



Organization of  
American States



## **Inter-American Commission on Human Rights**

Application with the Inter-American Court of Human Rights  
in the case of  
Xákmok Kásek Indigenous Community  
of the Enxet-Lengua People and Its Members  
(Case 12,420)  
against the Republic of Paraguay

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July 3, 2009  
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**APPLICATION FILED BY THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
WITH THE INTER-AMERICAN COURT OF HUMAN RIGHTS AGAINST  
THE REPUBLIC OF PARAGUAY**

**CASE 12,420  
XÁKMOK KÁSEK INDIGENOUS COMMUNITY OF THE ENXET-LENGUA PEOPLE  
AND ITS MEMBERS**

**I. INTRODUCTION**

1. The Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission”, “the Commission” or “the IACHR”) hereby files this application with the Honorable Inter-American Court of Human Rights (hereinafter the “Inter-American Court,” “the Court” or “the Honorable Court”) in case No. 12,420, “Xákmok Kásek Indigenous Community of the Enxet-Lengua People and Its Members.” The case is brought against the State of Paraguay (hereinafter the “Paraguayan State,” the “State” or “Paraguay”) for its failure to guarantee the right of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members (hereinafter the “Xákmok Kásek Community”, “the Indigenous Community”, the “Community” or “the victims”) to ancestral property that falls within the territorial claim that the Community filed back in 1990 but has still not been satisfactorily settled. The aforementioned has not only made it impossible for the Community to access the property or enter into possession of the territory, but, given the Community’s distinctive characteristics, it has placed the community in a vulnerable state with respect to food, medical care, and sanitary needs, that constantly threatens the survival of the members of the Community and the integrity of the Community itself.

2. The Inter-American Commission requests that the Honorable Court to adjudge and declare that the State of Paraguay failed to comply with its international obligations by its violation of the following articles of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”):

- 21 (Right to Property), 4 (Right to Life), 8(1) (Right to Due Process) and 25 (Right to Judicial Protection), all in relation to articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) and to the detriment of Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.
- 3 (Right to Juridical Personality) and 19 (Rights of the Child), both in relation to articles 1(1) and 2 and to the detriment of the members of the Xákmok Kásek Indigenous Committee of the Enxet-Lengua People.

3. The present case has been processed in accordance with the American Convention and is submitted to the Court pursuant to Article 34 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter “the Rules of Court”). Affixed to this application is a copy of the Report on the Merits No. 30/08, prepared pursuant to Article 50 of the Convention.<sup>1</sup>

4. The Inter-American Commission believes that it is a matter of fundamental importance that this case be submitted to the Inter-American Court. The Xákmok-Kásek Indigenous Community – like the Sawhoyamaxa and Yakye-Axa

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<sup>1</sup>Report on the Merits 30/08 of July 17, 2008, Xákmok Kásek Indigenous Community of the Enxet-Lengua People, Paraguay, Appendix 1.

Communities, whose cases were heard by the Court- has its own unique cultural identity and has for almost two decades been seeking recognition of its right to live in at least a portion of its traditional habitat or ancestral territory. The members of the Community find themselves in a state of extreme vulnerability – particularly the children and the elderly of the community. Prevented from engaging in their traditional economic activities and from living on their own territory, members of the community seek the justice, on an international level, that their country has denied them. The transcendence of the present case rests on the opportunity it offers the international system to protect the individual and collective rights of the Xákmok Kásek Indigenous Community through, *inter alia*, recognition of the vital bond that it has with its ancestral lands.

## II. PURPOSE OF THE APPLICATION

5. The purpose of the present application is to petition the Court to adjudge and declare that:

a) The Paraguayan State failed to guarantee the right to ancestral property of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members by virtue that since 1990 the territorial claim filed by the Community has been in process and yet to date their human rights have not been recognized or guaranteed. As a result, the Community not only has been unable to access or obtain title to and possession of its territory but, given the Community's unique characteristics, has been placed in a vulnerable state with regards to food, medical care, and sanitation that poses a constant threat to the survival of the members of the Community and the integrity of the Community itself.

b) The Paraguayan State is responsible for violation of the following articles:

- 21 (right to property), 8(1) (right to due process), and 25 (judicial protection) of the American Convention, all in relation to Articles 1(1) and 2 thereof and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.
- 4 (right to life), in relation to articles 1(1) and 2 of the American Convention and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members;
- 3 (right to juridical personality) and 19 (rights of the child), all in relation to Articles 1(1) and 2 of the American Convention and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.

6. In consideration of the above, the Inter-American Commission is asking the Court to order that the State:

a) Immediately take the measures necessary to give effect to the right of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members to ownership and possession of their ancestral territory; specifically, that it delimit and demarcate the land and grant the Community title deed thereto, in keeping with its customary laws, values, practices and customs, and that it guarantee to the members of the Community that they are able to practice their traditional subsistence activities.

- b) Should there be objective and substantiated reasons making it impossible for the State to adjudicate the territory that the Community is claiming as its traditional territory, it shall grant it alternative lands of sufficient size and quality, to be chosen by consensus.
- c) Adopt the measures necessary to protect the traditional habitat claimed by the indigenous Community until such time as the land is demarcated and delimited and title thereto granted to the Community, specifically those measures intended to avoid immediate and irreparable damage to the property caused by the activities of third parties.
- d) Immediately provide the members of the Xákmok Kásek Indigenous Community with adequate goods and services, relating to water, education and health care services, and access to the food necessary for their subsistence.
- e) Establish a simple and effective recourse that protects the Paraguayan indigenous peoples' right to reclaim and take possession of their traditional territories.
- f) Take the necessary steps to ensure registration of the births of indigenous children who are members of the Xákmok Kásek Indigenous Community in Paraguay.
- g) Adopt a comprehensive care program for the indigenous children, with their best interests as its guiding principle, and ensure that they are properly fed and have access to quality health services, without discrimination, and access to an education consistent with and respectful of their cultural traditions.
- h) Make reparations, on an individual and community level, for the consequences of the violation of the rights listed above.
- i) Adopt the measures necessary to prevent a recurrence of similar situations, in keeping with the duty to prevent and the duty to guarantee the basic rights recognized in the American Convention.

### **III. REPRESENTATION**

7. In accordance with the provisions of articles 23 and 34 of the amended Rules of Court, the Commission has appointed Commissioner Paolo Carozza and Executive Secretary Santiago A. Canton to serve as its delegates in this case. Assistant Executive Secretary Elizabeth Abi-Mershed and attorneys Karla I. Quintana Osuna, Isabel Madariaga, and María Claudia Pulido, specialists with the IACHR's Executive Secretariat, have been appointed to serve as legal advisers.

### **IV. JURISDICTION OF THE COURT**

8. Under Article 62(3) of the American Convention, the Inter-American Court is competent to hear all cases submitted to it regarding interpretation and application of the provisions of this Convention, provided that the states parties to the case recognize or have recognized its jurisdiction.

9. The Court has jurisdiction to take up the present case. The State ratified the American Convention on August 24, 1989, and accepted the Court's binding jurisdiction on March 11, 1993. Considering the date on which the State ratified the Convention and in application of the Court's jurisprudence, this application concerns acts

that constitute independent facts and specific and autonomous violations that occurred subsequent to the acceptance of the Court's jurisdiction.

## V. PROCESSING BY THE INTER-AMERICAN COMMISSION

10. On May 15, 2001, the Inter-American Commission received a petition presented by the nongovernmental organization *Tierraviva a los Pueblos Indígenas del Chaco* (hereinafter "the representatives" or "Tierraviva") on behalf of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members against Paraguay. The petition argues that the State has an international responsibility for failing to guarantee, through adequate mechanisms, the Community's right to live on its ancestral land, thereby depriving the Community of its traditional means of subsistence such as hunting, fishing and gathering, and so exposing them to inhuman living conditions. The Commission classified the petition as number 0326/2001. It received additional information from the representatives on May 25, 2001.

11. On June 6, 2001, the Commission forwarded the pertinent parts of the petition to the State and requested that it submit its response within two months.

12. On August 1, 2001, the State expressed its interest in instituting a friendly settlement procedure. On August 2, the Commission asked the representatives to submit, within 15 days, the observations they deemed pertinent.

13. On August 27, 2001, the Commission convoked the parties to a working meeting held during its 113<sup>th</sup> regular session (*infra*).

14. On September 17, 2001, the Commission received a note signed by Mr. Roberto C. Eaton K., at the time the owner of the land claimed by the Indigenous Community. The note purported to be a response to the petition. On September 20 of that year, the Commission explained to Mr. Eaton that in cases litigated before the Inter-American System of Human Rights, the parties are the victims and the respective State; hence, the Commission could not regard his note as a response to the petition. On October 31, 2001, Mr. Eaton asked the Commission to regard his earlier filing as an *amicus curiae* brief.

15. At the November 13, 2001 working meeting held during the Commission's 113<sup>th</sup> regular session, the parties signed an Agreement to Seek Common Ground [*Acuerdo de Acercamiento de Voluntades*].

16. On November 21, 2002, the representatives informed the Commission of their decision to withdraw from the friendly settlement procedure. Their note was forwarded to the State on December 10, 2002, with the request that it submit its admissibility arguments within 30 days.

17. On December 8, 2002, the Commission, through its Executive Secretariat, visited the Xákmok Kásek Community.

18. The State sent additional information to the Commission on January 15 and 16, 2003.

19. On February 20, 2003, the Commission approved Admissibility Report No. 11/03<sup>2</sup> wherein it concluded that it had competence to take up the complaint filed by the representatives and decided, based on the arguments of fact and of law and

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<sup>2</sup> IACHR, Admissibility Report N° 11/03, February 20, 2003, Petition 0326/2001, Xákmok Kásek Indigenous Community of the Enxet-Lengua People, Paraguay, Appendix 2.

without prejudging the merits of the case, to admit the representatives' complaint alleging violation of articles 8(1), 21 and 25 of the American Convention, in relation to Articles 2 and 1(1) thereof, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.

20. On March 13, 2003, the parties were notified that the admissibility report had been adopted. The representatives were asked to submit their observations on the merits of the case within two months. In its notification letter, the Commission made itself available to the parties with a view to arriving at a friendly settlement.

21. On March 27, 2003, the representatives expressed an interest in reaching a friendly settlement. They stated the following in their communication:

The community's decision is to hold a preliminary meeting with the representatives of the Paraguayan State to learn what steps the Paraguayan Institute of Indigenous Affairs (INDI) is taking to satisfy the Xákmok Kásek 's claims, so that the measures may be assessed and the Community's response then given.<sup>3</sup>

22. On April 7, 2003, the IACHR forwarded the representatives' communication to the State and informed it of the representatives' statement about considering the possibility of pursuing the case via the avenue of the friendly settlement process.

23. On April 16, 2003, the representatives informed the Commission that on April 10, 2003, the parties had held a meeting wherein they agreed to draft agreement to seek common ground that would reflect the points where there was consensus between the parties; that draft agreement could then be used as a tool with which to begin the friendly settlement process. As agreed by the parties, the proposed document would be prepared by the *Tierraviva* Organization. With their communication, the representatives enclosed a copy of the proposed agreement and asked the IACHR to forward it to the State. On April 17, 2003, the Commission sent the State the information it had received from the representatives.

24. On May 7, 2003, the State informed the Commission that it was not prepared to submit its observations on the document presented by *Tierraviva*, since the government authorities were still in talks with the indigenous leaders. The State added that when the parties had reached an agreement, it would be brought to the Commission's attention. That communication was sent to the representatives on May 21, 2003.

25. On May 14, 2003, the representatives asked the Commission to grant them an extension for submitting their observations on the merits. The requested extension was granted.

26. On June 13, 2003, the Commission received a report, submitted by Mr. Roberto C. Eaton K. as *amicus curiae*.

27. On July 14, 2003, the representatives submitted their observations on the merits, which were forwarded to the State on August 26, 2003, with the request that it submit its observations and arguments on the merits within two months.

28. On October 27, 2003, the State requested an extension for presentation of its observations. The extension was granted on November 11, 2003. On December 19, 2003, the State filed its observations on the merits. The Commission received the

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<sup>3</sup> See file of the case with the IACHR, Appendix 3.

respective appendices on January 6, 2004. That information was forwarded to the representatives on January 27, 2004.

29. On December 30, 2003, the representatives told the IACHR of their interest in attending a hearing during its 119<sup>th</sup> regular session.

30. On March 2, 2004, during the Commission's 119<sup>th</sup> regular session, a hearing was held on the matter, with witnesses participating. The questions put to the witnesses at the hearing centered around two main issues: steps taken by the Paraguayan authorities to solve the land problem and the economic and social situation of the Xákmok Kásek Indigenous Community in terms of their health, education and diet. During the hearing, the members of the Commission decided to hold a working meeting where the State promised to submit a response to the representatives' claims within 90 days.

31. On April 28, 2004, the representatives presented additional information, which was forwarded to the State on May 12, 2004.

32. On July 29, 2004, James Silk and Mary Hahn of Yale Law School's International Human Rights Program presented an *amicus curiae* brief on the situation of the Xákmok Kásek and Sawhoyamaxa indigenous communities of the Enxet-Lengua People and on questions of law.

33. On September 2, 2004, the representatives presented information to the Commission concerning the friendly settlement process. On November 23, 2004, the Commission forwarded the pertinent parts of that communication to the State and asked that it present its observations within one month. In that communication the representatives informed the Commission that on August 2 of that year, the Xákmok Kásek Indigenous Community of the Enxet-Lengua People had decided to end the friendly settlement process. In their communication the representatives wrote that they had decided

to withdraw, once and for all, the agreement offered to the Government to explore the purchase of the lands known as *Magallanes* and to reaffirm, with all legal effects, the community's claim to 10,700 hectares of land.<sup>4</sup>

34. In that same communication of September 2, 2004, the representatives explained the reasons why they had terminated the friendly settlement process, which were that on August 11, 2004, following a technical inspection of the lands on the Estancia *Magallanes* by officials from the Paraguayan Institute of Indigenous Affairs (INDI) and the Ministry of Public Works, the conclusion was that the land in question was not up to the minimum standards required for human settlement. They stated the following:

The lands in question lack the minimum conditions required for human settlement –in this case for over 80 families- and are in effect in this case an area designed in its geography and intended to be used for ranching. Additionally, the lands are, for the most part, prone to flooding; their natural conditions –basically the scarcity of forests- would not allow the practice of traditional subsistence activities (fishing, hunting and gathering); as for access to public services, suffice it to say that the land is more than forty kilometers from the region's only paved road.<sup>5</sup>

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<sup>4</sup> See file of the case with the IACHR, Appendix 3, specifically the August 2, 2004 document signed by the Community's leaders.

<sup>5</sup> See file of the case with the IACHR, Appendix 3.

35. On August 23, 2006, the representatives reported that Oscar Ayala and Julia Cabello Alonso of the *Tierraviva* Organization would be the attorneys authorized to represent the Xákmok Kásek Indigenous Community.

36. On October 20, 2006, the representatives sent the Commission a copy of administrative file No. 15,032, dating from 1990. The copy of the file sent is authenticated by the Secretary General of the National Institute for Rural Development and Land (INDERT), Mr. Enrique Ignacio Cáceres Lugo. On October 23, 2006, the IACHR forwarded to the State the additional information supplied by the representatives.

37. On February 21, 2007, the representatives provided additional information and asked the Commission to continue its proceedings on the case. On February 28, 2007, the Commission forwarded the pertinent parts of this communication to the State and requested its observations within 15 days.

38. On March 2, 2007, the representatives sent a summary of the internal administrative process. On March 6, 2007, the representatives submitted additional information to the Commission. On March 15, 2007, the State submitted its observations, which were forwarded to the representatives on March 22, 2007. In its communication of March 15, 2007, the State asked that it be given the opportunity to pursue the friendly settlement process. As evidence of its willingness to address the indigenous peoples' land claims, it pointed out that more than sufficient land had been acquired for other communities. It mentioned the Cora-í indigenous community,<sup>6</sup> which had agreed to cede a portion of its territory to the Xákmok Kásek Indigenous Community. The State's note reads as follows:

Of the lands acquired by the INDI, the members of the Cora-í Community - composed of the current communities of Nepoxen, Tajamar Kavaju, Saria and Kenaten- signed an agreement with the Xákmok Kásek community whereby they will cede 1500 hectares to the Xákmok Kásek people.

On May 11, 2006, the members of the Nepoxen, Tajamar, Kavaju, Saria, Kenaten communities ratified the content of the earlier agreement to cede 1500 hectares of a total of 15,713 hectares, to the Xákmok Kásek Indigenous Community and authorize INDI to take the necessary steps to transfer title to the aforementioned property. The document was signed by the legal representatives of the communities in the presence of officials from INDI and Tierraviva [.]

While the ceded land will not relieve the State of its obligation to ensure that the Xákmok Kásek people will receive more land, it does show that the lands acquired were more than sufficient for the Cora-í community [.]

The INDI is currently examining a number of proposals from landowners with a view to acquiring their land for the Xákmok Kásek community, whose case is before the IACHR. We believe we will come up with the satisfactory solution that they truly deserve.<sup>7</sup>

39. On March 22, 2007, the additional information provided by the State was forwarded to the representatives. In a communication dated April 19 and received on April 30, 2007, the representatives provided additional information, which was forwarded to the State on May 7, 2007. In their communication, the representatives stated that they reaffirmed for all legal purposes their claim to the 10,700 hectares and asked the IACHR to conclude that the steps to reach common ground between the parties had ended definitively.

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<sup>6</sup> Based on the documents supplied by the parties, the name of the Cora-í Community is written in several ways: Cora-i; Cora'i, Corai and Cora-l.

<sup>7</sup> See file of the case with the IACHR, Appendix 3.

40. On May 11, 2007, the representatives supplied additional information, which was forwarded to the State on May 14, 2007.

41. On August 31, 2007, the representatives provided additional information to the Commission, which was forwarded to the State on September 19, 2007.

42. On September 3, 2007, Commissioner Paolo Carozza, the IACHR Rapporteur on the Rights of Indigenous Peoples, visited the Xákmok Kásek Indigenous Community, during the course of an on-site working visit to the country at the State's invitation. During that visit, the Rapporteur interviewed leaders and members of the Community.

43. On April 17, 2008, the representatives submitted additional information which was forwarded to the State on April 21, 2008, which was given one month in which to present its observations.

44. On July 17, 2008, during its 132<sup>nd</sup> session, the Commission approved the report on the merits of the present case, No. 30/08, prepared pursuant to Article 50 of the Convention. In that report, the Commission concluded the following:

a) The Paraguayan State failed to guarantee the right to ancestral property of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members by virtue that since 1990 the territorial claim filed by the Community has been in process and yet to date their human rights have not been recognized or guaranteed. As a result, the Community not only has been unable to access or obtain title to and possession of its territory but, given the Community's unique characteristics, has been placed in a vulnerable state with regards to food, medical care, and sanitation that poses a constant threat to the survival of the members of the Community and the integrity of the Community itself.

b) As such, the Commission concludes that the Paraguayan State has not fulfilled the obligations imposed by Articles 21 (right to property), 8(1) (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 People and its members. Furthermore, in application of the principle *jura novit curia* the Commission concludes that the Paraguayan State also violated Articles 3 (right to juridical personality), 4 (right to life) and 19 (rights of the child), all in relation to Articles 1(1) and 2 of the American Convention and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.<sup>8</sup>

45. In its Report on the Merits, the Commission had the following recommendations for the Paraguayan State:

1. Immediately take the measures necessary to give effect to the right of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members to ownership and possession of their ancestral territory; specifically, that it delimit and demarcate the land and grant the Community title deed thereto, in keeping with its customary laws, values, practices and customs, and that it guarantee to the members of the Community that they will be able to practice their traditional subsistence activities.

2. Should there be objective and substantiated reasons making it impossible for the State to adjudicate the territory in question as the traditional territory of the Community, it shall grant it alternative lands of sufficient size and quality, to be chosen by consensus.

3. Adopt the measures necessary to protect the traditional habitat claimed by the indigenous Community until such time as the land is demarcated and delimited and title

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<sup>8</sup> Report on the Merits, No. 30/08, July 17, 2008, Xákmok Kásek Indigenous Community of the Enxet-Lengua People, Paraguay. Appendix 1.

thereto granted to the Community, specifically those measures intended to avoid immediate and irreparable damage to the property caused by the activities of third parties.

4. Provide the members of the Xákmok Kásek Indigenous Community immediately with adequate goods and services relating to water, education and health care services, and access to the food necessary for their subsistence.

5. Establish a simple and effective recourse that protects the Paraguayan indigenous peoples' right to reclaim and take possession of their traditional territories.

6. Take the necessary steps to ensure registration of the births of indigenous children who are members of the Xákmok Kásek Indigenous Community in Paraguay.

7. Adopt a comprehensive care program for indigenous children, with their best interests as its guiding principle, and ensure that they are properly fed and have access to quality health services, without discrimination and with access to an education consistent with and respectful of their cultural traditions.

8. Make reparations, on an individual and community level, for the consequences of violation of the rights listed above.

9. Adopt the measures necessary to prevent a recurrence of similar situations, in keeping with the duty to prevent and the duty to guarantee the basic rights recognized in the American Convention.<sup>9</sup>

46. The Commission forwarded the Report on the Merits to the State on August 5, 2008, and gave it two months to adopt the recommendations set forth therein. In keeping with Article 43(3) of its Rules of Procedure, on August 6, 2008 the Commission notified the representatives of the victims that a report on the merits had been adopted and forwarded to the State. It also asked that they indicate their preference regarding referral of the case to the Inter-American Court.

47. On September 5, 2008 the representatives sent a brief in which, *inter alia*, they indicated that they would like the case to be submitted to the jurisdiction of the Inter-American Court. They also sent a census, updated to 2008, and an updated list of the deceased members of the Community.

48. On October 7, 2008, the State submitted a brief referencing the recommendations made in the Report on the Merits –specifically, the recommendation that an inter-institutional meeting be held with the representatives of the victims in attendance, “to arrive at an Agreement on Fulfillment of Recommendations.” On October 22 of that year, the IACHR forwarded the brief to the representatives, giving them 15 days in which to submit their observations.

49. On October 24, 2009, the State requested a 90-day extension for submission of the report on compliance with the recommendations. In that note, the State expressly and irrevocably acknowledged that if granted, the extension would have the effect of suspending the time period for filing the case with the Court.

50. On November 3, 2008, the Commission granted the State a three-month extension so that Paraguay might have additional time to comply with the recommendations made by the Commission and make progress on their implementation. The Commission also requested that on December 6, 2008 and January 6, 2009, the State report the measures taken to comply with those recommendations.

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<sup>9</sup> *Idem*.

51. On November 4, 2008, the representatives requested a 15-day extension to submit their observations on the State's brief of October 7, 2008 (*supra*). The Commission granted the requested extension on November 13, 2008.

52. On December 1, 2008, the representatives submitted information on the instant case. On December 15, 2008, the Commission forwarded their brief to the State and asked that it submit its observations within one month's time.

