

INTER-AMERICAN COURT OF HUMAN RIGHTS

***CASE OF THE KUNA INDIGENOUS PEOPLE OF MADUNGANDÍ AND THE EMBERÁ
INDIGENOUS PEOPLE OF BAYANO AND THEIR MEMBERS V. PANAMA***

JUDGMENT OF OCTOBER 14, 2014

In the case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members,

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, “the American Convention” or “the Convention”) and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers this judgment.

* Judge Alberto Pérez Pérez was unable to take part in the deliberation of this judgment for reasons beyond his control.

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I

INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On February 26, 2013, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Court’s jurisdiction, pursuant to the provisions of Articles 51 and 61 of the American Convention, the case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members (hereinafter the “Kuna” case) against the Republic of Panama (hereinafter “the State”, “the Panamanian State” or “Panama”). The Commission submitted all the facts contained in its Merits Report.¹ The case refers to the alleged international responsibility of Panama for: (i) the presumed continuing violation of the right to communal property of the Kuna indigenous people of Madungandí (“Kuna”) and the Emberá indigenous people of Bayano (“Emberá”), owing to the alleged failure to pay compensation for the expropriation and flooding of their ancestral territories as a result of the construction of the Bayano Hydroelectric Dam from 1972 to 1976; (ii) the alleged failure to recognize, title, and demarcate the lands granted (in the case of the Kuna people for an extended period and in the case of the Emberá up until the present time); (iii) the alleged failure to provide effective protection to the territory and natural resources from invasion and illegal logging by third parties; (iv) the alleged failure of Panama to provide an appropriate and effective procedure to access communal ownership of the territory and to provide a response to the numerous complaints of interference in the territories, and (v) the series of violations committed by the State were allegedly a manifestation of discrimination against the Kuna and Emberá peoples revealed by the fact that laws reflecting an allegedly assimilationist policy were in force.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a. *Petition.* On May 11, 2000, the presumed victims, through the International Human Rights Clinic of the Washington College of Law at American University, the Centro de Asistencia Legal Popular (CEALP), the Asociación Napguana, and Emily Yozell, lodged a petition alleging that the State had committed human rights violations against the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members.

b. *Precautionary measures.* On April 5, 2011, the Inter-American Commission “asked the State of Panama to adopt the necessary measures to protect the ancestral territory of the communities of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano from invasion by third parties and from the destruction of their forests and crops.”²

c. *Admissibility report.* On April 21, 2009, the Inter-American Commission adopted Admissibility Report No. 58/09, in which it concluded that it was competent to examine the complaint regarding presumed violations of the American Convention. It also indicated that the petition was admissible³ because it met the requirements established in Articles 46 and 47 of the American Convention.

¹ In its brief of February 26, 2013, submitting the case, the Commission indicated that “[e]ven though the factual framework established by the Inter-American Commission refers to events that occurred prior to the date of acceptance of jurisdiction, such references are made to provide context for the reporting of subsequent facts and violations.”

² The Commission indicated in its Merits Report that “[a]s of the date of adoption of [the said] report, [it] continues to monitor the situation.”

³ The Commission established that the petition was admissible with regard to the presumed violation of Article 21 of the American Convention in connection with Article 1(1). In addition, based on the application of the *iura novit curia* principle, it indicated that, at the merits stage, it would analyze the possible application of Articles 2, 8, 24 and 25 of the Convention.

d. *Merits Report.* Pursuant to Article 50 of the Convention, on November 13, 2012, the Commission issued Merits Report No. 125/12 (hereinafter “the Merits Report”), in which it established conclusions and made recommendations.

i. *Conclusions.* The Commission concluded that the State was responsible for violating rights recognized in the following articles of the American Convention:

- Article 21 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members for having failed to grant just and prompt compensation more than 40 years after having dispossessed them of their ancestral territories.
- Article 21 of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of the Emberá indigenous people, by not providing them with access to a collective title to ownership of their territories and for failing to delimit, demarcate and protect their territories effectively.
- Article 21 of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of the Kuna people by failing to recognize, delimit and demarcate their territory promptly, and to provide effective protection to the territories of the Kuna Comarca of Madungandí against third parties.
- Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 of this instrument, due to the failure to provide an adequate and effective procedure to accede to the ownership of their ancestral territory and protect this against third parties, to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano.
- Article 24 of the Convention, in relation to Article 1(1) of this instrument, due to failure to comply with the obligation to ensure and respect the rights without discrimination based on ethnic origin and to provide equal protection before the law, to the detriment of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano.

ii. *Recommendations.* The Commission recommended that the State:

- Promptly conclude the process of formalizing, delimiting, and physically demarcating the territories of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano, bearing in mind the inter-American standards noted in th[e] report.
- Grant the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano prompt and just compensation for their removal and resettling, and the flooding of their ancestral territories; the appropriate amount to be determined by a process that ensures their participation, in keeping with their customary law, values, practices and customs.⁴
- Adopt the necessary measures to ensure the effective protection of the territory of the two peoples in order to ensure their physical and cultural survival, as well as the development and continuity of their world view, so that they can continue living their traditional way of life and preserve their cultural identity, social structure, economic system, customs, beliefs, distinct traditions and system of justice. Also, adopt the necessary measures to ensure that these peoples have access to culturally pertinent health and education programs.
- Halt the illegal entry of non-indigenous persons into the territories of these peoples and move the current settlers to territories that do not belong to the indigenous peoples. In addition, ensure the free, prior, and informed consent of the peoples to any plans, programs, and projects that it is sought to develop in their territories.
- Establish an adequate and effective remedy that protects the rights of the indigenous peoples of Panama to claim and accede to their traditional territories, and protect their territories and natural resources from third parties including respect for the right of indigenous peoples to apply their customary laws through their own systems of justice.
- Make individual and collective reparation for the consequences of the human rights violations found in the Merits Report. In particular, redress the failure to protect the ancestral territories of the two peoples, the lack of an effective and prompt response by the authorities, and the discriminatory treatment to which they were subjected.

⁴ The Commission considered that the expropriation of the ancestral territories entailed the loss of sacred places, forests, dwellings, crops, animals and medicinal plants that had not only a material value, but were an essential element of cultural identity and the traditional way of life, so that – in addition to material losses – this entailed cultural and spirial losses that were impossible to recover, and for which compensation was due.

- Adopt the necessary measures to prevent similar events from occurring in future, in keeping with the duty to prevent violations and ensure the fundamental rights recognized in the American Convention.⁵

e. *Notification of the State.* The Merits Report was notified to the State on November 26, 2012, granting it two months to report on compliance with the recommendations. The State presented its response on January 23, 2013.

f. *Submission to the Court.* Once the statutory time limit had expired, the Commission submitted the case to the jurisdiction of the Inter-American Court "owing to the need to obtain justice for the victims due to the lack of concrete information on compliance with the recommendations." The Commission appointed Commissioner José de Jesús Orozco Henríquez, and Executive Secretary Emilio Álvarez Icaza L., as its delegates. Its Deputy Executive Secretary, Elizabeth Abi-Mershed, together with Silvia Serrano Guzmán and Isabel Madariaga, Executive Secretariat lawyers, were appointed as legal advisers.

3. *Request of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked the Court to declare the international responsibility of Panama for the violation of the rights indicated previously in the conclusions to Merits Report No. 125/12.

4. In addition, the Inter-American Commission asked the Court to order the State to carry out certain measures of reparation that will be described and analyzed in the corresponding chapter (*infra* Chapter VIII).

II PROCEEDINGS BEFORE THE COURT

5. *Notification of the State and the representatives.* The State and the representatives were notified of the submission of the case by the Commission on May 14, 2013.

6. *Brief with pleadings, motions and evidence.* On July 13, 2013, the representatives⁶ presented their brief with pleadings, motions and evidence⁷ (hereinafter "the brief with pleadings and motions"), pursuant to Articles 25 and 40 of the Rules of Procedure.

7. *Legal Assistance Fund.* In an order of October 25, 2013, the President of the Court declared that the request filed by the presumed victims through their representatives to access the Victims' Legal Assistance Fund was admissible, and that the necessary financial assistance would be provided for the attendance of up to two representatives and a maximum of four testimonial statements and/or expert opinions at the public hearing and, if necessary, the expenses of a Spanish-Kuna interpreter would also be covered.

8. *Answering brief.* On July 15, 2013, the State submitted to the Court a brief filing preliminary objections⁸ and answering the submission of the case (hereinafter "first answering brief"). With a note of the Secretariat dated July 23, 2013, a copy of the first answering brief

⁵ Cf. Inter-American Commission on Human Rights. Merits Report 125/2012, Petition 12,354, *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and their members v. Panama*, November 13, 2012.

⁶ In an electronic communication of May 3, 2013, the Court was advised that the presumed victims' representatives before the Court would be Alexis Oriel Alvarado Ávila and Héctor Huertas (the latter from the Centro de Asistencia Legal Popular (CEALP)) and the International Human Rights Clinic of Washington College at American University. In a communication of March 20, 2014, the presumed victims' representatives advised that the latter would no longer be representing the presumed victims.

⁷ Following a request for clarification by the Secretariat, in a brief of August 8, 2013, with attachments, the representatives forwarded a missing annex and a complete version of another annex to the pleadings and motions brief.

⁸ The preliminary objections filed by the State are failure to exhaust domestic remedies, lack of jurisdiction *ratione temporis*, and lack of jurisdiction based on the statute of limitations.

was forwarded to the representatives and the Commission noting that the State had submitted the first answering brief on "the day the time limit for the representatives to present their initial brief had expired," and before their brief with pleadings and motions had been forwarded to the State. On October 13, 2013, the State presented a brief with preliminary objections and observations on the pleadings and motions brief (hereinafter "second answering brief").⁹ The second answering brief and its annexes were forwarded to the representatives and the Commission with a Secretariat note dated November 7, 2013, indicating that this brief would be the one used because it included the first answering brief together with additional considerations.¹⁰ Previously, in a brief of June 10, 2013, the State had designated Rosario Inés Granda Icaza de Brandao as its Agent.

9. *Observations on the preliminary objections.* On December 7 and 11, 2013, respectively, the Commission and the representatives presented their observations on the preliminary objections.

10. *Public hearing and additional evidence.* On March 3, 2014, the President issued an order in which he required the statements of two presumed victims proposed by the representatives and one expert witness offered by the Commission to be submitted by affidavit. In this order, the President also called the parties and the Commission to a public hearing that took place on April 2, 2014, during the Court's 50th special session held at its seat.¹¹ During the hearing, the Court received the statements of two presumed victims proposed by the representatives,¹² and the final oral observations and arguments of the Commission, the representatives of the presumed victims, and the State, respectively. Also, during the hearing, the Court required the parties to present certain helpful information and documentation.

11. *Final written arguments and observations.* On April 30, 2014,¹³ the State forwarded its final written arguments, and on May 3, 2014, the Commission presented its final written observations and the representatives their final written arguments;¹⁴ all of which were forwarded to the other party and to the Commission on May 28, 2014. The representatives and the State also responded to the Court's request for helpful information and documentation.

12. *Helpful evidence.* In a Secretariat note of June 10, 2014, the representatives were asked to send helpful documentation, and this was forwarded on June 20, 2014. The President, in a Secretariat note of June 23, 2014, granted the State and the Commission until June 30, 2014, to present any observations they deemed pertinent in this regard, and for the parties and the Commission to present their observations on the annexes to the respective final written arguments of the representatives and the State. On June 30, 2014, in two separate briefs, the State forwarded the observations requested. On July 1, 2014, the representatives sent their

⁹ The annexes to the said brief were presented on October 18, 2013, with a copy of the first answering brief.

¹⁰ In a brief of December 11, 2013, the Commission pointed out that the second answering brief only referred to the pleadings and motions brief and not to the Merits Report.

¹¹ There appeared at this hearing: (a) for the Inter-American Commission: Silvia Serrano Guzmán and Erick Acuña Pereda, Executive Secretariat lawyers; (b) for the representatives of the presumed victims: Alexis Oriel Alvarado Ávila and Héctor Huertas (the latter from the Centro de Asistencia Legal Popular (CEALP)), and (c) for the State of Panama: José Javier Mulino, Ambassador of Panama to Costa Rica; Rosario I. Brandao, Agent of the State; Vladimir Franco, Deputy Agent; Magdalena Brandao, Assistant to the State Agent, and Yariisa Montenegro, Assistant to the State Agent.

¹² In the order of March 3, 2014, the President of the Court also called on Aníbal Pastor Nuñez, a witness proposed by the State to provide testimony. However, the State withdrew the offer of his statement during the meeting held on April 1, 2014, prior to the said public hearing.

¹³ The State forwarded its final written arguments and annexes by an Internet file hosting site and, the same day, forwarded the originals to the Court's Secretariat.

¹⁴ The annexes to the representatives' final written arguments were received by the Court's Secretariat on May 5, 2014.

observations. On the same date, the Commission requested an extension and, that same day, this was granted until July 9, 2014; however, no observations were received.

13. *Deliberation of this case.* The Court began deliberating this judgment on October 13, 2014.

III JURISDICTION

14. Panama ratified the American Convention on June 22, 1978, and it entered into force for the State on July 18, 1978; the State accepted the compulsory jurisdiction of the Court on May 9, 1990. The State filed preliminary objections alleging that the Court did not have jurisdiction to hear this case (*infra* Chapter IV). Therefore, the Court will first decide on these preliminary objections; then, if admissible, the Court will decide on the merits and on the reparations requested in this case.

IV PRELIMINARY OBJECTIONS

15. The Court recalls that preliminary objections are acts by which a State seeks to prevent the analysis of the merits of the matter in dispute and, to this end, it may raise an objection to the admissibility of a case or to the Court's jurisdiction to examine a specific case or an aspect of the case, based on either the person, matter, time or place, provided these objections are of a preliminary nature.¹⁵ If these objections cannot be considered without examining the merits of a case, they cannot be examined by a preliminary objection.¹⁶

16. The Court will now examine the three preliminary objections filed by the Panamanian State.

A. First preliminary objection: "Failure to exhaust domestic remedies"

A.1. Allegations of the parties and arguments of the Commission

17. The State indicated that it had repeatedly informed the Commission that it considered that the claims for compensation were inadmissible because domestic remedies had not been exhausted. It referred to several communications it had sent to the Commission, including a brief from the National Indigenous Policy Directorate outlining the laws in force concerning domestic remedies related to the rights of the indigenous communities and indicating that the law was the same for all Panamanians. The State cited article 97 of section 5 of the Judicial Code that described the jurisdiction of the Third Contentious Administrative Chamber, underlining its competence, among other matters, in relation to contentious remedies in land adjudication cases, compensation in cases of State responsibility, and protection of human rights. The State also referred to a communication pointing out that the petitioners could have, and still could, avail themselves of the following domestic remedies: (i) action of unconstitutionality; (ii) the contentious administrative jurisdiction; (iii) actions and remedies in all administrative and judicial instances; (iv) application for protection of constitutional

¹⁵ Cf. *Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment February 4, 2000. Series C No. 67, para. 34, and *Case of the Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 15.

¹⁶ Cf. *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 15.

guarantees, and (v) recourse to the Ombudsman. Panama also mentioned its Constitution, which establishes the right to file complaints against acts of the State that violate rights and, specifically, its article 206 which establishes the attributes of the Supreme Court of Justice (underlining paragraphs relating to the contentious administrative jurisdiction).¹⁷

18. The Commission considered that the question of admissibility had been resolved at the opportune procedural moment and that the structure of the inter-American system of human rights meant that the Court acted "with a certain degree of deference towards the decisions taken by the Commission in this regard." Similarly, it considered that the Kuna and Emberá peoples had resorted to different mechanisms to realize their right to collective property and, therefore, the State had had numerous opportunities to resolve the situation; that the State had failed to comply with the burden of proof as regards the appropriate and effective nature of the remedies cited,¹⁸ and that there was sufficient evidence to consider that the exceptions to the exhaustion of domestic remedies were applicable.¹⁹ Furthermore, the Commission considered that the arguments presented by the State were inadmissible because "they did not differ substantially from those presented before [the Commission]," and that "the omissions in the burden of proof persist." It added that the State had provided a series of decisions of the Third Chamber of the Supreme Court of Justice and "none of them bear any relationship to similar facts, so that they lack relevance to prove the effectiveness of the said remedy."

19. The representatives added that the Kuna and Emberá peoples had undertaken actions of both an administrative and a criminal nature in order to obtain legal recognition of their territories, the payment of the compensation owed by the State, and protection against the invasion of their territories.²⁰ They argued that, over a span of 40 years,²¹ the steps taken had been the only available means to claim their rights because domestic law did not include an adequate and effective procedure for the recognition, titling, demarcation and delimitation of the collective property of the indigenous peoples. They also indicated that the remedies filed did not constitute special, opportune and effective mechanisms to protect these peoples' rights and

¹⁷ The State added that some recent rulings of the Third Chamber of the Supreme Court of Justice allowed it to affirm that the domestic remedies available to the presumed victims had not been exhausted; thus, the petitioners could not resort to the Inter-American Court – going over the head of all the domestic instances – to claim compensation that had not been requested in the domestic jurisdiction. The State argued that it had not received formal notice from the competent courts (the Supreme Court of Justice or the Third Contentious Administrative Chamber) of claims or complaints filed by the Kuna Comarca of Madugandí or the Emberá Comarca of Bayano and their members, based on non-compliance with Executive Decree 156, the Majecito Agreement, the Farallón Agreement, the Fuerte Cimarron Agreement, the La Espriella Agreement, or any other agreement or administrative or legal provision regarding the displacement of indigenous groups owing to the creation of the reservoir for the hydroelectric project. It added that there had been no judicial claims, using either the executive or the regular channels, and no summons to the State based on non-compliance with subsequent agreements.

¹⁸ The Commission indicated that the State had merely listed five remedies that have different purposes in the domestic sphere and had not specified which were the appropriate and effective remedies that had not been exhausted, had not described them or indicated how the said remedies permitted the effective exercise of collective ownership and how – in the practice – they could be effective.

¹⁹ The Commission indicated that the petitioners' arguments range from the inexistence of remedies to protect the right to communal property, the lack of geographical access to the judicial organ, the absence of assistance and obstacles *de facto*, as well as delays in the investigations into the settler invasions. It added that the State had not provided a specific answer or probative elements that contested these arguments, and had therefore failed to comply with the burden of proof. The Commission also declared that the exceptions established in Article 46(2) of the Convention were applicable.

²⁰ The representatives referred to: (i) communications to local, provincial and national authorities; (ii) administrative procedures to evict illegal occupants; (iii) administrative procedures based on ecological harm; (iv) administrative procedures for the adjudication of collective ownership, and (v) criminal proceedings owing to land invasion by peasants and crimes against the environment.

²¹ The representatives indicated that proceedings had been filed before and after the petition was lodged before the Commission because the violations of the Convention were permanent in nature and their effects have continued and, in some cases, began after the petition was lodged (May 11, 2000).

that, even though the Constitution recognized the property rights of the indigenous communities, it was not until the enactment of Law 72 of 2008 (regulated in 2010) that the necessary procedure was established to achieve legal recognition of their territories.²²

20. The representatives also indicated that the petitioners had been prevented from exhausting domestic remedies because there was no mechanism that obliged the State to comply with the agreements reached; moreover, existing remedies did not take into account their particularities as indigenous peoples (especially the collective nature of their demands). They added that the action of unconstitutionality was not appropriate because its purpose was to contest laws, decrees and resolutions, while what was being alleged was not the unconstitutionality of the agreements signed by the State, but rather the State's failure to comply with them. The representatives added that the purpose of the remedy for protection of constitutional guarantees was to request the repeal of an order issued or executed by a public servant to do or not to do something; thus, that remedy was also inappropriate. In addition, the representatives indicated that the presumed victims did not have access to domestic remedies owing to their poverty and geographical isolation, and because the State's institutions impart justice in Spanish and do not acknowledge the indigenous languages.²³

A.2. Considerations of the Court

21. The Court has maintained consistently that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be filed at the proper procedural moment; that is, during the admissibility procedure before the Commission.²⁴ Therefore, at that stage of the processing of the case, the State must explain clearly the remedies that, in its opinion, have not yet been exhausted.²⁵ This relates to the need to safeguard the principle of procedural equality between the parties that should govern the proceedings before the inter-American system. As the Court has repeatedly established, it is not the task of either the Court or the Commission to identify, *ex officio*, the domestic remedies that remain to be exhausted because it is not incumbent on the international organs to rectify the lack of precision of the State's arguments. Moreover, the arguments that substantiate the preliminary objection filed by the State before the Commission at the admissibility stage must correspond to those submitted to the Court.²⁶

²² They indicated that, even though the communities had tried to benefit from this, they still do not have the said recognition; therefore, the procedure is ineffective

²³ They recalled that the Kuna and Emberá peoples are marginalized in Panamanian society, and this results in a general lack of access to legal services and the judicial system. The representatives indicated that the only judicial body with jurisdiction for the Comarca is the District Prosecution Service in Panama City, which is 300 kilometers away from the Comarca, and that the State does not provide legal assistance (or only in a very limited way).

²³ The State referred to Article 46 of the Constitution which establishes, among other matters, that "the laws do not have retroactive effect, with the exception of those relating to public order or social interest when such laws so indicate." It added that the claim for money that was supposedly owed under unfulfilled agreements or amounts that were unjust or delayed are not part of the block of constitutionality because they are not rules of public order. It also indicated that Executive Decree 156 only established the retroactivity of this norm to January 1, 1971, the date on which it determined that 30% of the amounts received from logging permits would be paid retroactively.

²⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2014. Series C No. 281, para. 23.

²⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, paras. 88 and 89, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, para. 23.

²⁶ Cf. *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012 Series C No. 246, para. 29, and *Case of Brewer Carías v. Venezuela. Preliminary objections*. Judgment of May 26, 2014. Series C No. 278, para. 77.

22. In the instant case, the Court notes that the State referred generically to five remedies that should have been exhausted (*supra* para. 17). In this regard, the State referred, *inter alia*, to the "contentious administrative jurisdiction" and "actions and remedies in all administrative and judicial instances." This argument was submitted in both the procedure before the Commission and the contentious proceedings before the Court. Regarding the "contentious administrative jurisdiction," in its brief answering the submission of the case to the Court, the State provided supplementary information on the competence of the Third Contentious Administrative Chamber of the Supreme Court of Justice of Panama indicating which of the 15 remedies that this jurisdiction is able to examine would be appropriate to examine the claims for compensation.²⁷

23. Consequently, although the State effectively filed the objection of failure to exhaust domestic remedies during the processing of the case before the Commission, indicating five remedies that could have been filed by the petitioners, the Court has verified that the State has only recently specified – during the contentious proceedings before it – which of these remedies would be appropriate and effective for facts such as the failure to pay compensation in this case. Therefore, the objection of failure to exhaust domestic remedies related to the presumed failure to pay compensation must be rejected because it was not filed precisely and specifically at the proper procedural moment.

B. Second preliminary objection: "Lack of jurisdiction *ratione temporis*"

B.1. Allegations of the parties and arguments of the Commission

24. The State filed the objection of partial lack of jurisdiction *ratione temporis* owing to the date on which the alleged facts occurred. Panama indicated that the facts relating to the financial claims based on the relocation of the indigenous peoples because of the construction of the Bayano reservoir occurred starting in 1971. It added that the claims concerning insufficient amounts, or sums that were not paid, referred to the Majecito Agreement (1975), the Farallón Agreement (1976), the Fuerte Cimarrón Agreement (1977) and the La Espriella Agreement (1980, *infra* para. 38). It also indicated that the facts relating to the alleged violation of the ancestral rights over the property of the indigenous peoples due to their transfer occurred in 1972 and 1976. However, Panama only ratified the American Convention on June 5, 1978, and accepted the Court's contentious jurisdiction on May 9, 1990. The State recalled that the Court had repeatedly asserted, as established in the Vienna Convention on the Law of Treaties, that international norms are non-retroactive and that, in the case of the facts and rights referred to, it was "evident" that the Court's jurisdiction came into effect on February 29, 1990.

25. The Commission considered that the State's arguments regarding the existence, in the domestic sphere, of grounds that constitute exceptions to the principle of non-retroactivity of the law, lack relevance because the Court's analysis is based on the American Convention. It added that, it was precisely due to the principle of non-retroactivity of treaties that it had refrained from incorporating considerations on the expropriation and flooding of the ancestral territories in its Merits Report and in its requests to the Court. It also indicated that, even though the facts that substantiate this case are related by connectivity to the original event (the expropriation and flooding of the lands), the violations of the right to collective property continued to occur following the State's acceptance of the Court's jurisdiction, and that it was the intrinsic relationship between communal property and compensation in a case such as this that determined the continuing nature of the violation. The Commission added that the Court's temporal jurisdiction relates to the failure to satisfy the fundamental claim of the right to communal property from May 9, 1990, to date. It also alleged that the Court had jurisdiction to

²⁷ The State indicated this, stressing in "bold type" the remedies that it considered could have been used in this case, without any further explanation.

rule on the presumed failure to demarcate, title and delimit land for more than 10 years with regard to the Kuna people, and the persistence of that failure in the case of the Emberá people. Lastly, the Commission indicated that all the other facts relating to the lack of protection against incursions by third parties and the absence of judicial protection fall within the Court's jurisdiction.

26. The representatives argued that, even though the Court has recognized the principle of the non-retroactivity of treaties, this principle did not preclude its competence to hear the case, owing to the continuing nature of the human rights violations perpetrated. They also indicated that, although the dam construction occurred before the State had accepted the Court's jurisdiction, the Court should take those facts into account merely to provide a context to the human rights violations that have persisted following the acceptance of its jurisdiction. The representatives concluded that the Court had competence to examine all the acts and facts that have perpetuated the displacement of the Kuna and Emberá peoples after May 9, 1990, and that have also breached their right to collective ownership of their ancestral territories. They added that the said facts could include the "Working arrangement for the territorial reorganization of the Alto Bayano signed by the Provincial Government of Panama and the Kuna People of Wacuco" on July 16, 1991, the invasions and illegal appropriations of the territories of the indigenous communities by non-indigenous settlers, and the failure to fulfill agreements signed by the State and the communities after May 9, 1990.

B.3. Considerations of the Court

27. The Court notes that the preliminary objection of lack of jurisdiction *ratione temporis* filed by the State only refers to the State's alleged failure to pay the compensation and not to the other alleged human rights violations.

28. According to the State, several of the facts alleged by the Commission and the representatives in relation to compensation payments supposedly occurred before Panama had accepted the Court's contentious jurisdiction; thus, the Court did not have temporal jurisdiction with regard to them (*supra* para. 24).

29. The Commission and the representatives argued that the State's failure to pay compensation to the indigenous communities constituted a continuing violation of the right to property and, accordingly the Court would have temporal jurisdiction to examine this violation. In this regard, the representatives referred to the case of the *Moiwana Community v. Suriname*.

30. First, it should be recalled that, as indicated above, Panama ratified the American Convention on June 22, 1978, and accepted the contentious jurisdiction of the Inter-American Court on May 9, 1990. In other cases involving Panama, the Court has indicated that it "has jurisdiction to rule on the supposed facts that substantiate the alleged violations that took place after May 9, 1990, the date on which Panama accepted the Court's compulsory jurisdiction, as well as on violations that, even though they started before that date, continued or subsisted after it."²⁸

31. In the instant case, the Court notes that the alleged violations refer to facts related to two different and independent legal issues: (a) the facts relating to the displacement of the communities that took place between 1973 and 1975, and the State's undertaking to pay compensation to the Kuna community of Madungandí and to the Emberá community, and (b) the facts relating to the alternative lands assigned to the indigenous communities of the Bayano that persist to date.

²⁸ *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 27.

32. The Court notes that the arguments of the parties and the Commission regarding the preliminary objection of lack of jurisdiction *ratione temporis* filed by the State, which refer to the State's alleged failure to pay compensation relates to the first issue and not the second.

33. Therefore, the Court must determine whether it has jurisdiction to examine: (a) the presumed failure to pay the compensation agreed more than 10 years before the State accepted the Court's compulsory jurisdiction, and (b) whether this compensation was consistent with the harm presumably caused to the indigenous communities owing to the construction of the hydroelectric dam. To this end, the Court must analyze whether the failure to pay the compensation constitutes a continuing situation.

34. Regarding the alleged continuing violation of the right to property, the Court declared a continuing violation of the right to property in the case of the *Moiwana Community v. Suriname*. The Court recalls that the said case concerned members of a tribal community who had been forcibly displaced from their territories and unable to return to them owing to the persisting situation of violence. In that case, the Court indicated that even though the facts of the forced displacement had occurred before the State had accepted its compulsory jurisdiction, "the impossibility of returning to those lands had supposedly subsisted," and for this reason the Court "also has jurisdiction to decide on those presumed facts and on their legal definition."²⁹

35. The Court also notes that, the said case referred to a situation of forced displacement of a tribal community in which that community had not been relocated on alternative lands. Thus, the Court notes that the impossibility of returning to their ancestral territories was due to persisting situation of violence and insecurity and, on those grounds, the State was declared responsible. Furthermore, in that case, the Court declared the violation of the right to movement and residence contained in Article 22 of the Convention and, consequently, it also declared a violation of the right to property established in Article 21 of this instrument because the situation of violence deprived the victims of the communal use and enjoyment of their traditional property.

36. The Court notes that the situation in the instant case is different: (a) there is no possibility of a return to the ancestral lands; (b) the circumstance of a lack of protection by the State that results in the impossibility of returning is not present; (c) the indigenous communities were relocated permanently in alternative lands by an executive decree; (d) violation of the right to freedom of movement and residence was not alleged, and (e) the only arguments presented related to a continuing violation of the right to property owing to the failure to pay compensation, and not to the communal use and enjoyment of the ownership of ancestral lands. Consequently, the Court finds that the case of the *Moiwana Community v. Suriname* is not a precedent that can be applied in this case.

37. The Court notes that there is a necessary relationship between the international responsibility of the State for the violation of rights contained in the American Convention and the obligation to make reparation to victims of such violations. Regarding its jurisdiction *ratione temporis*, the Court has established in a recent case that "the individualization and integral nature of the reparation can only be appreciated on the basis of an examination of the facts that resulted in the harm and their effects" and that, consequently, if it lacks jurisdiction to examine the facts that caused the harm, it "is unable to analyze such facts, *per se*, or their effects, or the measures of reparation granted in that regard."³⁰

38. In the instant case, the alleged continuing violation of the right to property relates to the difference of opinion between the State and the indigenous communities in relation to payment

²⁹ *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 43. See also, para. 108.

³⁰ *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations.* Judgment of August 28, 2013. Series C No. 267, paras. 37 and 38.

of the compensation recognized in Executive Decree No. 156, issued in 1971, the 1976 Farallón Agreement, the 1977 Fuerte Cimarrón Agreement, and the 1980 La Espriella Agreement.³¹ All these agreements were signed by state authorities and representatives of the Kuna indigenous people of Madungandí prior to 1990, the year in which Panama accepted the Court's compulsory jurisdiction. Therefore, none of these agreements, nor Executive Decree No. 156, fall within the jurisdiction *ratione temporis* of the Court.

39. Accordingly, it is clear that the Court does not have jurisdiction to examine the relocation, the amounts agreed under Decree 156 and the said agreements, or the payments made by the State of Panama based on them.³²

40. Consequently, considering the date on which Panama accepted the Court's compulsory jurisdiction, and given that the said facts occurred prior to that acceptance, the Court admits the objection as it was filed by the State in relation to the alleged failure to pay the compensation. Therefore, the Court declares that it does not have jurisdiction *ratione temporis* to analyze: (a) the content of Decree 156 of 1971; (b) the presumed non-compliance with its provisions; (c) the facts that occurred between 1972 and 1975 in relation to the flooding of the territories of the indigenous communities and their displacement; (d) the content of the 1976, 1977 and 1980 agreements relating to compensation for the flooding of the territory and the displacement of the communities; (e) the alleged failure to comply with those agreements, and (f) the reparations related to the said facts.

C. Third preliminary objection: "Lack of jurisdiction based on the statute of limitations"

C.1. Allegations of the parties and arguments of the Commission

41. The State filed an objection of partial lack of jurisdiction based on the statute of limitations regarding the supposed amount owed by the State of Panama in relation to the compensation payment to the indigenous peoples that allegedly remained pending. The State indicated that the compensation claimed by these peoples related to the flooding of ancestral lands and the 1971, 1975, 1976 and 1977 agreements. It added that the law establishing the State's intention to provide compensation to these peoples dated from 1971, with the promulgation of Decree 156, and that 42 years had passed since the said decree was issued. It also indicated that the last final agreement mentioned, the La Espriella Agreement, dates from 1980. The State argued that the compensation report presented by the presumed victims indicated that the payments should have been made before 1985; consequently, 28 years have passed since the last obligation of the State to pay any amount.

