives of the Xákmok Kásek Community constitutes a problem for the transfer of ownership of the property, then the proper registry law requires the due clarification of the corresponding change, which is rectifiable via the expert testimony recently carried out by the Expert of the State, wherein it was stated that the Indigenous Community of Xákmok Kásek pertains to the Sanapaná peoples of the same linguistic family as the Enxet-Lengua. In the villages of the Sanapaná, the coexistence with other families of the linguistic group denominated Maskoy [FN346] (denominated by Kalish as Enlhet-Enenlhet) is frequent. It is difficult to determine, culturally speaking, to which belong the descendants of couples from two distinct peoples, and it is necessary to determine to which people they ultimately pertain to via an investigation with the members of the Community.

[FN346] Zanardini, José and Walter Biedermann. The Indigenous of Paraguay Asunción. 2006.

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2. In the Indigenous Census of 2002, the Xákmok Kásek Community is settled in the Salazar Ranch as Sanapaná. Also, in the play "The Indigenous of Paraguay" by José Zanardini and Walter Biederman, one of the places where the ethnic group Sanapaná with the name Xákmok Kásek inhabits is the Salazar Ranch; in addition, the representatives of this community participated, in the year 2003, in meetings with the Sanapaná communities when visiting the makeup of an Association of Sanapaná Communities.

II. Dissenting opinion. Right to Community Property, Fair Trial [Judicial Guarantees], and Judicial Protection

3. Regarding the State's violation of the right to community property, fair trial [judicial guarantees], and judicial protection, in the terms of paragraph 170 of the Judgment, in what regards the alleged violation of Article 21 of the American Convention, it is my understanding that the right to property cannot be interpreted in isolation, but rather it must be considered together with the legal system in which it operates, taking into account domestic and international law.

4. The National Constitution of Paraguay guarantees private property –individual and corporative-and community property of which the indigenous peoples have the right; Article 63 recognizes and guarantees the right of the indigenous peoples to preserve and develop their ethnic identity in their respective habitats. Moreover, Article 64 of the Constitution notes that:

Indigenous peoples have the right to communal property of land, in the quantity and quality sufficient for the conservation and development of their particular lifestyles. The State will freely offer these lands, those of which will be indefeasible, indivisible, inalienable, non-lapsable, not subject to guarantee contractual obligations nor be leased; moreover, they will be exempt from taxes. The removal or transfer from and of their habitat, without their express consent, is prohibited.

5. Article 109 of the National Constitution establishes that:

Private property, its content and limits established by law, is guaranteed, pursuant to its economic and social function, in order to make it accessible to all.
Private property is inviolable.
No one can be deprived of their property unless pursuant to judicial order, but expropriation is permitted in cases where there is a pubic utility or social interest, which will be determined in each case by law. This will guarantee the payment of just compensation, established conventionally or by judicial order, except unproductive large estates destined for land reform, in accordance with the procedure for expropriation to be established by law.

6. Likewise, Article 137 establishes:

The supreme Law of the Republic of the Constitution. There are the treatises, conventions, and international agreements, approved and ratified, the laws enacted by the Congress and other legal provisions of a lesser degree, approved as a consequence, which together makeup national positive law in the order stated.
Whoever attempts to change said order, outside of the procedures provided for in this Constitution, shall be guilty of crimes that are codified and punished by the law ...
All of the provisions or acts of authority opposed to that established in this Constitution are invalid.

7. The subjects being protected by the right to property include, in as much, the indigenous Xákmok Kásek Community, as well as the other indigenous, and in general all citizens, in the framework of the principle of equality of persons, enshrined in Article 46 of the National Constitution, which establishes: "All inhabitants of the Republic are equal in dignity and in law. Discrimination is not allowed. The State will remove the obstacles and impede the factors that maintain or promote it."

8. "The protective measures that are established based on unfair unequal treatment will not be considered as discriminatory factors but rather as egalitarian factors." Those that should be positively discriminated, in the Paraguayan context, consist of, at least, 2,000 indigenous families of the Chaco and 2,000 families of the Eastern Region, who lack land, as well as some 90,000 families of peasants without land, whom are poverty ridden. In my opinion, it is in this context that the provisions of the American Convention must be interpreted.