53. On February 3, 2009, the State requested that the Commission grant it another one-month extension in order that it might complete certain administrative business in connection with the draft Agreement on Fulfillment of Recommendations. In its submission, the State expressly and irrevocably acknowledged that if granted, the extension would have the effect of suspending the time period for filing the case with the Court.

54. On February 4, 2009, the Commission granted the State an extension until March 3, 2009, so that Paraguay might have additional time to comply with the recommendations made by the Commission and move forward with their implementation. The Commission requested that on February 15, 2009, the State report the measures taken to comply with those recommendations.

55. On February 4, 2009, the representatives informed the Commission of their "steadfast determination [...] to withdraw from the bargaining table", as the State was allegedly "using the extensions to force them to sign, at the expense of [the] needs [of the Community]." They also expressed their "firm opposition to the extension" requested by the State. That information was relayed to the State on February 23, 2009.

56. On January 22, 2009, the State sent the Commission a copy of the draft Agreement on Fulfillment of Recommendations, "the text of which was [allegedly] the product of a consensus among the parties, and which is [purportedly] slated to be signed at the Community's site."

57. On February 18, 2009, the State sent a report prepared by the Paraguayan Indigenous Institute [*Instituto Paraguayo del Indígena*] (INDI) in which it stated, *inter alia*, that "within a period of 15 working days, at the latest, an interparty agreement will be signed to faithfully comply with the aforementioned recommendations." The Commission forwarded that submission to the representatives on February 23, 2009.

58. On February 27, 2009, the State reported that the Agreement on Fulfillment of Recommendations was "awaiting the representatives' signature". It therefore requested that the IACHR "consider the State's earnest determination to comply with these recommendations in good faith and, accordingly, decide not to submit [the case] to the Court's jurisdiction." The State added that "should [...] the Commission determine that the prudent course of action would be to take more time to evaluate compliance with the agreement, the State expressly waives its right to file a preliminary objection regarding compliance with the time period, as stipulated in Article 51 of the Convention". That same day, the Commission sent the brief to the representatives and asked that they submit relevant information as soon as possible.

59. On March 3, 2009, the Commission granted the State a one-month extension to comply with the recommendations.

60. On March 11, 2009, the State reported the adoption of Decree No. 1595, "which creates and appoints an Inter-institutional Commission to carry out the measures needed to comply with the international judgments delivered by the Inter-

American Court of Human Rights and the recommendations forthcoming from the Inter-American Commission on Human Rights." That information was conveyed to the representatives on April 14, 2009.

61. On March 17, 2009 the representatives stated that "while [they] have no objection to the grant [of the extension ...], the Community reaffirms, in all its parts, the brief dated February 6 of this year, since the State ha[d] thus far done nothing that would lead one to suppose that measures would be taken to redress the Community's violated rights." That information was forwarded to the State on April 14, 2009.

62. On March 20, 2009, the State submitted information on the status of compliance with the recommendations. However, it also requested yet another extension and again waived its right to file the preliminary objection alleging failure to observe the time period specified in Article 51 of the Convention. On March 31, 2009, the Commission granted the State a three-month extension.

63. On April 3, 2009, the representatives objected to the requested extension despite the fact that it had already been granted. They once again observed that the State "ha[d] taken no concrete measure that [would] lead one to suppose that measures were being taken to redress the Community's violated rights." On April 28, 2009, the Commission forwarded the brief to the State.

64. On April 21, 2009, the State sent Decree No. 1830 of April 17, 2009, "in which the indigenous communities of Xamok Kásek and Kelynmagategma, both of the Enxet People, and the Y'ak'a Marangatú Indigenous Community of the Mbya People were declared to be in a state of emergency". That brief was sent to the representatives on May 5, 2009, who were asked to submit their observations within 15 days. The Commission also asked the State to provide additional information on the specific measures that would be taken by virtue of that decree.

65. On March 31, 2009, Mr. Roberto C. Eaton sent the Secretariat a note in which he reported that "on its own initiative, the community secured transport and moved to lands that INDI assigned to it." That note was forwarded to the parties on May 7, 2009.

66. On June 4, 2009, the State sent information on the measures adopted pursuant to Decree No. 1830. It also reported that it had issued resolution No. 634, in which "the Paraguayan Indigenous Institute [*Instituto Paraguayo del Indígena* (INDI)] sets up a special combined fund for the purchase of land for the Enxet People's indigenous communities of Xákmok Kásek in the Pozo Colorado District and Kelynmagategma in the Puerto Pinasco District in the Department of Presidente Hayes". The IACHR forwarded this information to the representatives on June 10, 2009.

67. On June 25, 2009, the representatives sent a brief in which, *inter alia*, they "applauded" the issuance of resolution No. 634, but asserted that the State had not complied with Decree No. 1830, which declares that the Community is in a state of emergency. They argued that "it is imperative that the State do more than merely enact resolutions or issue declarations; instead it has to take decisive action." They also argued that the State had failed to comply with the Commission's recommendations. Finally, they added the following:

There is no expropriation plan; the community has been neither consulted nor informed of any cooperation agreements with the Ministry of Agriculture and Livestock.

Even if an expropriation plan did exist it would be completely unworkable since, as we have previously observed, so long as the "protected wild area" situation persists, the lands are not subject to expropriation. The first step the State must

take, therefore, is to repeal the unconstitutional decree; at no time in the concession process was any consideration given to the indigenous claim.<sup>10</sup>

68. On June 30, 2009, the State reported on “a number of measures recently taken with a view to complying with the recommendations” made by the Commission. Specifically, Paraguay reported on certain food measures taken and sent the draft of the response plan for implementing the Emergency Plan for the Xákmok Kásek Community. The State also requested another extension to carry out the Commission’s recommendations, while waiving its right to enter a preliminary objection alleging noncompliance with the time period prescribed in Article 51 of the American Convention.

69. On July 2, 2009, the Commission decided to submit the present case to the jurisdiction of the Inter-American Court, pursuant to articles 51(1) of the Convention and 44 of its Rules of Procedure, based on the fact that it deemed that the State had not complied with the terms of the Report on the Merits. It reasoned that the State had only partially complied with one of the Commission’s recommendations.

## VI. CONSIDERATIONS OF FACT

70. The Commission presents below the facts that it deems to have been established in the instant case, based on the evidence available, the arguments of the parties, the documents presented, and the information obtained at the hearing held during the Commission’s 119th regular session and during the on-site observations conducted on December 8, 2002 and September 3, 2007. In addition, in keeping with Article 42(1) of its Rules of Procedure, the Commission has also taken into account other information that is a matter of public knowledge.

### 1. Background on the Enxet-Lengua indigenous people

71. The Enxet indigenous people are divided into three subgroups: the Lengua, Angaité and Sanapaná. These people are native to the Paraguayan Chaco and their ancestral territory has been the northeastern sector of the Chaco, called the Bajo Chaco.<sup>11</sup> The Enxet-Lengua People have been subdivided into groups called Mopey-Apto, Yexwase Apto and Chanawatsam.<sup>12</sup> The Enxet and its subgroups were hunters and

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<sup>10</sup> See file of the case with the IACHR, Appendix 3.

<sup>11</sup> “The indigenous peoples of the Gran Chaco are a heterogeneous group of approximately fifty groups whose apparent unity derives from their asymmetrical relationship with society as a whole. It is an Amer-Indian population estimated at two hundred and sixty thousand individuals who speak seventeen different recognized languages, associated with six linguistic groups. The current situation of the indigenous peoples of the Chaco is very fluid. When we refer to the indigenous peoples of the Chaco, we are talking about territorial, linguistic or historical units that, prior to the breakdown that occurred as a result of the Paraguayan State’s take-over of the lands, were organized as societies with their own political structure, social control and distinctive organizational structures. In other words, historically speaking, each of these peoples had its own social norms, leadership structure and social controls; even today, the descendants of these peoples have an awareness of a unique common heritage. In each of these systems, legal personality was invested not so much in the individual as in groups thought of as families. Therefore, the modern communities, which are the sedentary descendants of the traditional groups, should be regarded as legal persons if one’s objective is to keep the original set of social norms in tact. In this specific case, the people are the Chanawatsan people, who spoke a dialect of Enxet (Lengua) and lived near the Paraguay River, across from the city of Concepción. They were hunters and gatherers.”

I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125. Chapter V, Documentary Evidence, Statement by Mr. José Alberto Braunstein, sworn before a notary public on February 11, 2005.

<sup>12</sup> IACHR, Report on the Merits No. 73/04, October 19, 2004, Sawhoyamaya Indigenous Community of the Enxet-Lengua Indigenous People and Its Members v. Paraguay, par. 55. Annex 1.1. See also in IACHR, Report on the Merits No. 67/02, October 24, 2002, Yakye Axa Indigenous Community of the Enxet-Lengua Indigenous People against Paraguay, par. 79, Annex 1.2.

gatherers, small-scale farmers and shepherds. Their society can best be described as minimalist, with little or no hierarchical structure and with a very strong bond to a specific land.<sup>13</sup>

72. The economy of the indigenous peoples in the Chaco was mainly based on hunting, fishing, and gathering, which meant that they had to roam their lands to make use of nature to the extent that the seasons and their cultural technology allowed. Hence, they were always on the move and occupied a very large area of territory.<sup>14</sup>

73. The colonization or occupation of the Paraguayan Chaco by non-indigenous persons began in the late XIX century and was done with the permission and encouragement of the State, even though these lands were inhabited by several indigenous peoples. In the expert report prepared by Mr. José Alberto Braunstein for the Yakye Axa Indigenous Community Case, he states the following:

In the 19th century, when Argentina, Bolivia and Paraguay became independent countries, most of the region of the Chaco, bordered by the three fledgling States, had not been settled by whites. A period of major land speculation followed the war of 1870, during which the area where the Lengua indigenous people lived became private property, and Paraguay's leather tanning industry was established there.<sup>15</sup>

74. By the end of the XIX century, the first Anglican missions began to arrive in the Chaco and established themselves within indigenous territory in order to "attend to the needs of the natives." About the time the Anglicans arrived in the area, ranchers were beginning to move in.<sup>16</sup> Expert José Alberto Braunstein stated the following concerning the establishment of religious missions:

From the time of the conquest, religion and the teaching of Christian beliefs were very instrumental in unleashing the process of change and the assimilation of indigenous peoples into Western culture. In the late 19th century, the Anglicans began to establish several missions. W.B. Grubb established the Maklawaya mission among the Lengua indigenous people in the Paraguayan Chaco.<sup>17</sup>

75. Up to the early XX century, the Enxet people were practically the only group occupying an area of approximately 250,000 hectares. However, by the early XX century, the number of ranchers in the area had increased considerably, drawn by the

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<sup>13</sup> IACHR, Report on the Merits No. 67/02, October 24, 2002, Yakye Axa Indigenous Community of the Enxet-Lengua Indigenous People against Paraguay, par. 80, Annex 1.2.

<sup>14</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146. Chapter VII, Proven Facts, par. 73.2.

The flexibility and mobility of the hamlets –understood as a clutch of houses and small gardens- and of their members is mainly a function of socio-ecological factors: the type of political-religious leadership exercised within them; the kinship relations; the time of year and/or season associated with the natural resources available to sustain the group (hunting, fishing, water, fruit, arable land); relations with other hamlets and other indigenous peoples –friendly or hostile- including non-indigenous persons; and the system for settling differences.

<sup>15</sup> See in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125. Chapter V, Documentary Evidence. Statement by Mr. José Alberto Braunstein, sworn before a notary public on February 11, 2005.

<sup>16</sup> "The Anglican Mission began its work in the Chaco in 1888, the specific goal being to spread Christianity among the Enxet and allow colonization of the area. In the missionaries wake came the ranchers, who initially set up their ranches near the missions for protection and access to the indigenous labor force that the Anglicans were training." The representatives' brief of July 14, 2003. See file of the case with the IACHR, Appendix 3.

<sup>17</sup> See in: I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125. Chapter V, documentary evidence, Statement by Mr. José Alberto Braunstein, sworn before a notary public, February 11, 2005.

richness of the area and encouraged by offers of land grants from the Paraguayan State. A number of foreign companies were the beneficiaries of these State-sponsored inducements.<sup>18</sup>

76. According to the report prepared by the Center for Studies in Anthropology of the *Universidad Católica Nuestra Señora de la Asunción* on the subject of the Xákmok Kásek and Cora-í communities of the Enxet-Lengua People<sup>19</sup> (hereinafter referred to as “the anthropological report”), as the colonization of the Paraguayan Chaco was getting underway “the Paraguayan State sold off millions of hectares in the late XIX century. The land was sold to individuals and businesses of British, U.S. and Anglo-Argentine origin (Laino, 1976). These sales were carried out without regard for the political autonomy and property rights that the various indigenous groups had over the Chaco, a territory in which the Paraguayan State had no presence and over which it had no real control.”<sup>20</sup> The anthropological report adds, “Thus, the colonization really began in earnest in the early twentieth century, as the Mennonites, ranchers, missionaries, and tannin companies moved in, under a variety of circumstances and by various methods. For the indigenous peoples, the advance of “civilization” meant that they were stripped of their territories and lost their political autonomy.”<sup>21</sup>

77. When deciding the case of the Sawhoyamaxa Indigenous Community, the Inter-American Court wrote the following:

Towards the end of the 19<sup>th</sup> century vast stretches of land in the Paraguayan Chaco were acquired by British businessmen through the London Stock Exchange as a consequence of the debt owed by Paraguay after the so-called War of the Triple Alliance. The division and sale of such territories was transacted while their inhabitants, who at the time were exclusively Indians, were kept in complete ignorance of the facts. That is how several missions of the Anglican Church started settling in the area. In 1901 the “South American Missionary Society” settled the first cattle estate in the Chaco with the purpose of starting the evangelization and “pacification” of the indigenous communities, and of facilitating their employment in the cattle estates. The company was known as “Chaco Indian Association”, and its main seat was built in Alwátétkok.<sup>22</sup>

78. It is worth noting that in 1910 an Anglican missionary wrote that the Enxet of the area still lived as if they owned all their territory, unaware of the fact that the Paraguayan State had sold their land to foreigners, without consulting them on the matter, let alone offering them compensation for it.<sup>23</sup>

79. As the Inter-American Court established, over the years and particularly after the Chaco War between Bolivia and Paraguay (1933-1936), the non-indigenous occupation of the Northern Chaco which had started at the end of the 19th century gained momentum. The *estancias* that began to be established in the area used the indigenous population who had traditionally lived there as workers. They thus became

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<sup>18</sup> See in IACHR, Report on the Merits No. 73/04, of October 19, 2004, Sawhoyamaxa Indigenous Community of the Enxet-Lengua People, par. 58, Annex 1.1.

<sup>19</sup> Anthropological Report on the Xákmok Kásek and Cora-I of the Enxet-Lengua People, prepared by the Center for Studies in Anthropology, *Universidad Católica “Nuestra Señora de la Asunción”*, December 28, 1995. Coordinator of the Center for Studies in Anthropology (CEADUC): Anthropologist Miguel Chase Sardi. Report commissioned by the Paraguayan Institute for Indigenous Affairs (INDI) August 22, 1995. Annex 2.

<sup>20</sup> CEA Anthropological Report, Annex 2.

<sup>21</sup> Idem.

<sup>22</sup> See in: I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146. Chapter VII, Proven Facts, par. 73.1.

<sup>23</sup> See in IACHR, Report on the Merits No. 73/04, of October 19, 2004, Sawhoyamaxa Indigenous Community of the Enxet-Lengua People, par. 59, Annex 1.1.

farmhands and employees of new owners. Although the indigenous peoples continued to live on their traditional lands, the market economy into which they were incorporated restricted their mobility; in the end, they became a sedentary rather than nomadic population.<sup>24</sup>

80. Since then, the lands of the Paraguayan Chaco have been transferred to private owners and gradually divided and re-divided. This made the indigenous population's traditional lands even less accessible to them, which brought about significant changes in its subsistence activities. The indigenous population increasingly relied on wages for subsistence and took advantage of their temporary employment on the various *estancias* in the area to continue to practice their subsistence activities (hunting, fishing, and gathering).<sup>25</sup>

81. According to the aforementioned anthropological report, the colonization process in the Paraguayan Chaco also affected the Xákmok Kásek and Cora-í indigenous communities. Specifically, the report points out that because of the many Enxet hamlets within the area where the Xákmok Kásek and Cora-í communities are now located, the Anglican Church established the "Campo Flores" Mission in 1930, to continue the work of "converting" the Enxet to Christianity. The report adds that in 1939, the Xákmok Kásek mission substation was founded in the place where the community of that same name is to be found. The report adds the following:

About the time the missionaries arrived, ranchers of various origin began to settle on indigenous lands. The relationship between the indigenous people and the ranchers has been traumatic since the beginning. According to the testimony of the Anglican missionaries, in 1940 Paraguayan soldiers massacred a number of Enxet villages in the Cora-í area. The massacres had apparently been triggered by a complaint from the ranchers in that area alleging that the indigenous people were engaging in cattle rustling.<sup>26</sup>

## 2. The background of the Xákmok Kásek Indigenous Community

82. Up until March of 2008, the main settlement area of the Xákmok Kásek Indigenous Community ("parakeets' nest") is within what is now known as Estancia *Salazar*, in the Río Verde district of the department of Presidente Hayes, in the Western portion of the Paraguayan Chaco.<sup>27</sup> Since the first week of March 2008, the members of the Xákmok Kásek Indigenous Community within that *estancia* were forced to relocate to a 1,500 hectare area ceded by the Cora-i Indigenous Community,<sup>28</sup> located 375 kilometers from Asunción, on the 340th kilometer of the Trans-Chaco route, in the Cora-i *estancia*, previously owned by the firm of Eaton y Cía. S.A.<sup>29</sup> For survival, some members of the

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<sup>24</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146. Chapter VII, Proven Facts, par. 73.3.

<sup>25</sup> *Idem*, par. 73.4

<sup>26</sup> CEA Anthropological Report, Annex 2.

<sup>27</sup> "At Km. 340 on the Trans-Chaco route, a locked gate marks the entrance to *Estancia Salazar*, owned by Eaton y Cía. and Arpa S.A.. Some 500 meters from there, just before reaching the center of the *estancia* one finds a community of the Enxet-Sanapaná - Lengua people called Xákmok Kásek. There are some 53 families living there on the grounds of the *estancia*. Some 50 years ago, when barbed wire began to go up over a radius of approximately 50,000 hectares, many indigenous peoples in the area were literally trapped inside the lands that were then in the name of the International Products Corporation (IPC)."

See in this regard: <http://www.tierraviva.org.py>, Annex 8.

<sup>28</sup> On December 29, 2000, the State of Paraguay, through INDI, bought 15,113 hectares of land from the firm of Eaton & Cia S.A., which were transferred as free title to the Cora-i Indigenous Community. See, General Public Registry Office (*Dirección General de Registros Públicos*). Reg. No. 940, December 29, 2000. Relevant parts of the administrative file. Annex 4.1.

<sup>29</sup> CEA Anthropological Report, Annex 2, p. 32.

Community live temporarily in Mennonite colonies and on other *estancias* in the area. According to the anthropological report, many members of the Xákmok Kásek Indigenous Community migrate to other *estancias* or other Mennonite colonies to do seasonal work in order to be able to survive.<sup>30</sup>

83. As for the number of families and individuals in the Xákmok Kásek Indigenous Community, the case file shows that in 1995, it consisted of some 113 families and 449 persons.<sup>31</sup> According to the official census done by the National Bureau of Statistics, Surveys and Censuses of Paraguay, in 2002<sup>32</sup> the community was composed of 59 families and a total of 255 individuals.<sup>33</sup> According to the census done in 2007, the Community was made up of a total of 55 families and 238 people.<sup>34</sup> The 2008 census found that at that point in time the indigenous community was composed of 67 families and a total of 273 people.<sup>35</sup>

84. The aforementioned anthropological report states that the number of members in the Community varies because of the socio-economic circumstances in which they live. It states the following in that regard:

Many members of the Xákmok Kásek and Cora-í communities are forced to migrate to other *estancias* or Mennonite colonies to do seasonal work and are generally paid less than the minimum wage. Once the work is done, they return to their community. This accounts for why a number of censuses, including the 1992 nationwide census, report much smaller population figures for these communities. Many of these people do not have stable jobs; they live off of hunting, fishing and gathering, activities in which everyone engages: men, women and children.<sup>36</sup>

85. The number of members of the Xákmok Kásek community is down considerably since the census done by the *Universidad Nuestra Señora de la Asunción* in 1995. The decline is due to the fact that living conditions are so difficult that a number of Xákmok Kásek families have decided to leave the community, at least temporarily. They are looking for solutions to their needs, since after approximately 18 years –approximately 16 since the acceptance of the Court’s jurisdiction– the State has still not settled the claim that the indigenous community made on its ancestral territory.

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<sup>30</sup> “Paid work, either seasonal or for short terms, literally developed into a whole new method of subsistence for the indigenous people. The restrictions on residential mobility meant that the indigenous people could not relocate to new hunting grounds, which led to the depletion of game in the area. The settled communities developed small-scale vegetable patches (sweet potato and tapioca were the most common crops).”

I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Chapter V, proven facts. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, statement by Mr. Andrew Paul Leake, translated into Spanish by Tito Ulises Lahaye Díaz before a notary public, January 25, 2006.

<sup>31</sup> CEA Anthropological Report, Annex 2.

<sup>32</sup> Available at the official website of Paraguay’s National Bureau of Statistics, Surveys and Censuses. Atlas of indigenous communities in Paraguay <http://www.dgeec.gov.py/Publicaciones/Biblioteca/Web%20Atlas%20Indigena/Atlasindigena.htm>, Annex 8.

<sup>33</sup> As for the general condition of the community, the 2002 census indicates the following: total number of dwellings, 59; average number of inhabitants per dwelling, 8; average years of education: 1.8; economically active population: 61; principal occupation: farm work, 49.2%; forestry, 14.8%; hunting and fishing, 8.2%; washing and ironing, 6.6%; domestic worker, 3.3%. Other economic activities: hunting, fishing, gathering. Elementary/secondary school, yes; health clinic, no; type of water in the home: pond 84.4%, well with no pump 9.4%, cistern 3.1% COPSANA/SESANA 3.1%.

See Atlas of indigenous communities in Paraguay available at <http://www.dgeec.gov.py/Publicaciones/Biblioteca/Web%20Atlas%20Indigena/Atlasindigena.htm>, Annex 8.

<sup>34</sup> 2007 census of the Xákmok Kásek community, Annex 3.2

<sup>35</sup> 2008 census of the Xákmok Kásek community. Annex 3.1.

<sup>36</sup> CEA Anthropological Report, Annex 2.

86. As regards recognition of juridical personality, the State granted juridical personality to the Xákmok Kásek indigenous community by Decree N° 25,297,<sup>37</sup> dated November 4, 1987. The first attempts to reclaim territory began in 1986. Given that they met with no response, formal procedures were instituted on December 28, 1990.<sup>38</sup> In other words, juridical personality had been recognized by the time the Community formally instituted proceedings to reclaim part of its ancestral lands.