42. The State also cited article 1086 of its Tax Code which established, among other matters, that "[d]ebts for which the Treasury is responsible shall extinguish [...] by a statute of limitation of 15 years, which may be interrupted by an administrative procedure or by a legally notified judicial claim." It added that this article revealed that, even if the alleged debts existed, given

³¹ A dispute exists between the parties regarding whether the La Espriella Agreement was signed. The State, in the proceedings before the Court, questioned whether it existed. However, during the processing of the case before the Commission, the State recognized its existence. Cf. State report of March 24, 2011 (file of the processing of the case before the Commission, folio 4852).

³² Regarding the payment of compensation referred to in Decree No. 156 and the aforementioned agreements, the Commission alleged that the State had not paid the total amount of the compensation owed; the representatives alleged this also and added that the State had not complied with the payment of just compensation, while the State affirmed that it had made the payments and had therefore fulfilled its commitments. There is no dispute between the Commission and the parties that the State made at least some payments. What is in dispute is the exact amount of the compensation paid by the State and its beneficiaries.

the inexistence of a formal request to the administrative authorities or a judicial claim, they had prescribed. The State argued that there was no evidence that any administrative or judicial claim had been formally submitted to a public authority by the Kuna Comarca of Madungandí and the Emberá Comarca. Panama concluded that it had been proved that more than 40 years had passed since the date of the supposed initial events and more than 20 years since the supposed final events that gave rise to the petition and asked the Court to reject the financial claim because the possibility of claiming those supposed payments had prescribed under domestic law.

43. The Commission considered that the situation described by the State did not constitute a preliminary objection because, such an objection should refer to a dispute regarding the Court's jurisdiction or compliance with admissibility requirements. It added that the existence of a statute of limitations in the domestic sphere had no legal effect on the Court's temporal jurisdiction; rather it was a matter for discussion in relation to the merits of the case. The Commission indicated that, what the State considered had prescribed, was the payment of compensation, which constituted an essential component of the right to communal property in a case such as this one, and that the payment of the said compensation arose from the obligation to guarantee the said right. It added that States may not invoke provisions of domestic law to justify failure to comply with their international obligations.

44. The representatives argued that the right contained in Article 21 of the Convention could not prescribe, because it was a human right recognized in the said instrument. They also indicated that the presumed victims' claims had been permanent, referring to several communications and actions taken before the national Government, to which the State had failed to respond appropriately, or to provide the necessary advice to ensure that the claims were addressed to the appropriate instance; thus, the prescription invoked by the State was inadmissible.

C.2. Considerations of the Court

45. Regarding this objection of lack of jurisdiction owing to "prescription" of the alleged amount owed by the State, the Court considers it unnecessary to rule on this objection, because it has admitted the objection of lack of jurisdiction *ratione temporis*, in relation to the compensation (*supra* para. 40).

V EVIDENCE

A. Documentary, testimonial and expert evidence

46. The Court received different documents presented as evidence by the Commission, the representatives and the State, attached to their principal briefs (*supra* para. 1, 6, 7, 8 and 10). The Court also received the affidavits of two presumed victims and one expert witness.³³ Regarding the evidence provided during the public hearing, the Court received the statements of two presumed victims.³⁴ The purpose of these statements was established in the order of the President of the Court of March 3, 2014.

³³ Namely, the presumed victims: (1) Valentín Fausto, (2) Bolívar Jaripio, proposed by the representatives, and expert witness César Rodríguez Garavito, proposed by the Commission.

³⁴ Namely, the statements of the presumed victims Benjamín García and Bonarge Pacheco, proposed by the representatives.

B. Admission of the evidence

47. The Court admits the documents presented at the proper procedural opportunity by the parties and the Commission, the admissibility of which was not contested or challenged.³⁵ In the case of the newspaper articles submitted by the parties and the Commission together with their different briefs,³⁶ the Court has considered that these may be taken into account when they refer to well-known public facts or declarations of State officials, or when they corroborate aspects of the case; therefore, it decides to admit those documents that are complete or that, at least, permit verification of the source and the date of publication.³⁷

48. Furthermore, regarding documents indicated by the parties and the Commission by means of electronic links, the Court considers that neither legal certainty nor procedural balance is affected because they can be located immediately by the Court and the other parties.³⁸ Accordingly it considers admissible those that can be consulted at the date this judgment is delivered. Regarding articles or texts about events relating to this case, the Court considers that these are written reports that contain statements or declarations by their authors for public dissemination.³⁹

B.1. Documentary evidence submitted after the pleadings and motions brief and the answering brief

49. On July 26 and August 8, 2013, the representatives forwarded to the Court some missing annexes and a complete version of another annex that had been requested by the Secretariat.⁴⁰ Pursuant to Article 57(2) of the Rules of Procedure, the Court finds it in order to admit the documentation presented by the representatives as it relates to missing annexes requested by the Court's Secretariat, which are relevant to decide this case and were not contested by either the State or the Commission.

50. Also, on November 26, 2013, the State forwarded documentation that was not supervening and that had not been requested by the Court, without justifying that this was due to force majeure or grave impediment which had prevented the State from presenting it with the answering brief; therefore, it was not admitted.

³⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 54.

³⁶ The following newspaper articles will be referred to in the chapter on "Facts" (*infra* Chapter VI): "Panama: Indians say blood will flow unless they get land rights," Inter Press Service, May 18, 1993; "Antimotines enfrentan a los indígenas que se toman Puerto Obaldía" [Riot control police confront indigenous people who took over Puerto Obaldía], El Siglo, May 29, 1993, and "Panama: Tensions Between Government and Amerindians Subside", Inter Press Service, June 3, 1993 (Annex 34 to the Merits Report, folios 533 to 537).

³⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 146, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 55.

³⁸ Cf. *Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 56.

³⁹ Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 72, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 47.

⁴⁰ The missing annex corresponded to a certification issued on March 12, 2012, by the General Administrator of the National Land Administratio Authority ("ANATI"). The annex, which was forwarded in its complete version corresponded to Judgment 16-13 of the Mixed Jurisdiction Court of Darien.

B.2. Documentation requested during the hearing and subsequently

51. The Court notes that the representatives and the State forwarded several documents with their final written arguments. The Court requested the other party to submit observations in this regard and the State contested some evidence presented by the representatives and they contested two annexes forwarded by the State.⁴¹ However, the State and the representatives only made observations on the assessment of the evidence and not on its admission. Bearing in mind that, apart from those mentioned below, these documents had been requested during the public hearing held in this case, the Court incorporates them into the case file.

52. Regarding the copy of the "Deed ANATI-8-7-1254" and "Resolution No. ANATI 8-7-1254," both dated August 13, 2013, and the "Undertaking" of February 23, 2014, submitted by the representatives as annexes to their final arguments; a ruling of the Third Contentious Administrative and Labor Chamber dated February 27, 2014, provided by the State as an annex to its final arguments, and a communication of January 6, 2014,⁴² submitted by the representatives as an annex to their brief of July 1, 2014 (*supra* para. 13), the Court considers that this documentation is related to supervening acts and, therefore, incorporates it into the case file in application of Article 58 of the Rules of Procedure.

53. In the case of the documentation that the representatives were requested to forward as helpful evidence following the public hearing, and sent by them on June 20, 2014, this was incorporated into the body of evidence of the case in application of Article 58 of the Rules of Procedure. Additionally, the representatives forwarded a copy of an agreement dated November 27, 2013. The Court considers that this document relates to a supervening fact and therefore incorporates it into the case file in application of Article 58 of the Rules of Procedure.

B.3. Admission of the testimonial and expert evidence

54. The Court finds it pertinent to admit the statements and the expert opinion provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them⁴³ and the purpose of this case.

C. Assessment of the evidence

55. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, and on its consistent case law concerning evidence and its assessment,⁴⁴ the Court will examine and assess the documentary probative elements forwarded by the parties at the appropriate procedural moment, the statements made by affidavit and during the public hearing and also the helpful evidence requested and incorporated, *ex officio*, by this Court (*supra* paras. 9, 10, 13, 53 and *infra* paras. 130 and 131). To this end, it will abide by the principle of sound

⁴¹ The representatives contested annex 3 forwarded by the State with its final arguments, ANATI Report on Alto Bayano and Río Piragua of October 2013, and also annex 5, Ruling of the Third Contentious Administrative and Labor Chamber of the Supreme Court of February 27, 2014.

⁴² This is a communication signed by representatives of the Kuna of Madungandí General Congress addressed to the Administrator of the National Land Administration Authority (hereinafter "ANATI") dated January 6, 2014, which includes observations on three reports that were handed over to those representatives on December 18, 2013, in ANATI. The reports refer to the Tortí Abajo sector, the Wacuco sector, Alto Bayano and Río Piragua. The representatives, in their brief of July 1, 2014, emphasized the relevance of the annex which included comments on the last report mentioned (which was forwarded by the State as an annex to its final arguments).

⁴³ The purpose of all these statements was established in the order of the President of the Court of March 3, 2014, first and fifth operative paragraphs.

⁴⁴ *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 25, 2001. Series C No. 76, para. 51, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, para. 31.

judicial discretion within the corresponding legal framework, taking into account the whole body of evidence and the arguments submitted in the case.⁴⁵

56. In addition, the statements made by the presumed victims will be assessed in the context of all the evidence in the proceedings to the extent that it may provide further information on the presumed violations and their consequences.⁴⁶ Regarding the articles or texts which refer to facts that relate to this case, their assessment is not subject to the formalities required for testimonial evidence, and their probative value will depend on whether they corroborate or refer to aspects related to this specific case.⁴⁷

VI FACTS

57. In this chapter the Court will refer to certain relevant events that took place before the State had accepted the contentious jurisdiction of the Court (*supra* para. 14), which will only be taken into account to clarify the factual framework of this case. These events will be described in the following order: (a) the Kuna and Emberá indigenous peoples in Panama and the domestic legal framework; (b) the construction of the Bayano Hydroelectric Complex and transfer of the indigenous population; (c) the events that occurred after the transfer of the indigenous population; (d) the incursions of non-indigenous persons and the creation of the Kuna Comarca of Madungandí (1990-1996); (e) the Negotiation Tables of the Darién Sustainable Development Program (1996-2001) and the demarcation of the Kuna Comarca of Madungandí; (f) the attempt to reach a friendly settlement agreement before the Inter-American Commission on Human Rights, and the Indigenous Peoples - Government Commission (2001 - 2006); (g) the creation of the High-level Presidential Commission, the establishment of a procedure for the adjudication of the communal ownership of indigenous lands and the delimitation of Emberá lands (2007-2013), and (h) the administrative and judicial actions filed by the Kuna and Emberá peoples to protect their lands.

A. Kuna and Emberá indigenous peoples in Panama; domestic legal framework

58. Panama has an indigenous population of 417,559 persons, representing 12.3% of the population according to the 2010 census.⁴⁸ The indigenous peoples of Panama are composed of seven groups: Ngäbe, Kuna, Emberá, Buglé, Wounaan, Naso and Bri-bri.⁴⁹ The ancestral territories of the indigenous peoples of Panama cover more than 22.7% of its territory.⁵⁰ Starting in 1930, several indigenous reserves were established,⁵¹ including the lands inhabited

⁴⁵ Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs*, para. 76, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 70.

⁴⁶ Cf. *Case of Loayza Tamayo v. Peru*. Merits. Judgment of September 17, 1997. Series C No. 22, para. 43, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 70.

⁴⁷ Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 72, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 47.

⁴⁸ Cf. Basic final results - 2010 national census of the Republic of Panama, National Statistics and Census Institute, December 15, 2010 (evidence file, folios 7903 to 8178, and 7909).

⁴⁹ Cf. State report of April 28, 2010 (evidence file, folio 3929).

⁵⁰ Cf. State report of April 28, 2010 (evidence file, folio 3929).

⁵¹ Cf. Law 59 of December 12, 1930, "on indigenous reserves," Official Gazette No. 5901 of January 7, 1931 (evidence file, folios 7314 to 7315; Law 18 of November 8, 1934, "on indigenous reserves," Official Gazette No. 6934 of November 13, 1934 (evidence file, folios 7317 to 7318), and Law 20 of January 31, 1957 "declaring the San Blas Comarca and some lands in the province of Darien as indigenous reserves [and amending several laws]," Official Gazette No. 13,282 of June 28, 1957 (evidence file, folios 7342 to 7344).

by the indigenous peoples in the Alto Bayano.⁵² The Alto Bayano reserve covered an area of 87,321 hectares (873.21 Km²).⁵³ This region forms part of the tropical rainforest ecosystem that extends from the southeast of the Chepo District in the province of Panama to the province of Darien, and to the Atrato river in Colombia.⁵⁴

59. The possibility of creating "comarcas" [indigenous territorial units] is included in article 5 of the 1972 Constitution, last amended in 2004, which stipulates, among other matters, that "[t]he law may create other political divisions [than provinces, districts and *corregimientos* [administrative districts smaller than a district], either by subjecting them to special regimes or for reasons of administrative convenience or public services." The Constitution also recognizes, in its article 127, the collective ownership of lands of indigenous communities – a similar provision has been included in the Constitution since 1946 – establishing that "[t]he law shall regulate the procedures to be followed to achieve [this]."⁵⁵ Accordingly, the State established the following five indigenous comarcas by law: the Kuna Yala Comarca (previously known as the Comarca of San Blas),⁵⁶ the Emberá Comarca of Darien,⁵⁷ the Kuna Comarca of Madungandí ("the Kuna Comarca"),⁵⁸ the Ngöbe-Buglé Comarca,⁵⁹ and the Kuna Comarca of Wargandi.⁶⁰ On December 23, 2008, Law No. 72 was enacted "establishing the special procedure for the adjudication of the collective ownership of lands of the indigenous peoples outside the comarcas."⁶¹

⁵² Cf. Law 18 of November 8, 1934, "on indigenous reserves", Official Gazette No. 6934 of November 13, 1934 (evidence file, folios 7317 to 7318).

⁵³ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folio 336); Report and recommendation of the Inter-governmental Commission (evidence file, folio 363), and Physical demarcation of the Kuna Comarca of Madungandí – Final report, National Political-Administrative Boundaries Commission, 2000 (evidence file, folio 14).

⁵⁴ Cf. E. Urieta Donoso, "*Ipetí-Choco: Una comunidad indígena de Panamá afectada por una Presa Hidroeléctrica*", Universidad Veracruzana, 1994 (evidence file, folio 11).

⁵⁵ Article 127 establishes: "[t]he State shall guarantee the indigenous communities the reserve of the necessary lands and the collective ownership thereof to ensure their economic and social well-being. The law shall regulate the procedures to be followed to achieve this objective and the corresponding delimitations within which the private appropriation of lands is prohibited." This article was included as article 116 of the 1972 Constitution and a similar article 95(a) and (b) in the 1946 Constitution.

⁵⁶ Cf. Law 2 of Septemebr 16, 1938, "creating the Comarcas of San Blas and Barú," Official Gazette No. 7873, September 23, 1938 (evidence file, folios 7323 to 7326); Law 16 of February 19, 1953, "on the organization of the Comarca of San Blas," Official Gazette No. 12,042, April 7, 1953 (evidence file, folios 7337 to 7341); Law 20 of January 31, 1957, "declaring the San Blas Comarca and some lands in the province of Darien as indigenous reserves and amending [some laws]," Official Gazette No. 13,282, June 28, 1957, and Law 99 of December 23, 1998, "naming the San Blas Comarca the Kuna Yala Comarca," Official Gazette No. 23,701, December 29, 1998 (evidence file, folios 7433 to 7435).

⁵⁷ Cf. Law 22 of October 20, 1983, "creating the Emberá Comarca of Darien," Official Gazette No. 19,976 (evidence file, folios 7377 to 7384).

⁵⁸ Cf. Law 24 of January 12, 1996. "creating the Kuna Comarca of Madungandí," Official Gazette 22,951, January 15, 1996 (evidence file, folios 138 to 142).

⁵⁹ Cf. Law 10 of March 7, 1997, "creating the Ngobe-Bugle Comarca and and taking other measures."

⁶⁰ Cf. Law 34 of July 25, 2000, "creating the Kuna Comarca of Wargandi," Official Gazette No. 24,106, July 28, 2000 (evidence file, folios 7468 to 7474).

⁶¹ Cf. Law 72 of December 23, 2008, Official Gazette No. 26,193, December 30, 2008 (evidence file, folios 7475 to 7479).

A.1. The Kuna indigenous people

60. The evidence reveals that members of the Kuna indigenous people have inhabited the region of the Bayano since, at least, the sixteenth century.⁶² Also, as indicated by the petitioners, and undisputed by the State, most of the Kuna people inhabit the Kuna Yala Comarca,⁶³ and the members of the Kuna people who inhabit the region of the Alto Bayano are distributed in approximately 15 communities.⁶⁴ The Kuna population in Panama consists of around 80,526 persons.⁶⁵ Traditionally, the Kuna depend for their subsistence on slash and burn agriculture with reforestation, and hunting and fishing.⁶⁶ Their highest authority is a General Congress, and the representation of the General Congress before the Central Government and the autonomous entities is a *Cacique* elected by the said Congress. In addition, each of the villages of the Comarca have an authority known as the "Saila" or "Sáhila."⁶⁷

A.2. The Emberá indigenous people

61. In the seventeenth and eighteenth centuries, some of the Emberá indigenous people migrated from the Chocó region in Colombia to territory that is now part of Panama, settling on the banks of the rivers of the actual province of Darien.⁶⁸ Subsequently, some of the Emberá people moved to the Bayano region⁶⁹ and, currently, they are organized in four communities: Ipetí, Piriati, Majé Cordillera and Unión Emberá.⁷⁰ The Emberá population in Panama is composed of approximately 31,284 persons.⁷¹ The State recognized the territories of the Emberá who remained in the Darien region as the Emberá Comarca of Darien (*supra* para. 59), but the law establishing this comarca did not refer to the Emberá who moved to the Bayano region. The traditional activities of the Emberá people are hunting, fishing and handcrafts.⁷²

⁶² Cf. Physical demarcation of the Kuna Comarca of Madungandí – Final report, National Political-Administrative Boundaries Commission, 2000 (evidence file, folio 14).

⁶³ Cf. Petition of May 11, 2000 (evidence file, folios 1970 to 2025, folio 1979), and E. Urieta Donoso, "Ipetí-Choco: Una comunidad indígena de Panamá afectada por una Presa Hidroeléctrica", Universidad Veracruzana, 1994 (evidence file, folio 4121).

⁶⁴ Cf. Technical and economic report on collective and individual compensation and reparation for the consequences of the human rights violations of the Kuna Comarca of Madungandí, General Congress of the Kuna of Madungandí, April 2014 (evidence file, folios 8580 to 8645, and folios 8582 and 8583).

⁶⁵ Cf. Basic final results – 2010 national census of the Republic of Panama, National Statistics and Census Institute, December 15, 2010 (evidence file, folios 7903 to 8178, and 8006).

⁶⁶ Cf. A. Wali, "Kilowatts and Crisis: Hidroelectric Power and Social Dislocation in Eastern Panama," 1989 (evidence file, folios 96 to 131, and 114), and Negotiation Tables of the Bayano region, Final diagnosis report, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folios 317 to 357, and 322).

⁶⁷ Cf. Law 24 of January 12, 1996. "creating the Kuna Comarca of Madungandí," Official Gazette 22,951, January 15, 1996 (evidence file, folios 138 to 142), articles 5 to 7, and Executive Decree No. 228 of December 3, 1998, Official Gazette No. 23,687, December 8, 1998 (file of procedure before the Commission, folios 4833 to 4848), articles 10 to 13.

⁶⁸ Cf. A. Wali, "Kilowatts and Crisis: Hidroelectric Power and Social Dislocation in Eastern Panama", 1989 (evidence file, folios 96 to 131; folio 109 and 110).

⁶⁹ Cf. E. Urieta Donoso, "Ipetí-Choco: Una comunidad indígena de Panamá afectada por una Presa Hidroeléctrica", Universidad Veracruzana, 1994 (evidence file, folio 4139).

⁷⁰ Cf. Affidavit prepared by Bolivar Jaripio, presumed victim proposed by the representatives, March 21, 2014 (evidence file, folio 8423), and Statement by Bonarge Pacheco, presumed victim proposed by the representatives, before the Inter-American Court of Human Rights during the public hearing on April 2, 2014; Petitioners' brief of May 16, 2012 (evidence file, folio 4559).

⁷¹ Cf. Basic final results – 2010 national census of the Republic of Panama, National Statistics and Census Institute, December 15, 2010 (evidence file, folio 8008).

⁷² Cf. Ipetí-Piriati and Madungandí Negotiation Tables, Conclusions and Plan of Action - Final report, Ministry of Economy and Finance – Darien Sustainable Development Program, August 25, 1999 (evidence file, folio 1702), and

A.3. The non-indigenous population or "settlers" in the Bayano region

62. At the time the Kuna and Emberá peoples were relocated owing to the construction of the hydroelectric dam, there were some peasant farmers or "settlers" in the Bayano region.⁷³ Moreover, with the construction of the dam and the Pan-American Highway, the presence of "settlers" in the region increased considerably, and they formed at least three peasant communities, Wacuco, Loma Bonita and Curtí, in which workers unionized themselves.⁷⁴ It is an undisputed fact that tension and conflicts arose between indigenous communities and "settlers" owing to tenure and use of the land.

B. Construction of the Bayano Hydroelectric Complex and transfer of the indigenous population

63. In 1963, the State began to consider a project that had been submitted for the construction of a hydroelectric dam in the Bayano region, which involved the flooding of approximately 350 km² in the area.⁷⁵ On May 8, 1969, Executive Decree No. 123 was adopted indicating that "owing to the construction of the Río Bayano Project, part of the actual indigenous reserve in the Alto Bayano will be flooded by the reservoir" and that it was an "obligation of the State to provide the necessary site for the relocation of the inhabitants of the said reserve displaced by the reservoir." The first article of this decree established that an area of 1,124.24 km² was required for the hydroelectric reservoir of the Bayano Hydroelectric Project.⁷⁶ Also, as compensation for the "area of the actual indigenous reserve that will be flooded" by this project, the decree established that new lands would be granted (adjacent and located to the east of the indigenous reserve) which were declared "non-adjudicable," and that measured 457.11 km² and 426.33 km², respectively.⁷⁷

64. On July 8, 1971, Executive Decree No. 156 was issued establishing a "Special Compensation Fund to Assist the Indigenous Peoples of the Bayano." This decree considered that "the indigenous groups who inhabit the actual Bayano Indigenous Reserve will have to abandon the lands they occupy owing to the execution of the Bayano Hydroelectric Project" and that "these groups will have to relocate in the areas established as non-adjudicable land by Executive Decree No. 123." The said decree also recognized that "the transfer to new areas entails major efforts for the indigenous peoples as well as considerable financial disbursements, all of which justifies, for reasons of humanity, the assistance that the State has decided in their favor" and established that the "Forestry Service of the Ministry of Agriculture and Livestock shall deliver to the official representatives of the indigenous peoples the sum that, pursuant to

Statement by Bonarge Pacheco, presumed victim proposed by the representatives, before the Inter-American Court of Human Rights during the public hearing on April 2, 2014.

⁷³ Cf. "The problem of land invasion in the Madungandí Comarca (Alto Bayano)", Report and recommendation of the Inter-governmental Commission (evidence file, folio 364); Physical demarcation of the Kuna Comarca of Madungandí – Final report, National Political-Administrative Boundaries Commission, 2000 (evidence file, folio 14), and A. Wali, "Kilowatts and Crisis: Hidroelectric Power and Social Dislocation in Eastern Panama", 1989 (evidence file, folio 115).

⁷⁴ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folio 331 to 335).

⁷⁵ State report of March 24, 2011 (evidence file, folio 4852); See also, A. Wali, "Kilowatts and Crisis: Hidroelectric Power and Social Dislocation in Eastern Panama", 1989 (evidence file, folios 117 and 118).

⁷⁶ Executive Decree No. 123 of May 8, 1969 "declaring some lands non-adjudicable and suspending the processing of some adjudication requests," Official Gazette No. 16,367, May 23, 1969 (evidence file, folio 376 to 377), Preambular paragraph and first article.

⁷⁷ Executive Decree No. 123 of May 8, 1969 "declaring some lands non-adjudicable and suspending the processing of some adjudication requests," Official Gazette No. 16,367, May 23, 1969 (evidence file, folio 376 to 377), articles 2, 3 and paragraph.

article [2], forms part of the special compensation and assistance fund established by this Executive Decree.”⁷⁸

65. The State began construction of the dam in 1972.⁷⁹ In addition, it created the Project for the Integral Development of the Bayano by Decree No. 112 of November 15, 1973, which ordered “the transfer and relocation of the communities located in the area of the reservoir [and other areas].”⁸⁰ The transfer of the Kuna and Emberá peoples in the Alto Bayano was implemented from 1973 to 1975.⁸¹ Initially, the Emberá communities were transferred to sites that proved inadequate; they were therefore moved a second time⁸² to the lands where they are now located to the south of Bayano Lake beside the Pan-American Highway, covering around 7,000 hectares; of this, 2,490 hectares were assigned to the Ipetí community,⁸³ and two sites of 265 hectares and 3,840.95 m², and 3,678 hectares and 4,190.65 m², respectively, to the Piriati community (*infra* para. 83). The dam construction concluded in 1976.⁸⁴ As a result of the construction, several indigenous villages were flooded and their inhabitants relocated.⁸⁵

C. Events that occurred after the transfer of the indigenous population

66. Between 1975 and 1980, the state authorities signed four main agreements with indigenous representatives. The 1975 Majecito Agreement signed by the Emberá Community of Majecito and representatives of the Bayano Integral Development Project included the general guidelines for the relocation of this community.⁸⁶ Subsequently, the agreements of Farallón (1976),⁸⁷ Fuerte Cimarrón (1977)⁸⁸ and La Espriella (1980)⁸⁹ were signed by the Kuna of

⁷⁸ Cf. Executive Decree No. 156 of July 8, 1971 “establishing a Special Compensation Fund to Assist the Indigenous Peoples of the Bayano,” Official Gazette No. 16,801, July 26, 1971 (evidence file, folio 379), Preamble paragraphs, articles 1 and 3. Article 2 of the Decree established that the Fund would be formed by 30% of the total amount received by the State’s Forestry Fund following January 1, 1971, and the amounts received following the promulgation of the decree for the three following years. This referred to income from logging permits or concessions granted by the Forestry Service of the Ministry of Agriculture and Livestock in the area of the Bayano Indigenous Reserve.

⁷⁹ Cf. State report of March 24, 2011 (evidence file, folio 4852).

⁸⁰ Cf. Decree No. 112 of November 15, 1973, “The Bayano Integral Development Project”, Official Gazette No. 17,621, June 24, 1974. Available on October 15, 2014 at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1970/1973/1973_026_2085.PDF (referenced in the Merits Report, merits file, folio 30), Article 5b.

⁸¹ Cf. State report of March 24, 2011 (evidence file, folio 4852).

⁸² Cf. Affidavit of Bolívar Jaripio, presumed victim, proposed by the representatives of March 21, 2014 (evidence file, folio 8423), and E. Urieta Donoso, “*Ipetí-Choco: Una comunidad indígena de Panamá afectada por una Presa Hidroeléctrica*”, Universidad Veracruzana, 1994 (evidence file, folio 4220).

⁸³ Cf. Ipetí–Piriati and Madungandí Negotiation Tables, Conclusions and Plan of Action - Final report, Ministry of Economy and Finance – Darien Sustainable Development Program, August 25, 1999 (evidence file, folios 1697 to 1725; folio 1702).

⁸⁴ Cf. Petition of May 11, 2000 (evidence file, folios 1970 to 2025, folio 1985); A. Wali, “Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama”, 1989 (evidence file, folios 96 to 131; folio 119), and E. Urieta Donoso, “*Ipetí-Choco: Una comunidad indígena de Panamá afectada por una Presa Hidroeléctrica*”, Universidad Veracruzana, 1994 (evidence file, folio 4144).

⁸⁵ Cf. Ipetí–Piriati and Madungandí Negotiation Tables, Conclusions and Plan of Action - Final report, Ministry of Economy and Finance – Darien Sustainable Development Program, August 25, 1999 (evidence file, folios 1697 to 1725; folio 1702); State report of March 24, 2011 (evidence file, folio 4852); Affidavit of Fausto Valentín, presumed victim, proposed by the representatives, March 18, 2014 (evidence file, folios 8416 and 8417); Statement by Benjamín García, presumed victim, proposed by the representatives, before the Inter-American Court of Human Rights during the public hearing on April 2, 2014; Affidavit of Bolívar Jaripio, presumed victim, proposed by the representatives, March 21, 2014 (evidence file, folio 8423), and Statement by Bonarge Pacheco, presumed victim, proposed by the representatives, before the Inter-American Court of Human Rights during the public hearing on April 2, 2014.

⁸⁶ Cf. Majecito Agreement, February 5, 1975 (evidence file, folio 8460).

⁸⁷ Cf. Farallón Agreement, October 29, 1976 (evidence file, folios 392 to 394).

Madungandí and different state authorities. These referred, *inter alia*, to the compensation supposedly owed by the State for the flooding of the indigenous lands and the displacement of the inhabitants. Over the years following these agreements, several meetings were held between the representatives of the indigenous peoples and the State in order, above all, to seek a solution to the land disputes between the indigenous peoples and the settlers, and to obtain recognition of the Kuna and Emberá peoples' land rights.

67. In the early 1980s, an interinstitutional commission was set up responsible for the "Organization and Integral Management of the Alto Bayano Watershed" entrusted with the tasks, *inter alia*, of making an initial study of the situation of land tenure in some of the areas that were considered conflictive, and defining the boundaries between the Madungandí Reserve and the settlers.⁹⁰ On April 23, 1982, the Government issued Decree No. 5-A which regulated the adjudication, for sale, of state rural lands in the Chepo district, excluding the areas of the lands of the Kuna and Emberá indigenous peoples.⁹¹ Subsequently, on August 3, 1984, representatives of the State and the Kuna people signed a "memorandum of understanding" which established, among other matters, that "the national Government was obliged to comply with the commitments made to the Kuna indigenous communities located in the area" and that "one of the commitments refers to the creation of the Kuna Comarca of Madungandí."⁹² Then, on August 15, 1984, representatives of the Emberá communities of Piriati and Ipetí and of the Corporation for the Integral Development of the Bayano signed a "memorandum of understanding" by which the Corporation "undertook to take all necessary steps to ensure that the aspirations of the indigenous peoples were achieved with regard to the full demarcation of the Emberá Reserve in the areas of Ipetí and Piriati" and that "these lands would be held collectively."⁹³

D. Incursions by non-indigenous persons and creation of the Kuna Comarca of Madungandí (1990-1996)

68. In the early 1990s, the incursion of non-indigenous persons into the lands of the Kuna and Emberá communities increased and tensions rose in the area.⁹⁴ In 1989, the Kuna drew up a proposed bill for the recognition of their lands under the format of an indigenous comarca, and this was presented to the Legislative Assembly.⁹⁵ Also, a "Governmental Interdisciplinary Team"

⁸⁸ Cf. Fuerte Cimarrón Agreement, January 29, 1977 (evidence file, folios 396 to 397).

⁸⁹ This agreement is not included in the case file. In its final written arguments, the State indicated that it was "unaware of this agreement." However, during the processing of the case before the Commission the State had acknowledged its existence. Cf. State report of March 24, 2011 (evidence file, folio 4852).

⁹⁰ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folios 338 to 339).

⁹¹ Cf. Decree 5-A, April 23, 1982, "regulating the adjudication of rural state lands from Quebrada Guayabo, parallel to the Wacuco River, in the *corregimiento* of El Llano, Chepo district, to the border with Colombia," articles 1 and 2(e) (evidence file, folio 2490). Article 2(e) of the decree established that "[u]ntil the physical demarcation [of the areas of the Kuna and Emberá indigenous comarcas] are completed, the Kuna and Emberá communities may veto requests to adjudicate lots that invade the territories of these comarcas."

⁹² Cf. Memorandum of Understanding, August 3, 1984 (evidence file, folios 497 to 500).

⁹³ Cf. Memorandum of Understanding, August 15, 1984 (evidence file, folios 505 to 506), articles 1 and 2.

⁹⁴ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folio 339); Resolution No. 002, Corporation for the Integral Development of the Bayano, January 24, 1992 (evidence file, folio 528), and Statement by Bonarge Pacheco, presumed victim proposed by the representatives, before the Inter-American Court of Human Rights during the public hearing on April 2, 2014.