9. The Law 904/81, enacted prior to the National Constitution, sanctioned in 1992, regulates the access of indigenous communities to community property of land. Article 8 establishes that, prior to compliance of the established procedures, "the juridical personhood will be recognized of the indigenous communities preexistent to the promulgation of the Law, and to those composed of indigenous families that are regrouped in communities to gain from the benefits thereof." In the latter, the minimum amount of indigenous families is 20 (Article 9).In relation to the settlement of indigenous communities, Law 904 establishes:

Article 14. The settlement of indigenous communities shall encompass, to the extent possible, the current or traditional possession of the lands. The free and express consent of the indigenous community will be essential for its settlement in areas different from its usual territories, except where national security reasons are entailed.
Article 15. When, in the cases foreseen in the prior Article, the resettlement of one or more indigenous communities is essential, they shall be provided land that is suitable, and at a minimum, equal in quality to the land they occupied, and they shall be appropriately compensated for the harm and detriment suffered for the displacement and by the value of the improvements.

10. In turn, Article 22 of the mentioned Law 904 states the procedure for the settlement of indigenous communities on public lands, and Articles 24 and 25 states the procedures for the settlement of private lands, which the indigenous occupy. In Article 26 the law establishes that: "In cases of expropriation, the procedure and compensation shall be in conformity with that

provided in the Constitution and Laws and for the payment of compensation, the necessary resources from the General Budget of the Nation shall be planned."

11. The Law 43/89 that establishes a regimen for the regulation of the settlements of indigenous communities, in its Article 4, states: "During the administrative and legal procedures considered in Article 2, the Paraguayan Institute for the Indigenous (INDI) and the Institute for Rural Wellbeing (IBR), should propose definitive remedies for the settlement of the indigenous communities, pursuant to Law 854/63 Agrarian Statute, and Law 904/81, Indigenous Communities Statute, proposing the expropriation, pursuant to Article 1 of the Law 1372/88, when remedies are not obtained via other means." [FN347]

[FN347] Law 854/63 was derogated by Law 1863/02.

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12. The provisions of Law 904, as well as Law 43/89, established, in the absence of an agreement with the land owner, the expropriation as a way to regularize indigenous settlements established on private lands. These provisions are consistent with the standards of the Civil Code, which states that the domain of property is lost by: a) sale; b) transmission or judicial declaration c) execution of a judgment; d) expropriation, and e) abandonment declared in a deed, duly registered with the Registry of Property, and in other cases provided by law (Article 1967). In regard to Article 1966, it exhaustively lists ways to have access the property: a) contract; b) accession, c) adverse possession, and d) inheritance.

13. In this point, the conflict between the constitutional law and Article 64 of Law 1863/02 should be noted; meanwhile the latter limits the possibility of expropriation of property not in proper use, Article 109 of the Constitution, the supreme law of the Republic, provides that in the case of expropriation of unproductive land holdings for agrarian reform, the law itself sets the amount of compensation, while in other cases said amount is established conventionally or by judicial decree. The same Constitutional Chamber of the Supreme Court has established jurisprudence that affirms that in order for the expropriation to be appropriate, it suffices that the legislature is convinced of the existence of a necessity or social interest or public utility, and that it can be remedied with the expropriation of specific properties.

14. For the reasons stated, I dissent from the Judgment in what regards the declaration that the State violated the rights of the Xákmok Kásek Community of the people of Enxet-Language to the right to property enshrined in Article 21 of the Convention. The procedures to ensure the right of property of the Xákmok Kásek Community were not effective due to regulatory gaps in domestic law.

15. As for the alleged violation of Articles 8 and 25 of the American Convention (Fair Trial [Judicial Guarantees] and Judicial Protection), and more specifically in relation to proceedings instituted against the members of the community, I feel that the grievances of the community linked to the violation of due process, which originated in the early procedural steps, at the First Instance, could have been remedied in the other stages of the same process, within domestic law.