87. Furthermore, based on the 2006 census, 57 of the 212 persons interviewed did not have identification papers. Approximately 48 of them were children.<sup>39</sup> Based on the 2008 census, at least 43 of the 273 members of the Community do not have identification papers. At least 32 of them are minors.<sup>40</sup>

88. Most of the members of the indigenous peoples in Paraguay register their children late. The mothers usually give birth at home, given the difficulties they face in traveling from their communities to city hospitals. Other factors, such as lack of money, geographical remoteness, and the scant presence of public services in rural areas make it difficult for the indigenous to obtain identification papers.<sup>41</sup>

89. According to the United Nations Children's Fund (UNICEF), indigenous children are more likely than any other segment of the population to be excluded from registration services, because of their low level of education and high level of poverty.<sup>42</sup> There are also linguistic and geographical obstacles, because many of them live in remote areas and the women give birth at home. Many births, and many deaths, too, go unrecorded.<sup>43</sup>

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<sup>37</sup> On November 4, 1987, in Decree N° 25.297, the President of the Republic of Paraguay recognized the juridical personality of the Xákmok Kásek indigenous community. Article 1° "Let the juridical personality of the Xákmok Kásek indigenous community, belonging to the Maskoy ethnic group, in the district of Pozo Colorado (in the department of Presidente de Hayes) be recognized forthwith and authority be given to it to operate as a person before the law." Annex 8.

<sup>38</sup> Petition that Messrs. Ramón Oviedo, leader of the Xákmok Kásek indigenous community, and Florencio Gómez, an attorney representing it, lodged with the Rural Welfare Institute on December 29, 1990. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>39</sup> 2006 census of the Xákmok Kásek community, Annex 3.3. According to UNICEF, "[a]part from being the first legal acknowledgement of a child's existence, registration of births is fundamental to the realization of a number of rights and a number of practical needs including access to healthcare [in more than 30 countries, a child must be registered in order to be treated at a health center]; providing access to immunization [in at least 20 countries, children are not eligible for vaccination programs unless they have a birth certificate]; ensuring that children enroll in school at the right age; enforcing laws relating to the minimum age for employment, assisting efforts to prevent child labour; effectively countering forced marriage of young girls before they are legally eligible, without proof of age; protecting young people from underage military service or conscription; protecting children from harassment by police and other law enforcement officers; securing the child's right to a nationality, at the time of birth or at a later stage; protecting children who are trafficked, including through repatriation and family reunion." UNICEF, Child Protection from Violence, Exploitation and Abuse. Birth Registration. Available at: [http://www.unicef.org/spanish/protection/index\\_birthregistration.html](http://www.unicef.org/spanish/protection/index_birthregistration.html), Annex 8.

<sup>40</sup> 2008 Census of the Xákmok Kásek Community, Annex 3.1.

<sup>41</sup> The indigenous people in Paraguay use three types of identification: an indigenous identity card, issued by the Paraguayan Indigenous Institute (INDI); a birth certificate issued by the State Civil Registry Office (*Dirección de Registro del Estado Civil de las Personas*); and identification issued by the National Police Identification Department.

According to the 2006 census, approximately 9 adults in the Community had no identification cards. Annex 3.3.

At the request of the Community's leader, the competent authorities staged an I.D. issuance campaign in Xákmok Kásek between 1998 and 1999.

<sup>42</sup> See UNICEF news notes available at [http://www.unicef.org/spanish/media/media\\_27898.html](http://www.unicef.org/spanish/media/media_27898.html). Annex 8.

<sup>43</sup> "Indigenous children are less likely to be registered at birth, in part owing to the absence of information on the issue in their mother tongue. [...] The distance to the nearest registration office and the

90. In Paraguay, according to Plan Paraguay's<sup>44</sup> statistics, in 2002, overall, 608,120 children had not been registered<sup>45</sup>. In addition, the Latin American Regional Conference on Birth Registration and the Right to Identity pointed out that in several countries there were large numbers of children without birth certificates, chief among them Paraguay (36 percent).<sup>46</sup> According to UNICEF, an estimated 2 million of the 11 million children born in the region each year are not registered. This phenomenon is particularly acute in indigenous and afro descendant segments of the population.<sup>47</sup>

91. The Commission considers that the conditions of extreme risk and vulnerability endured by the members of the Xákmok Kásek community give rise to serious economic and geographical obstacles to proper registration of births and deaths and prevent access to other identity documents also needed for the exercise of fundamental rights.

92. In light of the above information, children in the Xákmok Kásek community are among those hardest-hit by the lack of identification documents. That seriously jeopardizes access by the children in that community to public services in education, health, sanitation, and social welfare, and so on. That further exacerbates the vulnerability and exclusion of members of the Xákmok Kásek indigenous community, as well as discrimination against them.

### **3. Living conditions of members of the Xákmok Kásek Indigenous Community.**

#### **a. Socioeconomic conditions**

93. According to the aforementioned anthropological report, the relationship between the Xákmok Kásek Indigenous Community and the ranchers in the region has been traumatic since the colonization of the Paraguayan Chaco first started, because the indigenous people were dispossessed of their lands. Their access to their traditional means of subsistence was severely curtailed with the result that they were forced to work in semi-slavery conditions on the various *estancias* in the region. "The people of Xákmok Kásek and Cora-í live in dire poverty. They were forced to eke out a living stripped of their land, always subordinate to the will of the *patron* or hostage to the

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cost of the certificate can also be severe deterrents." UNICEF. The State of the World's Children 2006. Latin America and the Caribbean, p. 25. Available at: [http://www.unicef.org/sowc06/pdfs/sowc06\\_fullreport.pdf](http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf). Annex 8.

<sup>44</sup> Plan is a humanitarian organization focusing on children and working with their families and their communities to ensure that their needs are met. It has been a consultative member of the United Nations Economic and Social Council since 1981.

<sup>45</sup> "Estudio de Situación y Bases de un Programa Regional de Apoyo al Registro de Nacimiento" [Assessment of the Current Situation and Guidelines for a Regional Program to Promote Birth Registration]. Antonio Peres Velasco. Plan International, February 2006. Cited in the press release of the "Latin American Regional Conference on Birth Registration and the Right to Identity." Organized jointly by The Americas and Caribbean Regional Office of UNICEF (TACRO), the Organization of American States (OAS), and Plan International's Regional Office for the Americas (ROA).

Available at:

[http://www.unicef.org/paraguay/spanish/Py\\_Gacetilla\\_Aluerzo\\_Conferencia\\_Regional\\_22ago07.pdf](http://www.unicef.org/paraguay/spanish/Py_Gacetilla_Aluerzo_Conferencia_Regional_22ago07.pdf).

Annex 8

<sup>46</sup> Discussion paper for the "Latin American Regional Conference on Birth Registration and the Right to Identity". Available at [http://www.unicef.org/lac/O1Documento\\_Conceptual\\_Final\\_.pdf](http://www.unicef.org/lac/O1Documento_Conceptual_Final_.pdf). Annex 8.

<sup>47</sup> The Latin American Regional Conference on Birth Registration and the Right to Identity specifically recommended allowing the participation of the peoples and groups hardest hit by underregistration, above all the indigenous and persons of African descent. UNICEF. Press Release, posted at: [http://www.unicef.org/media/media\\_40731.html](http://www.unicef.org/media/media_40731.html). Annex 8.

meager opportunities that their surroundings afforded."<sup>48</sup> The anthropological report adds the following:

Decimated, dispossessed of their lands, and with little opportunity to engage in the activities typical of their traditional economy (hunting, fishing, gathering, small-scale agriculture and raising domesticated animals), many indigenous persons were and are being forced to work on *estancias* under conditions amounting to semi-slavery. This is what has happened to the members of the Xákmok Kásek and Cora'í communities, who for over 40 years have worked on *Estancia Salazar*. They are also being denied their rights to own their own land and cultivate it. One example of this exploitation is the wages paid to indigenous workers: for a number of years the only wage the owners paid them for their labors was low-quality sugar cane.

The living conditions of these communities are not much different today. Many of the restrictions they face are because they live on "private property" and in such subordination labor-wise. These restrictions persist and in some ways are even worse today because of the struggle that the communities have waged to reclaim a portion of their traditional territory. Their claim is meeting fierce resistance from the current owner of *Estancia Salazar*, Mr. Roberto Carlos Eaton.<sup>49</sup>

94. The case file contains the record of the testimony given by Mr. Juan Dermott, about the conditions in which the members of the Xákmok Kásek community are living.

...one of indigenous workers went to get his meal and found only water and salt on the fire. He then asked for fat and the person in charge said to him: Why do you old Lenguas like fat? The indigenous worker answered that they were the ones who did the work and were hungry as a result. The person in charge drew his pistol and killed the indigenous worker with one shot to the forehead. He dropped dead on the spot. The victim's name was Ernesto. After the killing, the foreman's brother took an ax to the neck of the dead man ... Mr. Domínguez carried on as if nothing had happened; he (Eaton) always protected him.<sup>50</sup>

95. According to the anthropological report, the members of the Xákmok Kásek Indigenous Community were not allowed to farm, to have their own land or livestock.<sup>51</sup> Antonia Ramírez, a member of the Community, said the following about how they were dispossessed of everything they owned:

...the *patrón* (Eaton) took everything we had; he didn't want us to have animals; if we had animals, he forced us to hand them over to him directly or sell them. He did not want us to plant anything either [...] <sup>52</sup>

96. The same anthropological report talks about the work conditions that demonstrate the state of semi-slavery to which members of the Xákmok Kásek community who worked on *Estancia Salazar* were subjected:

The semi-enslavement of the indigenous people is most obvious in the conditions under which they work for Eaton & Cía.'s *Estancia Salazar*. To begin with, the wages paid to the indigenous workers have never been what the law requires.

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<sup>48</sup> CEA Anthropological Report. Chapter IV. Annex 2.

<sup>49</sup> CEA Anthropological Report. Chapter II. Annex 2.

<sup>50</sup> Testimony of Mr. Juan Dermott, a member of the Xákmok Kásek community. Cited by the representatives in their brief of July 14, 2003. See file of the case with the IACHR. Appendix 3.

<sup>51</sup> CEA Anthropological Report. Chapter IV. Annex 2.

<sup>52</sup> Testimony of Mrs. Antonia Ramírez, a member of the Xákmok Kásek community. Cited by the representatives in their brief of July 14, 2003. See file of the case with the IACHR. Appendix 3.

Even the manager of the *Estancia* admits this. As previously noted, for many years they were paid in kind, with low-grade sugar cane. Once wages were paid in currency, they were barely 40% of the minimum wage. While *estancia* owners are required by law to supply workers with provisions, those supplied to the indigenous workers were always inferior in quality and quantity to those supplied to non-indigenous workers. Other benefits (vacation time, overtime, housing, equipment, etc.), required under the Labor Code, were not provided. Over the course of time, many workers have been terminated without cause, without receiving the compensation that the law requires.<sup>53</sup>

97. In 1995 the indigenous workers on *Estancia* Salazar filed a job complaint against Eaton & Cía. As a result of that complaint, the company began paying the minimum wage and granting vacation time, as a result of which working conditions for its indigenous employees are said to have improved.<sup>54</sup>

#### **b. Health conditions**

98. The children in the indigenous community suffer from malnutrition. In general, members of the Community suffer from illnesses like tuberculosis, diarrhea, Chagas disease and other occasional epidemics that wreak havoc within the community.<sup>55</sup>

99. A medical-health report was prepared during the first half of 2003 about the health of the members of the Xákmok Kásek community. The study was to look for the presence of parasites and anemia, and therefore had to determine where members of the community were getting their water, how their dwellings were built, where they relieved themselves and what type of furnishings and domestic utensils they had. The medical-health report states that interviews were conducted on June 27 and 28, 2003, to try to determine the most likely cause or causes of death. According to the report, of the 28 people who had died in the Xákmok Kásek community, 23 were children and only three of these people received medical attention.<sup>56</sup> The medical-health report concludes the following:

The data compiled confirm what one painfully observes when one visits the community:

Little can be said about the overwhelming statistics we have before us.

The entire community has been living in abject poverty for many years, in huts that can hardly be called homes. The overcrowding is indescribable. They have no drinking water, not even enough for the most basic necessities.

There is not the remotest possibility for them to be able to live their lives by practicing the traditions of the Enxet: hunting, gathering and small-scale farming.

The State has no presence at all in the area. The police and judicial authorities are not represented, and there are no health care providers, which was obvious in the death toll within the Community. None of those who died had received medical treatment. The few who managed to make their way to a medical professional got there too late.

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<sup>53</sup> CEA Anthropological Report, Annex 2.

<sup>54</sup> CEA Anthropological Report, Annex 2.

<sup>55</sup> Seroepidemiological survey on Chagas disease, *Estancia Salazar*, conducted by the *Instituto de Investigaciones en Ciencias de la Salud* (hereinafter "seroepidemiological survey"). Annex 4.2

<sup>56</sup> Medical-health report prepared by Dr. Pablo Balmaceda, Annex 4.1.

According to the report, the most common causes of death are dehydration, hemorrhage, fetal suffering, pneumonia, whooping cough, enterocolitis, fever/diarrhea, vomiting and anemia.

Given all this, the only thing I can say is that: *The Xákmok Kásek community is in total indigence.*<sup>57</sup>

100. A June 1994 study was done by the *Instituto de Investigaciones de la Salud* among members of the Xákmok Kásek community. The study shows that of the 110 cases studied, 100 turned out positive,<sup>58</sup> which means that a high percentage of the Community was suffering from Chagas disease.<sup>59</sup>

101. Members of the Xákmok Kásek indigenous community receive the minimum in the way of medical care. To get it, they have to travel to a private health clinic operated by an Anglican nurse and located five kilometers from Xákmok Kásek.<sup>60</sup> The report adds that the community has not had a medical visit, which means that the children are not receiving the necessary vaccinations.<sup>61</sup> This information confirms the information reported by the Office of the Labor-Law Prosecutor from the First Circuit of the Pozo Colorado District.<sup>62</sup> When, in one of its interviews, it asked about the health of the members of the Community, it was told that in fact there was a health post in the Río Verde district, some 5 kilometers away, which provided free health care to *Estancia Salazar's* workers. However, the free treatment did not include medications.

102. According to information the Commission had in its possession before it issued its Report on the Merits, at least 28 people died between 1991<sup>63</sup> and 2007 (at least 19 of them were children). Most of the deaths could have been prevented with the minimum in the way of preventive medicine and health care.

103. The Report on the Merits included a list of deceased persons, as follows:

Deceased person and gender	Age at time of death	Date of death	Cause of death
Gilberto Dermott Quintana (m)	46 years	2007	Tuberculosis
Jonás Ríos Torres (m)	No data	2007	No data
Remigia Ruiz (f)	38 years	2005	Complications in a delivery unattended by a physician
Yelsi Karina López Cabañas (f)	1 year	2005	Pertussis (whooping cough)

<sup>57</sup> *Ibid.*

<sup>58</sup> Seroepidemiological survey. Annex 4.

<sup>59</sup> Chagas disease is caused by a parasite in the blood and tissue of diseased humans and animals. The parasite multiplies inside the cells of certain organs like the heart, and takes a serious toll on the functioning of those organs. Some of the most common complications associated with Chagas Disease are cardiomyopathy, congestive heart failure, an increase in the size of the esophagus, making ingestion and eating difficult, and enlargement of the colon, with symptoms of constipation and abdominal pain. See in this regard: <http://www.paho.org/Spanish/DD/PIN/ps060616.htm>. Annex 8.

<sup>60</sup> CEA Anthropological Report, Chapter IV, Annex 2.

<sup>61</sup> *Idem.*

<sup>62</sup> Report presented by the Prosecutor for Labor-related Legal Matters of the First Circuit of the Pozo Colorado District, department of Presidente de Hayes. Relevant documents from the case file in the domestic judicial system. Annex 5.

The report states that: "The Office of the Prosecutor for Labor-related Matters of the First Circuit of the Pozo Colorado District is acting in response to a complain filed by attorney Lida Acuña, in charge of department for the protection of indigenous peoples of the National Public Prosecutor's Office." The report does not have a date. However, it was prepared on the basis of Resolution No. 83 of May 3, 1995. .

<sup>63</sup> In its Report on the Merits, the Inter-American Commission included a list of the persons who had died subsequent to August 24, 1989, the date on which Paraguay deposited its instrument of ratification of the American Convention. The Commission is, however, aware that Paraguay's acceptance of the contentious jurisdiction of the Court is as of March 11, 1993.

Aída Carolina González (f)	8 months	2003	Anemia
(NN) Inter. Dermot (m)	2 months	2003	Pneumonia, vomiting
(NN) Dermott (f)	8 months	2001	Enterocolitis
(NN) Dermott (f)	5 days	2001	Anemia
(NN) García (f)	1 month	2000	Pertussis
(NN) Ávalos Torres (m)	3 days	1999	Hemorrhage
(NN) Ávalos Torres (m)	9 days	1998	Tetanus
(NN) Dermott (m)	Undetermined <sup>64</sup>	1998	Interdetermined
(NN) Dermott (m)	1 day	1996	Fetal Suffering
Rosana Corrientes (f)	10 months	1996	Pertussis (whooping cough)
(NN) Ojeda (f)	8 months	1994	Dehydration
Luisa Ramírez (f)	50 years	1993	Rheumatism
Mercedes Dermott (f)	2 years	1993	Dehydration
Rufino Pérez (m)	60 years	1993	Polytraumatism
(NN) (m) * * *	2 years	1993	Pneumonia
Betina Ávalos (f)	1 year	1992	Dehydration
(NN) González (m)	1 day	1992	Asphyxia
Élida Dermott Ramírez (f)	n/s	1991	Hemorrhage
Esteban López D. (m)	1 year and 3 months	1991	Dehydration

104. In the Report on the Merits, the IACHR unintentionally failed to include the names of a number of deceased persons, whose particulars were supplied by the representatives prior to issuance of the report and were duly forwarded to the State.

Deceased person and gender	Age at time of death	Date of death	Cause of death
(NN) Dermott (f)	1 year	2003	Diarrhea and vomiting
(NN) Ríos Torres (?) <sup>65</sup>	No data	2002	No data
Adalberto González López (m)	1 year and 2 months	2000	Pneumonia
(NN) Corrientes Domínguez (?)	Undetermined	1996 <sup>66</sup>	Undetermined
Benigno Corrientes Domínguez (m)	1 year	1991	Diarrhea

<sup>64</sup> Regarding (NN) Dermott (m) and (NN) Corrientes Domínguez, the Commission does not have information with respect to the circumstances of their deaths, which might have been linked to complications during delivery.

<sup>65</sup> In the 2007 observations presented by the representatives, this name appears as NN Ríos Torres and the date of death is 1999; however, there are no further details. In the 2009 observations presented by the representatives, the name appears as NN Ríos Torres, date of death 1999, age 3 days; the cause of death is listed as a hemorrhage. This may be the same person listed in the Report on the Merits as (NN) Ávalos Torres (m).

<sup>66</sup> In the brief presented by the representatives in 2009, subsequent to the issuance of the Report on the Merits, the year of death is listed as 2003. This may be the same person. In the medical report, the person is listed as Corrientes, and the cause of death given is fetal suffering.

105. Subsequent to the issuance of the Report on the Merits, the representatives sent the following list of decedents:

Deceased person and gender	Age at time of death	Date of death	Cause of death
Felipa Quintana (f)	64	2008	Septic Shock
Sara González López (f)	1 year, 5 months	2008	Gastroenteritis-Dehydration
Gilberto Dermott Quintana (m)	46	2007	Tuberculosis
Rosa Dermott (f)	80	2007	Undetermined
Jonás Ríos Torres (m)	No data	2007	sin datos
Tito García (m)	46	2005	Heart murmur
Yelsi Karina López Cabañas (f)	1 year	2005	Pertussis (whooping cough)
Remigia Ruiz (f)	38	2005	Complications in delivery
(NN) Dermott Larossa(f) <sup>67</sup>	At birth	2003	Undetermined
Aída Carolina González (f) <sup>68</sup>	8 months	2003	Anemia, possible hypoalbuminemia
(NN) Inter. Dermot (m) <sup>69</sup>	2 months	2003	Pneumonia, vomiting
(NN) Dermott Martinez (f) <sup>70</sup>	8 months	2001	Enterocolitis
(NN) Dermot Larrosa (f) <sup>71</sup>	5 days	2001	Undetermined
Roberto Roa González (m)	55	2000	Tuberculosis
Adalberto González López (m)	1 year and 2 months	2000	Pneumonia
(NN) García (f) Dermott <sup>72</sup>	1 month	2000	Pertussis
(NN) Ríos Torres (m) <sup>73</sup>	3 days	1999	Hemorrhage
(NN) Ríos Torres (m) <sup>74</sup>	9 days	1998	Tetanus
(NN) Dermott Ruiz (m) <sup>75</sup>	Stillborn (8-9 months of gestation)	1998	Undetermined

<sup>67</sup> The 2007 observations mention a NN Dermott (f) who died in 2003 at the age of one year; the cause of death is listed as diarrhea and vomiting. This may be the same person.

<sup>68</sup> The 2007 observations list the cause of death as pneumonia, whereas the 2009 observations cite anemia, possible hypoalbuminemia as the cause of death.

<sup>69</sup> In the Report on the Merits and the 2007 observations, this person is listed as NN Inter Dermot; all the other data are the same. Therefore, this may be the same person.

<sup>70</sup> The Report on the Merits mentions an NN Dermott (f), with the same date of death, age at death and cause of death. This may be the same person.

<sup>71</sup> The Report on the Merits includes an NN Dermot (f) with the same date of death and age at death; however, anemia is listed as the cause of death. This may be the same person.

<sup>72</sup> The Report on the Merits mentions an NN García (f) with the same date of death, age at death and cause of death. This may be the same person.

<sup>73</sup> In the Report on the Merits, there is a child listed as NN Ávalos Torres (m), with the same date of death, age at death and cause of death. This may be the same person.

<sup>74</sup> In the Report on the Merits, there is a child listed as NN Ávalos Torres (m) with the same date of death, age at death and cause of death. This may be the same person.

<sup>75</sup> The Report on the Merits mentions an NN Dermott (m), whose other particulars are all the same. This may be the same person.