⁹⁵ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folio 339).

composed of several state entities was created, and it prepared an agreement that was signed by those entities and two official representatives of the indigenous peoples of the Bayano on March 23, 1990. The agreement indicated that, "currently, the possessory rights of the indigenous sector of the Bayano area, as well as the ecological balance that is so necessary for the life of the Bayano Dam are [prejudiced by] the incursion of settlers in the region" and that "[t]he settlers who are within the boundaries of the comarca and in the higher part of the protected watershed [...] must leave the disputed area."⁹⁶ Subsequently, on July 16, 1991, the "Working Agreement for the Territorial Reorganization of Alto Bayano [...]" was signed in which several state entities "undertook to take steps to relocate the settlers who have invaded the protected lands in order to conserve the flora and fauna of the Bayano watershed," establishing September 15, 1991, as the deadline.⁹⁷

69. On January 24, 1992, the Director General of the Corporation for the Integral Development of the Bayano issued Resolution No. 002 considering – with reference to the "process of invasion-colonization" of the Kuna and Emberá indigenous lands of Alto Bayano – that "a large number of individuals are re-occupying lands for which the national Government had provided compensation through the Bayano Corporation" and that "a process of illegal land grabbing and occupation is underway of lands belonging" to the said Corporation. In this regard, it was decided to take the necessary steps to recover those lands and "[t]o establish a land management program in order to settle the existing conflicts permanently."⁹⁸ On March 17, 1992, the Ministry of the Interior and Justice issued Resolution No. 63, which referred to the above-mentioned Resolution No. 002 and granted the provincial governor and the Chepo mayor the necessary authority "to order the relocation of the settlers who had invaded the conflict areas" and instructed the national Police Force to provide the required assistance.⁹⁹ In April and May 1993, the indigenous peoples of the Bayano organized public protests and blocked part of the Pan-American Highway demanding recognition and protection of their lands.¹⁰⁰

70. On December 5, 1994, the Director General of the Corporation for the Integral Development of the Bayano issued Resolution No. 1 which referred, *inter alia*, to meetings held between settlers, indigenous peoples, the Corporation and state institutions on October 22 and 27, 1994, and prohibited the establishment of new settlements, as well as logging, burning, and expansion of the agricultural frontier in the upper catchment area of the Bayano.¹⁰¹ In this regard, on December 13, 1994, the Ministry of the Interior and Justice contacted the mayor of Chepo district asking him to take appropriate measures to ensure "strict compliance" with the said resolution.¹⁰²

Cf. Agreement of March 23, 1990 (evidence file, folios 519 to 520), third preambular paragraph and article 2.

⁹⁷ *Cf.* Working Agreement for the Territorial Reorganization of Alto Bayano between the provincial Government of Panama and the Kuna people of Wacuco, Ipetí and other indigenous communities, July 16, 1991 (evidence file, folios 524 to 525), articles 1 and 2.

⁹⁸ *Cf.* Resolution No. 002, Corporation for the Integral Development of the Bayano, January 24, 1992 (evidence file, folios 527 to 529).

⁹⁹ *Cf.* Resolution No. 63, Ministry of the Interior and Justice, March 17, 1992 (evidence file, folios 531 to 532), *considerandum* 3 and first and second operative paragraphs.

¹⁰⁰ *Cf.* "Panama: Indians say blood will flow unless they get land rights", Inter Press Service Global Information Network, May 18, 1993; "Antimotines enfrentan a los indígenas que se toman Puerto Obaldía", El Siglo, May 29, 1993 (evidence file, folios 534 to 536). See also: Statement by Benjamín García, presumed victim proposed by the representatives, before the Inter-American Court of Human Rights during the public hearing on April 2, 2014.

¹⁰¹ *Cf.* Resolution No. 1, Corporation for the Integral Development of the Bayano, December 5, 1994, "prohibiting logging, burning, and agricultural expansion in the upper catchment area of the Bayano" (evidence file, folio 541).

¹⁰² Communication of the Ministry of the Interior and Justice sent to the Mayor of Chepo district on December 13, 1994 (evidence file, folio 540).

71. Subsequently, on January 3 and February 1, 1995, meetings were held between state authorities and indigenous representatives in which the bill for the creation of the Kuna Comarca was discussed and it was proposed, among other matters, that “the settlers should stay where they are subject to certain special conditions,” including that “they c[ould] not expand the agricultural frontier beyond where it is at present.” Subsequently, the representatives of the State, the indigenous peoples and the settlers signed an agreement accepting the proposal.¹⁰³ On July 18 that year, the Governor of the province of Panama communicated with the Mayor of Chepo district with regard to the obligation to comply “immediately” with a decision taken by the national Government “in April 1992” to evict the settlers from the Ipetí Emberá and Kuna indigenous areas.¹⁰⁴ On January 12, 1996, Law No. 24 was enacted creating the Kuna Comarca¹⁰⁵ over an area of approximately 1,800 km².

E. Negotiation Tables of the Darien Sustainable Development Program (1996-2001) and demarcation of the Kuna Comarca of Madungandí

72. Coexistence between the indigenous peoples and the settlers remained tense¹⁰⁶ and, in August 1996, members of the Kuna people blocked the Pan-American Highway, and were involved in confrontations with the National Police.¹⁰⁷ On August 8 and 29, 1996, meetings were held during which a working agenda was agreed on for an interinstitutional commission to verify on-site the changes that had occurred owing to the arrival of new settlers. On December 16, 1996, a meeting was held between the Minister and the Vice Minister of the Interior and Justice, the Governor of the province of Panama, the Mayor of Chepo, and the representatives of the Kuna Comarca. One of its conclusions was that “[t]he Government undertook to take the necessary steps and legal measures to ensure that individuals identified as settlers and who were in the Comarca illegally would be evicted by January 30, 1997.”¹⁰⁸

73. Another meeting was held on December 17, 1997, between state authorities, settlers and indigenous peoples, during which the latter asserted that the problems had intensified, referring to violations of the agreements that had been signed.¹⁰⁹

¹⁰³ Cf. “Proposal for the bill to create the Kuna Comarca of Madungandí,” February 3, 1995 (evidence file, folios 673 to 674). The other special conditions mentioned for the settlers referred to: “the lands that they are using at this time may not be ceded, or exchanged, or sold to third persons [and] if they do this, or leave the area, those lands will revert to the patrimony of the Comarca.” In the annexes to its final written arguments, the State mentioned that this agreement “forms an integral part” of Law 24 creating the Kuna Comarca, referring to article 21 of that law (evidence file, folios 8475 to 8476). The representatives, in their observations on the said annexes of July 1, 2014, indicated that the “incorporation [of the said agreement in Law 24] was provisional and merely to permit the use of the land for crops, with the commitment that the beneficiaries would gradually be relocated until the land had been totally reclaimed” and that “this article has been used to justify the increased invasion of settlers in the Comarca” (merits file, folio 1164).

¹⁰⁴ Telegram of July 18, 1995, from the Governor of the province of Panama to the Mayor of the Chepo district (evidence file, folio 514).

¹⁰⁵ Cf. Law 24 of January 12, 1996. “creating the Kuna Comarca of Madungandí,” Official Gazette 22,951, January 15, 1996 (evidence file, folios 138 to 142).

¹⁰⁶ Cf. Bayano Region Negotiation Tables, Executive Summary, Ministry of Economy and Finance – Darien Sustainable Development Program, July 2, 1999 (evidence file, folio 406).

¹⁰⁷ Cf. “*Choque armado entre indios and policías*” [Armed confrontation between indians and police], *Crítica*, August 7, 1996; “*Defenderemos a muerte la Comarca*” [We will defend the Comarca to the death], *La Prensa*, August 8, 1996; “*Indígenas denuncian maltrato de policías and firman una tregua*” [Indigenous people denounce ill-treatment by police and sign truce], *El Universal de Panama* (evidence file, folios 543 to 546). Affidavit of Fausto Valentín, presumed victim proposed by the representatives, March 18, 2014 (evidence file, folio 8418).

¹⁰⁸ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folio 344).

¹⁰⁹ Cf. Bayano Region Negotiation Tables, Final diagnosis, Ministry of Economy and Finance – Darien Sustainable Development Program, June 30, 1999 (evidence file, folio 345).

74. On June 13, 1999, the Kuna General Congress issued a resolution demanding that the Panamanian authorities comply with Law 24 of 1996 and, among other matters, evict all the settlers who were within the Kuna Comarca.¹¹⁰ On July 21, 1999, a meeting was held between several state authorities "to seek a definitive solution to the land dispute between the Kuna indigenous people of Madungandí and the peasants who had migrated from the central provinces, settling in the communities of Wacuco, Loma Bonita and Curtí" and "[t]o unify the Government's position in order to lead the two parties in conflict to a lasting agreement, and therefore setting up the Negotiation Table."¹¹¹ In this regard the Ministry of Economy and Finance, through the Darien Sustainable Development Program, organized two "Bayano Negotiation Tables" on August 18, 1999, one between state authorities, Emberá people from the Ipetí community, and peasants, and another between state authorities and Emberá people from the Piriati community.¹¹² On August 25, 1999, a "Final report - Conclusions and Action Plan" was issued in relation to the said Negotiation Tables which established, among other matters, that "[t]he demarcation, delimitation and marking of the perimeter of the site of each indigenous community (Ipetí, Piriati and Comarca of Madungandí) should be a priority."¹¹³ In addition, an inter-governmental commission was created in order to settle the conflict arising from the use and occupation of the land, which made some recommendations.¹¹⁴

75. Lastly, from April to June 2000, the physical demarcation of the Kuna Comarca was carried out, a process conducted in coordination with the indigenous representatives.¹¹⁵

F. Attempt to reach a friendly settlement agreement before the Inter-American Commission on Human Rights; Indigenous Peoples - Government Commission (2001 - 2006)

76. From December 2001¹¹⁶ until early 2007, a friendly settlement procedure was undertaken before the Inter-American Commission and, to this end, an Indigenous Peoples-Government Commission was established in Panama with three subcommissions: (i) a territorial affairs subcommission; (ii) an investment subcommission, and (iii) a subcommission to assess the effects of the dam.¹¹⁷ Furthermore, during this period, the State took some steps to counter the invasion of indigenous lands, such as the issue by the Minister for the Interior and Justice of a "[w]arning," indicating, *inter alia*, that it was "totally prohibited to occupy or invade land located within the Madungandí Comarca,"¹¹⁸ and the training of 30 indigenous persons from six

¹¹⁰ Resolution No. 1 of the Kuna of Madungandí Special General Congress, June 13, 1999 (evidence file, folios 548 to 549).

¹¹¹ Minutes of the meeting held in the National Indigenous Policy Directorate on July 21, 1999 (evidence file, folio 551).

¹¹² Cf. Ipetí-Piriati and Madungandí Negotiation Tables, Conclusions and Plan of Action - Final report, Ministry of Economy and Finance - Darien Sustainable Development Program, August 25, 1999 (evidence file, folios 1701 to 1702 and 1707).

¹¹³ Cf. Ipetí-Piriati and Madungandí Negotiation Tables, Conclusions and Plan of Action - Final report, Ministry of Economy and Finance - Darien Sustainable Development Program, August 25, 1999 (evidence file, folios 1697 to 1713).

¹¹⁴ Cf. "The problem of land invasion in the Madungandí Comarca (Alto Bayano)", Report and recommendation of the Inter-governmental Commission (evidence file, folios 363 to 374).

¹¹⁵ Cf. Physical demarcation of the Kuna Comarca of Madungandí - Final report, National Political-Administrative Boundaries Commission, 2000 (evidence file, folios 57 and 65).

¹¹⁶ Comunication of the petitioners' representatives of December 12, 2001, indicating their willingness to reach a friendly settlement agreement (evidence file, folio 2338).

¹¹⁷ Cf. Second Progress Report to the Inter-American Commission on Human Rights, Ministry of the Interior and Justice, February 18, 2002 (evidence file, folio 2267); Petitioners' report to the Inter-American Commission on Human Rights, January 16, 2002 (evidence file, folios 2296 to 2297).

¹¹⁸ Note entitled "Warning" dated April 15, 2002 (evidence file, folio 555).

communities of the Madungandí Comarca as forest rangers by the National Environmental Authority.¹¹⁹ Also, on October 2, 2002, Executive Decree No. 267 was adopted extending the sphere of application of the aforementioned Decree 5-A of April 23, 1982 (*supra* para. 67).¹²⁰

77. On August 19, 2006, the indigenous communities of the Bayano issued a communiqué in which they considered that “[t]he national Government has no intention of settling our just demands” and decided “to formally inform” the Inter-American Commission that “the negotiations had failed.”¹²¹ Finally, the friendly settlement procedure ended on January 19, 2007, when the petitioners advised the Commission that they wished to continue processing the case before it.¹²²

G. Creation of a High-Level Presidential Commission; establishment of procedures to adjudicate collective ownership of indigenous lands; delimitation of Emberá lands (2007-2013)

78. In October 2007, members of the Kuma people conducted a public protest to demand that the authorities respond to their claims.¹²³ On December 23, 2008, Law No. 72 was enacted “establishing the special procedure for the adjudication of the collective ownership of lands of the indigenous peoples outside the comarcas.”¹²⁴

79. On January 26, 2009, the Government promulgated Executive Decree No. 1 amending article 2 of Decree 5-A of April 23, 1982, “to regulate the territorial status of the occupants of the area known as the catchment area of Lake Bayano.”¹²⁵

80. On the basis of this Law No. 72, the Cacique General of the Emberá of Alto Bayano filed two applications for adjudication of the collective ownership of land, one in 2009¹²⁶ and the other in 2011¹²⁷ (*infra* para. 92). On November 18, 2011, a “Decision and Action Agreement” was signed under which the General Administrator of the National Land Administration Authority (ANATI) affirmed that “coordination efforts will continue in order to continue the process to title

¹¹⁹ Certification issued by the National Environmental Authority, November 8, 2002 (evidence file, folio 557).

¹²⁰ Executive Decree 267 of October 2, 2002, “extending the sphere of application of Decree 5-A of April 23, 1982, for the adjudication, by sale, of state lots in the part of national territory that extends from Quebrada Cali to Quebrada Guayabo in the *corregimiento* of Tortí, Chepo district, province of Panama,” Official Gazette No. 24,652, October 3, 2002 (evidence file, folios 561 to 563). The Madungandí Comarca continued to be excluded from the application of the decree, and also the Emberá collective lands of Ipetí and Piriati, and the lands declare non-adjudicable under Executive Decree No. 123.

¹²¹ Communiqué of the Bayano indigenous communities in relation to the construction of the Bayano hydroelectric project, August 19, 2006 (evidence file, folios 566 to 567), *considerandum* 5 and second operative paragraph.

¹²² Petitioners’ brief of January 19, 2007 (evidence file, folios 2689 to 2717).

¹²³ Cf. Newspaper articles, including, “*Once heridos en manifestación*” [11 people injured in protest], La Prensa, October 25, 2007; “*Crece tensión por protestas de indígenas en Bayano*” [Tension grows due to indigenous protests in Bayano], Pánama América, October 25, 2007 (evidence file, folios 570 to 590).

¹²⁴ Law No. 72 of December 23, 2008 “establishing the special procedure for the adjudication of the collective ownership of lands of the indigenous peoples outside the comarcas,” Official Gazette No. 26,193, December 30, 2008 (evidence file, folios 7475 to 7479).

¹²⁵ Executive Decree No. 1, January 26, 2009, “amending article 2 of Decree No. 5-A of April 23, 1982,” Official Gazette 26,238, March 11, 2009. Available at: http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/2009/26238_2009.PDF. This is referenced in the Merits Report (merits file, folio 47). This decree maintained the prohibition to adjudicate state lands in the areas of the “Kuna and Emberá Indigenous Comarcas.”

¹²⁶ Cf. Procedure for request for free adjudication of collective ownership of lands granted in compensation to the communities of Ipetí and Piriati due to their displacement owing to the construction of the Bayano Dam (evidence file, folios 879 to 883).

¹²⁷ Cf. Communication of the National Land Administration Authority (ANATI) addressed to the Emberá Cacique General of Alto Bayano, January 26, 2011 (evidence file, folio 8276); Minutes of hearing No. 6 held before the Inter-American Commission on March 23, 2012 (evidence file, folio 4599).

the [...] lands requested, namely: Alto Bayano, Piriatí, Ipetí Emberá [and] Majé Cordillera” and that “as of this time, recognition and adjudication of possessory rights will be suspended within the sites included in the collective lands requested by the people.”¹²⁸

81. On February 8, 2012, state and indigenous authorities signed an agreement known as the “Piriatí Emberá Agreement” which established that “despite the requests for the adjudication of collective titles by the Emberá and Wounaan communities, the lands under consideration are invaded by settlers or unauthorized persons who allege that they have possessory rights issued by the municipal authorities of the provinces of Darien and Panama” and that “the Government undertakes to take the necessary steps to ensure that the indigenous communities are not deprived of their lands.” It was also agreed to set up “a commission to monitor the collective titling procedures until these had been totally adjudicated” composed of state and indigenous authorities and “to deliver the first collective titles by March 2012 at the latest.”¹²⁹ In 2011 and 2012, the National Land Administration Authority issued several resolutions in relation to the land tenure, including a certification of March 12, 2012, indicating that “the collective titling process in the area of Alto Bayano: Piriatí Emberá, Ipetí Emberá, Majé Emberá Drúa (Majé Cordillera and Unión Emberá), is being reviewed to continue with the appropriate procedure for the collective adjudication.”¹³⁰

82. In 2009, a private individual, C.C.M., requested the adjudication of a private property title in the *corregimiento* of Tortí, Chepo district,¹³¹ and the Caciques of the Alto Bayano filed a petition opposing this.¹³² ANATI responded to this individual’s request¹³³ on August 13, 2013, granting him title to a site of 96 hectares and 4,960.03 m². Subsequently, from October 14 to 19, 2013, an on-site inspection and verification of the boundaries of the territory of Alto Bayano and Río Piragua was conducted, with the help of members of the Kuna Comarca, corresponding to an “area of settler territory” within the Kuna Comarca of Madungandí.¹³⁴ On the same dates, an on-site inspection and verification was carried out of the boundaries of the Piriatí Emberá territory¹³⁵ and from November 27 to December 3, 2013, an on-site inspection and verification was conducted on the boundaries of the Ipetí Emberá territory.¹³⁶

¹²⁸ Cf. Decision and Action Agreement ANATI/MINGOB/People of Emberá and Wounaan Collective Lands, November 18, 2011 (evidence file, folio 597).

¹²⁹ Cf. Piriatí Emberá Agreement, February 8, 2012 (evidence file, folio 599).

¹³⁰ Certification issued by the General Administrator of the National Land Administration Authority (ANATI), March 12, 2012 (evidence file, folio 612). See also: Resolution No. ADMG-058-2011, National Land Administration Authority (ANATI), December 1, 2011 (evidence file, folio 607), and Resolution No. ADMG-[...]-2012, February 8, 2012 (evidence file, folios 609 to 610);.

¹³¹ Request for adjudication by payment, January 26, 2009 (evidence file, folios 4778 to 4779).

¹³² Communication of the Ministry of Agricultural Development addressed to the XV Prosecutor of the First Judicial Circuit of Panama, July 30, 2010 (evidence file, folio 4797); Agrarian procedure supports objection, May 25, 2010 (evidence file, folios 8699 to 8701). The XV Civil Circuit Court of the First Judicial Circuit by Order 1770 of November 17, 2011, ordered the joinder of the two petitions filed objecting to the adjudication and, in the absence of any follow-up, by Order 155 of January 30, 2012, considered that the objection had not been filed. The petitioners who had filed the objection appealed against Order 155 (evidence file, folios 8751 to 8758).

¹³³ Resolution No. ANATI-8-7-1254 of August 13, 2013 (evidence file, folios 8565 to 8566).

¹³⁴ Alto Bayano and Río Piragua Report, National Land Administration Authority (ANATI), October 2013 (evidence file, folios 8492 to 8495). In a communication of January 6, 2014, addressed to ANATI, representatives of the Kuna General Congress noted, in relation to this ANATI report that “the purpose of this inspection was to determine whether the settlers who wish to occupy land are within or outside the Madungandí Comarca and, if they are within the Comarca, they would be occupying collective property of the Comarca” and that “indicating that it is part of the territory of the settlers is to accept that those areas are not the property of the Kuna Comarca.”

¹³⁵ Cf. Piriatí Emberá Report, National Land Administration Authority (ANATI), October 2013 (evidence file, folio 8526).

¹³⁶ Cf. Ipetí Emberá Technical Report – Congress of Alto Bayano, National Land Administration Authority (ANATI), November 2013 (evidence file, folio 8506).

83. According to the evidence provided by the State, the title to the Ipetí Emberá lands is presumably being processed.¹³⁷ Regarding the Piriati lands, in their final written arguments, the representatives indicated that “on May 2, [2014,]” the title to collective ownership of the Piriati lands had been granted and provided a document dated April 30, 2014,¹³⁸ which effectively grants the Piriati Emberá community title to collective ownership of two parcels of land measuring 265 hectares and 3,840.95 m², and 3,678 hectares and 4,190.65 m², respectively, located in the *corregimiento* of Tortí, Chepo district.¹³⁹ In this regard, the representatives alleged that the State had granted C.C.M. title to at least part of these lands in 2012 (*supra* para. 80). They also forwarded an agreement dated November 27, 2013, signed by indigenous representatives and a representative of ANATI, which indicates that the latter undertook “[t]o annul the administrative act adjudicating lands to [C.C.M.]”¹⁴⁰ However, no evidence was provided to prove that the said title had been annulled.¹⁴¹

84. Finally, regarding the Kuna people, on February 23, 2014, the Minister of the Interior signed an “Undertaking” with the Cacique of the Kuna Comarca which included a commitment “to take up the case of displacement as soon as possible” and that “the case would be dealt with by March 10, [2014].”¹⁴²

H. Administrative and judicial actions file by the Kuna and Emberá peoples to protect their lands

H.1. Communications and actions before local, provincial and national authorities

85. Since at least 1990, the presumed victims have taken different measures before authorities of the local, provincial and national governments, including the President of the Republic, to call attention to their situation,¹⁴³ and to demand compliance with the above-

¹³⁷ Cf. Report on the Communities of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano in Panama – Current status of the request for delimitation, demarcation and titling of the Ipetí and Piriati collective lands, National Land Administration Authority (ANATI), April 15, 2014 (evidence file, folio 8489). This document indicates that “the file of the Ipetí Community will be sent to the ANATI Regional Office tomorrow (April 16, 2014), [...] for the plan or diagram to be verified and to proceed to approve it and, thus, continue the procedure for the issue of the title adjudicating collective lands.”

¹³⁸ The Court had requested a copy of this title as helpful evidence.

¹³⁹ Cf. Resolution No. ADMG 164-2014, National Land Administration Authority (ANATI), April 30, 2014 (evidence file, folios 8650D to 8650H).

¹⁴⁰ Cf. Agreement of November 27, 2013 (evidence file, folio 8650I).

¹⁴¹ In this regard, the State alleged that the agreement of November 27, 2013, “reveals a promise to annul the granting of a property title, a process that is only possible by filing a judicial action to annul a previously executed administrative act.”

¹⁴² Cf. Undertaking, February 23, 2014 (evidence file, folio 8579).

¹⁴³ Cf. Communication of the Kuna Regional Congress to the President of the Republic, June 11, 1990 (evidence file, folio 614), and Communication of the Kuna Comarca Regional Congress to the President of the Republic, February 21, 2000 (evidence file, folios 810 and 811).

mentioned agreements and resolutions,¹⁴⁴ legal recognition of their lands,¹⁴⁵ and the protection of those lands from incursions by non-indigenous persons.¹⁴⁶

H.2. Administrative and criminal proceedings filed by the presumed victims

H.2.1. Administrative eviction procedures

86. On April 5, 2002, the traditional authorities of the Kuna Comarca filed an administrative procedure before the mayor of the Chepo district against all non-indigenous occupants of the lands included within the borders of the Kuna Comarca and especially the Catriganti, Loma Bonita, Curtí and Wacuco communities, requesting the eviction of the intruders.¹⁴⁷ Given the lack of response for almost a year, on February 16, 2003, they submitted a request for the eviction of the settlers to the Governor of the province of Panama¹⁴⁸ and, on March 7 that year, they filed a formal eviction request before the said authority.¹⁴⁹

87. On March 10, 2004, one year after the eviction request, the Governor of the province of Panama sent note No 033-04 to the Attorney General asking his opinion as to which authorities should examine this request. In note C-No. 73 of March 31, 2004, the Attorney General responded that "the Governor of Panama could not examine the eviction request" and that it should be examined by "an official appointed especially by the President of the Republic, together with the Minister of the Interior and Justice."¹⁵⁰ In August 2004, the Governor declared that he did not have the necessary competence.¹⁵¹

88. On January 24, 2005, the representative of the authorities of the Kuna Comarca filed a formal complaint requiring the eviction of intruders before the President of the Republic.¹⁵² On February 15, 2005, the authorities of the Kuna Comarca sent a letter to the President of the Republic in which they indicated that the legal adviser of the Ministry of the Presidency had forwarded their complaint to the Ministry of the Interior and Justice indicating that it should be

¹⁴⁴ Cf. Communication of the Kuna General Congress to the Minister of the Interior and Justice, March 12, 1992 (evidence file, folio 620); Request to comply with agreement addressed to the Attorney General by the representatives of the Caciques of the Kuna Comarca, April 24, 1997 (evidence file, folios 622 to 625); Communication of the Kuna General Congress to the Governor of Panama, July 8, 2003 (evidence file, folio 677), and Communication of the Kuna Comarca to the Minister of the Interior and Justice, August 14, 2003 (evidence file, folios 678 and 679); Communication of the Kuna General Congress to the Vice Minister of the Interior and Justice, January 10, 2006 (evidence file, folios 804 and 805).

¹⁴⁵ Cf. Communication of the Caciques of the Kuna Comarca to the Minister of the Interior and Justice, June 21, 1991 (evidence file, folios 616).

¹⁴⁶ Cf. Communication of the Caciques of the Kuna Comarca to the Minister of the Interior and Justice, January 20, 1992 (evidence file, folio 618); Communication of the General Congress of the Kuna Comarca to the Governor of the province of Panama, April 27, 1997 (evidence file, folios 631 to 632); Communication of the General Congress of the Kuna Comarca to several state authorities, July 19, 1998 (evidence file, folio 680 to 681); Communication of the General Congress of the Kuna Comarca to the Presidential adviser, September 28, 2002 (evidence file, folio 812), and Communication of authorities of the Kuna Comarca to the mayor of the Chepo district, October 5, 1997 (evidence file, folio 823).

¹⁴⁷ Cf. Request to evict intruders, April 5, 2002 (evidence file, folios 656 to 658).

¹⁴⁸ Cf. Communication of the General Congress of the Kuna Comarca to the Governor of the province of Panama, February 16, 2003 (evidence file, folios 634 to 635).

¹⁴⁹ Cf. Eviction request, March 7, 2003 (evidence file, folio 653).

¹⁵⁰ Note C-No. 73, of the Attorney General, March 31, 2004 (evidence file, folios 682 and 684).

¹⁵¹ See, Action to evict intruders, filed with the President of the Republic, January 24, 2005 (evidence file, folio 820).

¹⁵² See, Action to evict intruders, filed with the President of the Republic, January 24, 2005 (evidence file, folio 820).

sent to the National Indigenous Policy Directorate “even though those two entities in the two Governments before [the current one] ha[d] been incapable of resolving the problem and did not have competence to do so.”¹⁵³

89. In a communication of October 26, 2006, presented on October 31 that year, the representative of the traditional authorities sent a request for information to the President to obtain information of the status of the case.¹⁵⁴ The case file does not include an answer to this request. On June 4, 2008, Executive Decree No. 247 was issued “[w]hich added articles to Executive Decree 228 of December 3, 1998,” establishing that “[t]he administration of administrative justice, within the special political division of the Kuna Comarca of Madungandí, will be entrusted to a Police *Corregidor* [a police chief].”¹⁵⁵ A *corregidor* was appointed for the Kuna Comarca, and he exercised this function in 2008 and 2009.¹⁵⁶

90. As indicated by the Commission and the representatives, and undisputed by the State, this authority carried out some evictions in 2008¹⁵⁷ and, on March 23, 2009, the representatives of a traditional authority of the Kuna Comarca filed a summary administrative action for the protection of the Comarca’s lands before the *Corregidor* of the special district of Madungandí against individuals who had supposedly invaded lands belonging to the Comarca.¹⁵⁸ In October 2011, a new *Corregidor* was appointed.¹⁵⁹

91. On December 13, 2011, an administrative hearing on the request to evict intruders was held before the new *Corregidor* in the presence of representatives of the Kuna Comarca and settlers during which an order was issued to inspect the disputed area,¹⁶⁰ and this took place in January 2012, in different sectors.¹⁶¹ On January 31, that year, the *Corregidor* ordered the eviction of the settlers on the Río Piragua lands within the Kuna Comarca, suspending this until March 30, 2012, to give the settlers “the opportunity to remove their belongings”;¹⁶² also, in Resolution No. 5 of April 2, 2012, the *Corregidor* required “the eviction owing to intrusion of the persons who illegally occupy lands of the Comarca in the Lago, Río Piragua, Río Bote, Wacuco and Tortí sector and in any other place of the Kuna Comarca of Madungandí.”¹⁶³ The settlers

¹⁵³ Communication of the Caciques of the Kuna Comarca addressed to the President of the Republic, February 15, 2005 (evidence file, folio 669).

¹⁵⁴ Request for information, October 26, 2006 (evidence file, folios 831 to 832).

¹⁵⁵ Cf. Executive Decree No. 247 of June 4, 2008, “That adds articles to Executive Decree 228 of December 3, 1998,” Official Gazette No. 26,083, July 15, 2008, articles 66a and 66b (evidence file, folio 834). This Decree established that the *Corregidor* “shall be appointed by the President of the Republic, together with the Minister of the Interior and Justice.”

¹⁵⁶ Cf. State report of May 14, 2012 (evidence file, folio 4576); Petitioners’ brief of July 13, 2012 (evidence file, folio 5291), and Petitioners’ brief of May 16, 2012 (evidence file, folios 5593).

¹⁵⁷ Cf. Petitioners’ brief of July 13, 2012 (evidence file, folio 5292), and Petitioners’ brief of May 16, 2012 (evidence file, folios 5593).

¹⁵⁸ Cf. Summary administrative proceeding – power of attorney and request, March 23, 2009 (evidence file, folios 838 to 840).

¹⁵⁹ State report of May 14, 2012 (evidence file, folio 4576), and Petitioners’ brief of May 25, 2011 (evidence file, folio 4817). The parties agreed that there was no *Corregidor* during a certain period in 2010, before a new *Corregidor* was appointed in 2011.

¹⁶⁰ Minutes of hearing, Office of the Special *Corregidor* of Madungandí (evidence file, folios 843 to 845), and Communication of the *Corregidor* of Madungandí to the Director of Local Governments, December 14, 2011 (evidence file, folio 842).

¹⁶¹ Report of field trip, Office of the Special *Corregidor* of Madungandí, January 3, 2012 (evidence file, folios 5135 to 5139).

¹⁶² Minutes of hearing, Office of the Special *Corregidor* of Madungandí, January 31, 2012 (evidence file, folios 5124 to 5125).

¹⁶³ Resolution No. 5, Office of the Special *Corregidor* of Madungandí, April 2, 2012 (evidence file, folio 849).

filed a remedy of appeal against this,¹⁶⁴ which was decided by the Minister of the Interior in Resolution No. 197-R-63 of August 22, 2012, establishing that "Resolution No. 5 of April 2, 2012, in its entirety, was ratified."¹⁶⁵ Subsequently, on May 18, 2012, the *Corregidor* again ordered an eviction owing to the intrusion of persons "who illegally occupy lands of the Comarca."¹⁶⁶

H.2.2. Administrative procedures before the National Environmental Authority based on environmental degradation

92. In early January 2007, members of the Kuna Comarca filed a complaint with the National Environmental Authority (ANAM) based on presumed environmental degradation in their territory. The Regional Administrator of that body admitted the complaint on February 8, 2007,¹⁶⁷ following an inspection visit on January 30, 2007, during which he recorded "the 'socuela' (clearing) of a forested area of approximately one (1) hectare" in that territory by four persons found *in flagrante*, and concluded that the Forestry Law had been violated.¹⁶⁸ In a resolution of May 21, 2007, ANAM condemned four persons to pay jointly B/.500.00 (five hundred balboas) owing to destruction of the forest without the corresponding permits.¹⁶⁹ The case file does not show whether the fine was paid. Another inspection was made on March 14 and 15, 2007, following a complaint filed by the representatives of the Kuna Comarca, during which three areas were examined in which logging had been carried out over approximately three (3) hectares, and it was again concluded that the Forestry Law had been violated.¹⁷⁰

H.2.3. Administrative procedures for the adjudication of collective ownership

93. On June 13, 1995, the Emberá Community of Ipetí submitted a claim for the demarcation and adjudication of collective lands with the President of the Republic requesting the "approval of the adjudication of 3,198 hectares, free of charge, under a collective title, to the Ipetí Emberá Community."¹⁷¹ On September 8, 1995, the representatives of the Ipetí Emberá Community requested a meeting with the Director of Legal Services of the Presidency of the Republic, after receiving a note from the latter on August 2, 1995, concerning the community's claim.¹⁷² The case file does not show whether the representatives' request was answered.