III. Dissenting opinion. Right to Life

16. In regard to the alleged violation of Article 4(1) of the American Convention (Right to Life), the application of the Inter-American Commission affirms that the State of Paraguay did not comply, to the detriment of the Xákmok Kásek Community, with the obligation to guarantee the right to life enshrined in Article 4(1) of the American Convention, to the detriment of the deceased indigenous persons of the Community which were duly identified, and that the State "has placed the members of the community, in a situation of risk," affecting their enjoyment and use of their fundamental human rights by leaving the community in a vulnerable situation. Article 4 of the Convention establishes:

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

17. In regard to the deceased indigenous persons, it must be pointed out that had it been argued opportunely, in the domestic forum, complaints of the eventual negligence that could be a cause of avoidable death, may have been prevented, may have been remedied, or at least, the illnesses could have been attended to; doing so would have allowed for a future investigation of the violations to the right to life, punishment of those responsible, and the provision of remedies for the families of the victims. The lack of reparation, in proven cases of negligence by State agents, could have led to responsibility deemed at the domestic level in the State of Paraguay.

18. It is worth mentioning that the settlement of the Xákmok Kásek Community in Estancia Salazar, unlike other very isolated communities, was a short distance from the Transchaco rout and therefore it was possible to request an ambulance to the health center in the District of Irala Fernandez, in the charge of Dr. Rolon, located an hour away on said route. Furthermore, the community had health aid.

19. Nevertheless, the interpretation of the right to life, so as to include positive precautionary measures for the indigenous to enjoy their right to a dignified existence, is based in international doctrine and jurisprudence and makes new advances in International Law of Human Rights.

20. The Court has stated that the State's duty to take positive measures should be prioritized precisely in relation to the protection of the lives of vulnerable people such as the indigenous. This conception of the right to life, referring to indigenous communities living in extreme poverty, manifested in diseases and preventable deaths, raises the social obligation to provide protection and to eradicate extreme poverty. Given their condition due to the severe deprivation, these communities lack strategies to enable them to adequately address the risks to which they are exposed, in a way that would allow them to take advantage of opportunities to improve the living conditions they encounter and ensure minimum conditions for quality of life.

21. The right to life is enshrined in various instruments, and pursuant to them, the existence of extreme poverty growing tendency in the country, means the denial of economic, social, and cultural rights, which include rights to adequate food, health, nutrition, and work. The United Nations Commission on Human Rights recognized that extreme poverty threatens the fundamental right to life, and it determined which human rights are essential for the protection of

life (food, potable water, health). On its behalf, the World Conference on Human Rights, held in Vienna in 1993, considered that extreme poverty constitutes a threat to human dignity, as has been noted in prior judgments. In the case of indigenous communities, particularly those affected by extreme poverty, said situation involves the systematic denial of the opportunity to enjoy the inherent rights of the human being. The Xákmok Kásek Community is certainly affected by extreme poverty, as is clear from the testimony given by witnesses and experts.

22. The interventions arising from State must prevent, mitigate, and overcome the risks, such as malnutrition, prevalence of anemia, morbidity, and mortality, creating the minimum conditions of health care, adequate nutrition, education, job training, and generation of income. In the case of the Paraguayan State, although it attends to the entire vulnerable population, it does not do so in a better manner given shortage of resources.

23. The State's duty to take positive measures to protect the right to life, even when it includes providing for vulnerable populations affected by extreme poverty, cannot be limited to them, given that assistance, by not attacking the root causes of poverty in general, and extreme poverty in particular, can not create those conditions for a dignified life.

24. In my view, in the evolving interpretation of the right to life enshrined in the American Convention, the socio-economic situation of Paraguay and the majority of Latin American countries should be taken into consideration, characterized by the growth of extreme poverty, in both absolute and relative terms, despite the implementation of social protection policies. The interpretation of the right to life does not only deal with only monitoring of compliance, of the State, with the provision of social protection benefits, that temporarily guarantee minimum living conditions, without attending to the root causes of poverty, that reproduce the conditions and create new poverty problems, as discussed in the framework of the United Nations. This raises the need to link the eradication of poverty of all phenomena that arises, taking into account the impact of decisions taken at the State level and within multinational and multilateral bodies; in the reproduction of the conditions of poverty, there are responsibilities for actors and international and national institutions involved.

25. In this context, the capacity of State intervention in developing countries, including Paraguay, and the application of international standards relating to extreme poverty, is not a legal issue that involves only the State, which is often conditioned both by the limited financial resources available and the structural factors linked to the “process of adjustment,” which transcend the domain of the State of Paraguay, considered in isolation. International responsibility is not limited to the right to international assistance in the event that a State Party is unable to achieve, on its own, the model established by the Covenant, enshrined in the International Covenant on Economic, Social, and Cultural Rights.