(NN) Corrientes Domínguez (m) <sup>76</sup>	Unborn	2003	Undetermined
Sargento Jiménez (m)	No data	1996	No data
(NN) Dermott Ruiz (m) <sup>77</sup>	1 day	1996	Fetal Suffering
Rosana Corrientes (f) <sup>78</sup>	10 months	1993	Pertussis (whooping cough)
Wilfrida Ojeda Chávez (f) <sup>79</sup>	8 months	1994	Enterocolitis, dehydration
Luisa Ramírez (f)	50	1993	Rheumatism
Mercedes Dermott (f) <sup>80</sup>	2 years	1996 <sup>81</sup>	Enterocolitis-dehydration
Rufino Pérez (m)	60	1993	Polytraumatism
Betina Ríos Torres (f) <sup>82</sup>	1 year	1992	Dehydration
(NN) González Dermott (m) <sup>83</sup>	1 hour	1994	Asphyxia
Herminio Corrientes Domínguez (m)	2 years	1991	Pneumonia
Élida Dermott Ramírez (f)	n/s (adult)	1991	Hemorrhage
Esteban López Dermott (m) <sup>84</sup>	1 year, 3 months	1993	Enterocolitis-Dehydration
Nelly González Torres (f)	2 years	1987	Undetermined
Narciso Larrosa Dermott (m)	4 years	1984	Anemia, hypoalbuminaemia
Adolfino López Dermott (m)	8 months	1983	Pneumonia.
Lorenza López Segundo (f)	9 months	1983	Dehydration
Eulalio Dermot Alberto (m)	3 years	1981	Enterocolitis-Dehydration

106. The members of the Xákmok Kásek community are at great risk and peril, living in subhuman poverty without proper medical attention. A number of members of the community have died as a result.

#### 4. Territory claimed by the Xákmok Kásek community

<sup>76</sup> The 2007 observations list NN Corrientes Domínguez, with 1996 as the year of death. Since all the other particulars are the same, this may be the same person.

<sup>77</sup> The Report on the Merits mentions an NN Dermott (m), whose other particulars are the same as the person listed here. Therefore, this may be the same person.

<sup>78</sup> The Report on the Merits includes a Rossana Corrientes, 10 months old, who died from whooping cough in 1996. This may be the same person.

<sup>79</sup> The Report on the Merits mentions an NN Ojeda (f), whose other particulars are the same as those for the person listed here. This may be the same person.

<sup>80</sup> The Report on the Merits lists a Mercedes Dermott (f), whose age at death and cause of death were the same as the person mentioned here, but whose date of death was listed as 1993. This may be the same person.

<sup>81</sup> The cause of death was different in the 2007 and 2009 lists: in 2007, it was vomiting and dehydration, whereas in 2009 it was enterocolitis-dehydration.

<sup>82</sup> The Report on the Merits lists a Betina Ávalos (f), whose particulars are the same. This may be the same person.

<sup>83</sup> The Report on the Merits mentions an NN González (m), who was one day old when he died of asphyxiation in 1992. This may be the same person.

<sup>84</sup> The Report on the Merits mentions an Esteban Lopez D., whose age at death and cause of death were the same, but date of death was 1991. This may be the same person.

107. The Xákmok Kásek Indigenous Community of the Enxet- Lengua People is currently claiming an area of 10,700 hectares as its ancestral territory.<sup>85</sup> The land is part of *Estancia Salazar*. As of the date on which the claim application was filed with the Paraguayan authorities, the *Estancia Salazar* was part of a property owned by Eaton y Cia S.A. The total size of that property was over 90,000 hectares.<sup>86</sup>

108. The territory being claimed by the Xákmok Kásek community is now owned by the "Chortitzer Komite" Mennonite cooperative.

109. The land being claimed by the members of the Xákmok Kásek Indigenous Community of the Enxet-Lengua people is its traditional territory.<sup>87</sup> The fact that the people of the Xákmok Kásek indigenous community live inside the perimeter of *Estancia Salazar* and some of its members work on the *Estancia* does not mean that these members of the community are no longer living on their territory and practicing their traditional economy, despite the restrictions imposed by private ownership of property, a practice introduced in order to accommodate ranchers.<sup>88</sup> "Both populations largely live from the hunting, fishing and gathering that their members practice even beyond the 90,000 hectares owned by Arpa S.A. and Eaton & Cia. S.A. ."<sup>89</sup>

110. The anthropological report concludes the following:

Lastly, it can be affirmed that the lands that the Xákmok Kásek and Cora-i communities are claiming are unquestionably part of their traditional territory [...]. The lands in question are, moreover, suitable for settlement of these communities and necessary for the preservation of their culture and the development of their identity.

Although the extent of the lands being claimed is not sufficient, giving the Xákmok Kásek and Cora-i communities title to them will improve their living conditions now and in the future. Up until now, those living conditions have been grossly and unjustly impoverished.<sup>90</sup>

## **5. Actions filed with the Paraguayan State seeking to reclaim and protect the ancestral territory of the Xákmok Kásek Indigenous Community**

### **a. Administrative measures**

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<sup>85</sup> In 1986 the members of the Xákmok Kásek Indigenous Community asked INDI to provide 200 hectares. In 1990 they requested 6,900 hectares.

In 1993, they requested 20,000 hectares; according to the community's members, under the new provisions of the Constitution, the surface area requested in 1990 was too small. They added that "we would not be able to practice our unique way of life on so little land."

See letter signed by Mr. Marcelino López Aquino, Mr. Amancio Ruiz and Mr. Serafín López. Relevant documents from the case file in the domestic judicial system. Annex 5.

In their original complaint with the Commission, the representatives clarified that the community is requesting a total of 10,700 hectares.

<sup>86</sup> According to the report that the Eaton Company filed with Paraguay's National Legislature, the company Eaton y Cia S.A. has been in the Paraguayan Chaco for sixty years and spanned 110,000 hectares at one time. In order to help its employees, in 1966 the Eaton Company "set up two of them on their own *estancias*," giving up a total of 3,750 hectares. Between 1976 and 1982, a total of 22,392 hectares were sold off. In 1987, "more than 18,000 hectares were sold to the ARPA Company." In 1998 27,000 hectares were transferred to the Zorz family. (Total area sold or otherwise ceded, 71,142 hectares). According to the report, at the time the expropriation was requested, the Eaton Company spanned 26,434 hectares. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>87</sup> CEA Anthropological Report. Chapter III. Annex 2.

<sup>88</sup> *Idem*.

<sup>89</sup> *Ibidem*.

<sup>90</sup> CEA Anthropological Report, Chapter V. Annex 2.

111. The community leaders were recognized in 1986, and that the community was granted juridical personality in 1987. On November 4, 1987, the President of the Paraguayan Institute of Indigenous Affairs (INDI) issued Decree No. 44/86 in which he recognized Messrs. Ramón Oviedo, Carlos Godoy and Rosendo Aquino as leaders of the community;<sup>91</sup> then, on November 4, 1987, the President of Paraguay issued Decree No. 25,297, in which the Xákmok Kásek Indigenous Community was granted legal status.<sup>92</sup>

112. It was in 1986 that the Xákmok Kásek Indigenous Community took its first steps to apply to the Paraguayan State to reclaim its traditional habitat.<sup>93</sup>

113. On December 28, 1990, the leader of the Xákmok Kásek indigenous community applied to the President of the IBR for a grant of 6,900 hectares, representing a portion of the Community's traditional territory.<sup>94</sup>

114. In the application filed with the IBR on December 28, 1990, the leaders of the indigenous community stated the following:

I am writing to you as leader and legal representative of the Xákmok Kásek community, which is located on *Estancia Salazar* [500 meters to the west of kilometer 340 on the Trans-Chaco highway, in the Pozo Colorado district of the department of Presidente Hayes] A Sanapá community consisting of 232 people divided among 59 families, the Xákmok Kásek community was granted legal status by decree 25,297.

The reason [for] my letter is that my community wants to petition the I.B.R. to obtain for us our own land. For the sake of justice and in compliance with the provisions of law 904/81, we are requesting 6,900 hectares. [The community] is on the eastern side of the Trans-Chaco route, near the first Salazar settlement. We were unable to take a proper measurement of the land. However, it does include Mopey, Sensap Yagkmet, Wannaktee, Naktee, Sagye and Mosmagala, and should extend as far as Xakmaxapak in the south. The owner is Mr. Roberto Eaton [...]

The reasons why we are requesting this land can best be summarized as follows:

1. It is our right as members of a native people of the Paraguayan Chaco to apply for our own land. We were dispossessed of this land, which belonged to us. Law 904/81 supports our claim.

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<sup>91</sup> Decree No.44/86 on the recognition of the leaders of the Xákmok Kásek indigenous community. Annex 5.

<sup>92</sup> Decree No 25,297 granting legal status to the Xákmok Kásek indigenous community. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>93</sup> "In 1986, Mr. Ramón Oviedo, leader of the indigenous community, filed a request with the Paraguayan Institute of Indigenous Affairs (INDI) seeking 200 hectares, a portion of their ancestral lands. INDI did not take action on the request." See the representatives' brief of March 6, 2007. Case file with the IACHR. Annex 3.

<sup>94</sup> In 1986, the members of the Xákmok Kásek Indigenous Community applied to the INDI seeking 200 hectares. In 1990, they requested 6,900 hectares.

In 1993, they requested 20,000 hectares; according to the community's members, under the new provisions of the Constitution, the surface area requested in 1990 was too small. They added that "we would not be able to practice our unique way of life on so little land." See letter signed by Mr. Marcelino López Aquino, Mr. Amancio Ruiz and Mr. Serafín López. Relevant documents from the case file with the domestic judicial system. Annex 5.

In their original complaint with the Commission and in other documents, the representatives clarified that the community is requesting a total of 10,700 hectares.

2. Our request is an urgent one, because ours is a very precarious situation. We have gone without food for many days; few people in the community have work; we are not allowed to have our farms and very few wild animals are left in the areas where the *patron* permits us to hunt.

Salazar is where we were born and raised; the first settlement is part of our traditional hunting ground.<sup>95</sup>

115. Articles 24 to 27<sup>96</sup> of Law 904/81 on the “Statute of Indigenous Communities” establish the procedure for settling indigenous communities on privately owned lands. The articles provide that the request seeking private land for settlement of indigenous communities shall be made by the community itself, or by any indigenous community member or any promoter of indigenous cultures with legal status. The request is to be filed directly with the IBR, or through the INDI. The IBR is empowered to file the request on its own initiative, in coordination with the INDI. In cases of expropriation, the procedure and compensation are to follow the Constitution and the laws. Once the indigenous community’s legal status has been recognized, the State is to transfer to it the title to the expropriated property.

116. When the community’s leader filed the application, administrative case file 15,032 was opened. Its cover reads: “Xákmok Kásek Indigenous Community. Pozo Colorado/lands, 6,900 hectares.” The corresponding government authorities took a number of steps, but the Community’s land claim was never settled. The claim was for a total of 10,700 hectares.

117. Once the application was filed, the following measures were taken:<sup>97</sup>

- The community’s leaders filed the request on December 28, 1990. On February 25, 1991, by IBR Report No. 339, it was requested that an IBR official be commissioned to conduct an on-site inspection of the land being claimed, once the owner of the property was notified.<sup>98</sup>
- On May 17, 1991, by IBR Resolution No. G.O.S.G. 168, it was decided to send IBR official Pastor Cabanellas to conduct an on-site inspection of the land.<sup>99</sup>

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<sup>95</sup> Request filed by Mr. Ramón Oviedo, leader of the Xákmok Kásek Indigenous Community, and Florencio Gómez, attorney for the community, December 28, 1990, with the Rural Welfare Institute (IBR). Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>96</sup> Article 24.- Applications in which privately-owned lands are requested for settlement of indigenous communities shall be made by the community itself, or by any indigenous community member or any promoter of indigenous cultures with legal status, directly to the IBR or through the Institute.

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

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

Article 27.- Once the legal status of an indigenous Community has been recognized, the State shall transfer the property to its name, in the manner set forth in Article 19.

<sup>97</sup> The Commission will do a brief summation of the most important steps taken in processing the administrative case.

<sup>98</sup> Report No. 339 of February 21, 1991. Signed by Irene Marrecos, IBR head of Indigenous Advocacy, *Instituto de Bienestar Rural* (IBR). Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>99</sup> Resolution No. 168 of May 17, 1991. Relevant documents from the case file in the domestic judicial system. Annex 5.

- On June 17, 1991, the IBR official presented a report in which he stated, *inter alia*, the following: the claimed piece of land measures approximately 6,500 hectares in size and is a portion of a larger property measuring 109,000 hectares. Within the *estancia* the IBR official observed 120 indigenous persons, who told him that the community consisted of 277 people, some of whom were employed by the *Estancia Salazar*. The report points out that the members of the community “were very insistent in claiming the land being inspected, which according to them was their original habitat and because they knew the place so well and there were areas within it that were suitable for farming. In the conversation with them, they pointed out that they needed land of their own desperately, because they are now living on land that belongs to someone else; they claim that their destitution is due to the fact that they do not have their own land.”<sup>100</sup>
- On July 24, 1991, the Secretary General of the IBR asked Mr. Roberto Eaton to make a proposal to the IBR that would accommodate the land needs of the members of the Xákmok Kásek Indigenous Community.<sup>101</sup> On October 9, 1991, the IBR Secretary General repeated his request.<sup>102</sup>
- On November 5, 1991, by IBR Report No. 2476 of 1991,<sup>103</sup> the following was established: “1. That the existence of the Xákmok Kásek Indigenous Community, part of the Sanapá family of the Maskoy ethnic group, has been established. 2. That the anthropological report commissioned by the Paraguayan Institute for Indigenous Affairs found that the land on which the *Estancia Salazar* is located is the traditional habitat of the community filing the claim. 3. That the property owner is not in compliance with Article 66 of law 904/81.”<sup>104</sup>
- Then, the attorney for the firm Eaton & CIA requested that another on-site inspection be done of the lands being claimed;<sup>105</sup> on November 18, 1991, the attorney for the community filed a formal objection to the request being made by Eaton company.
- On June 24, 1992, in Report No. 503, the IBR decided to commission officials from the IBR and the INDI to conduct the expanded on-site inspection that the Eaton Company had requested, and to investigate the harassment reported by the Community.<sup>106</sup> On August 21, 1992, the

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<sup>100</sup> Report on the on-site inspection done by Ing. Alfonso Pastor Caballeras, dated June 17, 1991. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>101</sup> Request addressed to Roberto Eaton, signed by Juan C. Silva, Secretary General of the IBR, dated July 24, 1991. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>102</sup> Letter signed by the Secretary General of the IBR, Mr. Juan C Silva. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>103</sup> Report No. 2476 of November 5, 1991. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>104</sup> Article 66 of Law 904/1981 reads as follows: “Owners of land on which there are indigenous settlements are required to report that fact to the INDI within ninety days of enactment of this law.”

<sup>105</sup> Request signed by the attorney for the Eaton Company, Mr. José María Caniza, undated. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>106</sup> Report No. 503, June 24, 1992. Relevant documents from the case file in the domestic judicial system. Annex 5.

President of the IBR assigned attorney Irene Marecos the job of executing Report No. 503.<sup>107</sup>

- Pursuant to IBR Resolution No. 651/92, attorney Irene Marecos presented her report on September 22, 1992. That report states that approximately 250 people live in the community; that there is a school attended by approximately 80 children. She also writes that the community has a strong political/religious leadership system and its own system of authority. The report goes on to say that the members of the Community live in a common habitat and under very poor conditions because they do not have land. The attorney writes the following: “the granting of this petition would be of the utmost importance to ensure the community’s development.”<sup>108</sup> As to the sale of the *Estancia Salazar*, the report states that the Eaton company claims that such a sale is out of the question because the sale of the portion called “retiro primero” [settlement one] would affect the economic organic unity of the firm. It offered instead the “Pozo Winchester” property. The community accepted the offer, so that an agreement did exist in principle.
- Later, the attorney for the Xákmok Kásek community wrote to the president of the IBR to inform him that the community’s legal representatives were not notified; nor did they give their consent to the supposed agreement in principle. They stated further that the soil on the land being offered (Pozo Winchester) has a high saline content and is unsuitable for farming. They requested that a geologist be assigned to do the corresponding study.<sup>109</sup>
- On February 19, 1993, the leaders requested that activity on their case continue, since “it appeared to have come to a halt for no reason.”<sup>110</sup> On February 24, 1993, by IBR Report No. 99, the parties were convened for a conciliation hearing.<sup>111</sup>
- On November 11, 1993, the leaders of the Xákmok Kásek community asked the IBR to increase their request from 6,900 hectares to 20,000 hectares. They pointed out the following: “The original area requested is too small to comply with Article 64<sup>112</sup> of the new Constitution. We would be unable to pursue and cultivate our particular way of life on such a small piece of land. We are therefore increasing our request to at least 20,000 hectares.”<sup>113</sup>

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<sup>107</sup> Resolution No. 651 of August 21, 1992. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>108</sup> Report on the on-site inspection done by Mrs. Irene Marecos dated September 24, 1992. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>109</sup> Document signed by Florencio Gómez Beloto, attorney for the Xákmok Kásek community, undated. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>110</sup> Request signed by attorney Florencio Gómez Beloto, attorney for the Xákmok Kásek community, dated February 19, 1993. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>111</sup> Report No. 99 of February 24, 1993. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>112</sup> The Political Constitution of Paraguay was promulgated on June 20, 1992. Article 64 establishes the indigenous peoples’ right to community ownership.

<sup>113</sup> Request signed by Xákmok Kásek community leaders Marcelino López Aquino, Amancio Ruiz Ramírez, and Serafín López. Relevant documents from the case file in the domestic judicial system. Annex 5.

- According to the information in the case file, measures were taken between January 17 and February 11, 1994, in an effort to arrive at a negotiated settlement of the matter.<sup>114</sup>

- By Report No. 1474, dated June 29, 1994, the IBR's Head of Indigenous Advocacy sent the case file to officials at INDI, for a decision on the expropriation of lands for the Cora-í and Xákmok Kásek communities. The report established the following:

the Xákmok Kásek Indigenous Community is requesting an area of at least 20,000 hectares at the place known as settlement one; the Eaton Company has offered the Winchester property to the Xákmok Kásek Indigenous Community, which is 8,941 hectares, and a segment of 3,059 hectares in the north settlement; the community turned down these offers; as of that point in time no negotiated settlement had been reached and all administrative procedures have been exhausted. The Office of Indigenous Advocacy is therefore suggesting that these files be forwarded to the Paraguayan Institute of Indigenous Affairs, which is to decide the matter of the expropriation requested by the communities.<sup>115</sup>

- On June 30, 1994, the IBR sent the administrative case file to the INDI so that it might continue to process the expropriation request.<sup>116</sup>

- On August 22, 1995, the INDI commissioned the *Universidad Católica Nuestra Señora de la Asunción* to prepare an anthropological report on the Cora-í and Xákmok Kásek communities. The request states the following:

Given the importance of the data that the Center for Studies in Anthropology of the *Universidad Católica* (CEADUC) has access to on the traditional territory of the requesting indigenous communities and other matters related to the land being claimed and the culture of these communities, I am requesting the center's cooperation (...) in the form of a scientific report prepared for the INDI. That report is to be an objective assessment of the situation.<sup>117</sup>

- On September 20, 1995, the attorneys for the community asked the INDI to again solicit a concrete offer from Eaton & CIA and Arpa SA., in order to satisfy the land needs of the Xákmok Kásek and Cora-í communities. On October 15, 1995, the President of the INDI wrote to the legal representative of the businesses in question, stating that the leaders of the community had asked him to solicit a final offer on the lands located in the vicinity of "*Retiro Primero*" and "*Retiro Pañuelo*" since the indigenous community confirmed its decision to reject the offer of "*Pozo*

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<sup>114</sup> The Xákmok Kásek community requested a conciliation hearing on January 17, 1994. The date for the conciliation hearing was set on January 28, 1994. On February 11, 1994, the conciliation hearing was held without reaching any final outcome. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>115</sup> Report No.1474, dated June 29, 1994. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>116</sup> Note from the IBR, dated June 30, 1994. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>117</sup> Request signed by Valentín Gamarra Velásquez, Chair of the INDI Executive Board, dated August 22, 1995. Relevant documents from the case file in the domestic judicial system. Annex 5.

*Winchester.*” In a letter dated November 7, 1995, the legal representative of the Eaton Company stated that they were willing to sell the so-called Cora-í sector and that the sector known as “*Retiro Primero*” could not be sold because it is an intensively worked area that provides access to the Trans-Chaco route. In the words of the company, selling that property “would be tantamount to destroying a productive business unit.”<sup>118</sup>

- On January 18, 1997, the attorney for the community requested that the Xákmok Kásek community’s case file be treated separately from that of the Cora-í community.

118. The Commission’s case file contains no record of any action between 1997 and 2004.

119. Three requests were filed between December 2004 and August 2006 seeking to have the missing administrative case file reconstituted.<sup>119</sup> The July 2006 request reads as follows:

That the file containing the record of the overtures made to the Institute requesting continued action on the land claim filed by the [Xákmok Kásek] indigenous community has been assigned to attorney Rubén Villalba since April 4, 2006. [...] The delay in issuing a report to go forward with the second reconstruction of the file lost at the Institute on two different occasions is at odds with the “reasonable period” principle. The rights of this indigenous community have been violated by this unwarranted delay.<sup>120</sup>

#### **b. Actions pursued before the legislative branch**

120. The Xákmok Kásek Indigenous Community did not obtain satisfaction of its land claim by pursuing the administrative procedures provided for in Law 904 of 1981. Therefore, on June 23, 1999, the leaders of the community turned to the Congress of the Republic with a petition seeking expropriation of farm 1,418, located on *Estancia Salazar*, at around kilometer 335 on the Trans-Chaco highway in the department of *Presidente Hayes*, western region. The land was owned by the Eaton Company. The members of the community and their legal representatives explained the reasons why the community was requesting these lands and not others in the following terms:

We believe that we should be given legal title to these lands and not others for the following reasons:

a) As the CEADUC<sup>121</sup> report states, the lands being claimed are suitable for (our) settlement and for the practice of (our) culture and development of our identity. There is a good amount of grassland, especially near the first settlement, which is suitable land because it is high enough and fertile enough for farming and to build our houses [...]

c) Our traditional territory is a much larger expanse of land (175,000 hectares). The dispossession we suffered was a terrible injustice, with irreversible consequences for the well-being of the members of our community. Their loss is

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<sup>118</sup> Brief of November 7, 1995. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>119</sup> Requests dated July 6, 2006 and August 23, 2006. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>120</sup> Request that the legal representatives of the Xákmok Kásek Indigenous Community made on July 6, 2006. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>121</sup> CEA Anthropological Report, Annex 2.

measured in property as well as physical well-being. It seems to us only fair that when this injustice is corrected, we should be allowed to choose what part of our territory we will be given legal title to. We do not wish to be victimized yet again by having a violation of our dignity and autonomy once again forced upon us.<sup>122</sup>

121. On June 25, 1999, Senator Nidia Flores introduced a bill in the Chamber of Deputies declaring a segment of 10,700 hectares on farm 1418 to be in the public interest and expropriated for the INDI, to then be turned over to the Enxet indigenous community of Xákmok Kásek.<sup>123</sup>

122. On September 27, 2000, the Chamber of Deputies' Agrarian Reform and Rural Welfare Commission issued Report No. 11-2000/2001 recommending adoption of the bill.<sup>124</sup>

123. On November 9, 2000, the Agrarian Reform Commission of the Senate, without explaining why, withdrew Report No. 11-2000/2001. It stated the following in that regard:

The majority on your Agrarian Reform and Rural Welfare Commission recommends the rejection of the bill declaring a 10,700-hectare segment of farm 1418 to be in the public interest and expropriated for the Paraguayan Institute of Indigenous Affairs and then handed over to the Xákmok Kásek community.<sup>125</sup>

124. On November 16, 2000, the Paraguayan Senate rejected the aforementioned expropriation bill in Resolution No. 693.<sup>126</sup>

### **c. The Xákmok Kásek land claim in the courts**

125. As for the judicial proceedings conducted in the case of the Xákmok Kásek Indigenous Community, the record shows that in 1993, the Fourth Circuit Civil and Commercial Lower Court asked the President of the IBR to provide a copy of Administrative File No. 15,032/90, in order to examine a request for an injunction.<sup>127</sup>

126. In a document dated February 11, 1994, the community's legal representatives stated the following with regard to a conciliation hearing between Eaton y Compañía S.A. and the legal representatives of the Xákmok Kásek indigenous community:

We have specific information to the effect that the lands that the indigenous community is claiming are being offered for sale. For that reason, we have a request

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<sup>122</sup> Request that the leaders of the Xákmok Kásek community and its legal representatives sent to Senator Juan Carlos Galaverna, president of the Senate of Paraguay, dated June 23, 1999. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>123</sup> Bill signed by Senator Nidia Ofelia Flores and introduced in the Chamber of Deputies on June 25, 1999. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>124</sup> Report No.11-2000/2001, signed by Senators Pedro Pablo Ovelar, Ramona Valiente de Grisetti, Juan Carlos Ramírez and Juan Manuel Benítez Florentin. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>125</sup> Report No. 18-200/2001. File No. 03819. Signed by Senators Basilio Nikhiporoff, Chair, Pedro Pablo Ovelar, Vice Chair, and Julio Rolando Elizeche Rapporteur of the Agrarian Reform and Rural Welfare Commission. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>126</sup> Resolution No. 693 Senate of the National Congress. Signed by Darío Antonio Franco Flores. Secretary/Parliamentarian, and Juan Roque Galeano Villalba. President of the Chamber of Deputies. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>127</sup> Document signed by Judge Oscar Rodríguez, dated December 27, 1993. Relevant documents from the case file in the domestic judicial system. Annex 5.

for an injunction pending with the courts and a provisional filing to protect legal interests in the property, in order to block the sale of those lands.<sup>128</sup>

127. In 1993, an injunction was allegedly sought on the lands claimed by the Xákmok Kásek Indigenous Community. However, the Commission does not know whether the injunctive relief was granted; or if so, when the injunction was lifted and whether the eventual sale of the land by Eaton y Cia S.A. and ARPA S.A. was done while an injunction was still in effect.