94. On January 27, 1999, a request was submitted to the President of the Republic for the Cabinet Council to grant, free of charge, a site with an area of 301 hectares and 9,343 m² to the

¹⁶⁴ Remedy of appeal (evidence file, folio 4960).

¹⁶⁵ Resolution No. 197-R-63, Minister of the Interior, August 22, 2012 (evidence file, folios 852 to 853).

¹⁶⁶ Resolution No. 6, Office of the Special *Corregidor* of Madungandí, May 18, 2012 (evidence file, folios 4962 to 4963).

¹⁶⁷ Resolution No. ARAPE-AGICH-030-2007. Regional Administration of the National Environmental Authority (ANAM), May 21, 2007 (evidence file, folio 860).

¹⁶⁸ Inspection report No. 006-2007, Regional Administration of the National Environmental Authority (ANAM) (evidence file, folios 857 to 858). The information in the case file reveals that "socuela" refers to activities related to the clearing or removal of vegetation from a plot of land.

¹⁶⁹ Resolution No. ARAPE-AGICH-030-2007, Regional Administration of the National Environmental Authority, May 21, 2007 (evidence file, folio 864 to 865).

¹⁷⁰ Technical report No. 18, Regional Administration of the National Environmental Authority (ANAM), March 14 and 15, 2007 (evidence file, folio 867).

¹⁷¹ Cf. Request for the demarcation and adjudication of collective lands, June 13, 1995 (evidence file, folios 869 to 871).

¹⁷² Cf. Centro de Asistencia Legal Popular (CEALP) communication to the Director of Legal Services of the Presidency of the Republic, September 8, 1995 (evidence file, folio 873).

Association for the Development of the Piriati Emberá Community.¹⁷³ The case file does not show whether this request was answered.

95. On October 27, 2009, a request was submitted to the National Agrarian Reform Directorate for the adjudication, free of charge, of the collective ownership of lands granted in compensation to the Ipetí and Piriati communities. This referred to an Ipetí community parcel of 3,191 hectares and a Piriati community parcel of 3,754 hectares; the request also asked that any procedure involving third party property titles or the certification of possessory rights in relation to these parcels be suspended.¹⁷⁴ This request was repeated in January 2011¹⁷⁵ and, in August that year, a field trip was organized by the National Political-Administrative Boundaries Commission and other entities to evaluate the collective lands requested by the Piriati and Ipetí communities.¹⁷⁶

96. Finally, between October and December 2013, verifications were conducted on these lands and a collective property title was granted to the Piriati Emberá community in April 2014 (*supra* paras. 80 and 81).

H.2.4. Criminal proceedings undertaken owing to the incursion of "settlers" and environmental offenses

a. Complaint based on the offense of criminal association, usurpation, damage to property, illicit enrichment, and environmental and other related offenses

97. On December 20, 2006, the representatives of the Caciques of the Kuna Comarca filed a complaint with the Attorney General against 127 persons. The complaint also accused the *Corregidores* of two *corregimientos*, the mayor of Chepo, the Governor of the province of Panama, and the President of the Republic and "other public officials who had failed to perform their public duty to avoid or resolve the unlawful invasions of the lands of the Kuna Comarca" of the offense of abuse of authority and breach of the duties of public servants.¹⁷⁷

98. In a resolution of January 29, 2007, the Attorney General decided to forward the investigation to the Circuit Prosecutor of the First Judicial Circuit of Panama. In a resolution of February 13, 2007, the XV Prosecutor of the First Judicial Circuit of Panama agreed to conduct the preliminary investigation and declared it open. On February 28, 2007, the same Prosecutor forwarded the case to the Prosecutor of the Special Environmental Circuit and, on March 14, 2007, the V Prosecutor of the Special Circuit for Offenses related to the Theft and Robbery of Automobiles and Accessories agreed to conduct the preliminary investigation.¹⁷⁸ During the processing of the case before the Commission, the State reported that "the Attorney General

¹⁷³ Cf. Request of January 11, 1999 (presented on January 27, 1999) (evidence file, folios 875 to 876). In its Merits Report, the Commission refers to a request of the same date presented by the Emberá Community of Ipetí, which does not appear in the case file.

¹⁷⁴ Cf. Request for the adjudication, free of charge, of the collective ownership of lands granted in compensation to the Ipetí and Piriati communities based on their displacement owing to the construction of the Bayano Dam (evidence file, folios 881 to 882). This request to suspend procedures referred specifically to the request for titles presented by C.C.M.

¹⁷⁵ Cf. Communication of the National Land Administration Authority (ANATI) addressed to the Emberá Cacique General of Alto Bayano, January 26, 2011 (evidence file, folio 8276), and Minutes of hearing No. 6, held before the Inter-American Commission on March 23, 2012 (evidence file, folio 4599).

¹⁷⁶ Cf. Technical report – Field trip to review the proposed collective lands in the province of Darien (evidence file, folios 4720 and 4724 to 4725).

¹⁷⁷ Cf. Criminal action (File 212), December 20, 2006 (evidence file, folios 640 to 641, 645 and 648).

¹⁷⁸ Cf. File No. 212 (evidence file, folios 712 to 713, and 715 to 719).

had advised that it had been unable to locate [this] criminal action."¹⁷⁹ The Court notes that no additional evidentiary documentation was presented in this regard.

b. Criminal proceedings for environmental offenses before the XI Prosecutor of the First Judicial Circuit

99. On January 16, 2007, the Caciques of the Kuna Comarca filed a complaint concerning environmental offenses with the corresponding Special Unit of the Judicial Technical Police based on environmental degradation on the lands of the Comarca, supposedly caused by intruders.¹⁸⁰ On January 23, 2007, the Environmental Offenses Unit sent out several communications to determine the identity of two individuals presumed to be responsible, which were answered on January 25 that year.¹⁸¹

100. By a resolution of January 25, 2007, the Assistant Prosecutor General ordered the opening of the preliminary investigation. On January 29, 2007, the statement expanding the complaint was taken by the Assistant Prosecutor who, by a decision of January 30, 2007, ordered the file to be referred to the Special Prosecutor for Environmental Offenses to continue the preliminary investigation.¹⁸²

101. On February 1, 2007, the representatives of the General Congress of the Kuna Comarca filed a criminal complaint based on an environmental offense against three individuals with the XI Circuit Prosecutor of Panama.¹⁸³ On February 2, 2007, the XI Prosecutor of the First Judicial Circuit assumed the preliminary investigation. On February 28, 2007, he admitted the Cacique General of the Kuna Comarca as plaintiff and, on April 24, 2007, incorporated into the case the three individuals presumed to be responsible as defendants.¹⁸⁴ On August 22 and September 14, 2007, the Prosecutor conducted an on-site visit.¹⁸⁵ On May 29, 2008, he issued Recommendation No. 151 in which he concluded, among other matters, that "there [was] no evidence whatsoever to determine the responsibility of the defendants" and requested the provisional dismissal of the investigation.¹⁸⁶ The Court has no further information on this proceeding.¹⁸⁷

c. Criminal proceeding before the V Special Prosecutor of the First Circuit of Panama

102. On January 30, 2007, a private individual, Mr. Huertas (who also represents the presumed victims before the inter-American system) filed a complaint with the Judicial Technical Police of Chepo district against three individuals based on an environmental offense and any

¹⁷⁹ State report of September 17, 2012 (evidence file, folio 5102).

¹⁸⁰ Cf. Complaint based on an environmental offense (File No. 0118), January 16, 2007 (evidence file, folios 887 and 888).

¹⁸¹ Cf. Several communications of the Environmental Offenses Unit addressed to other state authorities, January 23, 2007; Communications of the Judicial Technical Police and the Communications Unit to the Environmental Offenses Unit, January 25, 2007 (evidence file, folios 898 to 911).

¹⁸² Cf. File No. 0118 (evidence file, folio 916, 917, 924 and 930).

¹⁸³ Cf. Criminal complaint (File No. 0118), February 1, 2007 (evidence file, folios 935 to 937).

¹⁸⁴ Cf. File No. 0118 (evidence file, folios 933, 954 and 972).

¹⁸⁵ Cf. Transcript of the on-site inspection (evidence file, folios 974 and 977).

¹⁸⁶ Cf. Prosecutor's Recommendation No. 151, XI Circuit Prosecutor of the First Judicial Circuit of Panama, May 29, 2008 (evidence file, folios 980 and 994).

¹⁸⁷ According to the Inter-American Commission, the two complaints (*supra* paras. 96 and 97) were joindered in a single proceeding (merits file, folios 90 and 91). However, this information does not appear in the evidence file.

other offense that was found following an investigation, because he had discovered them *in flagrante* indiscriminately felling trees within the Kuna Comarca during a procedure he was conducting with several state authorities.¹⁸⁸ The same day, the Chepo Judicial Technical Police decided to admit the case and begin the preliminary investigation; four individuals were detained by the local Police as a preventive measure and brought before the Judicial Technical Police the following day.¹⁸⁹ On January 31, 2007, the complainant expanded the complaint filed with the Judicial Technical Police, an on-site visit was conducted¹⁹⁰ and the Judicial Technical Police forwarded the case file to the Chepo municipal attorney. On February 1, 2007, the said attorney agreed to take on the investigation, opened the preliminary investigation and took statements from the said individuals¹⁹¹ and on February 12 that year, the Chepo municipal attorney forwarded the case file to the Circuit Prosecutor of the First Judicial Circuit; on February 23, 2007, the V Special Prosecutor for Offenses related to the Theft and Robbery of Automobiles and Accessories assumed responsibility for the preliminary investigation and conducted various procedures in March and April 2007.¹⁹²

103. On July 29, 2007, the Prosecutor recommended to the judge that he issue an order to provisionally dismiss the case and, on December 27, 2007, the X Criminal Circuit Court of the First Judicial Circuit of the province of Panama issued this, noting that "the damage has not had a significant impact on the environment, [and] the place where] those presumably responsible were found] [...] was not a protected area."¹⁹³

d. Criminal proceeding before Chepo Judicial Inquiry Subdirectorate

104. On August 16, 2011, a *sahila* of a community of the Kuna Comarca filed a complaint with the Assistant Prosecutor of the Chepo Judicial Inquiry Subdirectorate based on an offense against the Comarca, relating to land invasion and logging over approximately 400 hectares in three sectors of the Comarca.¹⁹⁴

105. That same day, the Assistant Prosecutor of the Chepo Judicial Inquiry Subdirectorate declared the investigation open and took the complainant's statement. On August 24 and September 22, 2011, on-site inspections were conducted. On September 12, 2011, the complainant filed an expansion of the complaint based on new incursions. On September 26, 2011, the file was forwarded to the municipal attorney and, on October 17, 2011, the complainant filed a further expansion of the complaint.¹⁹⁵ The case file contains no additional information in this regard.

¹⁸⁸ Cf. Complaint No. CHE-029-2007 of January 30, 2007 (File No. 258) (evidence file, folios 1000 and 1001, and 1003), and Complaint notification, Judicial Technical Police - Chepo Agency, January 30, 2007 (evidence file, folio 1004).

¹⁸⁹ Cf. Incident report, National Police - Panama Police Eastern Region, January 30, 2007 (evidence file, folios 1013 and 1014); Report on opening of preliminary investigation, Judicial Technical Police of the Chepo district, January 30, 2007 (evidence file, folio 999), and Report, Judicial Technical Police - Chepo Agency, January 31, 2007 (evidence file, folio 1026).

¹⁹⁰ Expansion of complaint (File No. PTJ. CHE-029-2007), Judicial Technical Police, January 31, 2007 (evidence file, folio 1049); Report on on-site visit and requisitions at the crime scene, Judicial Technical Police - Chepo Agency, January 31, 2007 (evidence file, folio 1063), and Report on closure of preliminary investigation, Judicial Technical Police - Chepo Agency, January 31, 2007 (evidence file, folio 1066).

¹⁹¹ File No. 258 (evidence file, folios 1068, 1074 to 1089 and 1130 to 1232).

¹⁹² File No. 258 (evidence file, folios 1068, 1074 to 1089 and 1130 to 1232). These procedures were conducted by the said Prosecutor and by the V Special Prosecutor for environmental offenses.

¹⁹³ Provisional dismissal No. 436-07, X Criminal Circuit Court of the First Judicial Circuit of the province of Panama, December 27, 2007 (evidence file, folios 1234 and 1235).

¹⁹⁴ Complaint AID-FAR-CHE-298-2011, Assistant Prosecutor of the Chepo Judicial Inquiry Subdirectorate, August 16, 2011 (evidence file, folios 1237, 1239 and 1241).

¹⁹⁵ Evidence file, folios 1244, 1245, 1248, 1259, 1260, 1267, 1272 and 1281).

VII MERITS

106. Having decided the preliminary objections (*supra* Chapter IV), the Court will now consider and decide the merits of the dispute. In order to determine the scope of the State's responsibility in relation to the preceding facts (*supra* Chapter VI), the Court will analyze the following: 1. The right to property and the obligation to adapt domestic law (Articles 21 and 2, in relation to Article 1(1) of the Convention); 2. The right to judicial guarantees and an adequate and effective remedy and the obligation to adapt domestic law (Articles 8(1), 25 and 2, in relation to Article 1(1) of the Convention); 3. The obligation to respect and ensure rights without discrimination and equality before the law (Article 24, in relation to Article 1(1) of the Convention).

VII.1 THE RIGHT TO PROPERTY AND THE OBLIGATION TO ADAPT DOMESTIC LAW (Articles 21 and 2 in relation to Article 1(1) of the Convention)

A. The alleged failure to delimit, demarcate and title the lands of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano (Article 21 in relation to Article 1(1) of the Convention)

A.1. Arguments of the Commission and of the parties

107. The Commission indicated that the State acknowledges the right to collective property of the Kuna and Emberá peoples, so that the main dispute relates to the delimitation, demarcation and effective protection of the indigenous territory and, in the case of the communities of the Emberá people, also the delivery of a legal title. It added that, during the procedure before the Commission, the State held "contradictory positions" that ranged from recognizing the said territorial rights to "denying the existence of a 'special regime for the purposes of tenure, conservation and use by the indigenous population,'" and that this "ambivalence [was] a reflection of its actions domestically" that had "been characterized by signing commitments and subsequently denying them." The Commission added that Panama had not only deprived the Kuna and Emberá peoples of "the material possession of their territory, but also of the fundamental basis for developing their culture, spiritual life, integrity and economic survival."

108. The representatives agreed with the Commission and indicated that the Emberá communities of Bayano – Piriati, Ipetí Emberá, Maje Cordillera and Unión – did not have collective property titles, "and no demarcation process had been carried out," so that the lands were permanently unprotected, which caused great anguish to the members of these communities. They also indicated that the state authorities had adjudicated parcels to third parties in the territory claimed by the Emberá people, granting individual property titles and exacerbating the situation of legal uncertainty. In their final written arguments, they indicated that on May 2, [2014,] the Piriati Emberá community had received a collective property title, but "this title included more than 96 hectares of land that – although it had been assigned to them in reparation – had been titled by the State [to C.C.M.] a non-indigenous person in 2012." The representatives also indicated, with regard to the Kuna people of Madungandí, that it had taken 30 years for the agreements granting titles and rights to this people to be recognized by Law No. 24 of January 12, 1996. They added that, although the said law formally recognized the right to their collective property, the boundaries of the Kuna Comarca had only been physically demarcated four years later, and that had resulted in a climate of permanent uncertainty.

109. The State referred, in general, to domestic law and to recognition of the collective property of the indigenous peoples in Panama. It added that, in 2004, under the Project for the

Sustainable Development of the Darien, the territories of the Kuna of Madungandí and the Emberá had been delimited, which revealed that the affirmation in the representatives' petition that their territories had not been delimited and demarcated was unsubstantiated. The State indicated that all the collective property rights of the Kuna indigenous people had been fully recognized and their territories demarcated and protected because Law 24 of January 12, 1996, had created the Kuna Comarca and established its boundaries. It added that, therefore, when the petitioners lodged their petition before the Commission in 2000, their territorial rights had been recognized.

110. Regarding the Emberá communities of Bayano, the State indicated that the request for the adjudication of collective lands was being processed and a series of administrative requirements had to be fulfilled in order to comply with the laws in force. It also indicated that it had responded to the said communities by issuing Law No. 72 of December 23, 2008, which established a special procedure for recognition of the collective property of indigenous groups outside the Comarcas. In addition, the State referred to the National Agrarian Reform Directorate that, in a Resolution of March 18, 2003, had suspended all procedures and requests for possessory rights to lands located in the Emberá communities of Ipetí and Piriati and that the National Land Administration Authority, in Resolution No ADMG-058-2011, had ratified the suspension of private property titles in the Alto Bayano region.

A.2. Considerations of the Court

111. As the Court has indicated in its consistent case law, recently in the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, Article 21 of the American Convention protects the close relationship that the indigenous peoples have with their lands, as well as with the natural resources and the intangible elements derived from them. The indigenous peoples have a community-based tradition relating to a communal form of collective land ownership; thus, land is not owned by the individual but by the group and its community.¹⁹⁶ These notions of land ownership and possession do not necessarily conform to the classic concept of property, but the Court has established that they deserve equal protection under Article 21 of the American Convention. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under this provision illusory for millions of people.¹⁹⁷

112. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.¹⁹⁸

¹⁹⁶ Cf. *Case of the Mayagna (Sumo) Awajitjuna Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C. 79, paras. 148 and 148, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 17, 2012. Series C. 245, para. 145.

¹⁹⁷ Cf. *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C. 146, para. 120, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 17, 2012. Series C. 245, para. 145.

¹⁹⁸ Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C. 125, paras. 124, 135 and 137, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 146.

113. The Court has interpreted Article 21 of the Convention in conjunction with other rights recognized by the State in its domestic laws or in other relevant international laws, in light of Article 29(b) of the Convention. Therefore, when examining the meaning and scope of Article 21 of the Convention in this case, the Court will take into account, in light of the said general rules of interpretation established in Article 29 of this instrument and as it has done previously,¹⁹⁹ the aforementioned special significance of the communal ownership of the land for the indigenous peoples, as well as the measures taken by the State to ensure that the said right is fully effective.

114. Moreover, regarding the obligations that arise from the provisions of Panama's domestic law, the Court notes that the Constitution recognizes the right to collective property of the indigenous peoples and, on this basis, the Court will define the scope of Article 21 of the Convention. Article 127 of the current Constitution (Article 116 of the 1972 Constitution in force at the time of the facts) stipulates: "The State guarantees to the indigenous communities the reserve of the necessary lands and the collective ownership of these to ensure their economic and social well-being. The law shall regulate the procedures to be followed to achieve this goal and the corresponding boundaries within which the private appropriation of lands is prohibited." In addition, that provision is not restricted to the ownership of ancestral lands, but refers to the "reserve of the necessary lands [...] to ensure their economic and social well-being." Therefore, since 1946, the Panamanian Constitution has recognized the right of the indigenous peoples to the ownership of the land (*supra* para. 59) and, with the entry into force of the 1972 Constitution in October that year, the State had the obligation to recognize those rights legally.

115. In addition, on May 8, 1969, Executive Decree No. 123 (*supra* para. 63) had been issued which declared the alternative lands "non-adjudicable," establishing that "[t]he purpose of the non-adjudicable nature of these lands is to compensate the area of the actual Indigenous Reserve that will be flooded by the reservoir of the Bayano Hydroelectric Project."²⁰⁰ Similarly, on July 8, 1971, Executive Decree No. 156 was issued which indicated that "[t]he indigenous groups that inhabit the actual Bayano Indigenous Reserve] will have to relocate to areas that have been established as non-adjudicable by Executive Decree No. 123 of May 8, 1969, in compensation for the area of the actual indigenous reserve that will be flooded."²⁰¹ Consequently, the Court considers that by issuing this decree, the State assumed an obligation to respect and to ensure the effective enjoyment by the indigenous peoples of the right to ownership of the lands assigned to them.

116. Regarding international obligations, the Court notes that article 11 of ILO Convention No. 107, ratified by Panama on June 4, 1971, establishes that: "[t]he right of ownership, collective or individual, of the members of the populations concerned [indigenous, tribal and semi-tribal] over the lands which these populations traditionally occupy shall be recognised."

117. The Court also recalls its case law concerning the communal ownership of indigenous lands according to which it has indicated, *inter alia*, that: (1) the effects of the traditional possession of indigenous peoples of their lands are equivalent to the title of full ownership granted by the State; (2) traditional possession grants indigenous peoples the right to demand

¹⁹⁹ Cf. *Case of the Mayagna (Sumo) Awas Tingni Community*, para. 148, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 161.

²⁰⁰ Executive Decree No. 123 of May 8, 1969, "declaring some lands non-adjudicable and suspending the processing of some adjudication requests," Official Gazette No. 16,367, May 23, 1969 (evidence file, folio 376 to 377), *considerandum*.

²⁰¹ Executive Decree No. 156 of July 8, 1971 "establishing a Special Compensation Fund to Assist the Indigenous Peoples of the Bayano," Official Gazette No. 16,801, July 26, 1971 (evidence file, folio 379), *considerandum*.

official recognition of ownership and its registration, and (3) the State shall delimit, demarcate and grant collective title to the land to the members of indigenous communities.²⁰²

118. In addition, it should be pointed out that various Member States of the Organization of American States (OAS) that have accepted the Court's compulsory jurisdiction – for example, Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Honduras, Paraguay, Peru and Venezuela – have, in some way, incorporated the obligations to delimit, demarcate and title indigenous lands into their domestic laws, at least in the 1970s,²⁰³ 1980s,²⁰⁴ 1990s²⁰⁵ and 2000s.²⁰⁶ Thus, nowadays, the States have clearly recognized their obligation to delimit, demarcate and grant title to the lands of the indigenous peoples. Furthermore, the 2007 United Nations Declaration on the Rights of Indigenous Peoples, signed by Panama, establishes that the States shall give legal recognition and protection to the lands, territories and resources of the indigenous peoples.²⁰⁷

²⁰² Cf. *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C. 124, para. 209; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 151 and 153, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 14, 2010. Series C. 214, para. 109.

²⁰³ Brazil: Law 6001 of 1973; Costa Rica: Indigenous Peoples Law of 1977, and Peru: Law on Native Communities and Agrarian Development of Forests and Forest Edges, Decree Law 22175 of 1978, regulated in 1979.

²⁰⁴ Argentina: Law 23302 (1985) on Indigenous Policy and support for the Aboriginal Communities, known as the Comprehensive Aboriginal Law of the province of Formosa, and Decree 574 of 1985; Law 2378 of 1984 on the survey and demarcation of lands in the province of Chubut; the 1986 Law on aboriginal promotion and development of the province of Salta, and Law 2727 (1987) of the province of Misiones. Brazil: Decree No. 92470 of 1986. Paraguay: Law No. 1372 of 1988 amended by Law No. 43 of 1989.

²⁰⁵ Bolivia: Supreme Decree 22609 (1990), recognizing the villages of Iviato, Cantón San Javier, province of Cercado in the department of Beni, as indigenous territory of the Siriono people; Supreme Decree 22611 of September 24, 1990, declaring the region of Chimanes to be an Indigenous Area and establishing the socio-economic area for the survival and development of the Chimanes, Mojeños, Yuracarés and Movimas indigenous communities and settlements that live there; Supreme Decree 23110 (1992) recognizing as Pilon-Lajas Indigenous Territory, in favor of the original communities of the Mosestenes and Chimanes peoples, their settlement area located between the departments of La Paz and Beni, in the provinces of Sud Yungas, Larecaja, Franz Tamayo and Ballivian and creating the Pilon-Lajas Biosphere Reserve; Supreme Decree 23112 (1992), recognizing as Chiquitano No. 1 Indigenous Territory the series of lands situated in the cantons of Santa Rosa del Palmar, San Pedro and Concepción in the province of Ñuflo de Chávez, department of Santa Cruz; Supreme Decree 23500 (1993), recognizing in favor of the Weenhayek (Mataco) indigenous people the legal ownership of the lands they traditionally inhabit. Brazil: Decree No. 1,775 (1996), on the administrative procedure for the demarcation of indigenous lands and other provisions. Colombia: Colombian Constitution of 1991, article 329; Law 160 of 1994, "creating the National Agrarian Reform and Rural Development System; establishing a subsidy for land acquisition; amending the Colombian Agrarian Reform Institute, and establishing other provisions"; Decree 2164 (1995), "partially regulating Chapter XIV of Law 160 (1994) with regard to the award and titling of lands to the indigenous communities for the constitution, restructuring, expansion and rehabilitation of the Indigenous Reserves in national territory." Venezuela: 1999 Constitution of the Bolivarian Republic of Venezuela, article 119.

²⁰⁶ Argentina: Law 25,510 (2001), "authorizing the national Executive to transfer, free of charge, to the Mapuche Cayún Group lands located in the jurisdiction of the Lanín National Reserve"; Law 26,160 (2006), "declaring an emergency concerning possession and ownership of lands traditionally occupied by the indigenous communities, the original inhabitants of the country, whose legal personality has been registered in the National Register of Indigenous Communities or the competent provincial agency or a pre-existing one," and National Program for the Territorial Survey of Indigenous Communities. Bolivia: New Constitution of 2008, articles 30.II.6 and 31.II; Law 339 of 2013, "law on the delimitation of territorial units"; Supreme Decree 1560 of 2013, "regulation of Law 339 on delimitation of territorial units." Ecuador: 2008 Constitution, articles 57(5) and 60; Forestry Law for the conservation of natural areas and wildlife, 2004. Honduras: Decree No. 82-2004, "Property Law" (2004). Venezuela: Law on Demarcation and Guarantee of the Habitat and Lands of Indigenous Peoples, 2001; Organic Law on Indigenous Peoples and Communities, 2005.

²⁰⁷ Cf. A/Res/61/295, September 13, 2007, UN General Assembly Resolution. Paragraphs 2 and 3 of Article 26 of the Declaration establish: "2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

119. In this regard, the Court has interpreted Article 21 of the Convention to establish that the obligation of States to take measures to ensure the right to property of the indigenous peoples necessarily entails, based on the principle of legal certainty, that they must demarcate, delimit and title the territories of indigenous and tribal communities.²⁰⁸ Therefore, failure to comply with these obligations is a violation of the use and enjoyment of the rights of the members of these communities.

120. It should also be pointed out that the above-mentioned communal ownership of indigenous lands refers to the ancestral territories of the indigenous peoples, which signifies that such lands have been occupied traditionally. It also refers, in the case of indigenous peoples who have left their territories or lost the possession of their territories, to the right to recover them. In this case, the flooding of the lands of the communities of the Kuna of Madungandí and the Emberá of Bayano signify that their recovery by the indigenous peoples is impossible. Therefore, this case refers to the rights of these communities in relation to the alternative lands assigned to them by the State, which also means that they have not been traditionally occupied or possessed.

121. As indicated previously (*supra* para. 113), with regard to the ancestral lands, it is precisely their prolonged ancestral possession or occupation that establishes the right to demand the official recognition of ownership and their registration; whereas, in the case of alternative lands, in the absence of this ancestral occupation the recognition of the right to collective ownership occurs only when the State assigns the new lands. The Court also takes into account that the Kuna of Madungandí and the Emberá of Bayano in this case are not living on the alternative lands on a provisional basis. The flooding of their lands means that their occupation of the alternative lands is necessarily permanent. As indicated in the chapter on the facts of the case, the communities have been relocated on alternative lands by a decision of the State itself (*supra* para. 63).

122. Consequently, regarding the State's obligation to ensure the enjoyment of the right to property of the indigenous peoples in relation to the alternative lands, the Court establishes that this obligation must necessarily be the same as in cases in which the recovery of the ancestral lands is possible. To the contrary, the right to collective property of the Kuna and Emberá peoples would be limited because they do not have an ancestral relationship with, or prolonged occupation of, the alternative lands, precisely as a result of the relocation carried out by the State itself for reasons beyond the control of the indigenous peoples.

123. Based on the above, in order to analyze the right to communal property of the Kuna peoples of Madungandí and the Emberá of Bayano in relation to the alternative lands assigned to them, the Court also notes that the State has not contested that there is an obligation to recognize the communal ownership of those lands, arguing that the lands of the Kuna people of Madungandí have been titled and that the titling of the Emberá lands is underway.

124. However, the Commission and the representatives have indicated that another issue that needs to be considered is the failure to delimit, demarcate and title the lands of the Kuna indigenous people of Madungandí over a certain period of time, and the failure to delimit, demarcate and title the lands of the Emberá communities of Bayano. Therefore, the Court will, first, examine the facts relating to the Kuna lands and then those relating to the Emberá lands. Lastly, the Court will rule on the alleged violations of Article 2, in relation to Article 1(1) of the Convention.

²⁰⁸ Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153 and 164, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 109.

A.2.1. The facts related to the alleged failure to delimit, demarcate and title the lands of the Kuna people of Madungandí and the Emberá communities

a. The alleged failure to delimit, demarcate and title the lands of the Kuna people

125. In the case of the Kuna people, after several years during which the representatives of this people took steps to require the State to recognize their right to collective property, the said property title was granted by Law 24 of January 12, 1996 (*supra* para. 71). The law included a description of the boundaries of the lands, but did not refer to their demarcation. The Court notes that the demarcation of the lands of the Kuna people took place between April and June 2000 (*supra* para. 74); thus, there was a lapse of four years between the titling of the land and its demarcation. The State indicated in its final written arguments that "the delimitation was carried out following the promulgation of article 1 of Law 24 of January 12, 1996, and the demarcation was concluded in December 2000."

b. The alleged failure to delimit, demarcate and title the lands of the Emberá communities

126. In the case of the Emberá people of Bayano, as previously indicated they consist mainly of four communities: Ipetí, Piriati, Maje Cordillera and Unión (*supra* para. 61). Even though the Court's Secretariat had asked the representatives to provide documentation that was missing from the pleadings and motions brief in relation to the alleged failure to grant collective property titles to these four communities, the evidence provided only reveals the current situation in relation to the Ipetí and Piriati communities, and there is no recent information with regard to the Emberá communities of Maje Cordillera and Unión.²⁰⁹

127. With regard to the lands of the Ipetí community, the evidence shows that these lands were delimited in November and December 2013 (*supra* para. 80). However, the documentation provided by the State, which includes an ANATI report of November 2013, does not mention execution of the demarcation of the Ipetí lands. To the contrary, the said report refers to some monuments that had been "destroyed" and recommends "to the Emberá community that, to avoid future disputes with its neighbors, it prepare further documentation on the elements that have disappeared." Therefore, the Court notes that the State has not demarcated the Ipetí Emberá lands.

128. Regarding the titling of the Ipetí lands, an ANATI report of April 15, 2014, provided by the State indicates that "the Ipetí community file will be sent tomorrow (April 16, 2014) to the ANATI Regional Office in Santiago, Veraguas, so that the plan or sketch can be verified and approved and thus continue the process for the issue of the title adjudicating collective land."²¹⁰ Based on the evidence provided, the Court notes that the titling procedure, as established in Law 72, appears to be at the stage – prior to verification of the location of the land – at the phase of lodging objections, and possible reconsideration and appeal.²¹¹ Therefore, this

²⁰⁹ In the case of the communities of Maje Cordillera and Unión, among the evidence is an ANATI certification of March 12, 2012, referring to "the collective titling procedure in the area of Alto Bayano: Piriati Emberá, Ipetí Emberá, Maje Emberá Drúa (Maje Cordillera and Unión Emberá), is being reviewed to continue the procedure for collective adjudication" (evidence file, folio 612).

²¹⁰ Report on the Communities of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano in Panama – Current status of the request for delimitation, demarcation and titling of the Ipetí and Piriati collective lands, National Land Administration Authority (ANATI), April 15, 2014 (evidence file, folio 8489).

²¹¹ Law No. 72 of December 23, 2008, "establishing the specific procedure for the adjudication of collective ownership of lands of the indigenous peoples who are outside the Comarcas," Official Gazette No. 26,193, December 30, 2008 (evidence file, folios 7475 to 7479, articles 7 and 8).

documentation reveals that, at the date of this judgment, no collective property title has been granted for the lands of the Emberá community of Ipetí.