26. In this view, the increase in poverty is a result of decisions, mainly of an economic and financial nature, taken by private actors, agreed upon by public actors, who have much more power than the States of the countries in development. In this context, the responsibilities of transnational corporations and multilateral agencies must be analyzed for violations of economic, social and cultural rights; in this manner, the Human Rights Commission, while recognizing that poverty threatens the fundamental right to life, requested a review of policies of the World Bank,

the World Trade Organization, International Monetary Fund, and other international organizations.

27. In the progress made by the International Law of Human Rights, it is required that the international community assume that poverty, particularly extreme poverty, is a manner of denial of all human rights, civil, political, economic, and cultural rights, and that it act accordingly, so as to facilitate the identification of perpetrators who bear international responsibility. The system of economic growth, linked to a form of globalization that impoverishes growing sectors, is a form of "massive, flagrant, and systematic violation [of] human rights," in an increasingly interdependent world. In this interpretation of the right to life, which parallels the changing times and current living conditions, attention should be given to the causes that produce extreme poverty and to the perpetrators behind them. In this perspective, the international responsibilities of the State of Paraguay and the other signatories of the Convention do not cease, but these are shared with the international community whom requires new instruments.

IV. Dissenting opinion. Recognition of the Right to Juridical Personality

28. The Commission argued (para. 245) that the State has not implemented mechanisms that allow the members of the Community easy access to "the identification documents necessary to exercise their right to recognition of juridical personality." It indicated that, according to the 2008 census, at least 43 of the 273 members of the Community did not possess identification documents. Of those, at least 32 are minors.

29. The representatives added "the high number of Xákmok Kásek individuals who do not have documents […] blocks these individuals from legally demonstrating their existence and identity."

30. In my opinion, this insufficiency in documentation, to a great extent, affected the communities, and not only the indigenous of Xákmok Kásek, due to the lack of budgetary resources, but they were alleviated by the indigenous "identification card," issued by INDI.

31. Said Institute answered the requests of the community when vehicles, feul, and the requests of the communities were possible.

V. Dissenting opinion. Noncompliance with the obligation of Nondiscrimination

32. The Commission argued that "this case illustrates the persistence of structural factors of discrimination in the Paraguayan legal system relating to the protection of [indigenous peoples'] right to ancestral territory and the resources found there," despite the general progress in its legal system toward recognizing the rights of indigenous peoples, there remain legal provisions in civil, agrarian, and administrative law that apply to this case and that cause the State system to function in a discriminatory way by privileging the protection of the right to reasonably productive private property over the protection of the territorial rights of an indigenous population.

33. Likewise, the representatives indicated that there is "a policy of discrimination that follows a systematic, easily-observable pattern and that enjoys a high level of consensus in Paraguay, which is rapidly leading to extreme deterioration of the living conditions of indigenous communities in general, as well as in the [particular] case […] of the Xákmok Kásek [Community]." "The supposed factual and legal impossibility [of titling the land] that the State of Paraguay alluded to is nothing more than the deliberate application of a racist and discriminatory policy."

34. In my opinion, although there is some discrimination of the indigenous population due to a legacy of colonialism, through the education system an intent is made to reverse this, yet there is no deliberated agreement or consensus for the application of a racist or discriminatory policy, which favors the protection of the right to private property which is reasonably productive over the protection of the territorial rights of the indigenous population. I understand that the obligation of nondiscrimination is not violated, even though, in reality, there is a need to adapt the legislation to streamline the procedures for access of indigenous communities to their ancestral lands, thereby coinciding with the opinion of the Court, but in the meanwhile, applying constitutional norms such as those that guarantee private property, which is inviolable and can only be deprived by expropriation, by court order, upon payment of just compensation, and also because of the primacy of the Constitution over any treaty or international agreement and the expressed indication that any provisions or acts of opposition to the established authority in the Constitution are invalid. Moreover, the enormous resources allocated by the State in recent years for the acquisition of land should be assessed.

Augusto Fogel Pedrozo
Judge ad hoc

Pablo Saavedra Alessandri
Secretary