**d. Declaration of a Private Nature Reserve within part of the territory claimed by the Community**

128. On January 31, 2008, the State of Paraguay, through Decree No. 11804, declared *Estancia* Salazar to be a privately-owned protected wild area for a period of 5 years.<sup>129</sup> Some of the areas within the declared nature reserve overlap with the territory that the Xákmok Kásek Community is claiming as its traditional territory. In fact, the ancestral territory claimed by the Community consists of an area of 10,700 hectares located within the *Estancia* "Salazar".

129. The legal regime applicable to protected natural areas in Paraguay is contained in Law 352 of 1994 on "Protected Wild Areas". Article 56 of this Law states that privately owned Protected Wild Areas shall not be subject to expropriation for the period they are declared to be protected.

130. In addition, the law sets restrictions on the use and control of protected wild areas. Those restrictions are on record in the General Public Registry Office so that they may be public knowledge. Among other restrictions, the Law states that occupation of any land declared to be a Protected Wild Area under private ownership is prohibited; it states further that the Enforcement Authority will immediately proceed with eviction (Article 61). The Law on Protected Wild Areas states that in said areas, only those activities expressly determined by the Enforcement Authority shall be permitted (Article 46) and that the Enforcement Authority must give its authorization before any material (of plant, animal or other origin) may be removed from a Protected Wild Area, which must be for justified cause (Article 48).

131. According to Article 58 of said law, any violation of its provisions will be considered a transgression of a social good and an actionable criminal offense. Forest rangers are akin to law enforcement authorities and, within their territorial jurisdiction, are allowed to carry weapons, make arrests, conduct inspections, surveillance, detentions and confiscations as well as take or request precautionary measures for safety, correctional or punitive purposes (articles 44 and 45).

## **VII. CONSIDERATIONS OF LAW**

### **1. Right to property**

132. Article 21 of the American Convention, which concerns the right to property, provides as follows:

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<sup>128</sup> *Instituto de Bienestar Rural* (IBR), Conciliation and Arbitration Division, Report No. 2. Relevant documents from the case file in the domestic judicial system. Annex 5

<sup>129</sup> Decree No. 11804 of January 31, 2008. Relevant documents from the case file in the domestic judicial system. Annex 5.

Article 1: "The Nature Reserve named "Estancia Salazar," located within farms No. 1,418-13,016 -Property Records No. 3.849-9.708, respectively, as registered in the General Property Registry- and with a surface area of 12,450 hectares located in the department of Presidente de Hayes, is hereby declared a Protected Wild Area under private ownership for a period of five (5) years, according to the following polygon...."

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.

133. The jurisprudence of the Inter-American system for the protection of human rights has consistently upheld the right of indigenous peoples to live on their ancestral lands. In effect, in its judgments in the *Case of the Mayagna (Sumo) Awas Tingni Community*, dated August 31, 2001, the Inter-American Court wrote the following with regard to indigenous peoples' right of property:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>130</sup>

134. In their concurring opinion in the *Case of the Mayagna Awas Tingni Community*, Inter-American Court Judges Antônio Cançado Trindade, Máximo Pacheco Gómez and Alirio Abreu Burelli explained their vote as follows:

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

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

The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future) in respect of which we have obligations.<sup>131</sup>

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<sup>130</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, par. 149.

<sup>131</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79. Concurring Opinion of Judges Antônio Cançado Trindade, Máximo Pacheco Gómez and Alirio Abreu Burelli, paragraphs 8, 9 y 10.

135. In the judgment on the *Case of the Sawhoyamaxa Indigenous Community*, the Court held that:

[...] the close ties the members of indigenous communities have with their traditional land and the natural resources native to it and associated with their culture, as well as the intangible elements they derive from the land, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.<sup>132</sup>

136. Furthermore, when examining the right recognized in Article 21 of the American Convention, one must also consider the collective dimension that the right of property has in the case of indigenous peoples, which is not the classic notion of the right of property. The Inter-American Court has held the following in this regard:

This Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land "is not centered on an individual but rather on the group and its community."<sup>133</sup> This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, usages, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.

Consequently, the close ties of indigenous peoples with their traditional land and the natural resources native to it and associated with their culture, as well as any intangible elements they derive from the land, must be secured under Article 21 of the American Convention. On this matter, the Court, as it has been before, is of the opinion that the term "property" as used in Article 21, includes "material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movable and immovable, tangible and intangible elements and any other intangible object capable of having value."<sup>134</sup>

137. Taking the foregoing into consideration, the right to property cannot be interpreted in a narrow sense; instead, it must be interpreted in such a way as to take account of the entire body of law in which the right operates, which includes national and international law.<sup>135</sup>

138. In keeping with Article 29(b)<sup>136</sup> of the Convention, the Commission is using ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent

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<sup>132</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 117.

<sup>133</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*, Judgment of August 31, 2001, Series C No. 79, paragraph. 149.

<sup>134</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraphs 120 y 121.

<sup>135</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*, Merits, Judgment of August 31, 2001, paragraph 148; I/A Court H.R., *Case of the Five Pensioners*, Judgment of February 28, 2003, paragraph 103; I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraphs 124 to 131; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 117.

<sup>136</sup> Article 29. Restrictions regarding interpretation.

Countries, ratified by Paraguay on August 10, 1993, as an additional standard of interpretation *-lex specialis*. The Inter-American Court has held the following in this regard:

In analyzing the content and scope of Article 21 of the Convention in relation to the communal property of the members of indigenous communities, the Court has taken into account Convention No. 169 of the ILO in the light of the general interpretation rules established under Article 29 of the Convention, in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution of the inter-American system considering the development that has taken place regarding these matters in international human rights law.<sup>137</sup>

139. Further, by virtue of Article 29, which articulates the *pro personae* principle, the Commission is also taking Paraguay's domestic laws into account, such as the provisions of its Constitution, Law 904/81 and Law 43/89, provided they contain guarantees more specific or afford more protection than those contained in the Convention.

140. The Paraguayan Constitution recognizes the cultural diversity of the Paraguayan people and contains a number of specific provisions relating to indigenous peoples. Paraguay's Constitution follows the trend in constitutional law that has spread throughout the Americas in the last decade, in that it contains provisions that recognize the rights of indigenous peoples. From the standpoint of constitutional law, Paraguay is a multi-cultural and bilingual State.<sup>138</sup>

141. Articles 62 to 67 of the Constitution of Paraguay<sup>139</sup> recognize the existence of indigenous peoples and define them as cultural groups that predate the establishment and organization of the Paraguayan State. The Paraguayan Constitution also guarantees indigenous peoples their right to preserve and cultivate their ethnic identity and to practice their systems of political, social, economic, cultural and religious organization. The Constitution makes express reference to the customs and laws that indigenous peoples follow to regulate life within the group.

142. The right to communal ownership of their lands is recognized in Article 64 of the Paraguayan Constitution, which reads as follows:

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No provision of this Convention shall be interpreted as (...) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party (...)

<sup>137</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraphs 124 to 131; *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, paragraphs 148 and 149; *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 117.

<sup>138</sup> 1992 Constitution of Paraguay, Article 140. Annex 7.

<sup>139</sup> 1992 Constitution of Paraguay, Annex 7.

Articles 62 and 63 of the Constitution read as follows:

Article 62 – REGARDING INDIGENOUS PEOPLES AND ETHNIC GROUPS

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

Article 63 – REGARDING ETHNIC IDENTITY

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

On communal property: Indigenous peoples have the right to communal ownership of the land, of sufficient size and quality for the conservation and development of their particular way of life. The State will provide these lands to them free of cost, and these property titles shall not be subject to attachment, division, sale, or time limitations and cannot be used as collateral for contractual obligations or be leased. Further, they shall not be subject to taxation.

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

143. The Constitution expressly recognizes indigenous peoples' right to communal ownership of the land, but not just any land; they have a right to the land they require to preserve and cultivate their way of life. As has been established, the Xákmok Kásek community belongs to an indigenous people defined as hunters and gatherers. This means –as the Paraguayan Constitution recognizes- this community needs land of sufficient size and quality to preserve and cultivate its own way of life.<sup>140</sup>

144. Apart from the constitutional protection of the basic rights of Paraguay's indigenous peoples, other laws exist within Paraguay's legal system that concern those rights, especially the right to ancestral territory or traditional habitat.

145. Specifically, Law No. 904 of 1981, the "Statute on Indigenous Communities," contains provisions on settlement of indigenous communities, among them the following:

Article 14. Settlement of the indigenous communities shall take into account insofar as possible current or traditional possession of land. Free and express consent of the indigenous community will be essential for their settlement in places other than their territories, except for reasons of national security.

Article 15. When in the cases foreseen in the preceding article one or more indigenous communities have to be relocated, they will be given appropriate land of a quality at least equal to the land they occupied, and they will be adequately compensated for the damage and detriment suffered due to the displacement, as well as for the value of the improvements made to the land.

Article 16. Indigenous groups separated from their communities or scattered, must regroup for purposes of this Law. Once regrouped, settlements must have at least twenty families for purposes of this law. Such groups shall be settled on lands suited to their way of life.

146. In Law No. 43 of 1989, which amends the provisions of Law No. 1372/88 "Establishing a system for legalizing the status of the settlements of the indigenous communities", a settlement is defined as a "physical area including the nucleus of dwellings, natural resources, crops, vegetation, and surroundings, linked to the extent possible to the community's cultural traditions; each family shall have a minimum of twenty (20) hectares in the Eastern Region and one hundred (100) hectares in the Western Region."<sup>141</sup>

147. Article 4 of Law 43/89 states that during the administrative and judicial proceedings provided for in Article 2, the INDI and the IBR<sup>142</sup> shall propose permanent

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<sup>140</sup> The Inter-American Commission's finding was the same in the cases of the Yakye Axa and Sawhoyamaya indigenous communities. See in IACHR, Merits Report No. 67/02, October 24, 2002, paragraph 138. IACHR, Merits Report No. 73/04, October 19, 2004, paragraph 160, Annex 10.

<sup>141</sup> Law No. 43 of 1989, amending the provisions of Law No. 1372/88 "Establishing a system for legalizing the status of the settlements of indigenous communities," Article 3. Annex 7.

<sup>142</sup> The *Instituto de Bienestar Rural* (IBR) was created by Law No.852/63; when Law 2,419/04, enacted on July 15, 2004, took effect, the IBR was replaced by the "National Institute of Rural Development and Land" (INDERT). Relevant documents from the case file in the domestic judicial system, Annex 5.

solutions for the settlements of indigenous communities, pursuant to Law No. 854/63, the Agrarian Statute, and Law No. 904/81, proposing expropriation under Article 1 of Law No. 1372/88 when solutions cannot be found via other avenues.

148. Through Law No. 234 of 1993, Paraguay ratified the International Labour Organization's (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, and made it part of the body of Paraguayan domestic law.<sup>143</sup> Article 14 of the Convention reads as follows:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.<sup>144</sup>

149. Law No. 1863, enacted in 2002 as the New Agrarian Reform Statute, provides that all matters related to the rights of indigenous peoples shall be governed by the provisions of ILO Convention No. 169.

150. For the foregoing reasons, in the instant case the right to property protected under Article 21 of the American Convention includes the right to communal property, in keeping with the Constitution and laws of Paraguay and ILO Convention No. 169, to which Paraguay is party. This is consistent with the Inter-American Court's finding to the following effect:

Applying the aforementioned criteria, the Court has considered that the close ties the members of indigenous communities have with their traditional land and the natural resources native to it and associated with their culture, as well as the intangible elements derived from the land, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.<sup>145</sup>

151. The Court explained that the foregoing is related to the content of Article 13 of ILO Convention No. 169 in that States must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."<sup>146</sup>

152. The above analysis of fact and of law has established that Paraguayan law expressly recognizes indigenous peoples' right to property, including the Xákmok Kásek community. In Paraguay, the law requires that the State guarantee that right. Under articles 21 and 29 of the American Convention, indigenous peoples' legal right to property is subject to international protection.

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<sup>143</sup> Law No. 234/93 ratifying ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Annex 7.

<sup>144</sup> Convention No 169 (1989) of the International Labour Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries, Article 14. Annex 7

<sup>145</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awajitjuna Community*, Merits, Judgment of August 31, 2001, paragraph 149. I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 137. I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 118.

<sup>146</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 119.

153. In the present case, in 1990 the leaders of the Xákmok Kásek community followed the administrative procedure prescribed by Paraguayan domestic law to reclaim a portion of the community's ancestral territory. Since 1990, the government agencies charged with processing that request -the INDI and the IBR- have taken a number of measures to act on that request. As noted previously, under Paraguay's own laws<sup>147</sup> these two agencies are obligated to find definitive solutions to the requests presented to them. However, some 18 years and seven months -16 years since the acceptance of the Court's jurisdiction- have passed since the requests were formally filed, yet to this day the community's right to communal ownership of its ancestral territory has not been effectively upheld.

154. Since 1990, these two agencies have taken some action on the case, including attempts to negotiate with the lawyers for the owners of the lands being claimed by the Indigenous Community, with a view to acquiring the land and then transferring title of same to the Community free of cost. To this day, however, the State has failed to come up with a definitive solution for the Xákmok Kásek Indigenous Community.

155. The procedure that the Xákmok Kásek community instituted in 1990 to reclaim its ancestral territory has not thus far produced any result that serves to respect and guarantee the right to property of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People.

156. In the proceedings before the Commission, the State argued that the community "had neither possession nor ownership of the territory being claimed." On the other hand, it also observes that:

The Government of Paraguay finds itself caught between two rights, both protected under domestic law and human rights treaties; it is nevertheless aware that the public interest must prevail in this case, which is why it is taking measures to give back the Xákmok Kásek's ancestral territory.<sup>148</sup>

157. To settle this type of controversy, in the *Case of the Sawhoyamaya Indigenous Community* the Inter-American Court wrote the following:

Consequently, in order to address the issues in the instant case, the Court will proceed to examine, in the first place, whether possession of the lands by the indigenous people is a requisite for official recognition of property title thereto. In the event that possession not be a requisite for restitution rights, the Court will analyze, in the second place, whether enforcement of said rights is time-restricted. Finally, the Court will address the actions that the State must take to enforce indigenous communal property rights.<sup>149</sup>

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<sup>147</sup> Article 4 of Law No. 43/89, reads as follows: "In the administrative and judicial proceedings provided for in Article 2, the Paraguayan Institute of Indigenous Affairs (INDI) and the Rural Welfare Institute (IBR) are to find definitive solutions for the settlements of indigenous communities, pursuant to Law No. 854/63, the Agrarian Statute, and Law No. 904/81, Statute on Indigenous Communities, proposing expropriation under Article 1 of Law No. 1372/88 when solutions are not found via the established avenues." Law No. 43/89 amending Law No. 1372/88 "Establishing a system for legalizing the status of the settlements of indigenous communities." Annex 7.

<sup>148</sup> The State's brief of December 19, 2003. File of the case with the IACHR. Appendix 3.

<sup>149</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 126.

158. Concerning the issue of possession of the lands, after examining the cases of the Mayagna (Sumo) Awas Tingni,<sup>150</sup> Moiwana<sup>151</sup> and Yakye Axa communities,<sup>152</sup> the Court concluded the following in the Sawhoyamaxa case:

[...]

1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights. The instant case is categorized under this last conclusion.<sup>153</sup>

159. Based on the background information provided, the area claimed by the Xákmok Kásek community has been part of its traditional habitat from time immemorial. This assertion is based on, at the least, the following information:

1. The ethnographic map of the Republic of Paraguay drawn by Branislava Súsnik, where the territories occupied by Paraguay's 17 indigenous nations are officially recognized.<sup>154</sup>
2. The socio-anthropological report that the Rural Welfare Institute (Instituto de Bienestar Rural – IBR) provided to the Paraguayan Institute for Indigenous Affairs (Instituto Paraguayo del Indígena - INDI) on August 14, 1991. The report states that the community has inhabited that site from time immemorial.<sup>155</sup>
3. The Anthropological Report commissioned by the INDI, which is part of Administrative Case File No. 15,032. The report explains that the ancestral lands claimed by the Enxet Cora-i and Xákmok Kásek communities “are just a small portion of their traditional territory, which is an area of approximately 175,000 hectares.”<sup>156</sup> It also states the following:

The lands that the Xákmok Kásek and Cora-i communities are claiming are indisputably part of their traditional territory and currently [are occupied] by them. The lands in question are, moreover, suitable for

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<sup>150</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*, Merits, Judgment of August 31, 2001, paragraph 151.

<sup>151</sup> I/A Court H.R., *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124. par. 134.

<sup>152</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraphs 124 to 131.

<sup>153</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 128.

<sup>154</sup> Ethnographic map of the Republic of Paraguay, prepared by Branislava Súsnik. See in IACHR: Third Report on the Situation of Human Rights in Paraguay, 2001, Chapter IX: The Rights of Indigenous Peoples, paragraph. 2. Annex 10.

<sup>155</sup> Socio-anthropological report that the Rural Welfare Institute (IBR) sent to the Paraguayan Institute of Indigenous Affairs (INDI) on August 14, 1991. Relevant documents from the case file in the domestic judicial system. Annex 5.

<sup>156</sup> CEA Anthropological Report, Chapter III. Annex 2.

settlement of these communities and necessary for the preservation of their culture and the development of their identity.

[T]he fact that the population of the Xákmok Kásek indigenous community is living within *Estancia Salazar* and some of its members work on the *Estancia* does not mean that these members of the community are no longer living on their territory and practicing their traditional economy. [...]

Both populations largely live from the hunting, fishing and gathering that their members practice even beyond the 90,000 hectares owned by Arpa S.A. and Eaton & Cia. S.A. Therefore, they continue to live on the lands they are claiming and an area well beyond the perimeter of the claimed lands.<sup>157</sup>

4. Decision of the Rural Welfare Institute (*Instituto de Bienestar Rural* - IBR) N° 2467, dated November 5, 1991, in which it declares that "Based on the anthropological report, the *Estancia Salazar* is on the traditional habitat of the community filing the claim."<sup>158</sup>

160. The documents referred to in the preceding paragraph allow one to conclude that the area claimed by the Community has been part of its traditional habitat. However, during his visit to the Xákmok Kásek community, the Rapporteur for the Rights of Indigenous Peoples ascertained that for a number of years the members of the community had not been allowed to hunt, gather, fish, or carry out other traditional activities in the territory they are claiming. The leaders told the Rapporteur during his visit that sometimes they had to enter some areas in that territory secretly in order to hunt, fetch water, and bury their dead. The Commission therefore concludes that, at the present time and for reasons not of their choosing, the members of the Xákmok Kásek community do not have possession of the territory they claim.

161. For the Commission, the finding of the Inter-American Court in the case of the Sawhoyamaxa Community applies as well to the case of the Xákmok Kásek indigenous community of the Enxet-Lengua People, which is as follows:

[T]he members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. [...] Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights."<sup>159</sup>

162. Following the jurisprudence of the Inter-American Court, the Commission concludes that the State of Paraguay is obligated to recognize and respond to the Xákmok Kásek Indigenous Community's claim for land restitution, even when they are not in full possession of those lands, which are privately held.<sup>160</sup>

163. As for the period of time in which indigenous peoples are entitled to exercise their right to reclaim their traditional lands, the Inter-American Court has held the following:

In order to solve this matter, the Court takes into consideration that the spiritual and material basis for indigenous identity is mainly supported by their unique

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<sup>157</sup> CEA Anthropological Report, Chapter III. Annex 2.

<sup>158</sup> Decision of the Rural Welfare Institute No. 2467, of November 5, 1991.

<sup>159</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 128.

<sup>160</sup> *Idem*, paragraph 130.

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

It is to be further considered that the relationship with the land must be possible. For instance, in situations like in the instant case, where the relationship with the land is expressed, *inter alia*, in traditional hunting, fishing and gathering activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, which actually hinder them from keeping up such relationship, such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear.<sup>161</sup>

164. The Commission therefore considers that the right of the members of the Xákmok Kásek community to reclaim their lands is not time-barred and it is the responsibility of the State to return their ancestral lands to them.