129. Regarding the lands of the Emberá community of Piriati, according to an ANATI report of October 2013 forwarded by the State, the said lands were delimited that same month (*supra* para. 80). However, in the case of the demarcation of the territory, this report only mentions that “[t]he boundary of this land is well defined, because it is composed of natural elements on the one hand, and coordinates on the other.”²¹² In this regard, the Court notes that although it is true that some natural geographical boundaries could, depending on the specific circumstances, make physical demarcation unnecessary, it is also true that in the case of other boundaries, the mere reference to certain coordinates is insufficient. Therefore, the Court concludes that at least part of the necessary demarcation that the State should have carried out has not been executed.

130. With regard to the titling of the Piriati lands, the representatives reported in their final written arguments that “[a]lthough it is true that the Piriati collective title was granted on May 2, [2014], this title included more than 96 hectares of land that – although it had been assigned to them in reparation – had been titled by the State [to C.C.M.] a non-indigenous person in 2012.” Subsequently, in response to a request by the Court for helpful evidence, the representatives forwarded a copy of the collective property title granted for the Piriati lands. This title granted the collective ownership of two parcels of land, one of 265 hectares and 3,840.95 m², and the other of 3,678 hectares and 4,190.65 m², to the Piriati Emberá community, both parcels located in the *corregimiento* of Tortí, Chepo district (*supra* para. 81).

131. From the evidence provided (*supra* para. 80), the Court concludes that a property title was effectively granted to the said private individual that overlaps, at least partially, the lands granted in collective ownership to the Emberá community of Piriati. With their response to the request for helpful evidence, the representatives provided an agreement dated November 27, 2013, signed by indigenous representatives and a representative of ANATI, which records that the latter undertook “[t]o annul the administrative act that adjudicated lands to [C.C.M.]” (*supra* para. 81). However, no evidence has been provided that this title was annulled.²¹³

A.2.2. Analysis of the alleged violations of the State obligation to delimit, demarcate and title the Kuna and Emberá lands

132. The Court notes that the evidence provided reveals the following uncontested facts. On January 12, 1996, the collective property title to the lands of the Kuna Comarca of Madungandí was granted by Law No. 24, which established the boundaries of this Comarca. Between April and June 2000, these lands were demarcated. The lands of the Piriati and Ipetí Emberá were delimited in October, November and December 2013, but the evidence shows that they were not demarcated, or at least only partially. A collective property title was awarded to the Piriati lands on April 30, 2014 (*supra* para. 81). The evidence provided does not show that a collective property title had been granted to the Ipetí Emberá lands at the date of this judgment.

133. Bearing in mind that the State of Panama accepted the Court’s jurisdiction on May 9, 1990, the Court will examine the alleged violations of Article 21, in relation to Article 1(1) of the Convention, with regard to the following situations: (a) the territories of the Kuna people of Madungandí were not delimited or titled for approximately six years (in 1996); (b) the territories of the Kuna people of Madungandí were not demarcated for approximately 10 years (in 2000);

²¹² Piriati Emberá Report, October 2013 (ANATI) (evidence file, folio 8583).

²¹³ The State observed that this agreement of November 27, 2013, reveals “a promise to annul the granting of a property title, a procedure that is only possible by filing a judicial action to annul a previously executed administrative act” and that the indigenous representatives “have available all possible remedies to request the courts to annul, review, nullify or whatever is legally admissible [with regard to] the titling of the lot of land to [C.C.M].”

(c) the territories of the Ipetí and Piriati Emberá communities were not delimited for approximately 23 years (in 2013); (d) the territories of the Piriati Emberá community were not titled for approximately 24 years (in 2014); (e) the territories of the Piriati Emberá community were not completely demarcated at the date of this judgment, and (f) the territories of the Ipetí Emberá community were not demarcated or titled at the date of this judgment.

134. In addition, as previously indicated (*supra* para. 110), from the moment the right to property of the indigenous peoples was established in the 1946 Constitution and subsequently in the 1972 Constitution, the State had the obligation to recognize this right legally and grant title to the new lands assigned to the indigenous peoples who had been relocated, within a reasonable time after the lands had been assigned. Therefore, recalling that the State accepted the Court's contentious jurisdiction on May 9, 1990, there is no doubt that, at least from the date that the State ratified its acceptance, it had the obligation to delimit, demarcate and title the lands assigned to the Kuna and Emberá peoples to ensure that they could effectively enjoy the said right to property.

135. The Court has previously held that, what is at issue is not a privilege to use the land, which can be taken away by the State or countered by third party property rights, but a right of the members of indigenous and tribal peoples to obtain title to their territory to ensure the permanent use and enjoyment of this land. In order to obtain this title, the territory must first be demarcated and delimited,²¹⁴ and the Court has declared that "a strictly juridical or abstract recognition of indigenous lands, territories or resources lacks true meaning when the property has not been physically established and delimited."²¹⁵

136. The Court has also held that the State's failure to delimit and demarcate the boundaries of the territory over which a right to collective property of an indigenous people exists may create and, in this case effectively did create, a permanent climate of uncertainty among the members of the above-mentioned peoples, because they have no certainty as to where their right to communal property extends geographically and, consequently, they do not know the area over which they may freely use and enjoy the respective rights.²¹⁶

137. The Court concludes that the State has violated Article 21 of the Convention in relation to Article 1(1) of this instrument to the detriment of the Kuna indigenous people of Madungandí, owing to the delay in the delimitation, demarcation and titling of their collective property which was finally carried out in 1996 and 2000. In addition, the State violated Article 21 of the Convention in relation to Article 1(1) of this instrument to the detriment of the Emberá communities of Piriati and Ipetí, owing to the failure to delimit, demarcate and title their lands as described in paragraph 129 of this judgment,

A.2.3. The private property title in the territory of the Piriati Emberá community

138. Regarding the Piriati Emberá territory and the private property title granted to C.C.M. in August 2013 (*supra* para. 80) over lands that form part of this territory, the Court establishes that the relevant domestic law in force establishes the following:

²¹⁴ Cf. *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C. 124, para. 209, and *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C. 172, para. 116.

²¹⁵ *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 143, and *Case of the Saramaka People v. Suriname*, para. 116.

²¹⁶ Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153, and *Case of the Saramaka People v. Suriname*, para. 116.

1972 Constitution of Panama

Article 127: [...] The law shall regulate the procedures to be followed to achieve this purpose [the collective ownership of lands] and the corresponding boundaries within which private appropriation of land is prohibited.

Law No. 72 (December 23, 2008)

Article 9: When the corresponding procedures have been completed, the National Agrarian Reform Directorate shall issue the collective property title in favor of the indigenous community, which is imprescriptible, non-transferable, and may not be embargoed or otherwise alienated.

Article 10: Adjudications made under this law shall not prejudice the existing property titles and the possessory rights certified by the National Agrarian Reform Directorate.²¹⁷

139. The Court notes that Executive Decree No. 123 of 1969 declared that the alternative lands assigned to the indigenous peoples as compensation for the flooding of their lands were “non-adjudicable” (*supra* para. 111). Also, article 5 of the said decree recognized the property rights over parcels within those lands that had been registered.²¹⁸ Similarly, according to the State, on March 18, 2003, the National Agrarian Reform Directorate of the Ministry of Agricultural Development, in Resolution No. D.N. 132-2003, indicated that “all the requests begin processed for the adjudication, or transfer of possessory rights, of parcels located within the area occupied by the Emberá populations of Ipetí and Piriati, in the Chepo district, province of Panama” were suspended.”²¹⁹

140. More recently, an ANATI certification of March 12, 2012, indicated the suspension of “all requests for possessory rights and adjudication of private land titles presented to the National Titling and Regularization Directorate over lands for which the adjudication of a collective title is being processed, until the conditions under which this will be adjudicated have been defined based on Law 72 of December 23, 2008, and Executive Decree No. 223 of June 29, 2010; this suspension encompasses the following areas: (a) Alto Bayano: Piriati Emberá, Ipetí Emberá, Majé Emberá Drúa (Majé Cordillera and Unión Emberá).”²²⁰

141. The foregoing reveals that, since 1969, the Emberá alternative lands had been declared “non-adjudicable” and that different state entities – namely, ANATI and the National Agrarian Reform Directorate – had indicated that the processing of requests for the “adjudication” of private property titles should be suspended in relation, *inter alia*, to Piriati lands, while the adjudication of the said lands under a collective title was settled. Consequently, the Court concludes that, based on its domestic laws and regulations, the State could not adjudicate private property titles over the territories that had been assigned to the Piriati Emberá.

142. The Court notes that the Piriati Emberá lands had not been titled when the title was granted to C.C.M. (*supra* paras. 80 and 81) and that domestic law established that the titling of indigenous lands shall not prejudice existing property titles (*supra* para. 135). However, when the said alternative lands were awarded to the indigenous peoples, the State acquired the obligation to ensure the effective enjoyment of the right to property. That obligation cannot be ignored and the enjoyment cannot be obviated because a private property title has been granted in those lands, and a third party cannot acquire such a title in good faith. It is

²¹⁷ Action on unconstitutionality filed by the Cacique of the Kuna General Congress before the Supreme Court of Justice of the Republic of Panama, January 9, 2009 (evidence file, folios 7286 to 7287). The representatives alleged that this action has still not been decided, and the State did not contest this.

²¹⁸ Article 5 of Executive Decree No. 123 established: “[t]he rights of the owners of lands duly registered in the Public Registry and that are within the areas that are declared non-adjudicable shall be recognized, with the limitations established by law” (evidence file, folio 377).

²¹⁹ State reports estates of June 26, and September 26, 2011, January 30 and May 14, 2012 (evidence file, folios 7656, 7664, 7674 and 7691).

²²⁰ Certificate issued by the General Administrator of the National Land Administration Authority (ANATI), March 12, 2012 (evidence file, folio 612).

understood that this does not prejudice those private individuals who already had a private property title over part of the lands prior to their occupation by the indigenous peoples. Furthermore, the Court notes that the laws of several countries of the region – for example, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Honduras, Paraguay, Peru and Venezuela – include some form of reference to the fact that indigenous territories are, *inter alia*, imprescriptible and non-alienable.²²¹

143. The Court recalls its case law that “States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their development, and to carry out their life projects.”²²²

144. The Court also reiterates its case law that it is unable to decide whether the right to traditional property of the members of an indigenous community is more important than the right to private property of third parties or vice versa, because it is not a domestic tribunal that decides disputes between private individuals. That task corresponds exclusively to the State. Nevertheless, the Court has jurisdiction to analyze whether or not the State has guaranteed the human rights of the indigenous community.²²³

145. Based on the above, the Court notes that, even though the State has granted a collective property title to the Piriati Emberá community over their lands, it contravened its obligations under both domestic and international law by granting a private property title to C.C.M. over part of these lands, thus restricting the said community’s effective enjoyment of the right to the communal property it had been granted.

A.2.2. Conclusion

146. Consequently, the Court declares that the State has violated Article 21 of the Convention, in relation to Article 1(1) of this instrument; because it failed: (a) to delimit or title the territories of the Kuna indigenous people of Madungandí for approximately six years (from 1990 to 1996); (b) to demarcate the territories of the Kuna indigenous people of Madungandí for approximately 10 years (from 1990 to 2000); (c) to delimit the territories of the Emberá communities of Ipetí and Piriati for approximately 23 years (from 1990 to 2013); (d) to title the territories of the Piriati Emberá community for approximately 24 years (from 1990 to 2014); (e) to demarcate the territories of the Piriati Emberá community for approximately 24 years (from 1990 to the date of this judgment); (f) to demarcate or title the territories of the Ipetí Emberá community for approximately 24 years (from 1990 to the date of this judgment), and (g) to guarantee the effective enjoyment of the collective property title of the Piriati Emberá

²²¹ Argentina: 1994 Constitution of the Argentine Nation, article 75.17; 1994 Constitution of the province of Chaco, article 37; 1994 Constitution of the province of Chubut, article 34; 1986 Constitution of the province of Salta, article 15.I; Law No. 4086 of 1966, province of Salta; 1957 Constitution of the province of Formosa, article 79; Law 2727 of 1989, province of Misiones. Bolivia: 2008 Constitution, article 394.III; Law No. 1715 of 1996, “Law on the National Agrarian Reform Service.” Brazil: 1988 Constitution of the Federative Republic of Brazil, article 231.4. Chile: Law 19,253 of 1993 “[e]stablishing rules for the protection, promotion and development of the indigenous peoples and creating the National Indigenous Peoples Development Corporation” (amended March 25, 2014). Colombia: 1991 Constitution of Colombia, articles 63 and 329; Decree 2164 of 1995. Costa Rica: Law 6172 of 1977, “Indigenous Peoples Law.” Ecuador: 2008 Constitution, article 57.4. Honduras: Decree No. 82-2004, “Property Law” of 2004. Paraguay: 1992 Constitution of Paraguay, article 64. Peru: Legislative Decree No. 295 of 1984, “Civil Code”; Decree Law No. 22175 of 1978, “Law on Native Communities and on Agrarian Development of Forests and Forest Edges.” Venezuela: 1999 Constitution of the Republic Bolivariana of Venezuela, article 119; Organic law of indigenous peoples and communities, 2005.

²²² *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 146, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 146.

²²³ *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 136. See also: *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 146.

community because, at the date of this judgment, the private property title awarded to C.C.M. has not been annulled; all the foregoing to the detriment of the Kuna indigenous people of Madungandí and the Piriati and Ipetí Emberá communities of Bayano. Regarding the Emberá communities of Maje Cordillera and Unión, the evidence does not reveal that their lands have been delimited, demarcated and titled. It merely shows that, at least in 2012, the titling process "was under review to continue with the appropriate procedure for collective adjudication" (*supra* para. 79); thus, the Court does not have any elements to analyze and rule on an alleged violation of the right to property with regard to those two communities.

B. The alleged lack of an adequate procedure for the delimitation, demarcation and titling of indigenous lands (Article 2 of the Convention)

B.1. Arguments of the Commission and of the parties

147. The Commission indicated that, until the adoption of Law 72, there was no mechanism to obtain recognition of collective ownership and that the only available procedure was to obtain designation as a "comarca" under a law enacted by the Legislative Assembly, which entailed a lengthy process that was mainly political and inherently discretionary and left out numerous indigenous communities. It added that the State had made commitments in response to actions taken by the indigenous peoples, but these failed to provide a comprehensive and sustainable answer to the basic claims or to create legal mechanisms for these peoples to claim their rights. The Commission also indicated that the procedure followed by the Emberá people was neither effective nor appropriate because it did not taken into account the particular characteristics of the indigenous people; specifically, it was a general mechanism for titling individual property based on the productive use of the land. It added that Law 72 and its regulations merely established a "procedure to adjudicate collective ownership of the lands of the indigenous peoples" without referring to the obligation to physically demarcate the land once it had been adjudicated.

148. Regarding Law 72 of 2008 and Executive Decree 223 of 2010 on collective titles, the representatives added that the procedure appeared to be brief and effective but, in practice, it was long and complicated. Also, in the case of the Emberá people, more than four years after applications had been submitted, no titles had been approved. They also indicated that Law 72 discriminated against collective titles in favor of individual titles, and that article 10 of the law established that the titles granted could not contravene recognized property titles or possessory rights, which made adequate recognition ineffective.²²⁴ They recalled that, pursuant to Articles 8(1) and 25 of the Convention, the State had the obligation to provide the Emberá communities with an effective and efficient remedy to decide their territorial claims, which involved the duty to examine the claims of these communities with due guarantees and to determine the respective rights and obligations within a reasonable time. They added that domestic law did not conform to international law and that a similar situation was arising in other indigenous communities.

149. The State indicated that, according to the text of the Constitution, the indigenous territories had been recognized since the Republic was founded, and the comarcas and indigenous reserves had been guaranteed by law, as well as the protection of the indigenous peoples who had migrated from their original lands. It referred specifically to Law 72 of December 23, 2008, and Executive Decree 223 of June 29, 2010. The State indicated that the procedure established in the said law included several stages, including the appeal before the Ministry of Agricultural Development. It added that the indigenous peoples have the same rights

²²⁴ The representatives indicated that the said article had been the object of an action on unconstitutionality since 2009 based on discrimination compared with other forms of recognition of property, and the Supreme Court of Justice of Panama had failed to rule on the case to date.

as the rest of the inhabitants of Panama, with the same guarantees, and that judicial protection exists and can be obtained by recourse to remedies that are not subject to protocols or requirements other than accrediting juridical personality or the condition of citizen, resident, or migratory status. It also indicated that it had held congresses, meetings and consultations to provide access to justice to vulnerable groups and that, since 2009, it had signed an agreement that set up an "Inter-institutional Commission to close the gap between traditional justice and ordinary justice," which sought to facilitate access to the system of justice to all indigenous groups. It also argued that the Fourth Chamber of the Supreme Court of Justice of Panama had adopted Decision No. 424 of May 22, 2009, creating the Department of Access to Justice for Indigenous Groups, which established an interpretation service and alternative conflict settlement mechanisms for indigenous groups. Lastly, it indicated that the existence of legal remedies, the accessibility to justice, and equal treatment were a State responsibility and not just towards one social group in particular.

B.2. Considerations of the Court

150. The Court will examine the alleged violations of Article 2 of the Convention in relation to Articles 21, 8 and 25 of this instrument taking into account domestic law during two specific periods of time: (1) domestic norms on titling, demarcation and delimitation before Law 72 of 2008, and (2) domestic norms currently in force (Law 72 of 2008 and Executive Decree 223 of 2010).

B.2.1. Domestic norms in force before Law 72 of 2008

151. As indicated above, Executive Decree No. 123 of May 8, 1969, granted alternative territories in compensation for the area of the indigenous reserve that was subsequently flooded (*supra* para. 63). Thus, since 1969, the State of Panama was bound to make enjoyment of the alternative lands it had granted effective and, as indicated, this necessarily entailed the delimitation and demarcation of those lands (*supra* para. 119).

152. Furthermore, regarding the obligation to provide title to the lands, the Court notes that, in 1972, the right to collective property of the indigenous peoples was established in the Panamanian Constitution; thus, since that date, an obligation has existed under domestic law to provide title to indigenous lands. Despite this, before 2008, no legal procedure had been established to grant collective property titles to the indigenous peoples. This right had been granted in each specific case by different laws that created the five indigenous comarcas (*supra* para. 59).

153. In this regard, the Court notes that the said five laws contain different provisions in relation to the obligation to title, delimit and demarcate. The body of evidence reveals that neither Law 24 of 1996, which created the Kuna Comarca of Madungandí, nor the laws establishing another three comarcas referred to the demarcation of the territories. However, article 3 of the law that created the Ngobe-Buglé Comarca referred specifically to the demarcation of this comarca.²²⁵

²²⁵ Law 10 of March 7, 1997: "[t]he boundaries of this Comarca [...] shall be defined, on-site, by the Agrarian Reform Directorate of the Ministry of Agricultural Development and the National Boundaries Commission, with the collaboration of the National Indigenous Policy Directorate of the Ministry of the Interior and Justice [...] and other entities]. The physical definition of the boundaries of the Comarca and of the territories and communities shall be executed in no more than thirty months from the entry into force of this law and pursuant to a land ownership census conducted by the Agrarian Reform Directorate of the Ministry of Agricultural Development [...].

154. The Court notes that Law 58 of July 29, 1998,²²⁶ created the National Political-Administrative Boundaries Commission, which established, among other matters, that “[i]n the case of the demarcation of indigenous comarcas, it coordinate[d] with the Indigenous Policy Directorate of the Ministry of the Interior and Justice.” It also established that “[t]he political and administrative boundaries, whose reference points could lead to future conflicts, must be demarcated with border markers or another type of marker with the shape, form and dimensions in keeping with the appropriate technical specifications.” This commission carried out the physical demarcation of the Kuna Comarca of Madungandí in 2000.²²⁷

155. Furthermore, it has been indicated that it was evident that, at least since the State accepted the Court’s contentious jurisdiction, it had an international obligation to delimit, demarcate and title the alternative lands in favor of the Kuna and Emberá peoples in order to guarantee their effective enjoyment of those lands (*supra* para. 117).

156. Regarding the problems in the norms concerning titling, the evidence reveals that, in Panama, the practice was to provide title by creating indigenous comarcas under a specific law in each case, with no generic domestic law that established a procedure for the titling of indigenous lands as collective property. Consequently, following a request made by a community, titling did not depend on a decision taken by an administrative or judicial entity based on a pre-established procedure. To the contrary, the only mechanism that existed at the time was the enactment of laws and, in the practice, this was not effective for the prompt titling of the lands possessed by the Kuna and the Emberá.

157. Consequently, the State is responsible for violating Article 2 in relation to Articles 21, 8 and 25 of the American Convention because, prior to 2008, it failed to establish a domestic law that permitted the delimitation, demarcation and titling of collective lands, to the detriment of the Kuna of Madungandí and the Emberá of Bayano.

B.2.2. The domestic law currently in force

158. The Court notes that Law 72 of 2008, currently in force, establishes a procedure for the titling of lands of indigenous peoples who are outside the five indigenous comarcas previously mentioned (*supra* para. 59). This law is regulated by Executive Decree 223 of 2010. Among other matters, these norms establish the following:

Law 72 of 2008

Article 6. The application for the collective title shall be accompanied by the following documents: 1. The plan or sketch of the area covered by the application [...].

Article 7. The National Agrarian Reform Directorate [...] shall order the inspection *in situ* after notifying the applicants and shall take the necessary steps for recognition of collective property established in this law.

Article 9. When the corresponding procedure has been completed, the National Agrarian Reform Directorate shall issue the collective property title for the lands in favor of the indigenous community, and this is imprescriptible, non-transferable, and cannot be embargoed or alienated.

Article 10. The adjudications made pursuant to this law shall not prejudice existing property titles and possessory rights certified by the National Agrarian Reform Directorate.

²²⁶ Law establishing the political and administrative division of the provinces of Coclé, Herrera, los Santos and Veraguas, and creating new *corregimientos*. Law cited in the evidence provided by the Commission (evidence file, folio 31).

²²⁷ According to the Final report of the National Political-Administrative Boundaries Commission on the physical demarcation of the Kuna Comarca of Madungandí in 2000: “The work of surveying and erecting boundary markers was executed in six field trips of 12 days each.” According to the evidence, the following procedures were carried out: (a) conversations were held with the Kuna people on the logistics to be employed by the National Boundaries Commission; (b) reference points that had already been “implanted,” but possibly destroyed by the settlers, were reconstructed; (c) roads were widened; (d) 449 border markers were placed, and (e) indigenous and state authorities met to examine conflict areas (evidence file, folios 56 to 65 and 70).

Executive Decree 223 (2010):

Article 2. The application for collective title shall be accompanied by the following documents and information: 1. The plan or sketch of the area to be titled [...].

Article 4. When notice has been served and the judicial procedure undertaken, an on-site inspection shall be conducted in order to verify whether or not the requested lands can be adjudicated. A record of this inspection shall be made by the field inspector of the Regional Agrarian Reform Office, signed by those who have taken part in it.

Article 5. A file shall be established of all the actions taken [...] that shall be sent to the National Land Survey and Demarcation Department of the National Agrarian Reform Directorate, accompanied by the plan or sketch of the land requested, in order to verify the calculation, outline and location, so that it may be approved by the National Agrarian Reform Directorate. [...]

159. The Court notes that Law 72 and Executive Decree No. 223 establish a procedure for titling the collective ownership of lands of the indigenous peoples. Regarding delimitation, the law refers to a plan of the area that should accompany the application and mentions that “[t]he State shall provide the necessary funds for the delimitation of the collective lands that are granted in compliance with this law.” Meanwhile, Decree No. 223 indicates that the applicant must attach a plan of the area to his application for title, and that the “location” will be verified by the competent entity.

160. Therefore, based on the above, the Court notes that, even though Law 72 specifically establishes a procedure to obtain title to the lands, it also refers to the delimitation and “the location” of the area. Consequently, the Court considers that the State is not responsible for the violation of Article 2, in relation to Articles 21, 8 and 25 of the Convention to the detriment of the Kuna people of Madungandí and the Ipetí and Piriati Emberá communities of Bayano, in relation to the laws that are currently in force to delimit, demarcate and title indigenous lands.

VII-2

PROCEDURES TO ACCEDE TO OWNERSHIP OF INDIGENOUS TERRITORY AND FOR ITS PROTECTION AGAINST THIRD PARTIES AND THE OBLIGATION TO ADAPT DOMESTIC LAW

(Articles 8(1), 25 and 2 in relation to Article 1(1) of the Convention)

A. The alleged ineffectiveness of the procedures to accede to ownership of indigenous territory and for its protection against third parties (Article 8(1) and 25 in relation to Article 1(1) of the Convention)

A.1. Arguments of the Commission and of the parties

161. The Commission indicated that the State had violated the rights contained in Articles 8 and 25 of the American Convention to the detriment of the communities of the Kuna of Madungandí and the Emberá of Alto Bayano, for the following reasons: (a) the different applications for demarcation and titling filed with various Panamanian authorities by the representatives of these communities were not effective over a certain period of time in the case of the Kuna people, and to date in the case of the Ipetí Emberá who have still not obtained formal recognition of their territory; (b) the presumed victims filed administrative remedies and criminal complaints in order to obtain the protection of their territories and natural resources, but these were ineffective,²²⁸ and (c) the State failed to take effective measures to prevent the

²²⁸ The Commission indicated that the presumed victims filed at least five criminal complaints requesting the investigation and punishment of those responsible for attacks on their territories and natural resources. In addition, it indicated that administrative actions were also filed for the protection of the natural resources located in the indigenous territories. It concluded that the prolonged and repetitive acts of invasion and illegal logging, as well as the close relationship of the natural resources present in the traditional territories of the indigenous peoples to aspects fundamental for their material and cultural survival, indicated that the proceedings undertaken were insufficient and

unlawful invasion and deforestation of the indigenous territory and to protect the territory and the natural resources of the presumed victims. This was despite the fact that the presumed victims obtained the signature of numerous agreements by state authorities and the issue of resolutions to obtain the eviction of non-indigenous persons and a halt to the illegal logging activities. The Commission considered that the prolonged and repetitive nature of the invasions and illegal logging revealed that the administrative and criminal proceedings were insufficient and ineffective.

162. The representatives added with regard to the titling procedures that, in the case of the Emberá people, no title has been approved even though four years have passed since it was requested. Regarding the criminal proceedings against third parties who occupy indigenous lands, they indicated that the State had not enforced the provisions for "penalties" and that the traditional authorities had filed actions before the jurisdictional authorities without any of those who had invaded their lands being tried and convicted. The representatives also indicated that, despite the existence of the law and the ANATI resolutions providing protection, in the practice these norms are ineffective to protect the right to collective property against third parties.²²⁹ They added that the Kuna had filed petitions before several state entities using administrative channels to protect their lands and natural resources, but had not receive a ruling on those petitions, and although the Kuna Comarca had been demarcated it still lacked protection from possible invasions by settlers.

163. The representatives also indicated that the indigenous communities were gradually losing "parts of their lands owing to constant invasions and exploitation of the natural resources by non-indigenous persons who apply for recognition of possessory rights." They also stated that the failure to take effective actions to prevent the invasion and illegal logging of indigenous territory permits the progressive appropriation of the lands by non-indigenous persons, and the illegal logging activities.

164. Regarding Law 72 of December 23, 2008, and Executive Decree 223 of June 29, 2010, the State indicated that there were several stages to this procedure, including the appeal before the Ministry of Agricultural Development. The State also indicated that it had held congresses, meetings and consultations to provide access to justice to vulnerable groups and that, since 2009, it had signed an agreement that set up the "Inter-institutional Commission to close the gap between traditional justice and ordinary justice" which sought to facilitate access to the system of justice to all the indigenous groups. It also indicated that it was evidence that the owners had proper protection because the comarcas have special *Corregidores*, the Police help the authorities prevent invasions, and criminal justice is exercised to protect anyone affected. However, the State indicated that the improper exercise of the right to request justice, or the failure to exercise this right, despite having appropriate representation, may thwart the possibility of realizing the rights.

ineffective in the presumed victims' search to obtain protection and justice. It added that, despite the many complaints filed, the competent authorities failed to conduct a serious and effective investigation to discover the truth and to determine responsibilities that would halt the serious invasion of indigenous territory and the illegal extraction of its natural resources.

²²⁹ The representatives referred to the case of C.C.M., who, since January 2009, had attempted to obtain title to half the lands of the Piriati Emberá community. After the First Superior Court had upheld the first instance judgment that had been appealed, the issue has been at the stage of adjudication by ANATI, even though reports indicate that the 200 hectares are within the collective title. In the case of a complaint based on massive titling of lands of this same community by ANATI officials, local governments and authorities of the Chepo district, the Second Chamber of the Supreme Court of Justice decided to dismiss the case against the officials who had been charged, while in another proceeding in the same case, filed by the peasants who were unable to obtain title to their lands, charges were brought against the same defendants.

A.2. Considerations of the Court

165. The Court has considered that the States are obliged to provide effective judicial remedies to individuals who allege that they are victims of human rights violations (Article 25); remedies that must be substantiated pursuant to the rules of due process of law (Article 8(1)), all within the general obligation of the same States to ensure the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1(1)).²³⁰ The Court has also indicated that Article 25(1) of the Convention establishes, in general, the obligation of the States to guarantee an effective judicial remedy against acts that violate fundamental rights. When interpreting the text of Article 25 of the Convention, the Court has asserted, on other occasions, that the State's obligation to provide a judicial remedy is not restricted to the mere existence of the courts or the formal proceedings, or even to the possibility of having recourse to the courts; rather, the State has the obligation to adopt positive measures to guarantee that the remedies it provides under the judicial system are "truly effective to establish whether or not human rights have been violated and to provide reparation."²³¹

166. In addition, in other cases, the Court's case law has indicated that indigenous and tribal peoples have a right to the existence of effective and expeditious administrative mechanisms to protect, guarantee and promote their rights over indigenous territories, under which they may carry out the procedures of recognition, titling, demarcation and delimitation of their territory.²³² The said procedures must comply with the rules of due process of law established in Articles 8 and 25 of the American Convention.²³³

167. The Court has also reiterated that the right of everyone to a simple and prompt remedy, or any other effective remedy, before the competent judges or courts for protection against acts that violate their fundamental rights "constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law itself in a democratic society in the terms of the Convention."²³⁴ Moreover, in the case of indigenous peoples, it is essential that the State grant effective protection that takes into account their specific particularities, their economic and social characteristics, and their situation of special vulnerability, their customary law, values, practices and customs.²³⁵

168. The Court has already affirmed that the obligation to investigate and, if appropriate, prosecute and punish those responsible for human rights violations is one of the positive

²³⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 91; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 260, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, para. 215.

²³¹ *Case of the Saramaka People v. Suriname, Preliminary objections, merits, reparations and costs*, para. 177, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 404.

²³² Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, reparations and costs. Judgment of August 31, 2001. Series C No. 79, para. 138, and *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010 Series C No. 214, para. 109.

²³³ Cf. *Case of Godínez Cruz v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 3, para. 92; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of March 29, 2006. Series C No. 146, paras. 81 and 82, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 199.

²³⁴ *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 82, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 276, para. 42.

²³⁵ Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, reparations and costs*, para. 63, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 264.

measures that States should take to guarantee the rights recognized in the Convention²³⁶ under Article 1(1) of this instrument. This is an obligation that the State should assume as its inherent legal duty and not as a mere formality preordained to be ineffective, or as a measures taken at the instigation of private interests that depends upon the procedural activity of the victims or their families or on their offer of probative elements.²³⁷

169. The Court has also indicated that the obligation to investigate and the corresponding right of the presumed victims or their families is based not only on the convention-based rules of international law that are peremptory for the States Parties, but also arises from domestic law relating to the obligation to investigate, *ex officio*, certain unlawful conducts, and from the norms that allow victims or their families to denounce or file complaints, evidence, petitions, or any other procedure, in order to play a procedural role in the criminal investigation to establish the truth of the facts.²³⁸

A.2.1. The requests for delimitation, demarcation and titling

170. According to the proven facts, at least since 1990, the presumed victims have taken different steps before authorities of the local, provincial and national governments to demand compliance with the above-mentioned agreements and resolutions, and to request legal recognition of their lands, and the protection of these from the incursions of non-indigenous persons (*supra* paras. 85 and *ff.*).

171. In the case of the Ipetí and Piriati communities, on October 27, 2009, and in January 2011, applications were filed with the National Agrarian Reform Directorate for the adjudication, free of charge, of the collective ownership of lands granted in compensation, requesting the collective titling of 3,191 hectares in the name of the Ipetí community and 3,754 hectares in the name of the Piriati community, together with the suspension of any processing of property titles or certification of possessory rights of third parties over the lands (*supra* para. 95). Recently, in 2014, the collective property title was granted to the Piriati Emberá community (*supra* para. 94). The Court notes that, prior to the application of October 2009, at least two other applications for the adjudication of territories of the Piriati Emberá and Ipetí Emberá communities had been filed with specific government authorities.²³⁹ The state authorities failed to respond to any of these applications, and this results in a violation of Articles 8 and 25, in relation to Article 1(1) of the Convention.