165. In the instant case, the State has resorted to arguments similar to those used in the Case of the Sawhoyamaxa Community, such as the following: a) the current owners of the land claimed by the indigenous people have a deed to the property and are protected by the right to private property; and b) the lands are being put to productive use, which was the reason given by the Legislature to refuse to expropriate them.<sup>162</sup>

166. As to the first argument, in the *Case of the Sawhoyamaxa Indigenous Community* the Court held that:

[The] fact that the claimed lands are privately held by third parties is not in itself an “objective and reasoned” ground for dismissing *prima facie* the claims by the Indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other.<sup>163</sup>

167. As for the second argument used by the State, which concerned the productivity of the lands, the Court wrote the following:

This argument lodges the idea that indigenous communities are not entitled, under any circumstances, to claim traditional lands when they are exploited and fully productive, viewing the indigenous issue exclusively from the standpoint of land productivity and agrarian law, something which is insufficient for it fails to address the distinctive characteristics of such peoples.” Based on the foregoing, the Court dismisses the three arguments of the State described above

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<sup>161</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraphs 131 and 132.

<sup>162</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 90; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 99.

<sup>163</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 149.

and finds them insufficient to justify non-enforcement of the right to property of the Sawhoyamaxa Community.<sup>164</sup>

168. The Commission believes that the Inter-American Court's finding in the *Case of the Sawhoyamaxa Indigenous Community* applies with equal force to the case of the Xákmok Kásek Indigenous Community. It notes further that the arguments used by the State, i.e., that private owners had title to the land being claimed and were putting it to productive use, are not sufficient to justify the failure to recognize the right of property of the members of the Xákmok Kásek Indigenous Community and to ensure exercise thereof.

169. Like all other rights protected under the Convention, the right of property recognized in its Article 21 must be respected and observed in practice. The right of property must mean that the owners, in this case the Community and its members, are able to use, dispose of, transfer and enjoy their territory. They must be able to move about freely within it and enter and leave it at will. The right of property must ensure that the *titulaire* of such rights is able to use the natural resources on the property. The State has an obligation to discharge all legal and factual guarantees, including property demarcation and entitlement. It must also ensure that in practice, no State agents or third parties obstruct the free and full exercise of this right.

170. From the foregoing analysis, the Commission finds that the lands claimed by the Xákmok Kásek Indigenous Community are part of their ancestral territory or traditional habitat. While it is not up to the Commission to determine the exact size of the land the Community is claiming, in this case it is affirming the Community's right to live on that territory, a right provided for and protected under Paraguay's own laws. Paraguay's Constitution provides that indigenous peoples have a right to communal ownership of the land, of a size and quality sufficient to enable them to preserve and cultivate their particular ways of life, and requires the State to provide said lands at no cost to the communities.<sup>165</sup>

171. The Commission observes that while the community has the right to live on its ancestral territory, the latter must be of sufficient size to enable the community to preserve and cultivate its cultural identity.

172. While the effort of the Xákmok Kásek Indigenous Community to claim its traditional territory has been a protracted and difficult process, one of the effects of the private natural preserve created under Decree No. 11804 of January 31, 2008 and encompassing part of the territory claimed by the indigenous community, has been to thwart application of the expropriation mechanism provided for in articles 26 and 27 of Law 904 of 1981, for as long as the area is declared a Protected Wild Area; in other words, the creation of the privately-owned protected wild area renders illusory any measures that the State might take to uphold the Community's land claim.

173. The Commission notes, additionally, that the aforementioned Decree No. 11804 prohibits occupation of said territory and the practice of traditional activities such as hunting, fishing and gathering, which are essential for the physical survival of the Xákmok Kásek Community and the preservation of its culture. Thus, the right of the members of the Xákmok Kásek Community to effectively use and enjoy the territory they claim is not being respected.

174. The Commission recalls the close ties that indigenous peoples have with the land, which must be recognized and understood to be the fundamental basis of their

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<sup>164</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraphs 139 and 141.

<sup>165</sup> See Article 64 of the Constitution of Paraguay. Annex 7.

cultures, their spiritual life, their integrity and survival. Moreover, the right to property incorporates the right to the natural resources traditionally used and necessary for the survival, development and continuity of the way of life followed by indigenous communities.

175. The Commission appreciates the State's interest in protecting natural areas; in fact, land and natural resource conservation is one of the most important factors for the survival of indigenous peoples. Accordingly, the protection of natural areas and species cannot be at the cost of the survival of an indigenous community and its members.

176. The restrictions on the Indigenous Community's use of natural resources for the sake of protecting the environment betoken a failure to recognize that indigenous communities have for centuries lived in harmony with nature. Nature and the community's survival would have both been properly protected had the Xákmok Kásek Community be consulted about the creation of the nature preserve and participated in its management.

177. The State of Paraguay has failed to ensure the right of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members to the use and enjoyment of their ancestral territory, thereby depriving them not only of material possession of their territory but also of the basic foundation for the development of their culture, their spiritual life, their wholeness and their economic survival.

178. For all the foregoing reasons, the Commission considers that the State violated Article 21 of the American Convention, to the detriment of the Xákmok Kásek community and its members, in relation to Articles 1(1) and 2 thereof, inasmuch as it has not adopted, within the realm of its authority, the necessary positive measures that could be reasonably expected to prevent or avoid the violation of the Xákmok Kásek Community Members' right to property.

## 2. The right to life

179. In the Report on the Merits,<sup>166</sup> the Commission examined the Paraguayan State's violation of Article 4 of the Convention, to the detriment of members of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People. It did so in application of the principle of *iura novit curia* –consistently upheld in international case law-<sup>167</sup> and in light of the most recent decisions of the Inter-American Court of Human Rights. Article 4 reads as follows:

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.

180. The Inter-American Court has set down the following principles with regard to the right to life:

The right to life is a fundamental human right, which full enjoyment is a prerequisite for the enjoyment of the other human rights. If this right is not respected, all other rights do not have sense. Having such nature, no restrictive approach of the same is admissible. Pursuant to Article 27(2) of the Convention,

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<sup>166</sup> IACHR, Report on the Merits No.73/04, Case 12,419, Sawhoyamaya Indigenous Community of the Enxet People and its members, Paraguay, paragraph 163. Annex 10.

<sup>167</sup> I/A Court H.R., *Case of Heliodoro Portugal*. Judgment of August 12, 2008. Series C No. 186, paragraph 105; I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 186; I/A Court H.R., *Case of Kimel*. Judgment of May 2, 2008. Series C No. 177, paragraph 61.

this right forms part of the essential nucleus, since it is consecrated as one of the rights that cannot be suspended in cases of war, public danger or any other threat to the independence or security of a State Party.

By virtue of this fundamental role that the Convention assigns to this right, the States have the duty to guarantee the creation of the conditions that may be necessary in order to prevent violations of such inalienable right.<sup>168</sup>

181. The jurisprudence of the Court has consistently upheld that fulfillment of the obligations imposed by Article 4 of the American Convention, in relation to Article 1(1) thereof, not only presupposes that no person shall be deprived of his life arbitrarily (negative obligation), but also that, because of their obligation to secure the full and free enjoyment of human rights, States shall adopt all appropriate measures to protect and preserve the right to life (positive obligation) of all those who are under its jurisdiction.<sup>169</sup>

182. The Court adds that States must adopt any measures that may be necessary: (i) to create an adequate statutory framework to discourage any threat to the right to life; (ii) to establish an effective system of administration of justice able to investigate, to punish and redress any deprivation of lives by state agents or by individuals; and (iii) to protect every human being's right not to be denied the opportunity for a decent life, which entails the adoption of positive measures to prevent the breach of such right.<sup>170</sup> The Court has held the following in this regard:

[...] the international responsibility of States arises at the moment of the violation of the general obligations embodied in Articles 1(1) and 2 of such treaty. From these general obligations special duties are derived that can be determined according to the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, such as extreme poverty, exclusion or childhood.<sup>171</sup>

183. Article 1(1) of the American Convention establishes the general obligations of States with regard to human rights. The first is to respect the rights recognized in the Convention and the second is to ensure the exercise thereof. The obligation of the State to "respect" the right to life implies, *inter alia*, that the State must refrain from having its agents deprive people of their lives. The State's obligation to "ensure" the right to life means that the State is obliged to prevent violations of that right, to investigate violations of the right to life when they do occur, to punish those responsible, and to make reparation to the victim's next of kin when the perpetrators were agents of the State or private individuals acting with its acquiescence.

184. The Commission is aware that States cannot be responsible for all situations in which the right to life is at risk. The Inter-American Court has held the following on this subject:

It is clear for the Court that a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities. In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the

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<sup>168</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraphs 150 and 151.

<sup>169</sup> *Idem*, paragraph 152.

<sup>170</sup> *Idem*, paragraph 153.

<sup>171</sup> *Idem*, paragraph 154.

existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.<sup>172</sup>

185. In the instant case, the documents on record and the findings of the Rapporteur on the Rights of Indigenous Peoples during his visit to the place where most members of the Xákmok Kásek Indigenous Community lived until March 2008, are sufficient to show that these people lived in subhuman conditions of overcrowding, marginalization and poverty, without access to sufficient food, proper health and sanitary services, without water and access to adequate educational services.

186. It also has been established that the State had knowledge of the precarious living situation of the Xákmok Kásek Community, at least since December 28, 1990 - the date on which the claim for part of the Community's ancestral territory was presented. In that claim the Community mentioned that its request was "urgent" because it was in a "very precarious situation" and because "[w]e have gone without food for many days". The leader of the community and its attorney had the following to say in this regard:

Our request is an urgent one, because ours is a very precarious situation. We have gone without food for many days; few people in the community have work; we are not allowed to have our farms and very few wild animals are left in the areas where the *patron* permits us to hunt.<sup>173</sup>

187. In the present case, the evidence in the case file confirms that the conditions in which the members of the Xákmok Kásek indigenous community live are not sufficient to guarantee a decent life and affect the individual and collective existence of all members of the Community.

188. As previously observed, the fundamental right to life also includes the right of the individual not to be denied access to the conditions that will guarantee that individual a life befitting human dignity. On the question of the rights of indigenous peoples, the Court wrote in its judgment in the Case of the Mayagna (Sumo) Awas Tingni Community, that for indigenous communities, the relationship to the land is not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>174</sup>

189. In cases such as the present one, the Paraguayan State's failure to fulfill its obligation to ensure the right of the Xákmok Kásek Indigenous Community and its members to ownership of their ancestral territory has imperiled, *inter alia*, the community's right to preserve and pass on its cultural legacy and has created a permanent threat to the very physical survival of the members of the Xákmok Kásek Community.

190. The Commission notes further that the lack of land is not the only problem besetting the Xákmok Kásek community. It is also plagued by unemployment, illiteracy, a high incidence of preventable diseases, malnutrition, dwellings unfit for human inhabitation, limited access to and use of health services and drinking water, and marginalization caused by economic, geographic and cultural factors.

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<sup>172</sup> Idem, paragraph 155.

<sup>173</sup> Request filed by Mr. Ramón Oviedo, leader of the Xákmok Kásek Indigenous Community, and Mr. Florencio Gómez, the community's attorney, December 28, 1990, with the *Instituto de Bienestar Rural*. Annex

<sup>174</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79. paragraph 149.

191. As described in the present application in the section on ““The living conditions of the members of the Xákmok Kásek indigenous community,” according to the information supplied by the representatives and not contested by the State, 28 members of the Community died between 1991 and 2007 -15 in the 1993-2007 period, within the Court’s jurisdiction. Of the 28 deaths described, three were persons over the age of 18; 19 were children, and the others were persons for whom no data were available on age at time of death. The causes of death among the 19 children were: tetanus, enterocolitis, dehydration, pneumonia, anemia, whooping cough, fetal suffering and complications during birth.

192. The documents that refer to the likely causes of death for the deceased members of Xákmok Kásek indigenous community are the following: (i) the Census of the Xákmok Kásek Indigenous Community, taken by the representatives in 2006; (ii) the Medical/Health Report on the Enxet Community of Xákmok Kásek, signed by physician Pablo Balmaceda, (iii) the list of deceased members of the Xákmok Kásek Indigenous Community prepared by the representatives in 2007, and (iv) the list of deceased persons in the Xákmok Kásek Indigenous Community, prepared by the representatives in 2009 subsequent to issuance of the Report on the Merits.

193. While the Commission cannot determine whether each of the deaths described by the representatives is somehow related to the Xákmok Kásek community’s inability to secure title to its ancestral territory, the subhuman conditions in which the members of the indigenous community inside *Estancia Salazar* are living have been established.

194. In 2001, the Commission found that because of the precarious conditions in which Paraguay’s indigenous people are living, they are more prone to disease and epidemics like Chagas disease, tuberculosis and malaria, and that approximately 80% of the indigenous dwellings are infested by Chagas disease. The IACHR has stated that:

During the last quarter century, as the territory came to be occupied by colonization and migratory flows, the traditional indigenous habitat was encroached upon, with a negative impact on infant mortality and infant malnutrition for indigenous children, which are several times higher than the national average. A study by the Pan American Health Organization notes that the total fertility rate in the indigenous population averages 5.7 children per woman, with differences between ethnic groups ranging from 3.7 for the Lengua group to 7.8 for the Aché ethnic group. The infant mortality rate — calculated by using the Coale-Trussel variant of the Brass method and based on 1992 census data — was 106.7 per 1,000 live births for the indigenous population as a whole. Interethnic differences ranged from 64 per 1,000 for the Maká to 185 per 1,000 for the Chamacoco. In addition to having the highest infant mortality rate in the country, the indigenous population has the highest rate of tuberculosis — 10 times the national average.<sup>175</sup>

195. During the proceedings on this case before the Commission, the State did not provide any information to show that it had taken effective measures to correct the subhuman conditions in which the Indigenous Community was living, which would have included the introduction of basic services. This despite the fact that the State was aware of the Community’s precarious living conditions. According to reports, the lack of medical care and food in the Community contributed to a number of its members’ deaths. The situation described was verified by the IACHR Rapporteur on the Rights of Indigenous Peoples during his visit to the place where Xákmok Kásek community was

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<sup>175</sup> IACHR, Third Report on the Situation of Human Rights in Paraguay, 2001, Chapter IX, The Rights of Indigenous Peoples, paragraphs 35 and 36.

settled until March 2008. The Rapporteur ascertained the deplorable conditions in which the community has lived.

196. In an interview with the Rapporteur, leaders of the Xákmok Kásek community told him that the owner of the land on which they lived until March 2008, prevented them from enlarging or repairing their already makeshift dwellings. The Rapporteur was able to observe the houses in which most members of the community live. He found that on average four or five families are crammed into one house measuring approximately 16 square meters, with dirt floors and built of materials too flimsy to keep out rain and wind. The Rapporteur was also told that their long-standing problems were lack of land, lack of water, lack of health care, and lack of food.

197. In its judgment in the *Case of the Yakye Axa Indigenous Community*, the Inter-American Court found that:

Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, said Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.<sup>176</sup>

198. Following issuance of the Report on the Merits, the State informed the Commission that in April 2009, the Office of the President of the Republic of Paraguay had issued Decree No. 3789, which declared the Xákmok Kásek Indigenous Community to be in a state of emergency. The representatives told the Commission that the decree in question had not yet been implemented as of the time the present application was prepared.

199. Therefore, the State has not taken the necessary measures to respond to the conditions that are effectively preventing the Community from living a life befitting human dignity. Further, it did not take the necessary measures that could be reasonably expected of it, within the scope of its authority, to prevent or avoid the risk to the right to life of the members of the Xákmok Kásek community.

200. The Commission considers that the failure to effectively guarantee the Community's right of property had the effect of leaving its members unprotected and extremely vulnerable. Their defenselessness and exposure lead to the violation of the right to life and the right to humane treatment, to the detriment of the members of the Xákmok Kásek Indigenous Community.

201. For the aforementioned reasons, the State of Paraguay is responsible for having violated Article 4, in conjunction with Articles 1(1) and 2 of the American Convention, to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua people and its members.

### **3. Rights of the Child**

202. In the Report on the Merits, the Inter-American Commission examined the Paraguayan State's violation of Article 19 of the American Convention, to the detriment of members of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People. It

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<sup>176</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 167.

did so in application of the principle of *iura novit curia* -which international case law has consistently upheld- and in light of the most recent decisions of the Inter-American Court of Human Rights. Article 19 reads as follows:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

203. The subhuman conditions in which the Xákmok Kásek Indigenous Community lives have taken a particularly heavy toll on its children. The rates of malnutrition, lack of health care and lack of education have been particularly high among the children of the community. As described in the chapter on living conditions in the Xákmok Kásek Indigenous Community, during the present international proceeding, a complaint was filed concerning the deaths of 21 children from the Community, deaths that could have been prevented with minimal preventive medicine and health care.

204. The measures of protection required under Article 19 of the Convention call to mind the definition of a child as set forth in Article 1 of the Convention on the Rights of the Child,<sup>177</sup> which is “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Therefore, Article 19 of the American Convention, in conjunction with the Convention on the Rights of the Child, is applicable in defining the extent of the Paraguayan State’s international responsibility with respect to the human rights of the indigenous children in the Xákmok Kásek Community.

205. When the protection of children’s human rights is in question, the Commission does its analysis by applying Article 19 of the American Convention and the provisions of the Convention on the Rights of the Child, which together “form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.”<sup>178</sup>

206. That *corpus juris* establishes that States have the obligation to conform to an especially high standard in respecting and guaranteeing the human rights of children. This obligation has specific content in the case of indigenous children, as will be explained below.

207. On the issue of protecting the rights of children, the Inter-American Court of Human Rights has written that:

States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.”<sup>179</sup> [It has also held that in the matter of protecting the rights of the child and adopting measures to attain said protection] the principle of the best interest of the child prevails, based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential.<sup>180</sup>

208. The Commission observes that Paraguay’s domestic law -both constitutional law and otherwise- establishes a special framework for protecting the

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<sup>177</sup> The Convention on the Rights of the Child was ratified by Paraguay on September 25, 1990. Annex 7

<sup>178</sup> Inter-American Court of Human Rights. *Case of Villagrán-Morales et al.*, Judgment of November 19, 1999, Series C No. 63, par. 194.

<sup>179</sup> Inter-American Court of Human Rights. *Judicial Condition and Human Rights of the Child*, Advisory Opinion OC-17/ 2002, Series A No. 17.

<sup>180</sup> I/A Court H.R., *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110,, paragraphs 162 and 163.

human rights of children, and very specifically the rights of indigenous children.<sup>181</sup> Thus, for example, Article 13 of Law No. 1680 of 2001, the *Child and Adolescent Code*, provides the following:

If the child or adolescent in question belongs to an ethnic group or indigenous community, his or her community's medical-health practices and customs will be respected so long as they do not pose a threat to the life and physical and mental well-being of the child or of third parties.

209. The Commission finds, however, that in the instant case, the Paraguayan State failed to take adequate positive measures to ensure that the basic human rights of the children of the Xákmok Kásek community were protected.

210. Despite the provisions of Paraguay's Constitution and laws that are specifically intended to establish a special standard of protection for indigenous children, the Commission has observed that the children of the Xákmok Kásek community suffer from chronic malnutrition and endemic diseases, which adversely affect their enjoyment and exercise of the right to a decent life and prevent them from achieving their full potential as human beings and from enjoying their culture, as required under Article 30 of the Convention on the Rights of the Child.

211. These findings are consistent with the finding of the Pan American Health Organization which states that nutrition and food insecurity makes it difficult to sustain quality of life in human beings. In this aspect, it establishes the following:

First, it impairs human development potential, which manifests itself in the overall state of health, learning, and productivity. Second, it affects different vulnerable groups, depending on where they are in the life cycle, their socioeconomic status and the ethnic group to which they belong, at the individual, family, community, and national levels. Finally, its effects are inter-generational. It hits the current generation in the near term; but it will also take its toll on future generations.<sup>182</sup>

212. The IACHR notes that the State did not seek to ensure that the best interest of the children of the Xákmok Kásek community prevailed: no steps were taken to ensure their access to health care and decent living conditions. The Commission recalls the observations made by judges A. A Cañado Trindade and A. Abreu Burelli to the following effect:

[T]he duty of the State to take positive measures is stressed precisely in relation to the protection of life of vulnerable and defenseless persons, in a situation of risk. [According to the judges,] A person who in his childhood lives, as in so many countries of Latin America, in the humiliation of misery, without even the minimum condition of creating his project of life, experiences a state of suffering which amounts to a spiritual death.<sup>183</sup>

213. The precarious living conditions of the children in the Xákmok Kásek community are self-evident in the lack of timely and adequate medical care. Some 19

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<sup>181</sup> Constitution of Paraguay, Article 54, and Law 1680 of 2001 "Child and Adolescent Code." Annex 7.

<sup>182</sup> Pan American Health Organization (PAHO): "Desnutrición infantil indígena en las Américas" [Indigenous Child Malnutrition in the Hemisphere], document submitted to the Inter-American Commission on Human Rights for the hearing on Indigenous Child Malnutrition, held on October 10, 2007, during the 130th regular session. Available at: <http://www.sica.int/busqueda/Noticias.aspx?IDItem=19208&IDCat=3&IdEnt=29&Idm=1&IdmStyle=1> Annex 8.

<sup>183</sup> Inter-American Court of Human Rights. Street Children Case: *Villagrán Morales et al. v. Guatemala*. Judgment of November 19, 1999, Series C No. 63. Joint explanation of vote by judges Antônio Cañado Trindade and Alirio Abreu Burelli, paragraphs 4 and 9.

children have died as a result. At least 15 of those deaths occurred after Paraguay's acceptance of the Court's jurisdiction. These children died from causes that could have been avoided with minimal preventive medicine and health care.

214. The Rapporteur on the Rights of Indigenous Peoples also observed the ramshackled state of the school attended by some 60 children in the community.<sup>184</sup> The school is roughly 25 square meters large, with a dirt floor and no roof capable of keeping out the rain. It has no desks, chairs, or teaching materials. During the Rapporteur's visit to the community, he was told by a teacher that more and more children were dropping out for lack of food and water.

215. Among the special measures of protection for children and the rights of the child recognized under Article 19 of the Convention is the right to education, which is instrumental in enabling the child to enjoy a decent life and in avoiding situations that are detrimental to children and society as a whole.<sup>185</sup> The commitment to protect children is guaranteed in various international instruments which afford children special protection by virtue of their status as minors: the Convention on the Rights of the Child and the Protocol of San Salvador, for example.<sup>186</sup>

216. The Commission thus concludes that Paraguay failed to comply with its obligation to adopt special measures to protect the human rights of indigenous children, pursuant to Article 19 of the American Convention, interpreted in combination with the Convention on the Rights of the Child, especially its Article 30 which establishes the specific standard of protection for indigenous children.

217. For the foregoing reasons, the State of Paraguay is responsible for violation of Article 19, in relation to Article 1(1) and 2 of the American Convention and to the detriment of the members of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People.

#### **4. Right to juridical personality.**

218. In the Report on the Merits, the Inter-American Commission examined the Paraguayan State's violation of Article 3 of the American Convention, to the detriment of members of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People. It did so in application of the principle of *iura novit curia* -which international case law has consistently upheld- and in light of the most recent decisions of the Inter-American Court of Human Rights. Article 3 establishes that, "Every person has the right to recognition as a person before the law."

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<sup>184</sup> Cf. IACHR, Third Report on the Situation of Human Rights in Paraguay, 2001, Chapter IX: The Rights of Indigenous Peoples, paragraphs 30ff. Annex 10.

<sup>185</sup> Likewise, the Declaration on the Rights of the Child (1959) provides that: "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society". See OC-17, par. 84.

<sup>186</sup> The Protocol of San Salvador asserts these rights in Article 16, which establishes that "Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system." Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", in force since November 16, 1999, in "Basic Documents Pertaining to Human Rights in the Inter-American System" (updated to May 2001) OEA/Ser.L.V/II.4, rev. 8 of May 22, 2001.

219. This right applies to both the individuals making up a community and the community itself. In case of the Xákmok Kásek Indigenous Community as a *titulaire* of rights, the Commission appreciates the fact that the Paraguayan State recognized that community's juridical personality on November 4, 1987, thereby rendering its rights enforceable.

220. The Xákmok Kásek Indigenous Community is composed of approximately 255 people. According to the census conducted by the representatives in 2006, of the 212 people interviewed, 57 did not possess an identification document. Approximately 48 of those 57 people without identification papers were children. According to the 2008 census, which was supplied subsequent to issuance of the Report on the Merits, 43 of the community's 273 members had no birth certificate; another 37 members of the community were undocumented. That meant that the members of the Xákmok Kásek Indigenous Community –most especially the children- were at risk of not being able to exercise a series of rights and practical needs, such as access to public health and education services, among others. What is more, those members possess no State-issued document of any kind with which to prove their existence and identity.

221. The Inter-American Court has ruled as follows with reference to the right to juridical personality:

The right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such person can enforce such rights.<sup>187</sup> [V]iolation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations<sup>188</sup> and renders him vulnerable to non-observance of his rights by the State or other individuals.<sup>189</sup>

222. In the *Case of the Sawhoyamaxa Indigenous Community*, the Inter-American Court wrote that:

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

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

The above mentioned members of the Community have remained in a legal limbo in which, though they have been born and have died in Paraguay, their existence

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<sup>187</sup> International Covenant on Civil and Political Rights. Examination of Reports Submitted by the State Parties pursuant to Article 40 of the Convention. U.N. Doc. CCPR/C/31/Add.4 (1996), para. 58.

<sup>188</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 188; *Bámaca Velásquez Case*, Judgment of November 25, 2000. Series C No. 70. paragraph. 179.

<sup>189</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 188; *Case of the Yean and Bosico Girls*. Judgment of September 8, 2005. Series C No. 130. paragraph 179; I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70. paragraph. 179.

and identity were never legally recognized, that is to say, they did not have personality before the law.<sup>190</sup>

223. In the case of the Yean and Bosico Girls versus the Dominican Republic, the Court considered that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to violation of his rights by the State or other individuals.

224. In the instant case, the Commission notes that the State has not implemented any mechanisms to enable members of the Xákmok Kásek Indigenous Community to acquire the identification documents they need to exercise their right to recognition of their juridical personality.

225. For the reasons stated, the Commission considers that the State violated the right to recognition of juridical personality of the members of the Xákmok Kásek Community, as established in Article 3 of the American Convention, in conjunction with Articles 1(1) and 2 thereof.

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<sup>190</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraphs 190 and 191.

## 5. The right to judicial guarantees and judicial protection

226. Article 25 of the Convention provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
  - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
  - b. to develop the possibilities of judicial remedy; and
  - c. to ensure that the competent authorities shall enforce such remedies when granted.

227. The pertinent part of Article 8 of the American Convention reads as follows:

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

228. Article 25 of the American Convention establishes the right of every person to have recourse to a competent court or tribunal for protection against acts that violate his rights. It further provides that the States parties to the Convention undertake "to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state" and shall "ensure that the competent authorities shall enforce such remedies when granted."

229. The Court's interpretation of Article 25 is that it not only guarantees a simple and prompt recourse for the protection of one's rights, but also that the recourse shall be effective in protecting the individual against acts by the State that violate that individual's basic rights. Hence, the right to judicial protection is regarded as one of fundamental importance, as it is essential for the defense of all other violated rights, which are protected by bringing the corresponding actions or remedies to the competent judicial authority.

230. The Court has stated the following:

[...] it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention.<sup>191</sup>

231. The procedures that Paraguayan law prescribes to enable indigenous peoples to assert their right of property have been ineffective and in practice have meant that the State is not ensuring the Xákmok Kásek community's right to ownership of its ancestral territory, despite the many requests that the Community has made since 1990.

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<sup>191</sup>I/A Court H.R., *Barrios Altos Case*, Judgment of March 14, 2001, paragraph 43.

232. The absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. The jurisprudence of the Court is that if a remedy is ineffective, the representatives need not exhaust it. The Court has also held that the absence of an effective remedy is itself a violation of the obligations undertaken with the Convention.<sup>192</sup>

233. Article 14(3) of ILO Convention No. 169, which Paraguay ratified, states that adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned. That article establishes that:

Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.<sup>193</sup>

234. It was the Commission's opinion in the *Case of the Sawhoyamaxa Indigenous Community* that Paraguayan law did not provide an effective remedy to protect the territorial claims of Paraguay's indigenous peoples. Specifically, the Commission stated that:

Assuming, *arguendo*, that the existence of a judicial recourse is not a prerequisite, it has been shown that the procedures provided under Paraguayan law to ensure indigenous peoples' constitutional right to their traditional habitat or ancestral territory were not effective in the case of the Sawhoyamaxa Community.<sup>194</sup>

235. On the question of the effectiveness of the administrative procedure that indigenous communities are to follow to reclaim their lands in Paraguay, the Court found that the procedure was "clearly ineffective."<sup>195</sup> In the *Case of the Sawhoyamaxa Indigenous Community*, the Court examined the administrative procedure instituted in Paraguay to reclaim indigenous territories and found at least three shortcomings in the system:

The first one is that domestic laws refer to the Agrarian Law, wherein the yardstick is whether or not the claimed lands are rationally exploited, regardless of considerations specific to the indigenous peoples, such as what lands mean for them. It is enough to ascertain that the lands are being rationally exploited for the IBR not to be able to return them to the indigenous communities [...]

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

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

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<sup>192</sup> I/A Court H.R., Advisory Opinion OC-9/87, October 6, 1987, paragraph 24.

<sup>193</sup> Article 14, International Labour Organisation (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>194</sup> IACHR, Report on the Merits No. 73/04 of October 19, 2004, *Sawhoyamaxa Indigenous Community of the Enxet-Lengua People and Its Members v. Paraguay*, par. 199.

<sup>195</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 97.

Finally, as follows from the Chapter on Proven Facts in the instant Judgment, Paraguayan administrative authorities have failed to conduct enough technical surveys. According to the case file kept in this Court, the only two steps taken in the instant case are: i) visual inspection and verification of the Community census carried out by an IBR officer [...] Such lack of technical and scientific actions render the proceedings undertaken before the *INDI* and the IBR ineffective.

On the grounds of the foregoing, the Court reaffirms its previous decision,<sup>196</sup> according to which the land claim administrative proceedings have been ineffective and failed to grant the Sawhoyamaxa Community the possibility to regain access to their traditional lands.<sup>197</sup>

236. In the instant case the Commission also observes that the delay in the administrative procedure under examination was also due to the chronically belated action on the part of State authorities.

237. The leaders of the Xákmok Kásek Indigenous Community instituted proceedings to reclaim their ancestral territory back on December 28, 1990. It is the Commission's opinion that the more than 18 years -16 years and three months since the acceptance of the Court's jurisdiction- that the procedure for claiming lands has taken is itself a violation of the right to judicial guarantees, to the detriment of the members of that Community. Thus, the conduct of the State authorities in the administrative land-claim procedure have been incompatible with the "reasonable time" principle.

238. Under Articles 25 and 8(1) of the American Convention and the provisions of ILO Convention No. 169, the Paraguayan State has an obligation to provide the indigenous community with an efficient and effective recourse for a solution to its land claim, a duty to ensure that the Community is given a hearing, with due guarantees, and a duty to make a final determination within a reasonable time, to thus ensure the rights and obligations submitted to it for adjudication.

239. In conclusion, the Paraguayan State has not guaranteed an effective and efficacious remedy for addressing the Xákmok Kásek Community's claims to ancestral territory, thus preventing it from being heard in a proceeding with due guarantees. Accordingly, the State of Paraguay violated Articles 25 and 8(1) of the American Convention in conjunction with Articles 1(1) and 2 thereof and to the detriment of the Xákmok Kásek Indigenous Community and its members.

## **6. Obligation to respect rights and the duty to adopt domestic legislative measures**

240. The protection of the rights to property, life, a fair trial and judicial protection is reinforced by the general obligation undertaken in Convention Article 1(1), which is to respect the human rights recognized therein. It establishes the following:

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.

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<sup>196</sup> *Idem*, par. 98.

<sup>197</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 104 a 107.

2. For the purposes of this Convention, "person" means every human being.

241. Furthermore, Article 2 of the American Convention provides that if the exercise of the rights and freedoms referenced in Article 1 of the Convention is not guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutions and the provisions of the Convention, any legislative or other measures that may be needed to give effect to those rights. Article 2 provides that:

#### Domestic Legal Effects

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

242. In the *Case of the Mayagna (Sumo) Awas Tingni Community*, the Court deemed it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention; therefore, pursuant to Article 2 of the American Convention, the State had to adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation, demarcation and titling of the property of the members of the Mayagna Awas Tingni Community, in accordance with the customary law, values, customs and mores of that Community.<sup>198</sup>

243. States Parties have the obligation to ensure the exercise of human rights to all persons subject to their jurisdiction. Therefore, in order not to incur international responsibility the measures of protection that the State must adopt must be timely and effective.

244. The Paraguayan State has laws protecting the rights of indigenous peoples. However, one of the most basic rights under Paraguay's own laws, the right of indigenous peoples to live in their own habitat, is neither protected nor guaranteed by an effective remedy that can be filed with the courts and thus give effect to that legal recognition.

245. The Paraguayan government agencies charged with processing the Xákmok Kásek Indigenous Community's claim were required, under Article 4 of Law 43/89, to find a definitive solution.

246. Some 18 years have passed since the indigenous community first instituted proceedings and its claim has still not been definitively settled. The measures taken with the National Congress –the expropriation requests filed in 1997 and 2000– have also been ineffective.

247. The obligation that the States Parties undertake in Article 1(1), which is to ensure the free and full exercise of human rights to all persons subject to their jurisdiction, implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.<sup>199</sup>

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<sup>198</sup> I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*, Merits, Judgment of August 31, 2001, par. 38.

<sup>199</sup> I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, paragraphs 166 and 172.

248. In the instant case, because there is no effective remedy to enable the Paraguayan government institutions to ensure the free and full exercise of the human rights of the Indigenous Community and its members, the Paraguayan State is in noncompliance with the duty to adopt the domestic measures necessary to give effect to and guarantee the rights recognized in the American Convention.

249. The absence of a simple, prompt recourse or any other effective domestic recourse to a competent court for protection against acts that violate one's fundamental rights is itself a violation of the Convention.<sup>200</sup>

250. The State's obligation was to adopt effective administrative, legislative and judicial measures to find a definitive solution to the claim brought by the leaders of the Community back in 1990; its failure to take those measures has kept the Community in a position of extreme vulnerability, thereby seriously violating their rights to property, to a decent life and to judicial protection and guarantees.

251. In light of the above, the State of Paraguay failed to comply with its obligations under articles 1(1) and 2 of the Convention, as it did not adopt domestic provisions guaranteeing the right of the Indigenous Community to own its traditional habitat or ancestral territory. This is because the State made no provision, in its domestic laws, for effective and efficacious mechanisms to guarantee the rights established in Paraguay's own legislation in favor of or to benefit indigenous peoples.

## VIII. REPARATIONS AND COSTS

252. The *jurisprudence constante* of the Inter-American Court is that "it is a principle of international law that any violation of an international obligation that has caused damage creates a new obligation, which is to adequately redress the wrong done."<sup>201</sup> Given the facts alleged in the present application, and in application of that jurisprudence, the Commission is submitting to the Court its claims as to the reparations and costs that the Paraguayan State must pay as a consequence of its responsibility for the human rights violations committed against the victims.

253. The Inter-American Commission is asking the Court to order the State to grant land to the Xákmok Kásek Indigenous Community, to provide them with health, food and education services, and to make other measures of reparation and give guarantees of non-repetition, as described below. It is also asking the Court to order the State to pay the pecuniary and non-pecuniary damages caused to the Community and its members. Finally, the Commission is asking the Court to order the State to pay the legal fees and costs that the victims incurred in pursuing their case at the national level, and those resulting from the litigation of the present case before the inter-American system.

254. Pursuant to the Rules of Court, which give the individual autonomous standing in its proceedings, in these submissions the Commission will confine itself to elaborating upon the general standards that the Court should apply in the matter of reparations and costs in the instant case. The Inter-American Commission understands that it is up to the victims and their representatives to spell out precisely what their claims are, pursuant to Article 63 of the American Convention and articles 23 and 34 of the Rules of Court.

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<sup>200</sup> IACHR, Report No. 119/99, Case 11,428, Susana Higuchi Miyagawa, Peru, October 6, 1999.

<sup>201</sup> I/A Court H.R., *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 230; I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 85; I/A Court H.R., *Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 138.

## A. Obligation to make reparations

255. Article 63(1) of the American Convention provides that:

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

256. As this Court has previously held,

Article 63(1) of the American Convention reflects a customary rule that is one of the fundamental principles of contemporary international law regarding the responsibility of States. When a wrongful act occurs that is imputable to a State, the latter incurs international responsibility for violation of an international rule, and thus incurs a duty to make reparation and putting an end to the consequences of the violation.<sup>202</sup>

257. Reparations are crucial to ensuring that justice is done in an individual case and are the means by which the Court's judgments are carried beyond the realm of moral condemnation. Reparations are the measures that will cause the effect of the violations committed to disappear. Reparation of the damage caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which is to restore the situation as it was prior to the violation.

258. Where full restitution is not possible, as is true in the instant case, it is up to the Inter-American Court to order a series of measures that will not only ensure that the violated rights are respected but also redress the consequences that the violations caused and ensure payment of indemnification as compensation for the damage caused in that case.<sup>203</sup> In such cases, the compensation is, first of all, for the damages – material and moral- suffered by the injured parties.<sup>204</sup> “Reparations shall be proportionate to the gravity of the violations and the resulting damage.”<sup>205</sup> Furthermore, reparations have another, no less important purpose, which is to deter and put a stop to future violations.

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<sup>202</sup> I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 86; I/A Court H.R., *Case of the Plan de Sánchez Massacre.* Judgment of November 19, 2004. Series C No. 116, para. 52; I/A Court H.R., *Case of De la Cruz Flores.* Judgment of November 18, 2004. Series C No. 115, para. 139.

<sup>203</sup> I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 87; I/A Court H.R., *Case of the Plan de Sánchez Massacre.* Judgment of November 19, 2004. Series C No. 116, para. 53; I/A Court H.R., *Case of De la Cruz Flores.* Judgment of November 18, 2004. Series C No. 115, para. 140.

<sup>204</sup> I/A Court H.R., *Case of Bulacio.* Judgment of September 30, 2003, Series C No. 100, para. 70; I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, para. 204; I/A Court H.R., *The “White Panel Truck” Case (Paniagua Morales et al.). Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 80, and I/A Court H.R., *Case of Castillo Páez. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998, Series C No. 43, para. 52.

<sup>205</sup> United Nations, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law* prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, E/CN.4/Sub.2/1996/17 para. 7. See also I/A Court H.R., *Case Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 89; I/A Court H.R., *Case of De La Cruz Flores.* Judgment of November 18, 2004, Series C No. 115, para. 141; *Case of Cantoral Benavides, Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of December 3, 2001, Series C No. 88, para. 42, and *Case of Cesti Hurtado, Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of May 31, 2001, Series C No. 78, para. 36.

259. The obligation to make reparations is regulated in all its aspects (scope, nature, modes and determination of beneficiaries) by international law and cannot be modified by the respondent State by invoking the provisions of its own domestic laws; nor can the latter decline to discharge that obligation by invoking provisions of its own domestic laws.<sup>206</sup> "Whenever a violation goes unpunished or a wrong unredressed, the law is in crisis, not just as a means for settling a certain litigation, but as a method for settling any litigation; in other words, as a tool to ensure peace with justice."<sup>207</sup>

## B. Measures of reparations

260. The Court has held that measures of reparation tend to remove or redress the consequences of the violations committed.<sup>208</sup> Those measures include the various ways in which a State can compensate for the international responsibility it has incurred. Under international law, those measures may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>209</sup>

261. The United Nations Special Rapporteur on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law has divided the forms of reparation into four general categories: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.<sup>210</sup>

262. Accordingly, the United Nations Commission on Human Rights has determined that:

In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>211</sup>

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<sup>206</sup> I/A Court H.R., *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 231; I/A Court H.R., *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 87; I/A Court H.R., *Case of the Plan de Sánchez Massacre*. Judgment of November 19, 2004. Series C No. 116, para. 53.

<sup>207</sup> SERGIO GARCÍA RAMÍREZ, *LAS REPARACIONES EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS*, paper presented at the seminar titled "The inter-American system for the protection of human rights on the threshold of the XXI century," San José, Costa Rica, November 1999.

<sup>208</sup> I/A Court H.R., *Case of La Cantuta*. Merits, Reparations and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 202; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, paragraph 416; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, paragraph 144.

<sup>209</sup> See United Nations, *Preliminary Report* submitted by Theo Van Boven, Special Rapporteur, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. E/CN.4/Sub.1/1990/10, July 26, 1990. See also I/A Court H.R., *Blake Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48, para. 31; *Suárez Rosero Case, Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of January 20, 1999. Series C No. 44, para. 41.

<sup>210</sup> Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, document prepared by Dr. Theo Van Boven pursuant to Sub-Commission decision 1995/117. E/CN.4/Sub.2/1996/17.

<sup>211</sup> United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17, *The Administration of Justice and the Human Rights of Detainees, Revised set of basic principles and guidelines on the right to reparation for victims of gross*

263. In the instant case, the Inter-American Commission has shown that the State incurred international responsibility for violation of a number of rights recognized in the American Convention, to the detriment of the Xákmok Kásek Indigenous Community and its members. By denying the community its right to live freely in, at the very least, a portion of its ancestral territory, the State incurred a number of serious violations of internationally protected rights, violations so severe that the members of the Indigenous Community have for years lived in a situation so extremely dangerous to their health that a number of its members have died as a result.

264. In the instant case, reparations cannot be considered solely from an individual angle, as reparations have a special dimension because of the collective nature of the rights violated by Paraguay to the detriment of the Community and its members. In the instant case, the aggrieved parties belong to a group with its own cultural identity;<sup>212</sup> they are members of an indigenous community where State violations of international law affect not just the individual victim, but the very existence of the community. Thus, the reparation must also take into account the collective dimension and be based on an understanding of the socio-cultural elements characteristic of the Enxet-Lengua people in general and of the Xákmok Kásek Community in particular, including their cosmovision, spirituality and communitarian social structure. This factor was considered in the cases of the Sawhoyamaxa and Yakyé-Axa Indigenous Communities, where the Court reaffirmed its case law<sup>213</sup> to the effect that cases involving indigenous peoples have a collective component.

265. Although witnesses and experts may, at the stage in the proceedings determined by the Court, testify on the measures of reparations for the Xákmok Kásek Indigenous Community based on its own uses, customs and values, the Commission is asking the Court that when arriving at its judgment, it consider the fact that the victims in the instant case are members of the Enxet-Lengua indigenous people and that a violation of their fundamental rights by the Paraguayan State has caused very egregious harm, even to their right to preserve their cultural heritage and pass it to future generations.

266. The Commission is also asking that the measures of reparations that the Court orders in the instant case be implemented by the State by mutual agreement with the Xákmok Kásek Indigenous Community.

267. Based on the evidence presented in the present application and given the criteria the Court has established in its case law, the Inter-American Commission is submitting its conclusions and claims concerning the measures of reparation for the

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*violations of human rights and humanitarian law, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, May 24, 1996, para. 7.*

<sup>212</sup> The relationship among the members of the Community is what gives meaning to their indigenous existence. It gives meaning not just to a common ethnic origin, but also to the possibility of having and passing down a culture of their own, including such elements as language, spirituality, way of life, customary law, and traditions. As already indicated, being and belonging to an indigenous people –in this case the Enxet-Lengua People – “embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory.”

See *Study on the protection of the cultural and intellectual property of indigenous peoples*, Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations. E/CN.4/Sub.2/1993/28. July 28, 1993. United Nations, paragraph 1.

<sup>213</sup> I/A Court H.R., *Case of the Plan de Sánchez Massacre*, Reparations, Judgment of November 19, 2004, paragraphs 85 and 86; I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community*, Merits, Judgment of August 31, 2001, Explanation of vote given by judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli.

pecuniary and non-pecuniary damages and other forms of reparation and satisfaction owed in the case of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.

#### 1. Measures of cessation, satisfaction and guarantees of non-repetition

268. Satisfaction has been defined as “any measure which the author of a breach of duty is bound to take under customary law or under an agreement by the parties to a dispute, apart from restitution or compensation ... seeking a token of regret and acknowledgment of wrongdoing.”<sup>214</sup> Satisfaction involves measures of three kinds, generally taken cumulatively: apologies or any other gesture acknowledging authorship; prosecution and punishment of the individuals involved, and measures taken to prevent a repetition of the wrong done.<sup>215</sup>

269. On November 29, 1985, the United Nations General Assembly approved by consensus the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>216</sup> which holds that victims “are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.” Accordingly, the needs of the victims must be addressed by allowing “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where they personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”

270. The IACHR will explain its position regarding the measures of cessation, satisfaction and guarantees of non-repetition required in the instant case, although it may later elaborate upon its arguments on this issue:

271. In the cases of the Sawhoyamaxa and Yakye-Axa Indigenous Communities, the Court held that the reparations, particularly the guarantees of non-repetition and the restitution of traditional lands, were “especially relevant [...] due to the collective nature of the damage caused.”<sup>217</sup> The judgment in the Case of the Sawhoyamaxa Indigenous Community was the first time that the Court held restitution of traditional lands to the members of the Community to be the reparation measure that best complies with the *restitutio in integrum* principle, setting it apart from the more traditional forms of reparation.<sup>218</sup>

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<sup>214</sup> Brownlie, *State Responsibility Part 1*. Clarendon Press, Oxford, 1983, p. 208.

<sup>215</sup> *Idem*.

<sup>216</sup> A/RES/40/34, Access to justice and fair treatment. “4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. 5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. 6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.”

<sup>217</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraphs 218, 210 and 222; *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, paragraph 188.

<sup>218</sup> I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, paragraph 210.