172. In the case of the Kuna people of Madungandí, the evidence merely shows that they took several measures with state authorities that concluded with the adoption of Law 24 of 1996, recognizing the collective ownership of their territories, and with the demarcation of these territories in 2000 (*supra* paras. 71 to 75). The evidence does not reveal that they filed requests with state entities (either administrative or judicial) for the delimitation, demarcation and titling of their territories. The analysis of the delay in the recognition of their collective ownership was

²³⁶ Cf. *Case of Velásquez Rodríguez v. Honduras, Merits*, paras. 166 and 167, and *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, para. 183.

²³⁷ Cf. *Case of Velásquez Rodríguez v. Honduras, Merits*, para. 177, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, para. 216.

²³⁸ Cf. *Case of the Barrios Family v. Venezuela*, para. 80, and *Case of Veliz Franco et al. v. Guatemala*, para. 184.

²³⁹ On June 13, 1995, the Emberá Community of Ipetí filed a request for demarcation and adjudication of collective lands asking the Cabinet Council of the President of the Republic to "approve the adjudication, free of charge, of a collective title to 3,198 hectares in favor of the Ipetí-Emberá Community" (*supra* para. 93). In addition, as indicated, on January 27, 1999, a request was presented to the President of the Republic for the Cabinet Council to grant a title, free of charge, to land with a surface area of 301 hectares and 9,343 m² to the Association for the Development of the Piriati-Emberá Community. There is no record that any reply was received to these requests (*supra* para. 94).

made in the Court's considerations on the violation of Article 21 of the Convention in relation to Articles 1(1) and 2 of this instrument.

173. Based on the above, the Court finds that the State is responsible for the violation of the provisions of Articles 8(1) and 25 of the American Convention in relation to Article 1(1) of this instrument to the detriment of the Emberá indigenous communities considering that the State did not provide a response to the remedies filed by the presumed victims that permitted adequate determination of their rights and obligations.

A.2.2. The proceedings filed to protect the indigenous territories from invasion by third parties

174. On this point, the Commission and the representatives referred to different types of proceedings that were filed by the presumed victims to protect their right to communal property.

175. In the case of the administrative procedures filed with the National Environmental Authority owing to ecological damage, the proven facts reveal that, in early 2007, the Authority fined several persons different amounts because they had caused damage to the forest without the corresponding permits. There is no evidence that these fines were paid (*supra* para. 92).

176. With regard to the criminal proceedings before the V Special Prosecutor of the First Circuit of Panama, the Court notes that, following the complaint of January 30, 2007, against individuals who had felled trees indiscriminately, several individuals were taken into preventive detention and it was decided to open a preliminary investigation. Several investigation procedures were conducted during the year, but on December 27, 2007, the case was dismissed (*supra* para. 100).

177. Regarding the criminal proceedings instituted based on the complaints of December 20, 2006, and January 16, 2007, investigations were opened, but the Court does not have recent information on them or on a final decision by the courts (*supra* paras. 97 to 101). In the case of the criminal proceeding before the Judicial Inquiry Subdirectorate of the Chepo Agency, the Court notes that, on August 16, 2011, a representative of the community filed the complaint, the investigation was opened and on-site inspections made. The Court has no further information in this regard (*supra* paras. 104 and 105).

178. In relation to the foregoing and the development of those proceedings, the Court notes that no evidence was provided that would allow it to infer that the dismissals and the failure to determine those responsible was due to fraudulence in the proceedings or an absence of the judicial guarantees contained in the Convention. To the contrary, the representatives and the Commission only alleged that the said proceedings failed to result in the conviction of those presumed to be responsible for the facts without providing any other type of argument. Therefore, the Court lacks evidence to analyze whether or not these proceedings were in keeping with the provisions of Article 8(1) of the American Convention. In this regard, it is relevant to recall that the said article "includes a material aspect of protection which means that the State must guarantee that the decision produced by the proceedings satisfies the end for which it was conceived. This does not mean that the complaint must always be admitted, but rather that the possibility of the proceedings producing the result for which they were conceived be guaranteed."²⁴⁰

179. The proven facts reveal that, starting in April 2002, the representatives of the Kuna Comarca of Madungandí filed different administrative procedures with various local and national authorities requiring the expulsion of the non-indigenous occupants of the lands included within

²⁴⁰ *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 122.

the boundaries of the Kuna Comarca due to their invasion (*supra* paras. 86 and *ff.*). It was only in 2008 and 2009, and then in 2011, that a *corregidor* was appointed who ordered the expulsion of settlers from the lands of Río Piragua in the Kuna Comarca and, on April 5, 2012, decided the “eviction, due to intrusion, of the persons who are illegally occupying the Comarca’s lands in the Lago, Río Piragua, Río Bote, Wacuco and Tortí sector and any other site of the Kuna Comarca of Madungandí” (*supra* paras. 90 and *ff.*).

180. In the case of the administrative procedures requesting evictions and the criminal proceedings regarding which there is no evidence that a final decision has been delivered, the Court reiterates that, in principle, the lack of reasonableness in the time taken to conduct an investigation or a proceeding constitutes, in itself, a violation of judicial guarantees. The Court has consistently taken into account four elements to determine whether the time taken is reasonable: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the effects on the legal situation of the person involved in the proceedings.²⁴¹ Regarding the last element, the Court reiterates that, to determine whether the time is reasonable, it is necessary to consider the effects resulting from the duration of the proceedings on the legal situation of the person involved in them,²⁴² bearing in mind, among other aspects, the matter in dispute.²⁴³ Thus, the Court has established that if the passage of time has a relevant impact on the legal situation of the individual, the proceedings must be conducted more diligently in order to decide the case as promptly as possible.²⁴⁴

181. With regard to the first element, the Court notes that the proceedings described above did not involve legal aspects or discussions that could justify a delay of several years owing to the complexity of the matter. Regarding the activity of the interested parties, the Court has no evidence to find that they failed to expedite the proceedings or obstructed their development.

182. In relation to the conduct of the authorities in the administrative procedure on the eviction request, the body of evidence reveals that they failed to conduct investigative and procedural activities promptly and diligently. To the contrary, an analysis of these proceedings reveals that, for approximately six years following the filing of the request, the state authorities with competence to hear it had not been defined or appointed and, therefore, at those stages it was not possible to order the evictions requested by the petitioners.

183. Regarding the conduct of the authorities in the context of the three previously mentioned criminal proceedings (*supra* para. 177), this Court finds that the investigations were opened and some procedures conducted; nevertheless, there is no record that, to date, 3, 6 and 7 years from the time the complaints were filed, they have culminated in final decisions by the courts or the organs conducting the investigations.

184. Lastly, the Court has insufficient evidence in this case to analyze the impact of the delay in the said criminal proceedings or the proceeding to obtain a decision on the requests to evict the occupants and/or invaders of the territories of the communities and its consequences on the assessment of a reasonable time. Moreover, no evidence was submitted to explain why special promptness should have been accorded to these proceedings.

²⁴¹ Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, para. 246.

²⁴² Cf. *Case of Valle Jaramillo et al. v. Colombia*, para. 155, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 194.

²⁴³ Cf. *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010 Series C No. 214, para. 136, and *Case of Furlan and family v. Argentina*, para. 194.

²⁴⁴ Cf. *Case of Valle Jaramillo et al. v. Colombia*, para. 155, and *Case of Furlan and family v. Argentina*, para. 194.

185. Consequently, the Court concludes that the duration of the criminal proceedings: (i) for the offense of criminal association, usurpation, damage to property, illicit enrichment, environmental and other related offenses, and (ii) for offenses against the environment before the XI Prosecutor of the First Judicial Circuit for which no final decision has been issued after approximately 6 and 7 years, respectively, is not compatible with the principle of a reasonable time established in Article 8(1) of the American Convention. Lastly, regarding the duration of the administrative procedure on eviction, the Court concludes that the duration of approximately 10 years since the complaint was filed until the eviction order issued in 2012 is not compatible with the principle of a reasonable time established in Article 8(1) of the American Convention.

186. Regarding the duration of three years in the criminal proceedings filed with the Judicial Investigation Subdirectorates of Chepo on August 16, 2011, the Court considers that this is compatible with the principle of a reasonable time established in Article 8(1) of the American Convention.

187. Consequently, the Court finds that the State is responsible for the violation of the right contained in Article 8(1) of the American Convention in relation to Article 1(1) of this instrument to the detriment of the Kuna people of Madungandí and its members in relation to the two criminal proceedings and the administrative procedure to evict illegal occupants described in paragraphs 97 and 99.

B. The alleged lack of adequate and effective proceedings for the protection of indigenous territories against third parties (Article 2 of the Convention)

B.1. Arguments of the Commission and of the parties

188. The Commission indicated that the proceedings filed by the Kuna Comarca with the local, provincial and national authorities under article 1409 of the Judicial Code of Panama did not constitute special, opportune and effective mechanisms to obtain effective protection of its territory. The Commission added that Law No. 24, which created the Kuna Comarca, did not establish police authorities and that, to date, there is no competent authority to resolve the problem of settler invasion.

189. The representatives agreed that no special procedure existed under Panamanian law to deal with the issue of land invasion, referring specifically to criminal law. They added that the appointment of a special *corregidor* within the Kuna Comarca did not constitute an effective and conclusive mechanism to respond to the indigenous peoples' complaints.

190. The State referred to the introduction of a series of mechanisms that were simple to access, such as conciliation, mediation and other alternative conflict resolution methods, and to the creation of the Mediation and Conciliation Department. It also referred to several provisions of the Criminal Code on the defense of individual or collective property and the destruction of natural resources, and also to the definition of certain conducts as offenses, together with their respective punishments, aimed at responding to all the concerns of the occupants of protected areas. The State indicated that it had made it an offense for an official or public servant to sell or grant tenure or possession to all or part of a piece of public real estate, and an aggravated offense if this was within a protected area, and it indicated that the representatives of the presumed victims were aware of this norm as they had already filed a criminal action in September 2013.²⁴⁵

191. The State also referred to articles 17 to 19 of the Constitution, indicating that the guarantee of protection of the rights of the citizen is available to all citizens equally with the express prohibition to constitute personal or discriminatory privileges or distinctions based on

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race, birth, disability, social class, sex, religion or political ideas. The State indicated that constituting a special jurisdiction to investigate, capture, prosecute, and punish Panamanian citizens, settlers, or immigrants from their original lands, with reference to the possible invasion of the indigenous areas, would violate the Constitution.

B.2. Considerations of the Court

192. With regard to Article 2 of the American Convention, the Court has indicated that this obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms protect by the Convention.²⁴⁶ In other words, the States not only have the positive obligation to adopt the necessary legislative measures to ensure the exercise of the rights contained in the Convention, but must also avoid the enactment of laws that prevent the free exercise of those rights and prevent the elimination or amendment of laws that protect them.²⁴⁷

193. In the instant case, regarding the alleged violation of the obligation to adopt domestic legal provisions for the protection of indigenous territories from third parties, the Court notes that this is based on the following factors: (a) the inexistence of a special offense or criminal procedure under Panamanian law to deal with the issue of the invasion of indigenous lands by third parties, and (b) the inexistence – to date – of a competent authority to address the problem of settler invasion.

194. Regarding the first factor, there is no evidence that the laws of Panama contain a specific procedure to evict third parties who occupy collective territories of the indigenous communities. Despite this, it is true that the representatives and the Commission alleged and proved that several legal actions for eviction and criminal actions against third party occupants had been filed by the representatives of the Kuna communities of Madungandí (*supra* paras. 86 and *ff.*). It is also true that some of the proceedings concluded with judicial decisions in favor of the presumed victims (*supra* para. 91).

195. The Court notes that the said actions were filed under administrative and criminal jurisdictions by representatives of the indigenous communities. The Court also notes that no arguments or evidence was submitted that would allow it to conclude that the general legal actions established in the laws of Panama to evict third parties or to prosecute those who commit certain illegal acts in indigenous territories are not appropriate to comply with the objective sought by the communities or because the legal framework of the general or ordinary actions filed by the petitioners is not appropriate to produce the same results as a specific remedy established for the collective territories of the indigenous communities.

196. Furthermore, the representatives and the Commission also failed to explain why offenses that already exist under the Criminal Code do not protect the rights of the indigenous peoples with the same effectiveness, and how the lack of a specific offense or criminal proceeding results in a violation of the rights of the communities in this particular case.

197. Regarding the second factor, the Court notes that the representatives and the Commission did not indicate precisely how the lack of a competent authority to address the problem of settler invasion constituted a violation of the rights of the communities in this case. To the contrary, the arguments presented indicate that legal actions were filed in the domestic

²⁴⁶ Cf. *Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 51, and *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 140.

²⁴⁷ Cf. *Case of Chocrón Chocrón v. Venezuela*, para. 140, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 140.

sphere, and that it was the lack of due diligence of the authorities that resulted in their ineffectiveness and not the legal framework.

198. Based on the above, the Court finds that it has not been proved that the State failed to comply with its obligation to adopt legislative or other measures, contained in Article 2 of the American Convention in relation to Article 8(1) of this instrument, to the detriment of the Kuna people of Madungandí and the Emberá communities of Bayano and their respective members.

VII-3

OBLIGATION TO ENSURE AND RESPECT RIGHTS WITHOUT DISCRIMINATION BASED ON ETHNIC ORIGIN AND TO PROVIDE EQUAL PROTECTION BEFORE THE LAW (Article 24 in relation to Article 1(1) of the Convention)

A. Arguments of the Commission and of the parties

199. With regard to the presumed violation of the obligation to respect and ensure the rights of the Kuna and Emberá communities without discrimination, the Commission indicated that article 126 of the Panamanian Constitution refers to a policy of an assimilationist nature in relation to the indigenous peoples – addressed at achieving the purposes of the country’s agricultural policy – “that has been overtaken owing to the development of international human rights law.”²⁴⁸ It added that the fact that this provision is still included in domestic law signifies the persistence of discriminatory factors in relation to the right to collective property of these peoples. It also observed that there was a lack of equal protection of indigenous property that contrasted with the measures taken to promote land appropriation by non-indigenous people, such as the adjudication of land with individual property titles. In addition, it indicated that there had been a systematic disregard of, and non-compliance with, the commitments made to the Kuna and Emberá peoples and that the State had failed to take measures of prevention and protection in relation to the invasion of settlers and illegal logging activities.

200. The representatives added that the mere fact of failing to provide a prompt, rapid and effective response to the requests and claims of the Kuna and Emberá “is a clear example of the State’s discrimination against these peoples and the lack of equality before the law.” They also indicated that the absence of an adequate procedure to prevent land invasions and the destruction of natural resources; the delay in the delimitation, demarcation and titling of the territories of the Kuna of Madungandí and the Emberá of Alto Bayano, as well as the failure to pay just and prompt compensation for the loss of their lands, natural resources, culture and spirituality, “reflects discrimination by the State against the indigenous peoples.” They added that individual property titles were awarded more rapidly than collective property titles.

201. The State argued that the alleged distinction based on certain criteria did not exist and neither did the State have segregationist intentions; rather, the State had revealed its permanent concern to integrate all the components of its nation. It added that the presumed victims had not specified which domestic norms had an assimilationist nature that prejudiced their ancestral territories and mentioned that Resolution ADMG-001 of 2012 (*supra* para. 83) had only suspended the processing of private property titles and not of collective titles; this meant that it was only the settlers who had applied for the adjudication of land who could consider themselves prejudiced. The State also indicated that discrimination and lack of equal response had been claimed “based on events that occurred 40 years ago and on the natural consequences of the problems of development.” It added that the integration of the indigenous groups into the country’s world view was not assimilationist, because “the coexistence of the

²⁴⁸ The Commission indicated that the last paragraph of this article on agrarian policy establishes that this policy “shall be applicable to the indigenous communities based on scientific methods of cultural change” (merits file, folio 95).

different ethnic groups is the State's primary objective."²⁴⁹ It added that it had provided effective protection to the territories of the Kuna Comarca against third parties and had taken steps to recognize the original rights, and this constituted "reliable evidence that discrimination was non-existent."²⁵⁰

B. Considerations of the Court

202. The Court notes that: (i) the Commission and the representatives argued that the State's acts and omissions that supposedly resulted in violations of the rights contained in Articles 21, 8 and 25 of the Convention, in relation to Articles 1(1) and 2 of this instrument, had also entailed the alleged violation of Article 24, and that (ii) the Commission alleged that article 126 of the Panamanian Constitution was of "an assimilationist nature."

203. The Court also notes that the Commission did not indicate how the foregoing had resulted in specific violations that differed from those that have already been declared to the detriment of the Kuna communities of Madungandí and the Emberá communities of Bayano. In addition, the Court notes that the representatives alleged that requests to grant individual property titles were processed more promptly and granted more frequently than the requests filed by indigenous communities. However, no evidence was provided to indicate that a difference in treatment existed between indigenous persons, specifically the said communities, and non-indigenous persons, in relation to land ownership titles.

204. Consequently, in this case, the Court refers to what it has already decided in this judgment in relation to the right to property and the right to judicial protection of the Kuna and Emberá peoples and their members, and will not rule with regard to the alleged violation of Article 24.

VIII REPARATIONS (Application of Article 63(1) of the American Convention)

205. Based on the provisions of Article 63(1) of the Convention,²⁵¹ the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to repair this adequately,²⁵² and that this provision "reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility."²⁵³ In addition, the Court has established that reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm that has been proved, and the

²⁴⁹ It also indicated that education and development will necessarily result in changes in their world view and the references to their environment, which will never be violated, but there must be an adaptation that promotes a balance between protecting their culture and promoting their social development.

²⁵⁰ The State also referred to access to health care services and indicated that access to work had been widely recognized to guarantee without distinction based on race or creed, the same opportunities as the rest of the Panamanians.

²⁵¹ Article 63(1) of the American Convention establishes: "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."

²⁵² Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 243.

²⁵³ *Case of Castillo Páez v. Peru. Reparations and costs*, para. 50, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 243.

measures requested to redress this harm. Accordingly, the Court must verify the concurrence of these factors to rule appropriately and in keeping with law.²⁵⁴

206. Reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution, which consists in re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the rights that have been violated and to redress the consequences of such violations.²⁵⁵ Accordingly, the Court has found it necessary to grant different types of measures of reparation in order to redress the harm integrally; thus, in addition to pecuniary compensation, measures of restitution and satisfaction, and guarantees of non-repetition have special relevance in relation to the harm caused.²⁵⁶

207. In the case of compensation, the Court recalls that this does not include reparations related to the facts mentioned previously over which the Court does not have jurisdiction to rule *ratione temporis* (*supra* para. 40), because they occurred before Panama had accepted the Court's contentious jurisdiction.

208. Consequently, and without prejudice to any form of reparation that is subsequently agreed between the State and the victims, based on the violations of the American Convention declared in this judgment, the Court will proceed to establish measures aimed at redressing the harm caused. To this end, it will take into account the claims of the Commission and the representatives, and also the arguments of the State,²⁵⁷ in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation.²⁵⁸

A. Injured party

209. The Court reiterates that, pursuant to Article 63(1) of the American Convention, it considers that anyone who has been declared a victim of the violation of any right recognized therein is an injured party. Therefore, the Court considers that the Kuna indigenous people of Madungandí and the Piriati and Ipetí Emberá indigenous communities of Bayano, and their members, are the injured party and, as victims of the violations declared in this judgment, they will be considered the beneficiaries of the reparations ordered by the Court.

B. Measures of satisfaction and guarantees of non-repetition

B.1. Measures of satisfaction

210. The Court will determine measures that seek to repair the non-pecuniary damage and that are not of a monetary nature, as well as measures with public scope and repercussion.²⁵⁹

²⁵⁴ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*, para. 110, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 245.

²⁵⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 26, and *Case of Osorio Rivera and family members v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 274, para. 236.

²⁵⁶ Cf. *Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs*, para. 294, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 241.

²⁵⁷ The State made no specific reference to the reparations requested by the Commission and the representatives; it only addressed the failure to pay compensation, and to demarcate and protect the territories (as well as the supposed discrimination), in response to the alleged violations.

²⁵⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 to 27, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 413.

²⁵⁹ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, para. 84, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 441.

Thus, considering the circumstances of the instant case, and their effects on the Kuna and Emberá indigenous peoples and their members and the consequences of a non-pecuniary nature derived from the violations of the American Convention that have been declared to their detriment, the Court finds it necessary to examine the pertinence of measures of satisfaction and guarantees of non-repetition. International case law and, in particular, that of the Court, has established repeatedly that the judgment constituted, *per se*, a form of reparation.²⁶⁰

211. The Court also takes note of the Commission's recommendation to make individual and collective reparation for the consequences of the human rights violations that have been determined.

212. The representatives indicated that the violations had prejudiced the indigenous communities and, owing to their cultural identity, they should be considered "from an individual and a collective perspective." They also considered that, in this case, the reparations had a special significance owing to the collective nature of the rights that had been violated, because the State's actions had affected not only the victims considered individually, but also the very existence of the communities. In addition, they observed that it was especially important that the reparations took into account the interests and needs of the said communities.

213. The State did not present specific arguments in this regard.

B.1.1. Publication and dissemination of the judgment

214. The Commission and the State did not refer to this type of measure of reparation.

215. The representatives asked the Court to order the State to publish: (i) the official summary of the judgment in the Official Gazette; (ii) the official summary of the judgment in a national newspaper with widespread circulation, and (iii) the judgment in its entirety on an official website.

216. As it has in other cases,²⁶¹ the Court finds it pertinent to order the State, within six months of notification of this judgment, to make the following publications: (a) the official summary of the judgment prepared by the Court, to be published in the Official Gazette and in a national newspaper with widespread circulation, and (b) the judgment in its entirety, available for one year, on an official website of the State.

217. The Court also considers it appropriate to order, as it has in other cases,²⁶² that the State publicize the official summary of the judgment, by broadcasting it on a radio station with extensive coverage in the territories of the Kuna people of Madungandí and the Emberá communities of Bayano in Spanish and in their respective languages. This broadcast should be made on the first Sunday of the month for at least three months. The State must previously inform the common interveners, with at least two weeks' notice, of the radio station on which the broadcast will be made and the date and time. The State must comply with this measure within six months of notification of this judgment.

²⁶⁰ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*, para. 56, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 448.

²⁶¹ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 261.

²⁶² Cf. *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 227, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 308.

B.1.2. Public act to acknowledge responsibility

218. The representatives asked the Court to order the State to organize a public act to acknowledge its international responsibility for the violations committed to the detriment of the Kuna and Emberá peoples. They added that they considered it pertinent that this act be carried out in a public ceremony in the presence of senior State authorities and members of both peoples, and that it be widely disseminated in the media. The Commission and the State made no reference to this measure of reparation.

219. As it has in other cases, the Court establishes that the State must organize a public act to acknowledge international responsibility during which it must refer to the human rights violations declared in this judgment.²⁶³ Determination of the date and place and details of the act must be previously consulted and agreed with the members of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Alto Bayano. The act must take place in a public ceremony in the presence of senior authorities of the State and members of the communities, and it must be widely disseminated in the media. In addition, the act should take into account the traditions, practices and customs of the members of the said indigenous peoples and must be conducted in both Spanish and in their respective languages.²⁶⁴ The State must carry out this act within one year of notification of this judgment.

B.2. Guarantees of non-repetition

B.2.1. Request to adapt domestic law

220. The Commission asked the Court to order the State to take the necessary measures to prevent similar events occurring in future, in keeping with the obligation to prevent violations and to ensure the fundamental rights recognized in the Convention. It also asked the Court to order the State to establish an adequate and effective remedy that protected the right of the indigenous peoples of Panama to claim and accede to their traditional territories, and to protect their territories and natural resources against third parties, including respecting the right of the indigenous peoples to apply their customary norms through their own systems of justice. In addition, the Commission asked the Court to order the State to ensure that the people have access to health care and education programs that are culturally pertinent.

221. The representatives asked the Court to order the State to take administrative, legislative and judicial measures to guarantee that the indigenous communities had the necessary protection to exercise their right to property fully and on an equal footing with the rest of the population. They also indicated that the State should provide an adequate and effective procedure to obtain protection and reparation in case of conflicts with third parties that affect the communities' rights. They added that these procedure should be conducted with the full participation of the communities, taking into consideration their customary law, values, practices and customs.

222. The State did not present arguments in relation to these requests.

223. In the instant case, the Court has declared the violation of Article 2 in relation to Articles 21, 8 and 25 of the Convention owing to the absence, prior to 2008, of any norms on the delimitation, demarcation and titling of indigenous lands. However, the Court established that

²⁶³ Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 469 (sixteenth operative paragraph), and *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, para. 307.

²⁶⁴ Cf. *Case of the Plan de Sánchez Massacre v. Guatemala. Reparations.* Judgment of November 19, 2004. Series C No. 116, para. 101 (third operative paragraph), and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 305.

the domestic norms subsequently enacted by Panama, namely Law 72 and, in 2010, Decree 223, did not violate the Convention, so that it was not appropriate to determine a measure of reparation in this regard.

224. Regarding the measure requested to establish an adequate and effective remedy to protect the lands against third parties, the Court analyzed the alleged violations under Articles 8, 25, 21, in relation to Article 2 of the Convention, and concluded that the State had not violated the obligation to adopt domestic legal provisions in relation to the protection of lands against third parties. Therefore, it is not appropriate to order the said measure of reparation.

225. In relation to the right to equality before the law and to non-discrimination, the representatives requested that domestic law be adapted so that the indigenous peoples could "exercise their right to property fully and on an equal footing with the rest of the population." In this regard, the Court notes that, in this judgment, it has not considered that the right to equality and non-discrimination had been violated; therefore, it is not appropriate to order the measure requested.

226. As regards the other measures of reparation requested, the Court considers that it is not appropriate to order them, because they are not related to the facts of the case.

B.2.2. Request for protection against third parties in territories of the indigenous peoples

227. The Commission asked that the Court order the State to adopt the necessary measures to protect the territory of the two indigenous peoples effectively, in order to guarantee their physical and cultural survival, as well as the development and continuity of their world view. It also requested the Court to order the State to halt the illegal entry of non-indigenous persons into the territories of the peoples and to remove the actual settlers to lands that do not belong to the indigenous peoples, and that the State guarantee the "free, prior and informed consent of the peoples to any plans, programs or projects it wishes to develop in their territories." The representatives asked the Court to order the State to take the appropriate measures to prevent conflicts with third parties based on land ownership and to ensure that this process did not prejudice the normal development of community life and property. The State did not present arguments in this regard.

228. In relation to these requests, the Court notes that, in this judgment, it has ordered measures of reparation with regard to the demarcation and titling of the Piriati and Ipeti lands and with regard to the State's obligation to refrain from acts that could affect the existence, value, use or enjoyment of the resources located on the said lands (*infra* paras. 229 and *ff.*). Consequently, it does not find it necessary to order the measures requested by the representatives, because the delivery of this judgment and the other reparations ordered herein are sufficient and adequate.

B.2.3. Conclude the process of formalizing, delimiting and physically demarcating the Emberá territories as soon as possible

229. The Commission asked the Court to order the State to conclude the process of formalizing, delimiting and physically demarcating the territories of the two peoples and their members promptly, taking into account the inter-American standards described in the Merits Report.

230. The representatives asked the Court to order the State to adopt the administrative, legislative or any other measures necessary to create an effective mechanism for the delimitation, demarcation and titling of the properties of the indigenous communities, in keeping with their customary law, values, practices and customs. They added that, while the lands have

not been delimited, demarcated and titled, the State must refrain from any action that could lead to its agents or third parties affecting the existence, value, use or enjoyment of the resources located in the area.

231. The State did not present arguments on the measures of reparation requested.

232. The Court determines that the State must proceed to demarcate the lands that correspond to the Ipetí and Piriati Emberá communities, and to title the Ipetí lands as a right to collective ownership, within one year of notification of this judgment, with the full participation of the communities and taking into consideration their customary law, values, practices and customs. While the said lands have not been adequately demarcated and titled, the State must refrain from any action that could lead to state agents, or third parties acting with their acquiescence or tolerance, affecting the existence, value, use or enjoyment of the resources located in the geographical area where the members of the Ipetí and Piriati Emberá communities live and carry out their activities.

233. The State must also take the necessary measures to annul the property title granted to C.C.M. within the territory of the Emberá Community of Piriati within one year of notification of this judgment.

C. Compensation

C.1. Pecuniary damage

C.1.1. Arguments of the Commission and allegations of the parties

234. The Commission asked the Court to order to State to provide the two peoples and their members with prompt and just compensation for their removal and resettling, and the flooding of their ancestral territories, the appropriate amount of which should be determined by a process than ensures their participation, in keeping with their customary law, values, practices and customs. The representatives agreed with this measure of reparation, but indicated that the "appropriate amount" should be determined "based on [the] study presented by the presumed victims."²⁶⁵

235. The representatives also indicated that the construction of the hydroelectric project had had serious effects for the Kuna and Emberá peoples: (i) it had resulted in an increase in disease; (ii) it had had an prejudicial impact on the forms of traditional subsistence and destroyed the ecosystem; (iii) it caused malnutrition in 89% of the children under the age of 5; (iv) there was an absence of basic services of water and electricity; (v) settler migration produced drastic changes in the social composition of the area, and (vi) deforestation by these settlers. Lastly, the representatives indicated that, bearing in mind the commercial, cultural and spiritual value of the territories belonging to the Kuna when they were expropriated by the State, as well as the foregoing considerations on the importance of their ancestral lands for these communities and the consequent adverse impact of the dispossession and eviction and the flooding of those lands,²⁶⁶ the State should pay compensation for pecuniary damage

²⁶⁵ They added that the flooding of the ancestral territories of the Kuna and Emberá peoples as a result of the construction of the Ascanio Villalaz Hydroelectric Complex made it impossible to reconstitute those territories, so that the State "should award benefits of another kind." They considered that, in this case, the Court should not analyze the pecuniary damage from the traditional perspective of indirect damage or loss of income, but derived from the failure to comply with the payment of fair compensation.

²⁶⁶ Technical and economic report on compensation and reparation in the collective and individual sphere of the consequences of violations of the human rights of the Kuna Comarca of Madungandí, April 2014 (merits file, folios 8580 and ff.). At the request of the representatives, technical reports had been prepared previously, in 2002, 2009, and 2013, for presentation to the inter-American system in the context of this case.

amounting to US\$53,630,278.44 (fifty-three million six hundred and thirty thousand two hundred and seventy-eight United States dollars and forty-four cents).²⁶⁷

236. The State did not present arguments in relation to these requests.

C.1.2. Considerations of the Court

237. In its case law, the Court has developed the concept of pecuniary damage and the circumstances in which it should be compensated. It has established that pecuniary damage entails "the loss of or detriment to the victims' income, the expenses incurred due to the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."²⁶⁸ In this judgment, in order to take a decision on the claims concerning pecuniary damage, the Court will take into account the body of evidence, its own case law, and the arguments of the parties.

238. As already indicated, the Court will not rule on "related" reparations, namely those that can only be appreciated based on an examination of the facts that resulted in the harm and its effects, which are excluded owing to the Court's temporal jurisdiction (*supra* para. 40). Consequently, the Court will not rule on the pecuniary measures of reparation requested by the Commission and the representatives in relation to the removal and resettlement, and the flooding of the ancestral territories of the indigenous peoples, or on the State's supposed failure to make certain compensation payments. Furthermore, the Court notes that the representatives failed to make a clear distinction regarding which of the reparations requested were specifically related to the different violations alleged in this case.

239. Bearing in mind that the representatives did not provide sufficient evidence to determine the exact amount related to each of the violations declared, the Court considers that the prejudices suffered by the victims involved loss of earning because the communities were unable to obtain full economic benefit from their lands owing to the failure to demarcate, delimit and title their territories. Moreover, the damage caused to the territories of the indigenous communities by third party intruders must be repaired.

240. The Court will therefore determine compensation for the said pecuniary damage based on the equity principle. Accordingly, the Court establishes a total compensation of US\$250,000.00 (two hundred and fifty thousand United States dollars) for the concept of pecuniary damage for the Ipetí and Piriati Emberá communities, and US\$1,000,000.00 (one million United States dollars) for the Kuna people of Madungandí, which shall be delivered to the representatives of the respective indigenous communities within one year of notification of this judgment so that they may invest the money as decided by the said peoples, in accordance with their own decision-making mechanisms and institutions.