272. In the instant case, the Paraguayan State has repeatedly acknowledged the Xákmok Kásek Indigenous Community's constitutional right to its ancestral territory; yet that right has not been respected in practice. The effect has been to keep the Community and its members entrapped in deplorable living conditions, year after year, barred from engaging in their traditional subsistence activities, from living their communal way of life freely and in their own habitat, and exposed to the threat of death –and in all too many cases to death itself- from entirely preventable causes. The IACHR is therefore asking the Court to order the State to immediately take the measures necessary to give effect to the right of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members to ownership and possession of their ancestral territory; specifically, that it delimit and demarcate the land and grant the Community title deed thereto, in keeping with its customary laws, values, practices and customs, and that it guarantee to the members of the Community that they will be able to practice their traditional subsistence activities. Should there be objective and substantiated reasons making it impossible for the State to adjudicate the territory in question as the traditional territory of the Community, it should grant the Community alternative lands of sufficient size and quality and chosen by consensus.

273. In a related request, the Commission is petitioning the Court to order the State to adopt the measures necessary to protect the traditional habitat claimed by the indigenous Community until such time as the land is demarcated and delimited and title thereto granted to the Community, specifically those measures intended to avoid immediate and irreparable damage to the property caused by the activities of third parties.

274. Furthermore, as has been shown throughout this application, the Indigenous Community does not have even the most basic health, food and education services. The Commission therefore believes it is vital that the State immediately provides the members of the Xákmok Kásek Indigenous Community with adequate goods, water, education, health services, and access to the food necessary for their subsistence. The Commission is also petitioning the Court to order the State to adopt a comprehensive care program for indigenous children, with their best interests as its guiding principle, and to ensure that they are properly fed and have access to quality health services, without discrimination, and access to an education in keeping with and respectful of their cultural traditions.

275. As explained throughout the present application, many children in the Community do not have birth certificates. The Commission is therefore asking the Court to order the State to take the necessary steps to ensure registration of the births of indigenous children in the Xákmok Kásek Indigenous Community.

276. Moreover, the Commission deems it of fundamental importance that the Court orders the State to establish a simple and effective recourse that protects the Paraguayan indigenous peoples' right to reclaim and take possession of their traditional territories.

## **2. Measures of compensation**

277. The Court has established the fundamental criteria for establishing just indemnification calculated to be adequate and effective financial compensation for the harm caused by the human rights violations. The Court has held that the indemnification

is merely compensatory in nature, and is to be awarded to the extent and in an amount sufficient to redress the pecuniary and non-pecuniary damages caused.<sup>219</sup>

278. The Commission considers that for a determination of the material damage in the instant case, the Court, when arriving at its judgment, should consider the Xákmok Kásek Indigenous Community's cosmovision and how the Community and its members have been affected by being denied ownership of their traditional habitat or ancestral territory and thus prevented from engaging in their traditional subsistence activities, and other consequences.

279. On the other hand, to determine the non-pecuniary damages in the present case, factors such as the severity of the violations and the emotional suffering – which are a direct consequence of the violations- caused to the members of the Xákmok Kásek Indigenous Community must be taken into consideration.

280. The Community has been especially affected by the deaths of a number of its members as a consequence of the Community's deplorable living conditions, as it waited for the State to hand over the lands that it is claiming as its traditional habitat. The deaths of members of the Community have touched not just the respective families, but have also altered the fabric of the Xákmok Kásek Community as a whole.

281. The Commission considers that the loss of a loved one is not the only factor that causes moral damages. The inhumane conditions in which the members of the Xákmok Kásek Community live also cause moral suffering. This is an especially important factor in the instant case because the inhumane conditions are due to the Paraguayan State's failure to guarantee the Community's right to its ancestral territory.

282. In accordance with the aforementioned, the Commission is petitioning the Court to order the Paraguayan State to pay a compensation for the moral damages that the Community and its members have suffered as a direct consequence of the breach of articles 21, 8, 25, 4, 3 and 19 of the American Convention. The Commission is also petitioning the Court to order the Paraguayan State to pay equitable relief to the next of kin of the Community members who died while at its present site, the amount of which the Court will determine. When deciding that figure, the Commission ask that the Court take into account the Community's customary law.

283. The Commission is also requesting that the Court order payment of compensation in equitable relief for the moral damages caused to the Community and its members by the suffering, pain, anguish and indignities to which they have been subjected in the years that they have waited for an effective response from the Paraguayan State to their territorial claim.

### **C. The *titulaires* of the right to receive reparations**

284. Article 63(1) of the American Convention requires reparation of the consequences of a breach of a right or freedom and that fair compensation be paid to the injured party. The persons entitled to that compensation are, as a rule, those directly harmed by the facts of the violation in question.<sup>220</sup>

285. In the present case, the *titulaires* of the right to receive compensation are the Xákmok Kásek Indigenous Community and its members because the violations of

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<sup>219</sup> I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, para. 204; I/A Court H.R., *Case of Garrido and Baigorria. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 27, 1998, Series C No. 39, para. 41.

<sup>220</sup> I/A Court H.R., *Case of Villagrán Morales (The "Street Children" Case), Reparations*, Judgment of May 26, 2001, paragraphs 107 and 108.

Convention-protected rights that the Paraguayan State committed have been to the detriment of an Indigenous Community which, given of its own cultural identity, must be regarded from a collective and individual perspective.

286. A list of the members of the Xákmok Kásek Community is attached to the present application as Annex 3.1.

287. The Commission should note that the names of the members of the families that make up the Community could vary, since the number of members might change during the course of the present case.

#### **D. Costs and expenses**

288. The *jurisprudence constante* of the Court is that costs and expenses should be understood to be included within the concept of reparation established in Article 63(1) of the American Convention because the measures taken by the victim or victims, their heirs or their representatives to have access to international justice imply disbursements and commitments of a financial nature that must be compensated.<sup>221</sup> The Court has also held that the costs to which Article 59.1.h (former article 55(1)(h)) of its Rules refers also include the various necessary and reasonable expenses that the victim or victims incur to have access to the oversight bodies established by the American Convention. The fees of those who provide legal assistance are included among the expenses.<sup>222</sup>

289. In the present case, the Commission is asking the Court, once it has heard the representatives of the victims, to order the Paraguayan State to pay the costs incurred in bringing their case to the domestic courts, and the costs that they incurred in bringing the case to the Commission and those resulting from the filing of the present application with the Court and that have been duly proven by the representatives.

#### **IX. Conclusions**

290. Based on the considerations in the present application, the Commission concludes that:

- a) The Paraguayan State failed to guarantee the right to ancestral property of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members by virtue that since 1990 the territorial claim filed by the Community has been in process and yet to date their human rights have not been recognized or guaranteed. As a result, the Community not only has been unable to access or obtain title to and possession of its territory but, given the Community's unique characteristics, has been placed in a vulnerable state with regards to food, medical care, and sanitation that poses a constant threat to the survival of the members of the Community and the integrity of the Community itself.
- b) The Commission therefore concludes that the Paraguayan State is responsible for violation of the following articles:

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<sup>221</sup> I/A Court H.R., *Case of Carpio Nicolle et al. Case*, Judgment of November 22, 2004. Series C No. 117, para. 143; I/A Court H.R., *Plan de Sánchez Massacre Case*. Judgment of November 19, 2004. Series C No. 116, para. 115; I/A Court H.R., *De la Cruz Flores Case*. Judgment of November 18, 2004. Series C No. 115, para. 177.

<sup>222</sup> I/A Court H.R., *Case of the "White Van" (Paniagua Morales et al.)*, Reparations, Judgment of May 25, 2001, paragraph 212.

- 21 (right to property), 8(1) (judicial guarantees), and 25 (judicial protection), all in relation to Articles 1(1) and 2 of the American Convention and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.
- 4 (right to life), in relation to articles 1(1) and 2 of the American Convention and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members;
- 3 (right to juridical personality) and 19 (rights of the child) of the American Convention, all in relation to Articles 1(1) and 2 thereof and to the detriment of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members.

291. As a consequence, the Commission is asking the Honorable Court to order the State:

a. To immediately take the measures necessary to give effect to the right of the Xákmok Kásek Indigenous Community of the Enxet-Lengua People and its members to ownership and possession of their ancestral territory; specifically, to delimit and demarcate the land and grant the Community title deed thereto, in keeping with its customary laws, values, practices and customs, and to guarantee to the members of the Community that they will be able to practice their traditional subsistence activities.

b. Should there be objective and substantiated reasons making it impossible for the State to adjudicate the territory in question as the traditional territory of the Community, to grant said Community alternative lands of sufficient size and quality and chosen by consensus.

c. To adopt the measures necessary to protect the traditional habitat claimed by the indigenous Community until such time as the land is demarcated and delimited and title thereto granted to the Community, specifically those measures intended to avoid immediate and irreparable damage to the property caused by the activities of third parties.

d. Immediately provide the members of the Xákmok Kásek Indigenous Community with adequate goods and services, relating to water, education and health care services, and access to the food necessary for their subsistence.

e. To establish a simple and effective recourse that protects the Paraguayan indigenous peoples' right to reclaim and take possession of their traditional territories.

f. To take the necessary steps to ensure registration of the births of the indigenous children of the Xákmok Kásek Indigenous Community in Paraguay.

g. To adopt a comprehensive care program for indigenous children, with their best interests as its guiding principle, and ensure that they are properly fed and have access to quality health services, without discrimination, and to an education in keeping with and respectful of their cultural traditions.

h. To make reparation to individuals and to the community for the consequences of the violations of the rights listed above.

i. To adopt the measures necessary to prevent a recurrence of similar situations, in keeping with the duty to prevent and the duty to guarantee the basic rights recognized in the American Convention.

**X. EVIDENTIARY SUPPORTS**

**A. DOCUMENTARY EVIDENCE**

292. The documentary evidence available at this time is listed below

APPENDIX 1 IACHR, Report No. 30/08 (Merits), Xákmok Kásek Indigenous Community of the Enxet-Lengua People, Paraguay, July 17, 2008.

APPENDIX 2 IACHR, Report 11/03 (Admissibility), Xákmok Kásek Indigenous Community of the Enxet-Lengua People, Paraguay, February 20, 2003.

APPENDIX 3 File of the case with the IACHR.

ANNEX 1. Reports issued by the IACHR

1.1 Report on the Merits No. 73/04, dated October 19, 2004, Sawhoyamaya Indigenous Community of the Enxet-Lengua People and its members v. Paraguay.

1.2 Report on the Merits No. 67/02, dated October 24, 2002, Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay.

ANNEX 2. Anthropological Report on the Xákmok Kásek and Cora-I Communities of the Enxet-Lengua People, prepared by the Center for Studies in Anthropology of the *Universidad Católica "Nuestra Señora de la Asunción"*, November 28, 1995. (T. 2)

ANNEX 3. Censuses

3.1 Census of the Xákmok Kásek community (2008).

3.2 Census of the Xákmok Kásek community (2007).

3.3 Census of the Xákmok Kásek community (2006).

3.4 Census of the Xákmok Kásek community (2003).

ANNEX 4. Medical reports

4.1 Medical/Health Report prepared by physician Pablo Balmaceda in the first half of 2003.

4.2 *Instituto de Investigaciones en Ciencias de la Salud*. Seroepidemiological survey on Chagas disease, Estancia Salazar.

ANNEX 5. Relevant documents from the case file in the domestic judicial system

- Decree No. 44/86 of November 4, 1986, recognizing the leaders of the Xákmok Kásek indigenous community.
- Decree No 25,297 of November 4, 1987, recognizing the legal status of the Xákmok Kásek indigenous community.
- Petition that Messrs. Ramón Oviedo, leader of the Xákmok Kásek indigenous community, and Florencio Gómez, an attorney representing it, lodged with the Rural Welfare Institute on December 29, 1990.
- Request addressed to Roberto Eaton, signed the Secretary General of the IBR and dated July 24, 1991.
- Request addressed to Roberto Eaton, signed by Juan C. Silva, Secretary General of the IBR, dated July 24, 1991.

- Document signed by Florencio Gómez Beloto, attorney for the Xákmok Kásek community, undated.
- Report No. 339, dated February 25, 1991, signed by Irene Mareco, Head of Indigenous Advocacy of the I.B.R.
- Resolution No. 168, dated May 17, 1991.
- Report No. 2476, dated November 5, 1991.
- Report on the on-site inspection done by Engineer Alfonso Pastor Caballeras, dated June 17, 1991.
- Resolution No. 651, dated August 21, 1992.
- Report on the on-site inspection done by Mrs. Irene Mareco, dated September 22, 1992.
- Request signed by Florencio Gómez Beloto, attorney for the Xákmok Kásek community, dated February 19, 1993.
- Report No. 99, dated February 24, 1993.
- Request signed by the leaders of the Xákmok Kásek community and dated November 11, 1993.
- Report, undated, presented by the Office of the Prosecutor for Labor-related Matters of the First Circuit of the Pozo Colorado District, Department of Presidente de Hayes.
- Report No. 503, dated June 24, 1992.
- Report No. 1474, dated June 20, 1994.
- Note from the IBR dated June 30, 1994.
- Request signed by the Chair of the INDI Executive Board and dated August 22, 1995.
- Letter dated November 7, 1995.
- Report that Eaton Company submitted to Paraguay's National Parliament.
- Requests filed by the legal representatives of the Xákmok Kásek indigenous community and dated July 6, 2006 and August 23, 2006.
- Bill signed by Senator Nidia Ofelia Flores and introduced to the Honorable Chamber of Deputies, June 25, 1999.
- Report No.11-2000/2001, dated September 27, 2000, signed by Senators Pedro Pablo Ovelar, Ramona Valiente de Grisetti, Juan Carlos Ramírez and Juan Manuel Benítez Florentín.
- Report No. 18-2000-2001, dated November 9, 2000 and signed by Senators Basilio Nikhiporoff (Chair), Pedro Pablo Ovelar (Vice Chair) and Julio Rolando Elizeche (Rapporteur of the Agrarian Reform and Rural Welfare Commission).
- Resolution No. 693, dated November 16, 2000, issued by the Senate of the National Congress and signed by Darío Antonio Franco Flores (Parliamentary Secretary) and Juan Roque Galeano Villalba (President of the House of Representatives).
- Document signed by Judge Oscar Rodríguez, dated December 27, 1993.
- *Instituto de Bienestar Rural* (IBR) Conciliation and Arbitration Division. Report No. 7.

- 6.1 2003 List
- 6.2 2007 List
- 6.3 2008 List

ANNEX 7. Laws cited

- Law 904/81, Statute of Indigenous Communities, December 18, 1981 (T.5)
- Decree declaring a state of emergency in the Xákmok Kásek Indigenous Community, April 17, 2009 (T. 5)
- Decree No 11804, dated January 31, 2008.
- Relevant articles of Paraguay's Constitution, enacted into law on June 20, 1992.

ANNEX 8. Electronic citations

- UNICEF. Child Protection from Violence, Exploitation and Abuse. Birth Registration. Available at: [http://www.unicef.org/spanish/protection/index\\_birthregistration.html](http://www.unicef.org/spanish/protection/index_birthregistration.html)
- UNICEF press notes, available [in Spanish] at:  
[http://www.unicef.org/spanish/media/media\\_40567.html](http://www.unicef.org/spanish/media/media_40567.html)  
[http://www.unicef.org/spanish/media/media\\_27898.html](http://www.unicef.org/spanish/media/media_27898.html)
- UNICEF. The State of the World's Children 2006, p. 25. Available at: [http://www.unicef.org/sowc06/pdfs/sowc06\\_fullreport.pdf](http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf).
- *Estudio de Situación y Bases de un Programa Regional de Apoyo al Registro de Nacimiento* [Assessment of the Current Situation and Guidelines for a Regional Program to Promote Birth Registration]. Antonio Peres Velasco. Plan International, February 2006. Cited in the press release of the "Latin American Regional Conference on Birth Registration and the Right to Identity." Organized jointly by The Americas and Caribbean Regional Office of UNICEF (TACRO), the Organization of American States (OAS), and Plan International's Regional Office for the Americas (ROA). Available [in Spanish] at: [http://www.unicef.org/paraguay/spanish/Py\\_Gacetilla Almuerzo Conferencia Regional 22ago07.pdf](http://www.unicef.org/paraguay/spanish/Py_Gacetilla_Aluerzo_Conferencia_Regional_22ago07.pdf)
- Discussion paper for the "Latin American Regional Conference on Birth Registration and the Right to Identity." Available [in Spanish] at: [http://www.unicef.org/lac/01Documento Conceptual Final .pdf](http://www.unicef.org/lac/01Documento_Conceptual_Final.pdf)
- UNICEF. Press Note available at: [http://www.unicef.org/media/media\\_40731.html](http://www.unicef.org/media/media_40731.html)
- <http://www.tierraviva.org.py>
- *Atlas de las comunidades indígenas en el Paraguay* [Atlas of indigenous communities in Paraguay] available at <http://www.dgeec.gov.py/>
- <http://www.paho.org/Spanish/DD/PIN/ps060616.htm>
- Official website of the *Dirección Nacional de Estadísticas, Encuestas y Censos de la República de Paraguay* [Paraguayan National Bureau of Statistics, Surveys and Censuses]. *Atlas de las comunidades indígenas en el Paraguay* [Atlas of indigenous communities in Paraguay] <http://www.dgeec.gov.py/>
- Pan American Health Organization. "Desnutrición infantil indígena en las Américas" [Indigenous Child Malnutrition in the Hemisphere],. Document submitted to the Inter-American Commission on Human Rights for the hearing on Indigenous Child Malnutrition, held on October 10, 2007, during the Commission's 130<sup>th</sup> regular session. Available at

ANNEX 9. Power of attorney of August 18, 2006.

ANNEX 10. Expert witness' resume.

**B. STATEMENTS BY VICTIMS, WITNESSES, AND EXPERTS**

**1. VICTIMS**

293. In compliance with Article 50 of the Court's amended Rules of Procedure, the Commission asks that it hear statements from the following victims:

- **Clemente Dermott**, leader of the Xákmok Kásek Community, who will testify to the legal procedures pursued in the domestic legal system to reclaim the territory of the Xákmok Kásek Community, as well as other issues relevant to the object and purpose of the present application.
- **Antonia Ruíz**, a member of the Xákmok Kásek Community who will testify to living conditions in the Community today and the conditions experienced on Estancia Salazar during the time the Community members lived there, as well as other issues related to the object and purpose of this application.
- **Juan Dermott**, a member of the Xákmok Kásek Community who will testify to the living conditions in the Community today and the conditions experienced while its members were living on Estancia Salazar, and other issues related to the object and purpose of the present application.
- **Maximiliano Ruiz**, teacher and member of the Xákmok Kásek Community who will testify to the social and educational conditions in the Community today and what they were when the members of the Community lived on Estancia Salazar, as well as other issues related to the object and purpose of the present application.

**2. WITNESSES**

294. The Commission asks the Court to hear the testimony of the following witness:

- **Fulgencio Pablo Balmaceda Rodríguez**, physician, Warsaw University, Poland. The Commission is offering this witness to enlighten the Court on the question of the medical/health situation of the Xákmok Kásek Community, especially the causes of death among the deceased members of the Community and how they relate to the medical/health conditions observed at the Xákmok Kásek settlements. He will also address other issues related to the object and purpose of this application. He resides in Tuyutí (12<sup>a</sup> Proyectada) 112 c/ Brasil, Asunción, Paraguay.
- **Rodrigo Villagra Carron**, anthropologist and attorney, who will describe the colonization and loss of the Enxet territory and the initial efforts by the Enxet People's communities to reclaim their land. He will also discuss the specific case of the Xákmok Kásek community's land claim, the domestic laws that apply in cases where Paraguay's indigenous peoples seek to reclaim their territories, and other issues related to the object and purpose of this application.

### 3. EXPERTS

295. The Commission is asking the Honorable Court to hear the opinions of the following expert:

- **Rodolfo Stavenhagen**, anthropologist and sociologist, former United Nations Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People. Professor Stavenhagen will testify as an expert on the situation of the indigenous peoples in the Paraguayan Chaco; the importance of their obtaining recognition of the rights to their lands and ancestral territories and protection of them; the consequences of a State's failure to recognize indigenous peoples' territorial rights; and other issues related to the object and purpose of the present application.

296. In addition, the Commission asks the Court to enter the following expert reports into the record of this case:

- **José Alberto Braunstein**, expert report offered in the case of the Yakye Axa Community and added to the record of the case of the Sawhoyamaxa Indigenous Community. This expert discussed the social dynamics of indigenous peoples in the Chaco, their relationship to the land, and the colonization of indigenous lands in the South American Chaco.
- **Bartemeu Melia i Lliteres**, expert report offered in the case of the Yakye Axa Indigenous Community and added to the record of the Case of the Sawhoyamaxa Indigenous Community. The expert described the relationship between indigenous and non-indigenous peoples during the colonial and postcolonial periods in Paraguay, and the current demographic and socio-economic situation of indigenous peoples in Paraguay.
- **Enrique Castillo**, Master in Comparative Law from the Universidad Complutense de Madrid. The Commission is offering this expert witness to explain Paraguay's juridical system and indigenous territorial claims. His domicile is Avenida Brasilia 155, Asunción Paraguay. He provided an expert report in the case of the Yakye Axa Community, which in turn was added to the record in the case of the Sawhoyamaxa Indigenous Community.
- **José Antonio Aylwin Oyarzún**, Master of Laws from the University of British Columbia, Canada. The Commission is offering this witness to the Honorable Court as a distinguished expert in the various issues in international law on the subject of the land, territory and natural resources of the indigenous peoples in relation to Paraguay's domestic law. His domicile is Calle Isabel Riquelme 477, Villarrica, Chile. He delivered an expert report in the case of the Yakye Axa Indigenous Community, which was then added to the record in the case of the Sawhoyamaxa Indigenous Community.

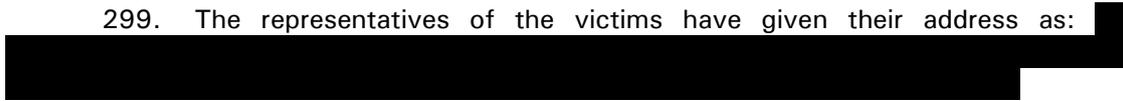
## XII. INFORMATION ON THE REPRESENTATIVES

297. In compliance with Article 34 of the Court's amended Rules of Procedure, the Inter-American Commission submits the following information:

298. Amancio Ruiz Ramírez, Marcelino López Aquino Fleitas and Clemente Dermott, leaders of the Xákmok Kásek indigenous Community, granted, on its behalf, a power of attorney to Oscar Ayala Amarilla and Julia Cabello Alonso, members of the

NGO *Tierraviva para los pueblos indígenas del Chaco*, to represent them before the organs of the Inter-American system.<sup>223</sup>

299. The representatives of the victims have given their address as:



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<sup>223</sup> Letter granting power of attorney, August 18, 2006, signed by Amancio Ruiz Ramírez, Marcelino López Aquino and Clemente Dermott, Annex 9.