C.2. Non-pecuniary damage

C.2.1. Arguments of the Commission and of the parties

241. The Commission asked the Court to order the State to make reparation, individually and collectively, for the consequences of the human rights violations determined in the Merits

²⁶⁷ Regarding compensation, the "Technical Socio-economic Report on Compensation of the Kuna Comarca of Madungandí and of the Emberá Collective Lands of Piriati, Ipetí and Majé Cordillera" had been prepared by the presumed victims and referred to a total compensation of B/.9,512,804.30. Technical Socio-economic Report on Compensation of the Kuna Comarca of Madungandí and of the Emberá Collective Lands of Piriati, Ipetí and Majé Cordillera, 2009 (Annex 23 to the Merits Report, folios 450 to 489, 467).

²⁶⁸ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 479.

Report. In particular, it asked that the State redress the lack of protection of the ancestral territories of the two peoples, the lack of an effective and prompt response by the authorities, and the discriminatory treatment to which the said peoples were subjected. It added that the dispossession of the ancestral territories entailed the loss of sacred places, forests, dwellings, crops, animals and medicinal plants that had more than just material value, but were an essential element of the cultural identity and traditional way of life, so that – in addition to material losses – this constituted cultural and spiritual losses that could never be recovered, and that should be compensated.

242. The representatives agreed with the Commission about these cultural and spiritual losses and added that the peoples had been left in a situation of legal uncertainty as a result of the delay in the proceedings, because their ancestral lands had been expropriated over 40 years ago without them receiving the corresponding compensation. Consequently, the representatives considered that it was pertinent to establish a compensation payment based on equity.

243. The State did not present arguments in this regard.

C.2.2. Considerations of the Court

244. In its case law, the Court has defined the concept of non-pecuniary damage and has established that this “may include the suffering and affliction caused to the direct victim and to his next of kin, the impairment of values of great significance to the individual, and the changes of a non-pecuniary nature in the living conditions of the victim or his or her family.”²⁶⁹

245. When assessing the non-pecuniary damage caused in the case *sub judice*, the Court has borne in mind the words of Benjamín García and Bonarge Pacheco in their statements before this Court during the public hearing, and of Fausto Valentín and Bolívar Jaripio in their affidavits, considering that the harm caused to them was representative of the harm caused to the other victims, members of the Kuna people of Madungandí and the Emberá people of Bayano.²⁷⁰

246. The Court refers back to its considerations on the violation of Article 21, in relation to Articles 1(1) and 2 of the Convention (*supra* para. 146). It observes that the failure to materialize the right to communal property of the members of the said peoples, as well as the living conditions to which they were subjected as a result of the State’s delay in making their territorial rights effective, must also be taken into account when establishing non-pecuniary damage. The Court also observes that the special significance of the land for indigenous peoples in general, and for the Kuna and Emberá peoples in particular, means that any denial of the exercise or enjoyment of their territorial rights impairs values that are very significant for the members of these peoples, who run the risk of losing, or suffering irreparable harm to, their life and cultural identity, and the cultural patrimony to be passed on to future generations.

²⁶⁹ *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014. Series C No. 276, para. 156.

²⁷⁰ For example, Bolívar Jaripio stated that: “[t]here are no trees, so there are no animals, or medicines and our spirituality has deteriorated and we feel strangers in these lands, but we have to continue living [...]. Nowadays, the Emberá communities of Alto Bayano are in a very bad state, as we do not have title to the scant lands that we have, we are permanently anxious because we see how they take away our lands and some of our brothers, when they see this, they prefer to sell the lands to invading settlers, and our community is very sad because when they take away the lands they take away our spirits.” Similarly, Fausto Valentín, speaking with regard to the Kuna people, stated that “[n]ow our social and cultural values are being lost because we are not united like before, because we have lost the communication with the other communities and also our traditional songs, owing to the changes in the environment.” Affidavit of Bolívar Jaripio, presumed victim proposed by the representatives, of March 21, 2014 (evidence file, folios 8424 and 8425); Affidavit of Fausto Valentín, presumed victim proposed by the representatives, of March 18, 2014 (evidence file, folios 8416 and 8417).

247. Based on its case law and considering the circumstances of this case and the violations committed, the Court finds it pertinent to establish, in equity, for non-pecuniary damage a total compensation payment of US\$250,000.00 (two hundred and fifty thousand United States dollars), for the Ipetí and Piriati Emberá communities, and US\$1,000,000.00 (one million United States dollars) for the Kuna people of Madungandí, which shall be delivered to the representatives of the respective indigenous communities. Payment of this sum must be made within one year of notification of this judgment.

D. Costs and expenses

D.1. Arguments of the parties

248. The representatives referred to the report on compensation and reparations of April 2014 (*supra* para. 12), forwarded as an annex to their final written arguments, specifically to certain "Administrative costs." Neither the Commission nor the State presented arguments on this point.

D.2. Considerations of the Court

249. The Court reiterates that, pursuant to its case law,²⁷¹ costs and expenses form part of the concept of reparations because the actions taken by the victims in order to obtain justice, at both the national and international level, entail expenditure that must be compensated when the international responsibility of the State has been declared in a judgment.

250. Regarding the reimbursement of expenses, the Court must assess their scope prudently, and this includes the expenses arising before the authorities of the domestic jurisdiction and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. The said assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.²⁷² Furthermore, the Court reiterates that is not sufficient to merely forward evidentiary documents; rather the parties must include arguments that relate the evidence to the fact that it is considered to represent and, in the case of financial disbursements, the items and their justification must be clearly established.²⁷³

251. The Court considers that, in this case, the compensation for pecuniary damage should include the expenses incurred by the members of the Kuna and Emberá peoples in the different actions they took in order to claim their rights at the domestic level. In this regard, the Court notes that the table provided by the representatives together with their final written arguments refers to "Administrative costs" of B/.666,402.92.²⁷⁴ It should be pointed out that these costs refer to the Kuna people only and no evidence was provided to substantiate this sum. Also, the

²⁷¹ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 418.

²⁷² Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 82, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 450.

²⁷³ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 496.

²⁷⁴ These costs refer to the "technical advisory services" related to "the socio-economic study of Alto Bayano" (B/192,925.00) and "the administrative expenses of the General Congress to negotiate this compensation [...] during 36 years" (B/474,393.67).

table of compensation and reparations of July 2009 includes as "Operating costs" of the Piriati and Ipetí Emberá Congress a total of B/.350,000.00, "for all procedures, transportation expenses, local and government meetings [...] for more than 30 years."²⁷⁵

252. The Court notes that the representatives have not referred to expenses incurred during the litigation at the international level or provided evidence in this regard. Therefore, the Court has no supporting evidence to determine the expenses incurred due to this case.²⁷⁶ The only vouchers sent correspond to expenses relating to the reimbursement of the Victims' Legal Assistance Fund (*infra* paras. 254 and *ff.*).

253. Consequently, the Court decides to establish a total of US\$120,000.00 (one hundred and twenty thousand United States dollars), for the work carried out in the litigation of this case at the national and international level, which shall be distributed as follows: the sum of US\$60,000.00 (sixty thousand United States dollars) each, to be delivered to the representatives of the Kuna people of Madungandí and to the representatives of the Ipetí and Piriati Emberá communities. The Court determines that, during the proceeding to monitor compliance with this judgment, it may order the State to reimburse the victims or their representatives any reasonable expenses they incur at that procedural stage.

E. Reimbursement of expenses to the Victims' Legal Assistance Fund

254. The members of the Kuna people of Madungandí and the Emberá people of Bayano, through their representatives, requested the support of the Victims' Legal Assistance Fund of the Court to cover some of the expenses of litigating before the Court, such as "the expenses of transportation and per diems of the proposed witnesses and expert witnesses who had to appear before the Court to provide their statements," and also the "expenses of transportation and per diems of the lawyers who would represent them in this litigation."

255. In an order of October 25, 2013, the President authorized the necessary funds to cover the assistance of up to two (2) representatives and a maximum of four (4) presumed victims and/or expert witnesses at the public hearing, and, if necessary, funds would also be provided to cover the costs of the assistance of a Spanish-Kuna interpreter.

256. According to the information in the report on disbursements in this case, these amounted to US\$4,525.49 (four thousand five hundred and twenty-five United States dollars and forty-nine cents). The State was given the opportunity to present observations on the disbursements made in this case up until June 12, 2014; however, it did not do so.

257. Under Article 5 of the Rules for the Operation of the Fund, it corresponds to the Court to evaluate the appropriateness of ordering the defendant State to reimburse the expenditure incurred to the Legal Assistance Fund. Based on the violations declared in this judgment, the Court orders the State to reimburse the sum of US\$4,525.49 (four thousand five hundred and twenty-five United States dollars and forty-nine cents) to the Fund for the expenses incurred. This amount must be reimbursed to the Inter-American Court within 90 days of notification of this judgment.

F. Method of complying with the payments ordered

²⁷⁵ Technical Socio-economic Report on Compensation of the Kuna Comarca of Madungandí and of the Emberá Collective Lands of Piriati, Ipetí and Majé Cordillera of July 2009 (evidence file, folios 450 and *ff.*). The 2002 Report also refers to B/4,500 for operating costs of the Local Congress of Majé Cordillera. 2002 Technical Socio-economic Report on Compensation of the Kuna Comarca of Madungandí and of the Emberá Collective Lands of Piriati, Ipetí and Majé Cordillera (evidence file, folio 266).

²⁷⁶ *Cf. Case of Chitay Nech et al. v. Guatemala*, para. 287, and *Case of Luna López v. Honduras. Merits, reparations and costs*. Judgment of October 10, 2013. Series C No. 269, para. 219.

258. The State shall make the payment of compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein or, as requested by the representatives, to the person they designate to receive it in an instrument that is valid under Panamanian law, within one year of notification of this judgment, pursuant to the following paragraph. The amounts allocated in this judgment as compensation and to reimburse costs and expenses shall be delivered as established in this judgment, without any deductions arising from possible taxes or charges.

259. The State shall comply with its pecuniary obligations by payment in United States dollars. If the State should fall in arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in Panama.

IX OPERATIVE PARAGRAPHS

THEREFORE,

THE COURT

DECIDES:

By five votes to one,

1. To admit the objection filed by the State concerning the "lack of jurisdiction *ratione temporis*," specifically in relation to the State's alleged failure to pay compensation, pursuant to paragraphs 27 to 40 of this judgment.
2. That it is not necessary to rule on the preliminary objection filed by the State on "lack of jurisdiction owing to the statute of limitations," pursuant to paragraph 27 of this judgment.

Unanimously,

3. To reject the preliminary objection filed by the State on the "failure to exhaust domestic remedies" pursuant to paragraphs 21 to 23 of this judgment.

DECLARES:

Unanimously, that:

4. The State violated Article 21 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the Kuna community of Madungandí and the Emberá community of Bayano and their members, owing to the failure to delimit, demarcate and grant title to their territories, pursuant to paragraphs 111 to 146 of this judgment.
5. The State violated Article 2 of the American Convention on Human Rights, in relation to Articles 21, 8 and 25 of this instrument, to the detriment of the Kuna community of Madungandí and the Emberá community of Bayano and their members, owing to the absence of domestic laws

on the delimitation, demarcation and titling of indigenous territories prior to 2008, pursuant to paragraphs 150 to 157 of this judgment.

6. The State violated Articles 8(1) and 25 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the Kuna community of Madungandí and the Emberá community of Bayano and their members, owing to non-compliance with the principle of a reasonable time in relation to certain domestic proceedings, pursuant to paragraphs 165 to 187 of this judgment.

7. The State did not violate Article 2 of the American Convention, in relation to 8 and 25 of this instrument, to the detriment of the Kuna community of Madungandí and the Emberá community of Bayano and their members, with regard to the alleged absence of a proceeding to protect indigenous territories, pursuant to paragraphs 188 to 198 of this judgment.

8. It has no evidence to rule on the violation of equality before the law and the principle of non-discrimination established in Articles 24 and 1(1) of the American Convention, to the detriment of the Kuna community of Madungandí and the Emberá community of Bayano and their members, pursuant to paragraphs 202 to 204 of this judgment.

AND ESTABLISHES

Unanimously, that:

9. This judgment constitutes, *per se*, a form of reparation.

10. The State shall, within six months of notification of this judgment, publish the official summary of this judgment, once, in the Official Gazette of Panama and in a national newspaper with widespread coverage. In addition, the State shall, within the same time frame, publish this judgment in full on an official website of the State for one year, and broadcast it on a radio station. All of this pursuant to paragraphs 216 and 217 of this judgment.

11. The State shall organize a public act to acknowledge international responsibility in relation to the facts of this case, pursuant to paragraph 219 of this judgment.

12. The State shall demarcate, within one year at the most, the lands that correspond to the Ipetí and Piriati Emberá communities and grant title to the Ipetí lands as a right to collective ownership of the Ipetí Emberá community, pursuant to paragraph 232 of this judgment.

13. The State shall adopt the necessary measures to annul the property title granted to C.C.M. in the territory of the Emberá community of Piriati, pursuant to paragraph 233 of this judgment.

14. The State shall pay the amounts established in paragraphs 240, 247 and 253 of this judgment for pecuniary and non-pecuniary damage, and to reimburse costs and expenses within one year of its notification.

15. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, pursuant to paragraph 257 of this judgment.

16. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with it.

17. The Court will monitor full compliance with the judgment in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judge Eduardo Ferrer Mac-Gregor Poisot advised the Court of his partially dissenting opinion which is attached to this judgment.

DONE, at San José, Costa Rica, on October 14, 2014, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

**PARTIALLY DISSENTING OPINION
OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

**CASE OF THE KUNA INDIGENOUS PEOPLE OF MADUNGANDÍ AND THE EMBERÁ
INDIGENOUS PEOPLE OF BAYANO AND THEIR MEMBERS V. PANAMA**

**JUDGMENT OF OCTOBER 14, 2014
(PRELIMINARY OBJECTIONS, MERITS, REPARATIONS AND COSTS)**

INTRODUCTION

1. This opinion is issued in the *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, in which the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) admitted the preliminary objection filed by the State concerning lack of jurisdiction *ratione temporis* and, therefore, decided that, when examining the merits of the case, it would not analyze the compensation payment that the State should have made.

2. Regarding the said preliminary objection, the dispute is rooted in the facts relating to the displacement of the communities that took place between 1973 and 1975, and the State’s undertaking to pay compensation for these displacements.

3. The majority opinion considered that the Court did not have jurisdiction to rule on the alleged failure to pay the compensation to the communities of the Kuna of Madungandí and the Emberá of Bayano, because the Panamanian State accepted the Court’s compulsory jurisdiction on May 9, 1990, and the facts relating to the lack of payment had taken place prior to the acceptance of jurisdiction. Thus, the Court found the preliminary objection based on lack of jurisdiction *ratione temporis* admissible and determined that it lacked competence to examine the content of the agreements of 1976, 1977 and 1980 and the alleged failure to comply with these agreements.

4. I dissent from the majority because I consider that the Court should have rejected this preliminary objection filed by the State and examined the merits of the dispute, taking into account that, in this case, *we are not faced with isolated facts that happened instantaneously, but rather with a continuing situation (concerning a composite fact) relating to non-compliance with the payment of the compensation*, for reasons that I will explain below. It is worth noting that, if the Court had examined the matter in depth, it would have been the first time that the Inter-American Court had been able to analyze non-compliance with a compensation payment as part of the guarantees contained in Article 21 of the American Convention for indigenous peoples, taking into account that what was claimed in this case consisted, precisely, in “the supposed continuing violation of the right to collective property of the Kuna indigenous people of Madungandí (“Kuna”) and the Emberá indigenous people of Bayano (“Emberá”) and their members, owing to the alleged failure to comply with the payment of compensation related to the expropriation and flooding of their ancestral territories, as a result of the construction of the Bayano Hydroelectric Dam from 1972 to 1976”¹ (underlining added).

¹ Para. 1 of the judgment.

5. For greater clarity, this opinion is divided into the following sections: (i) Jurisprudential development of Article 21 of the American Convention from the perspective of collective ownership by indigenous peoples (paras. 6 to 19); (ii) The limits to the right to collective ownership by indigenous peoples under the inter-American system (paras. 20 to 30); (iii) The right to payment of just compensation in cases of expropriation as a continuing violation (paras. 31 to 51), and (iv) The failure to pay compensation as a continuing violation in the case of the Kuna indigenous communities of Madungandí and the Emberá indigenous communities of Bayano (paras. 52 to 78).

I. JURISPRUDENTIAL DEVELOPMENT OF ARTICLE 21 OF THE AMERICAN CONVENTION FROM THE PERSPECTIVE OF COLLECTIVE OWNERSHIP BY INDIGENOUS PEOPLES

6. During the preparatory work on the American Convention on Human Rights the phrase “[e]veryone has the right to private property, but the law may subordinate its use and enjoyment to public interest” was replaced by that of “[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.” In other words, it was chosen to refer to “the use and enjoyment of his property [possessions]” instead of “private property.”²

7. Article 21 of the American Convention recognizes the right to property. In this regard, it establishes: (a) that “[e]veryone has the right to the use and enjoyment of his property; (b) that the law may subordinate such use and enjoyment to the “interest of society”; (c) that a person may be deprived of his property for reasons of “public utility or social interest and in the cases and according to the forms established by law”; and (d) this deprivation shall be made upon payment of just compensation³ (underlining added).

8. In its case law, the Court has developed a broad concept of property that includes, among other matters, the use and enjoyment of possessions, defined as material goods that can be acquired, as well as any right that may form part of an individual’s net worth. This concept includes all movable and immovable property, corporeal and incorporeal elements and any other intangible object that may have a value.⁴

² *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 145.

³ *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 120.

⁴ *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 170; *Case of the Santo Domingo Massacre v. Colombia. Request for interpretation of the judgment on preliminary objections, merits, reparations and costs.* Judgment of August 19, 2013. Series C No. 263, para. 269; *Case of Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012. Series C No. 252, para. 179; *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 220; *Case of Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, para. 148; *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 237; *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs.* Judgment of March 4, 2011. Series C No. 223, para. 82; *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 84; *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28, 2009. Series C No. 195, para. 399; *Case of Salvador Chiriboga v. Ecuador. Preliminary objection*

9. Article 21 of the Convention provides a broad range of protection. In light of this provision, the Inter-American Court has examined cases on pensions,⁵ possessions seized at the time of a detention,⁶ copyright,⁷ return of property,⁸ expropriations,⁹ a salary scale system,¹⁰ seizure and destruction of possessions,¹¹ payment of compensation,¹² loss of property owing to displacement,¹³ property embargo¹⁴ and the collective property of indigenous and tribal peoples.¹⁵

and merits. Judgment of May 6, 2008. Series C No. 179, para. 55; *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 174; *Case of the Ituango Massacres v. Colombia.* Judgment of July 1, 2006. Series C No. 148, para. 174; *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 121; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, para. 102; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 137; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 144, and *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 122.

⁵ *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, and *Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198.

⁶ *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114.

⁷ *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135.

⁸ *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170.

⁹ *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179.

¹⁰ *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs.* Judgment of March 4, 2011. Series C No. 223.

¹¹ *Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, and *Case of Uzcátegui et al. v. Venezuela. Merits and reparations.* Judgment of September 3, 2012. Series C No. 249.

¹² *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246.

¹³ *Case of the Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012. Series C No. 252; *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2013. Series C No. 270.

¹⁴ *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265.

¹⁵ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125; *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172; *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2013. Series C No. 270.

10. The Court's case law with regard to the latter has been extensively developed within the framework of the inter-American system, and the Court has found it necessary to make some clarifications concerning the concept of "property" where indigenous communities were concerned. Thus, it considered that:

"[...]. The indigenous peoples have a community-based tradition related to a communal form of collective land ownership; thus, land is not owned by the individual but rather by the group and its community [...]."¹⁶

11. Using an evolutive interpretation, the Court has indicated that "[t]he terms of an international human rights treaty have an autonomous meaning, so that they cannot be compared to the meaning attributed to them under domestic law. Moreover, such human rights treaties are living instruments whose interpretation must evolve with the time and, in particular, with present day conditions."¹⁷ In addition, "Article 29(b) of the Convention establishes that no provision 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."¹⁸ In sum, the Court reached the conclusion that "Article 21 of the Convention protects the right to property in the sense that it includes, among other matters, the rights of the members of indigenous communities within the framework of communal ownership."¹⁹

12. Article 21 of the American Convention does not explicitly mention collective property and, in particular, indigenous property. In this understanding, when examining the scope of Article 21 of the Pact of San José, the Court has found it useful and appropriate to use international treaties other than the American Convention, such as Convention No. 169 of the International Labour Organization (hereinafter "ILO Convention No. 169"),²⁰ the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,²¹ to interpret their provisions based on the evolution of the inter-American system.

¹⁶ *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 145; *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 86, and *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 149.

¹⁷ *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114.

¹⁸ *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 171, and *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 147.

¹⁹ *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 171, and *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 148

²⁰ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125; *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146; *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245.

²¹ *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172.

13. The Court has considered "that, in indigenous communities, the concepts of property and possession may have a collective significance, in the sense that possession is 'not focused on individuals, but on the group and its community.'"²² The Inter-American Court has also indicated that "both the private property of individuals and the communal property of the members of indigenous communities are covered by the protection granted by Article 21 of the American Convention."²³ This concept of the ownership and possession of the land does not necessarily correspond to the classic concept of property, but it deserves equal protection under Article 21 of the American Convention. Failing to recognize the specific versions of the right to use and enjoyment of property that derive from the culture, practices, customs and beliefs of each people, would be equivalent to maintaining that there is only one way of using and enjoying property and this, in turn, would make the protection granted by that provision meaningless for millions of individuals.²⁴

14. Based on the above criteria, the Court has emphasized that the close relationship that indigenous peoples have with the land must be recognized and understood as the fundamental basis of their culture, spiritual life, integrity, economic survival, and the preservation and transmission of these to future generations.²⁵

15. The foregoing is related to article 13 of ILO Convention No. 169, in the sense that the State 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."²⁶

16. The main mechanism to guarantee the right to indigenous land ownership that has been identified by the organs of the inter-American system is the delimitation and demarcation of the lands that belong to the indigenous peoples. As the Court has explained: "to obtain this title, the territory that the members of the [respective] people have traditionally occupied and used must first be demarcated and delimited, following consultations with this people and with the neighboring peoples."²⁷ The Court

²² *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 87; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 89, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 120.

²³ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 143.

²⁴ *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 120; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 87, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 145

²⁵ *Cf. Case of the Plan de Sánchez Massacre. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 85; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 149, and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 131.

²⁶ *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 119, and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 136.

²⁷ *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 209, and *Case of the Saramaka People v.*

has also established that one of the basic rights related to the right to collective ownership of the indigenous peoples is the permanent enjoyment of their ancestral territory, to which end, they require title to that territory.²⁸

17. The culture of the members of indigenous communities corresponds to a particular way of life and of being, seeing and acting in the world based on their close relationship with their traditional territories and the resources found on these, not only because these territories constitutes their principal means of subsistence, but also because they constitute an element that is part of their world view, religion and, consequently, their cultural identity.²⁹ Therefore, the close relationship of the indigenous peoples with their traditional territories and the natural resources connected to their culture that are found on those territories, as well as the incorporeal elements derived from them, must be safeguarded by Article 21 of the American Convention.³⁰

18. Failing to recognize the ancestral right of members of indigenous communities to their territories could violate other basic rights, such as the right to cultural identity and the very survival of the indigenous communities and their members.³¹

19. The Court has determined that “[i]ndigenous 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.”³²

Suriname. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2007. Series C No. 172, para. 116

²⁸ Cf. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 153; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 215; *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 209, and *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 116.

²⁹ *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 118; *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 266, and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 135.

³⁰ *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 88; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 118, and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 137.

³¹ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 147.

³² *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79, para. 149

II. THE LIMITS TO THE RIGHT TO COLLECTIVE OWNERSHIP BY INDIGENOUS PEOPLES UNDER THE INTER-AMERICAN SYSTEM

20. When there are real or apparent clashes between indigenous communal property and the property of private individuals, the American Convention and the case law of the Inter-American Court provide the standards to define the admissible restrictions to the use and enjoyment of those rights, namely: (a) they must be established by law; (b) they must be necessary; (c) they must be proportionate, and (d) they must be addressed at achieving a legitimate purpose in a democratic society.³³

21. Article 21(1) of the Convention establishes that “[t]he law may subordinate such use and enjoyment to the interest of society.” The need for legally established restrictions will depend on their aim being to satisfy an essential public interest, and it is not sufficient to prove, for example, that the law has a useful and timely purpose. The proportionality stems from the fact that the restriction must be closely adapted to the achievement of a legitimate purpose, interfering as little as possible in the effective exercise of the restricted rights. Lastly, to be compatible with the Convention, restrictions must be justified by collective objectives that, owing to their importance, clearly outweigh the need for the full enjoyment of the restricted right.³⁴

22. The Court has observed that the right to property is not absolute and, therefore, it may be subject to restrictions and limitations,³⁵ provided these are imposed using the appropriate legal mechanisms and in accordance with the parameters established in the said Article 21 of the Convention.³⁶ The Court has established that, when examining a possible violation of the right to property, it should not restrict itself to merely examining whether a formal expropriation or dispossession occurred, but also verify, over and above appearances, the real situation behind the situation denounced.³⁷

³³ *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 156; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 128, and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 144. Regarding the issue of proportionality, see the following: *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 170, para. 127, and *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 51.

³⁴ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 145 Cf. (*mutatis mutandi*) *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 96, and *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 127.

³⁵ *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 170; *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 128, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 220.

³⁶ Cf. *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 170; *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, para. 54, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 220.

³⁷ Cf. *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 170, and *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 124.

23. Article 21(2) of the Convention establishes that, for the deprivation of someone[s] property to be compatible with the right to property established in the Convention, it must be based on reasons of public utility or social interest, subject to payment of just compensation, and be limited to the case and according to the forms established by law.³⁸ It may be necessary to restrict the right to property of private individuals in order to achieve the collective purpose of preserving cultural identities in a democratic and pluralist society in the sense of the American Convention; and proportionate, if a just compensation is paid to those who are prejudiced, pursuant to Article 21(2) of the Convention.³⁹

24. This does not mean that whenever there is a conflict between the territorial interests of private individuals or of the State and the territorial interests of the members of indigenous communities, the latter should prevail over the former. When States are unable, for specific and justified reasons, to take measures to return the traditional territory and communal resources to indigenous populations, the compensation granted must be guided primarily by the significance that the land has for them⁴⁰ (underlining added).

25. In the context of major development projects or for exploration, extraction or exploitation of resources and minerals, the Inter-American Court has determined a series of rights of indigenous and tribal peoples in relation the restrictions to communal property: (a) participation of the respective people in decision making with regard to the project that it is intended to develop on their ancestral territory; (b) the indigenous or tribal people must benefit from the project that it is intended to develop on their territory, and (c) environmental and social impact assessments must be made.⁴¹

26. When applying these standards to conflicts that occur between private property and the claims of the members of indigenous communities over their ancestral property, States must assess, on a case by case basis, the restriction that would result from the recognition of one right over another. Thus, for example, States must take into account that indigenous territorial rights encompass a broader and different concept that is related to the collective right to their survival as an organized people, with control over their habitat as a necessary condition for the reproduction of their culture, for their very development and to carry out their life projects. The ownership of the land guarantees that the members of indigenous communities can conserve their cultural heritage.⁴²

27. In this regard, Article 16(4) of ILO Convention No. 169, when referring to the return of the indigenous peoples to the territories from which they have been

³⁸ *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, para. 108.

³⁹ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 148.

⁴⁰ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 149.

⁴¹ *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 130, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 157.

⁴² *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 146

displaced, indicates that:

When such return is not possible, [...] these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.⁴³

28. The choice of, and the awarding of, alternative lands, the payment of just compensation, or both, are not subject merely to the State's discretion, but pursuant to a comprehensive interpretation of ILO Convention No. 169 and the American Convention, must be agreed with the peoples concerned, in keeping with their own consultation procedures, values, practices and customary law.⁴⁴

29. It should be recalled that based on Article 1(1) of the Convention, the State is obliged to respect the rights recognized in the Pact of San José and to organize the public powers to ensure to all persons subject to its jurisdiction the free and full exercise of those human rights.⁴⁵

30. The guarantee of the right to communal property of the indigenous peoples should take into account that the land is closely related to their traditions and oral expression, their customs and languages, their arts and rituals, their knowledge and practices related to nature, their culinary arts, their customary law, clothing, philosophy and values. Owing to their surroundings, their integration with nature and their own history, the members of indigenous communities transmit this immaterial cultural heritage from generation to generation, and it is constantly recreated by members of the indigenous communities and groups.⁴⁶

III. THE RIGHT TO PAYMENT OF JUST COMPENSATION IN CASES OF EXPROPRIATION AS A CONTINUING VIOLATION

31. It should be emphasized that this case was submitted by the Inter-American Commission on Human Rights for the Court to determine the alleged responsibility of the State for, *inter alia*, "the ongoing violation of the right to collective property of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano and their members, based on the alleged failure to pay compensation owing to the dispossession and flooding of their ancestral territories as a result of the construction of the Bayano Hydroelectric Dam from 1972 to 1976."⁴⁷ However, among its different considerations when deciding on the preliminary objection in relation to the alleged "lack of jurisdiction *ratione temporis*," the Court decided not to examine the central aspect of this issue, in the sense of defining the meaning and scope of the international

⁴³ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 150

⁴⁴ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 151

⁴⁵ *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99 para. 142, and *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 109.

⁴⁶ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 154.

⁴⁷ Para. 1 of the judgment.

standards concerning what constitutes a continuing violation and how those standards were applicable in the instant case.⁴⁸

32. In this section, I will explain the definition of a continuing violation under international law, considering: (a) the definition of a continuing violation, and (b) the elements of continuing violations in relation to the right to property. Then, in the last section, I will analyze, specifically, the failure to pay compensation as a continuing violation in the case of the Kuna indigenous people of Madungandí and the Emberá indigenous people of Bayano.

a) *The definition of a continuing violation under international law*

33. At the international level there is not a standardized definition of what constitutes a continuing violation or a violation of a continuous nature. However, in general, it has been recognized that "a continuing violation is the breach of an international obligation by an act of a subject of international law extending in time and causing a duration of continuance in time of that breach."⁴⁹ In addition, if the act affects the legal status of a person over a certain period of time, it should be considered a continuing act.⁵⁰ To the contrary, if "the breach is completed once and for all at a certain moment in time without continuing harmful effects"⁵¹ it cannot be of a continuing nature.⁵²

34. The Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission make a distinction between instantaneous acts and acts of a continuing character. Thus, Article 14(1) establishes that: "The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." Meanwhile, paragraph 2 of this article stipulates that: "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation." And, finally, Article 14(3) establishes that: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

35. It is important to point out that according to the logic of the analysis made by the International Law Commission it is possible to classify a violation of an international obligation as a composite act, which could be defined as "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act" (Article 15(1)). Thus, "In such a case, the breach extends over the entire period starting with

⁴⁸ See paragraphs 24 to 40 of the judgment.

⁴⁹ Joost Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' [1996] 66:1 BYIL 415, 415.

⁵⁰ Joost Pauwelyn, 'The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems' [1996] 66:1 BYIL 415, 421.

⁵¹ Loukis G. Loucaides, *The European Convention on Human Rights: Collected Essays* (Brill Academic Publishers 2007) 21.

⁵² Loukis G. Loucaides, *The European Convention on Human Rights: Collected Essays* (Brill Academic Publishers 2007) 21.

the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation" (Article 15(2)). Composite acts always consist of "a series of individual acts of the State succeeding each other in a sequence of separate courses of conduct, actions or omissions, adopted in separate cases, but all contributing to the commission of the aggregate act in question."⁵³ These acts, "taken separately, may be lawful or unlawful, but [...] are interrelated by having the same intention, content and effects."⁵⁴

36. Under the European system of human rights, a general definition of what a continuing violation consists of was adopted, first, by the former European Commission on Human Rights and later ratified by the European Court of Human Rights. Thus, a continuing situation refers to "a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims."⁵⁵ It is also important to point out that there is no clear differentiation between the expressions "continuous" or "continuing" violation, and the European Court uses the two expressions indistinctly.⁵⁶

37. Under the inter-American system of human rights, this Court has indicated the continuing nature of different human rights violations on different occasions. Perhaps the most significant case is that of the forced disappearance of persons. In this type of human rights violation, the Inter-American Court has repeatedly asserted that "[t]he forced disappearance of persons is a multiple and continuing violation of numerous Convention-based rights that the States Parties are obliged to respect and guarantee."⁵⁷

38. The Court has also repeatedly recognized the continuing nature of various human rights violations such as the lack of access to justice in relation to extrajudicial execution and massacres,⁵⁸ as well as in contexts of forced displacement and persecution with regard to the rights of the child and the rights of the family and to personal integrity.⁵⁹

39. Recently, in the *Case of García Lucero v. Chile*, the Inter-American Court referred to violations of a non-continuing nature and whether their effects could be examined by the Court when they fall outside its temporal jurisdiction. In this regard, in that case, the Court determined that, even though it was unable to examine the acts of torture owing to its temporal jurisdiction, "the integral nature or individualization of

⁵³ ILC, 'Report of the International Law Commission on the Work of its 30th Session' (8 May–28 July 1978) UN Doc A/33/10, p. 226.

⁵⁴ ILC, 'Report of the Commission to the General Assembly on the work of its 30th session' (1978) YB of the ILC, 1978, II, part 2, UN Doc A/CN.4/SER.A/1978/Add.I (Part 2), p. 93.

⁵⁵ See: *McDaid and Others v. The United Kingdom*, no. 25681/94, p. 5, Commission decision of 9 April 1996. The European Court of Human Rights has used this definition in recent decisions: *Posti and Rahko v. Finland*, no. 27824/95, § 39, ECHR 2002-VII; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 75, 10 January 2012, and *Hadzhigeorgievi v. Bulgaria*, no. 41064/05, § 56, 16 July 2013.

⁵⁶ *Loizidou v. Turkey*, no. 15389/89, §§ 40-11, 8 December 1996 (judgment).

⁵⁷ *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 155.

⁵⁸ *Case of Las Dos Erres Massacre v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of November 24, 2009. Series C No. 211.

⁵⁹ See, *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, and *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212.

the reparation can only be evaluated based on an examination of the facts that gave rise to the harm and their effects, and they are excluded from the Court's temporal jurisdiction."⁶⁰ In addition, it indicated that although it was unable to examine all the facts, the Court was able "to examine whether, based on autonomous facts that occurred within its temporal jurisdiction, the State complied with its obligation to investigate and whether it provided the appropriate remedies for claims to be filed for measures of reparation pursuant to the American Convention, and also the Inter-American Convention against Torture."⁶¹ This precedent did not change the Court's case law in any way in relation to the nature of continuing violations, or present additional elements to analyze this.

b) The elements of continuing violations with regard to the right to property

40. The European Court of Human Rights has determined in its case law that "the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of 'deprivation' in respect of the rights concerned."⁶² However, there are times when a deprivation of property may be considered to be continuing, if there is a continuation of acts or omissions or if there are successive acts or a series of acts that endow it with this character.

41. Based on the provisions of Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms on the protection of property, the European Court of Human Rights has determined the existence of continuing situations in cases in which impediments existed for the property owner to be able to use and dispose of the property,⁶³ lack of access to property,⁶⁴ *de facto* expropriation,⁶⁵ and failure to pay compensation owing to the loss of property when this was established in domestic law.⁶⁶ In this regard, it should be taken into account that there are instantaneous acts that, even though they have subsequent effects, do not create a continuing situation under international law; this could be the case, for example, of the physical destruction of property.⁶⁷ However, in that situation, if there is an obligation to provide compensation, the failure to do so could become a continuing situation.⁶⁸

⁶⁰ *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations.* Judgment of August 28, 2013. Series C No. 267, para. 37.

⁶¹ *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations.* Judgment of August 28, 2013. Series C No. 267, para. 38.

⁶² Cf. ECHR, *Case of Almeida Garrett, Mascarenhas Falcão and Others v. Portugal* (Applications nos. 29813/96 and 30229/96), 11 January 2000, para. 43; ECHR, *Case of Blečić v. Croatia*, GC (Application no. 59532/00), 8 March 2006, para. 86 ("As to the applicant's argument that the termination of her tenancy resulted in a continuing situation [...], the Court reiterates that the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of "deprivation" in respect of the rights concerned. [...] Therefore, the termination of the applicant's tenancy did not create a continuing situation"), see also, ECHR, *Case of Malhous v. The Czech Republic*, GC (Application no. 33071/96), 13 December 2000; *mutatis mutandis*, ECHR, *Case of Ostojic v. Croatia* (Application no. 16837/02), 26 September 2009.

⁶³ ECHR, *Vasilescu v. Romania*, no. 27053/95, §§ 48-59, 22 May 1998

⁶⁴ ECHR, *Loizidou v. Turkey*, no. 15389/89, 8 December 1996,

⁶⁵ ECHR, *Guiso-Galliasay v. Italy*, no. 58858/00, 8 December 2005

⁶⁶ ECHR, *Broniowski v. Poland*, no. 31443/96 [GC], 22 June 2004

⁶⁷ ECHR, *Ostojic v. Croatia*, no.16837/02 (dec.), 26 September 2002

⁶⁸ See cases of *Almeida Aarrett, Aascarenhas Falcao and Others v. Portugal* and *Broniowki v. Poland*.

42. Probably the best-known cases on this issue – deprivation of property rights as a continuing situation – are the cases of *Loizidou v. Turkey* and *Cyprus v. Turkey*.

43. The *Case of Loizidou v. Turkey*⁶⁹ relates to the Turkish invasion of the north of Cyprus in 1974, which resulted in the denial of the plaintiff's access to her property. In its defense, Turkey had argued that, according to article 159 of the Constitution of the Turkish Republic of Northern Cyprus, the property had been expropriated before Turkey's acceptance of the compulsory jurisdiction of the European Court of Human Rights.⁷⁰ In this case, the applicant was confronted with a continuing denial of access to her property that was located in territory occupied by the Turkish army since 1974. Owing to this situation, the applicant was unable to use, control or dispose of her property. In this regard, the European Court considered that it was not possible to attribute legal effects to that Constitution.⁷¹ Therefore, the property had not been directly expropriated and continued to belong to the applicant.⁷² Consequently, with regard to the concept of a continuing violation of the Convention, the facts of the case constituted violations of a continuing nature. This case eventually resulted in the case of *Cyprus v. Turkey*, in the form of an inter-State petition.

44. In the *Case of Papamichalopoulos and Others v. Greece*,⁷³ the European Court of Human Rights indicated that the alleged violation began in 1967 with the enactment of Law No. 109/1967. Under this law, the military government at the time took possession of the land of the applicants, without transferring the ownership of this land to the State. The European Court considered that this was an act of "de facto expropriation."⁷⁴ Following the restoration of democracy, the State, seeking a way to provide reparation for the harm caused to the applicants, enacted Law No. 1341/1983 to resolve the situation created in 1967. Despite the fact that the domestic courts ordered that new land should be assigned to the applicants, they had to wait until 1992. Regarding this situation, the European Court of Human Rights concluded that "the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions. In conclusion, there has been and there continues to be a breach of [the right to property.]"⁷⁵

45. In the *Case of Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, the facts related to the nationalization and formal expropriation of properties of the

⁶⁹ ECHR, *Case of Loizidou v. Turkey*, GC (Application no. [15318/89](#)), 18 December 1996.

⁷⁰ ECHR, *Case of Loizidou v. Turkey*, GC (Application no. 15318/89), 18 December 1996, para. 35.

⁷¹ ECHR, *Case of Loizidou v. Turkey*, GC (Application no. 15318/89), 18 December 1996, paras. 42 and 44.

⁷² ECHR, *Case of Loizidou v. Turkey*, GC (Application no. 15318/89), 18 December 1996, paras. 46 and 47.

⁷³ ECHR, *Case of Papamichalopoulos and Others v. Greece* (Application no. [14556/89](#)), 24 June 1993.

⁷⁴ ECHR, *Case of Papamichalopoulos and Others v. Greece* (Application no. 14556/89), 24 June 1993, para. 42.

⁷⁵ ECHR, *Case of Papamichalopoulos and Others v. Greece* (Application no. [14556/89](#)), 24 June 1993, paras. 45 and 46.

applicants by the Portuguese Government in 1975 and 1976.⁷⁶ In this case, the State failed to pay the compensation established by a decree issued following the entry into force of the European Convention on Human Rights and it was determined that “while it was true that the Court [was] not empowered to examine questions linked to the deprivation of the property, such questions clearly being beyond its jurisdiction *ratione temporis*, the same d[id] not apply to the delays in the assessment and payment of final compensation,” especially taking into consideration “that the Government continued to legislate on the subject after ratifying the [European] Convention,” so that the right to property was violated due to the unreasonable delay in providing the said compensation.⁷⁷

46. In the case of *Broniowski v. Poland*, the European Court of Human Rights recognized that the failure to provide adequate compensation based on domestic law constituted a continuing situation. In this case, the Court found it necessary to weigh the excessive time that the State had taken to provide compensation.⁷⁸ The European Court of Human Rights has consistently recognized that different legislative acts, including those imposing restrictions, may give rise to a situation of a continuing character.⁷⁹

47. It has also determined that a series of acts may result in the creation of a continuing situation. For example, in the case of *McFeely and Others v. The United Kingdom*, the former European Commission on Human Rights determined that different acts related to detention conditions may create a “permanent state of affairs which is still continuing.” Based on this precedent, in the case of *Agrotexim and Others v. Greece*, the European Court held that different acts of the Municipal Council of Athens could be considered a series of steps that constituted a continuing situation.

48. In the case of *Phocas v. France*, the European Court examined a case in which the applicant alleged a continuing situation owing to an expropriation process that lasted from July 31, 1965, to January 22, 1982.⁸⁰ This continuing situation in expropriation procedures was also analyzed by the European Court in the cases of *Cvijet v. Croatia*⁸¹ and *Crnojevic v. Croatia*.⁸²

49. Under the inter-American system, in the *case of the Moiwana Community v Suriname*, this Court recognized the existence of continuing effects based on different human rights violations. As in the instant judgment,⁸³ that case related to members of a tribal community who had been forcibly displaced from their territories without being able to return to them owing to the situation of continuing violence. In that case, the

⁷⁶ ECHR, *Case of Almeida Garrett, Mascarenhas Falcão and Others V. Portugal* (Applications nos. 29813/96 and 30229/96), 11 January 2000.

⁷⁷ ECHR, *Case of Almeida Garrett, Mascarenhas Falcão and Others V. Portugal* (Applications nos. 29813/96 and 30229/96), 11 January 2000, para. 43.

⁷⁸ ECHR, *Broniowski v. Poland*, no. 31443/96 (dec.), § 75, 19 December 2002; *Broniowski v. Poland*, no. 31443/96 [GC], § 122, 22 June 2004.

⁷⁹ ECHR, *Hutton-Czapska v. Poland*, no. 35014/97 (dec.), 16 March 2003 and *Hutton-Czapska v. Poland*, no. 35014/97 [GC], §§ 152-153, 19 June 2006.

⁸⁰ ECHR, *Phocas v. France*, no. 17869/91, § 45-9, 23 April 1996.

⁸¹ ECHR, *Cvijetic v. Croatia*, no. 71549/01 (dec.), 3 April 2003.

⁸² ECHR, *Crnojevic v. Croatia*, no. 71614/01 (dec.), 29 April 2003.

⁸³ Paras. 34 and 35 of the judgment.

Court indicated that although the forced displacement had occurred prior to acceptance of the Court's contentious jurisdiction, "*the inability to return to those territories has allegedly continued*" and, therefore, the Court "*may properly exercise jurisdiction over those presumed facts and over their legal definition.*"⁸⁴ The Court also noted that the said case, in which the State was declared responsible, referred to a situation of forced displacement of a tribal community owing to a situation of violence and insecurity and in which that community had not been relocated to alternative lands. In that case, the Court declared the violation of the right to freedom of movement and residence contain in Article 22 of the Convention and, consequently, also declared a violation of the right to property contain in Article 21 of this instrument because the situation of violence had deprived them of the communal use and enjoyment of their traditional property.

50. To determine whether or not a fact that violates human rights can be classified as continuing, it is essential, according to the Human Rights Committee, to determine whether the said violations continue or have effects which themselves constitute a violations.⁸⁵ Thus, for example, in the cases analyzed above, the breach of the right to private property of the applicants occurred continuously because they had not lost their ownership rights legally or as beneficiaries of compensation; to the contrary, they had been victims of continuing effects in relation to the possibility of disposing of their property or receiving compensation for it.

51. The precedents cited above reveal that the determination of when we are faced with a continuing situation must be made on a case-by-case basis. To this end, it is important to consider, among other aspects: the applicable legal norms at both the national and the international level; the nature of the facts (such as, the type, duration, scope) and, lastly, the effects it has on the rights of those who have recourse to the inter-American system of human rights as presumed victims.

IV. THE FAILURE TO PAY COMPENSATION AS A CONTINUING VIOLATION IN THE CASE OF THE KUNA INDIGENOUS COMMUNITIES OF MADUNGANDÍ AND THE EMBERÁ INDIGENOUS COMMUNITIES OF BAYANO

52. To determine whether the failure to pay compensation in this case constitutes a continuing violation, I will examine: (i) the scope of the content of Article 21 of the American Convention on Human Rights and its interpretation by the inter-American Court in cases of indigenous peoples, and (ii) the fact of this case, the applicable domestic law, and the effects on the rights of the failure to pay compensation.

i) The scope of Article 21 of the American Convention on Human Rights.

53. The second paragraph of Article 21 of the American Convention on Human Rights on the right to property establishes that: "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." Consequently,

⁸⁴ *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, paras. 43 and 108.

⁸⁵ Human Rights Committee, Communication No. 24/1977, *Lovelace v. Canada*, Views adopted on July 30, 1981, para.7.3 Human Rights Committee, Communication No. 1367/2005, *Anderson v. Australia*, decision on admissibility adopted on October 31, 2006, para. 7.3. Human Rights Committee, Communication No. 1424/2005, *Armand Anton v. Algeria*, decision on admissibility adopted on November 1, 2004, para. 8.3.

expropriation may not be carried out, even respecting the principles of public utility and social interest, without the existence of the "payment of just compensation."

54. In the case of *Salvador Chiriboga v. Ecuador* the Inter-American Court determined that "Article 21(2) of the American Convention expressly establishes that the payment of just compensation is a requirement to be able to carry out a deprivation of property."⁸⁶ Moreover, the Court determined that "in cases of expropriation, the payment of compensation constitutes a general principle of international law,⁸⁷ derived from the need to seek a balance between the general interest and the owner's interest. This principle is reflected in Article 21 of the American Convention when referring to the payment of "just compensation" which should be "adequate, prompt and effective."⁸⁸

55. Similarly, the European Court of Human Rights has interpreted the rule contained in Article 1 of Protocol No. 1, considering that there is an intrinsic right to receive compensation for the deprivation of property.⁸⁹ Also, the United Nations General Assembly, in Resolution 1803, indicated that the State's sovereignty to expropriate for reasons of public utility included its obligation to pay the owner appropriate compensation.⁹⁰ Moreover, the principle according to which compensation is required in case of expropriation has been reaffirmed by international case law.⁹¹

56. Furthermore, in the case of indigenous and tribal peoples, this Court, in the case of the *Saramaka People v. Suriname*, considered that "the right to receive payment of compensation pursuant to Article 21(2) of the Convention extended not only to total deprivation of a property title owing to expropriation by the State, for example, but also included deprivation of the regular use and enjoyment of that property."⁹²

⁸⁶ *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179. para. 95.

⁸⁷ *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179. para. 96; Cf. Article 1 of Protocol No. 1 of the European Court; and P.C.I.J *The Factory at Chorzów (Claim for Indemnity) (The Merits)* Judgment No. 13, p. 40 and 41.

⁸⁸ *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, para. 97 Cf. *INA Corporation v. The Islamic Republic of Iran*, 8 Iran US CTR, p.373; 75 ILR, p. 595; and Principles 15 and 18 of the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," Resolution G.A. Res. 60/147, Preamble, UN Doc. A/RES/60/147 (Dec. 16, 2006). Cf. The World Bank, Guidelines on the Treatment of Foreign Direct Investment, 1962. *Texaco* case 17 ILM, 1978, pp. 3, 29; 53 ILR, pp. 389, 489; *Aminoil* case 21 ILM, 1982, p. 1032; 66 ILR, p. 601, and Permanent Sovereignty Resolution; 1974 Charter of Economic Rights and Duties of States.

⁸⁹ Cf. ECHR, *James v. The United Kingdom*, Judgment of February 1985, Application no. 8793/79, para. 54; and ECHR, *Lithgow and Others v. The United Kingdom*, Judgment of July 1986, Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/8, paras. 114 and 120.

⁹⁰ Cf. General Assembly Resolution 1803 (XVII) of December 14, 1962, entitled "Permanent sovereignty over natural resources" (1962).

⁹¹ Cf. International Centre for Settlement of Investment Disputes, Arbitration between *Compañía del Desarrollo de Santa Elena, S.A. and The Republic of Costa Rica*, Case No. ARB/96/1; *Matter BP (British Petroleum Exploration Co. v. Libyan Arab Republic*, October 10, 1973, and August 1, 1974; *Matter Liamco*, and P.C.I.J *The Factory at Chorzów*, Judgment No. 7 (May 25, 1926).

⁹² *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 140.

57. In this regard, Judge Manuel Ventura Robles, in his concurring opinion in the case of *Salvador Chiriboga v. Ecuador*, determined that:

Article 21 of the Convention refers to the payment of a just compensation, which, according to this Court, must be adequate, prompt and effective, since compensation is one of the measures by which the State can comply with the goal of achieving a fair balance between the general interest and the individual interest. Thus, the Court considered that in order to analyze whether there was a fair balance in this case, it was necessary to note whether just compensation was granted, as well as other relevant factors such as the passage of excessive time, disproportionate burdens or situations of uncertainty regarding the rights of the owner, that infringed the fair balance that Article 21 seeks to protect, as well as the object and purpose of the Convention.⁹³

58. In the *Sawhoyamaxa* and *Xákmók Kásek* cases, both against the Paraguayan State, as part of the violation of Article 21, the Court determined the absence of a guarantee of the right to the ancestral territories of these communities. In order to decide these cases, the Court took into account that "the spiritual and physical foundation of the identity of the indigenous peoples is based, above all, on their unique relationship with their traditional lands, so that as long as this relationship exists, the right to claim those lands remains in force. If the relationship ceases to exist, so would this right."⁹⁴ It added that "[t]his relationship may be expressed in different ways by each indigenous people and according to their specific circumstances, and may include traditional use or presence, either by spiritual or ceremonial links; sporadic settlements or crops; hunting, fishing or seasonal or nomadic gathering; use of natural resources linked to their customs, and any other element characteristic of their culture."⁹⁵

59. However, the relationship with the land must be possible.⁹⁶ This element signifies that the members of the community should not be prevented by factors beyond their control from carrying out those activities that reveal the persistence of the relationship with their traditional land.⁹⁷ In other words, the Court has already recognized that, in light of the provisions of Article 21 of the Convention, violations which have a direct impact on the territory of the indigenous peoples must be analyzed considering this special relationship, which evidently does not exist under ordinary circumstances with non-indigenous individuals or groups of individuals.

⁹³ *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, Concurring opinion of Judge Manuel Ventura Robles, p. 2.

⁹⁴ *Case of the Xákmók Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010 Series C No. 214, para. 112, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 131

⁹⁵ *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 154, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 131

⁹⁶ *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 154, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, paras. 131 and 132, and *Case of the Xákmók Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 113

⁹⁷ *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 132, and *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 113.

- ii) *The failure to pay compensation as a continuing violation in the case of the Kuna indigenous community of Madungandí and the Emberá indigenous community of Bayano*

60. As indicated in the judgment, the Kuna indigenous people have inhabited the region of the Bayano since at least the sixteenth century. Traditionally, the Kuna practice slash and burn agriculture and depend for their subsistence almost exclusively on agriculture, hunting and fishing.⁹⁸ Meanwhile, between the seventeenth and eighteenth centuries, some of the Emberá indigenous people migrated from the Chocó region in Colombia to territory that today belongs to Panama, settling on river banks in what is now the province of Darien. In the early nineteenth century, some of the Emberá people moved to the Bayano region. The traditional activities of the Emberá people are hunting, fishing and handcrafts.⁹⁹

61. Also, the section of the judgment on the facts indicates that, in 1963, the State proposed to construct a hydroelectric dam (known as the Ascanio Villalaz Hydroelectric Complex or the Bayano Hydroelectric Complex) in the region of the Bayano, which involved the creation of an artificial lake and reservoir that would cover approximately 350 km² of the area. Subsequently, on May 8, 1969, the State adopted Executive Decree No. 123 which established that, "owing to the construction of the Bayano River Project, part of the actual Indigenous Reserve in the Alto Bayano will be flooded to create the reservoir" and that it was the "State's obligation to provide the necessary area for the relocation of the inhabitants of the said reserve forced from their land owing to the creation of the reservoir." In compensation for the "area of the actual Indigenous Reserve that will be flooded" by this project, it established the award of new lands (located adjacent to and to the east of the indigenous reserve) that were declared "non-adjudicable."¹⁰⁰

62. The Court also found that it had been proved that, on July 8, 1971, Executive Decree No. 156 had been issued establishing a "Special Compensation Fund to Assist the Indigenous Peoples of the Bayano," for the relocation of the indigenous peoples who inhabited the Bayano Indigenous Reserve in the areas established as non-adjudicable land by Executive Decree No. 123." This decree considered that "the indigenous groups who inhabit the actual Bayano Indigenous Reserve will have to abandon the lands they occupy owing to the execution of the Bayano Hydroelectric Project" and that "these groups will have to relocate in the areas established as non-adjudicable land by Executive Decree No. 123." The said decree also recognized that "the transfer to new areas entails major efforts for the indigenous peoples as well as considerable financial disbursements, all of which justifies, for reasons of humanity, the assistance that the State has decided in their favor" and established that the "Forestry Service of the Ministry of Agriculture and Livestock shall deliver to the official representatives of the indigenous peoples the sum that, pursuant to article [2], forms part of the special compensation and assistance fund established by this Executive Decree."¹⁰¹

⁹⁸ Para. 60 of the judgment.

⁹⁹ Para. 61 of the judgment.

¹⁰⁰ Para. 63 of the judgment.

¹⁰¹ Para. 64 of the judgment.

63. The State began construction of the hydroelectric project in 1972. It created the Bayano Integral Development Project by Decree No. 112 of November 15, 1973, which required "the transfer and relocation of the communities located in the areas of the reservoir [and other areas]." From 1973 to 1975, the Kuna and the Emberá peoples were moved from the Alto Bayano. Initially, the Emberá communities were moved to sites that were inadequate; they were therefore relocated a second time to their actual lands. The construction of the hydroelectric project ended on March 16, 1976. As a result of the construction several indigenous villages were flooded and their inhabitants were relocated.¹⁰²

64. The Court determined that, between 1975 and 1980, the state authorities signed four main agreement with indigenous representatives. First, the 1975 Majecito Agreement signed by the Emberá, which established the general guidelines for the relocation of this community and, subsequently, the agreements of Farallón in 1976, Fuerte Cimarrón in 1977, and La Espriella in 1980 with the Kuna of Madungandí, which referred to the compensation supposedly agreed by the parties for the flooding of the indigenous peoples' lands and their displacement. Over the years following these agreements, several meetings were held between the parties in order, above all, to seek a solution to the land disputes between the indigenous peoples and the settlers, and to recognize the land rights of the Kuna and Emberá peoples.¹⁰³

65. In the early 1980s, an interinstitutional commission was set up responsible for the "Organization and Integral Management of the Alto Bayano Watershed" with the task, *inter alia*, of making an initial study of the situation of land tenure in some of the areas that were considered to be conflictive, and defining the boundaries between the Madungandí Reserve and the settlers. On April 23, 1982, the Government issued Decree No. 5-A which regulated the adjudication, for sale, of parcels of rural lands that had been declared the property of the State, excluding the areas of the lands of the Kuna and Emberá indigenous peoples. Subsequently, on August 3, 1984, representatives of the State, the Kuna people and the Bayano Corporation signed a "memorandum of understanding" which established, *inter alia*, that it was "obligatory to comply with the commitments made by the National Government towards the Kuna indigenous communities located in the area" and that "one of the commitments made refers to the creation of the Kuna Comarca of Madungandí."¹⁰⁴

66. Subsequently, in the early 1990s, the incursion of non-indigenous persons into the lands of the Kuna and Emberá communities increased and tensions rose in the area, which resulted in numerous responses by the State, such as the creation of a "Governmental Interdisciplinary Team" composed of several state entities which prepared an agreement that was signed on March 23, 1990, by those entities and two official representatives of the indigenous peoples of the Bayano. The following year, the "Working Agreement for the Territorial Reorganization of Alto Bayano" was signed on July 16, 1991.¹⁰⁵

67. On January 24, 1992, the Director General of the Corporation for the Integral Development of the Bayano issued Resolution No. 002 deciding to recover the said lands and "[t]o establish a land management program in order to settle the existing

¹⁰² Para. 65 of the judgment.

¹⁰³ Para. 66 of the judgment.

¹⁰⁴ Para. 67 of the judgment.

¹⁰⁵ Para. 68 of the judgment.

conflicts permanently.” On March 17, 1992, the Ministry of the Interior and Justice issued Resolution No. 63, which referred to the aforementioned Resolution No. 002 and granted the provincial governor and the Chepo mayor the necessary authority “to order the relocation of the settlers who had invaded the conflict areas.”¹⁰⁶

68. Subsequently the State took various measures such as establishing a Joint Commission composed of state and indigenous representatives that prepared a study on the creation of a comarca for the Kuna and the demarcation of the collective lands of the 42 Emberá communities.¹⁰⁷ On January 31, 1995, a meeting was held between state authorities, the Cacique General of Madungandí and representatives of the peasants from the different communities where there was conflict and an agreement was signed. Also, on December 29, 1995, a law was approved creating the Kuna Comarca with an area of approximately 1,800 km², and this was ratified by Law No. 24 of January 12, 1996.¹⁰⁸

69. According to the facts of the case, as a result of diverse problems that arose owing to conflicts with “settlers” in the area, starting in 1996, negotiation tables were established under the Darien Sustainable Development Program, which led to the physical demarcation of the Kuna Comarca between April and June 2000, a process that was carried out in coordination with the indigenous representatives.¹⁰⁹ In addition, various efforts were made to seek a friendly settlement to this situation under the inter-American system,¹¹⁰ and a High-level Presidential Commission was established, as well as a procedure for the adjudication of collective ownership of indigenous lands and the delimitation of Emberá lands.¹¹¹

70. Here, it should be recalled that “a continuing violation is the breach of an international obligation by an act of a subject of international law extending in time and causing a duration of continuance in time of that breach.”¹¹² In this regard, the International Law Commission has established that: “The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”¹¹³ It has also established that: “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”¹¹⁴

71. In the instant case, it is clear that the obligation breached is the presumed lack of compensation, which should have been granted based on the provisions of Article

¹⁰⁶ Para. 69 of the judgment.

¹⁰⁷ Para. 70 of the judgment.

¹⁰⁸ Para. 71 of the judgment.

¹⁰⁹ Paras. 72 to 75 of the judgment.

¹¹⁰ Paras. 76 and 77 of the judgment.

¹¹¹ Paras. 78 to 84 of the judgment.

¹¹² Joost Pauwelyn, ‘The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems’ [1996] 66:1 BYIL 415, 415.

¹¹³ Article 14(2) of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

¹¹⁴ Article 14(3) of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

21(2) of the Convention, which establishes the payment of "just compensation" which, in the opinion of this Court, should be "adequate, prompt and effective."

72. Additionally, in light of international law, the different facts of this case could be classified as a *composite fact*, which can be defined as "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."¹¹⁵ Thus, "the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."¹¹⁶ Composite facts always consist of a series of individual acts of the State succeeding each other, that is to say, a sequence of separate courses of conduct, actions or omissions, adopted in separate cases, but all contributing to the commission of the aggregate act in question.¹¹⁷ These acts, "taken separately, may be lawful or unlawful, but are interrelated by having the same intention, content and effects."¹¹⁸

73. In the instant case, the problem that has affected the Kuna and Emberá indigenous communities has been consistently recognized by the State at both the political and administrative level, as well as by legislation, all of this accompanied by a categorical affirmation in Executive Decree 156 of July 8, 1971, that "the transfer to new areas entails major efforts for the indigenous peoples as well as considerable financial disbursements, all of which justifies, for reasons of humanity, the assistance that the State has decided in their favor." The diverse actions taken by the State at different times recognizing the disadvantaged situation of the victims in this case following the expropriation of their territories reveals the continuing nature of the facts.

74. The present situation has been constituted by different circumstances that, although they started before the Inter-American Court had compulsory jurisdiction, have extended up until today. The Court observed some of these circumstances partially, in relation to the failure to delimit, demarcate and title the lands of the Kuna and Emberá indigenous peoples,¹¹⁹ analyzing the merits and declaring the violation of Article 21 of the American Convention. However, inconsistently, it did not do so with regard to the obligation to pay compensation that is also an obligation which is specifically indicated in Article 21(2) of the Pact of San José ("just compensation") with regard to the right to property, as I have been analyzing in this opinion.

75. When examining the preliminary objection on lack of jurisdiction *ratione temporis*, the Court did not discuss whether the facts of this case constituted, of

¹¹⁵ Article 15(1) of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

¹¹⁶ Article 15(2) of the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission.

¹¹⁷ ILC, 'Report of the International Law Commission on the Work of its 30th Session' (8 May–28 July 1978) UN Doc A/33/10, 226.

¹¹⁸ ILC, 'Report of the Commission to the General Assembly on the work of its 30th session' (1978) YB of the ILC, 1978, II, part 2, UN Doc A/CN.4/SER.A/1978/Add.I (Part 2), 93.

¹¹⁹ Paras. 107 to 146 of the judgment.

themselves, a continuing situation; to the contrary, the majority opinion chose to imply that they did not, without analyzing this delicate legal problem in detail in the specific case of the violation of the legitimate right of the indigenous peoples to obtain “just compensation” pursuant to the provisions of Article 21(2) of the Pact of San José.

76. This explains why the majority of the Court agreed to cite the precedent in the case of *García Lucero* (see *supra* para. 39 of this opinion) which established that “the integral nature or individualization of the reparation can only be evaluated based on an examination of the facts that gave rise to the harm and their effects.”¹²⁰ I consider that this precedent does not change the Court’s case law concerning the nature of continuing violations. In my opinion, this precedent is not applicable to the instant case because it constitutes a continuing situation,¹²¹ and the Court should have made a specific analysis of “the presumed continuing violation of the right to collective property of the Kuna indigenous people of Madungandí (“Kuna”) and the Emberá indigenous people of Bayano (“Emberá”) and their members, based on the alleged failure to comply with the payment of compensation related to the expropriation and flooding of their ancestral territories,” as the case was submitted to the Inter-American Court.¹²²

77. Moreover, the majority opinion tried to make a distinction with the case of the *Moiwana Community v. Suriname*¹²³ — a precedent that recognized the existence of continuing effects based on various human rights violations. Although it is true that the instant case is not exactly the same as that one, it is pertinent to clarify that, based on the proven facts in this case, and based on international law, especially international human rights law, there are sufficient precedents – which I have tried to highlight (see *supra* paras. 40 to 51 of this opinion) – that, if they had been applied pursuant to the *pro persona* principle, would have guided the Inter-American Court to a different decision with regard to this preliminary objection, especially considering that the alleged failure to pay compensation is related to the expropriation and flooding of ancestral territories of indigenous peoples. Consequently, if the Court had rejected the preliminary objection filed by the State on its jurisdiction *ratione temporis*, it could also have undertaken to decide the issue of whether or not that claim was subject to a statute of limitations.¹²⁴

78. Finally, it is pertinent to note that it would be a fallacy and an *argumentum ad absurdum*, to claim that any type of expropriation of indigenous lands, present, future but, above all, in the past, constitutes, in itself, a continuing situation. To make this

¹²⁰ *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations.* Judgment of August 28, 2013. Series C No. 267, para. 37.

¹²¹ This precedent is correct because it even accords with the findings of the International Law Commission in Article 14(1) of the Articles on Responsibility of States for Internationally Wrongful Acts that: “The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.” However, the instant case does not involve “isolated facts that happened instantaneously,” but rather a continuing situation.

¹²² The Inter-American Commission submitted this case to the Court, *inter alia*, owing to the continuing violation of the right to property, precisely due to the failure to pay compensation for the dispossession of ancestral lands. See para. 1 of the judgment.

¹²³ In this regard, the *Moiwana* case is more like other precedents of the European Court of Human Rights such as the cases of *Loizidou v. Turkey* and *Cyprus v. Turkey* (see *supra* para. 43 of this opinion), than cases that are mainly related to the failure to pay compensation.

¹²⁴ In para. 45 of the judgment “the Court finds it unnecessary to rule on the said objection, because it has admitted the objection of lack of jurisdiction *ratione temporis*, in relation to compensation,” and this is reflected in the second operative paragraph of the judgment.

affirmation would create an absolute lack of legal certainty in relation to any property on the American continent. However, emphatically adopting the opposite position in general, without analyzing the specific circumstances of each case is disproportionate – as occurred in this case in which *a continuing situation exists owing to a composite fact relating to failure to pay compensation* – leaving at a disadvantage groups of persons and communities that this Court has recognized as possessing special protection under international human rights law.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary