

REPORT No. 58/09
PETITION 12.354
ADMISSIBILITY
KUNA OF MADUNGANDÍ AND EMBERÁ OF BAYANO INDIGENOUS PEOPLES AND THEIR
MEMBERS
PANAMA
April 21, 2009

I. SUMMARY

1. On May 11, 2000, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission", "the Commission" or "the IACHR") received a complaint presented by the International Human Rights Law Clinic of the Washington College of Law, *Centro de Asistencia Legal Popular* (CEALP), *Asociación Napguana*, and Emily Yozell (hereinafter "the petitioners"),¹ on behalf of the indigenous peoples Kuna of the Madungandí and the Emberá of Bayano and their members, (hereinafter "the alleged victims"), against the Republic of Panama, (hereinafter the "Panamanian State", "Panama" or the "State").

2. The petition alleges that the construction of the Bayano Hydroelectric Dam, which resulted in the flooding of the ancestral territory they used to inhabit, violated the collective rights of the Kuna of Madungandí and Emberá of Bayano peoples because: the alleged victims were not paid the full amount of compensation agreed to by the State; the lands currently inhabited by the Kuna of Madungandí have not been demarcated or protected; the territory occupied by the Emberá of Bayano has not been recognized; the intrusion by colonists into the lands presently inhabited by the alleged victims has generated a situation of constant conflict; and because indigenous culture has not been respected. The petitioners allege that the State of Panama is responsible for the violation of the rights enshrined in Articles 4 (right to life), 7 (right to personal liberty), 10 (right to compensation), 12 (freedom of conscience and religion), 17 (rights of the family), 19 (rights of the child) and, 21 (right to private property) of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention"). They also hold that the State disregarded Articles I, III, V, VI, VII, XI, and XIII of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration").

3. The State, for its part, asserts that the petition should be declared inadmissible because no violation exists of the alleged victims' human rights on account of the fact that it has met their demands through various agreements and resolutions and that they have been compensated for being moved off their lands. The State also argues that the rule of prior exhaustion of domestic remedies set forth in Article 46(1)(a) of the American Convention has not been met.

4. Having examined the positions of the parties and the requirements set forth in Articles 46 and 47 of the Convention, and without prejudging the merits of the matter, the Commission concludes that the petition is admissible with regard to alleged violations of Article 21 of the American Convention, in conjunction with Article 1(1) of same. Furthermore, under the principle of *iura novit curia*, the Commission will, in the merits stage, analyze if a possible violation exists of Articles 2, 8(1), 24, and 25 of the American Convention. The Commission concludes that the petition is inadmissible with respect to Articles 4, 7, 10, 12, 17, and 19 of the Convention and inadmissible with respect to Articles I, III, V, VI, VII, XI and XIII of the American Declaration. The Commission has decided to notify the parties of this decision, publish it, and include it in its Annual Report to the General Assembly of the Organization of American States.

¹ In a letter received on October 30, 2008, the International Human Rights Law Clinic of the Washington College of Law informed that Chief Félix Mato Mato, legal representative of the Madungandí Reserve designated the law firm of Rubio, Alvarez, Solís & Abrego as their new representatives.

II. PROCESSING BY THE COMMISSION

A. Processing of the Petition

5. The Commission received the petition on May 11, 2000, and assigned it case number 12.354. On January 11, 2001, it transmitted a copy of the pertinent portions to the State and requested it to reply within 90 days, in keeping with Article 34 of its Regulations (in force in 2001). The Commission received the reply of the State on July 2, 2001.

6. The IACHR also received information from the petitioners on the following dates: May 26, 2001; July 26, 2001; September 24, 2001; December 12, 2001; January 18, 2002; May 15, 2002; September 25, 2002; February 21, 2003; August 4, 2003; December 23, 2003; January 19, 2007; March 14, 2007; April 17, 2007; May 10, 2007; September 15, 2007, and November 13, 2007. Said communications were duly relayed to the State.

7. Furthermore, the IACHR received comments from the State on the following dates: November 16, 2001; December 18, 2001; February 26, 2002; December 2, 2002; June 2, 2003; May 28, 2004; May 23, 2007; June 18, 2007, and September 6, 2007. Said communications were duly forwarded to the petitioners.

8. On November 12, 2001, a hearing was held at which the parties expressed their interest to reach a friendly settlement of the matter. On March 8, 2002, a working meeting was held in the framework of the 114th Period of Sessions of the IACHR to follow up on the friendly settlement process initiated by the parties. On September 25, 2002, the petitioners informed the IACHR that they had decided to terminate the friendly settlement process and requested that it continue its processing of the case.

9. In a communication of March 9, 2007, received on March 14, 2007, the petitioners requested the Commission to adopt precautionary measures in order to protect the lives and physical integrity of the members of the Kuna of Madungandí and Emberá of Bayano indigenous peoples, due to alleged illegal trespassing by colonists on their territory, which had intensified since January 2007. In this context, they requested the Commission to require the State to adopt effective measures to protect their right to the land.²

² The Commission requested the State for information on effective steps implemented to protect the land of the Kuna of Madungandí and Emberá of Bayano indigenous peoples; prevent colonists from entering those peoples' land, in view of the alleged trespassing that has been taking place since January 2007; protect the lives and physical integrity of the members of those peoples; and report on the investigations conducted in response to the alleged confrontations reported by the indigenous Kuna of Madungandí and Emberá of Bayano. The Commission also asked the petitioners to provide detailed information about the harassment, threats, and confrontations mentioned in their request, and to explain the causes that have allowed the incidents that have occurred since January 2007 to increase. Both parties submitted the additional information requested by the Commission.

III. POSITIONS OF THE PARTIES

A. The petitioners

10. According to information furnished by the parties, the Kuna of Madungandí and Emberá of Bayano indigenous peoples lived on the Alto Bayano Indigenous Reserve until 1976.³ At present, the members of the Kuna indigenous people from the Bayano region live in the Kuna of Madungandí Reserve⁴. The Emberá, for their part, live in the villages of Ipeti and Piriati.⁵

11. The petitioners state that in 1963, the United States Agency for International Development (USAID) and the Government of Panama proposed a project for the construction of a hydroelectric complex in the Bayano Region that consisted of a concrete dam at the confluence of the Rivers Canita and Bayano, which would create a reservoir covering approximately 350 km².

12. The petitioners indicate that the Bayano dam was built between 1972 and 1976 and that the indigenous peoples who inhabited the area were relocated in 1973 and 1977. They say that as a result of the dam, 80% of Kuna and Emberá ancestral lands were flooded; they were forced to move from their ancestral lands to lands smaller in area and of inferior quality; the ecosystem on which they depended for their physical and spiritual survival was destroyed; there was an increase in disease caused by decomposing vegetation, and the cultures of the Emberá and Kuna de Madungandí indigenous peoples deteriorated.

13. As regards the Emberá, the petitioners point out that the government relocated the members of this people to the vicinity of the Mebrillo River. They state that when it was determined that this place was unsuitable, were relocated to their current settlements of Ipeti and Piriati. They say that the Emberá were promised financial compensation for the loss of their crops, which, according to the petitioners, was to be delivered over a period of three years.

14. With respect to the Kuna of Madungandí people, the petitioners indicate that they were relocated to less fertile, higher-altitude lands. They also state that the government of President Omar Torrijos agreed to provide them with financial compensation as redress for the loss of their crops. They state that only those persons who possessed a property title were eligible for the compensation offered by the State, which was impossible for members of the Kuna people, who have a collective concept of land ownership.

15. According to the petitioners, in 1977, the government, alleging a shortage of funds, suspended all compensation payments and, as a result, at their current settlements, the members of the Kuna and Emberá peoples have continued to suffer the effects of the loss of their lands and crops following the dam's construction.⁶

16. The petitioners also argue that the alleged victims have been prevented from effectively exercising their right to property due to the presence of peasant farmers who are illegally settling on their

³ National Legislature, Law 18 of 1934. Article 1. The following uncultivated lands are declared indigenous reserves [...] Alto Bayano Indigenous Region.

⁴ The petitioners point out that the Kuna of Madungandí Reserve was created in 1996 by Law 24 of January 12, 1996 and is situated east of Panama Province, Chepo District, in the area known as Alto Bayano. The Madungandí Region comprises 12 communities belonging to the Kuna People.

⁵ The petitioners state that the communities of Ipeti and Piriati have attempted to obtain legal recognition for their lands by means of petitions to the legislature seeking the adoption of a collective lands law. As yet they have not succeeded.

⁶ The petitioners note that according to a study carried out in 2002, the State, the Kuna and Emberá agreed in 1980 to defer the process of compensation for another five years. The study, which was carried out at the request of the petitioners and is part of the record before the IACHR, is titled "Technical Report on Compensation and Investment in the Kuna of Madungandí Region and the Emberá Piriati, Ipeti and Majé Cordillera Collective Lands," and puts the amount of compensation outstanding to the alleged victims at \$7,824,714.19. According to the petitioners, the State has not responded to the study or produced any documents to show that it has compensated the alleged victims.

land, a situation made possible by the construction of the Pan-American Highway which provides access to the territory of the indigenous peoples. They state that in the mid-1970's, these colonists initiated a continuing invasion of Kuna and Emberá territory and, taking advantage of the government's passiveness in demarcating indigenous territories, took possession of indigenous lands along with their natural resources and turned them into grazing land. At present, colonists continue to unlawfully appropriate lands inhabited by indigenous peoples.

17. The petitioners point out that over the course of 30 years, innumerable measures have been adopted in an attempt to obtain compensation for the forced relocation of the alleged victims, secure recognition and protection for the lands they currently inhabit, and confront the invasion of the colonists. Among those measures, are a series of agreements that the petitioners have signed with the State since 1969, administrative complaints filed at least since 1992, and criminal complaints brought since January 2007 to deal with the invasion of squatters, none of which has been effective.

18. With respect to legal actions against the presence of the colonists, the petitioners maintained that in spite of the fact that the National Environmental Authority has carried out investigations and imposed penalties, these have been ineffective, as demonstrated by the fact that only three colonists out of a total of 200 in the area were detained.⁷ Despite the penalties imposed, the colonists have returned to the Reserve and continued their illegal activities. According to the petitioners, the complaints filed with the Office of the Attorney General are still at the enquiry stage and no one has yet been investigated or apprehended. The petitioners argue that as a result of the ineffectiveness of the measures taken by the State, the Kuna held peaceful protests on October 23 and 24, 2007, which were harshly put down by the police, which violently entered the Kuna Reserve and arrested 95 indigenous demonstrators.⁸ These latter developments, according to the petitioners, are evidence of the State's continuing unwillingness to meet the alleged victims' demands for protection of their land.

B. The State

19. According to the State, the construction of the Bayano hydroelectric plant was one of a number of government projects implemented in order to supply the Panamanian State with electricity and avoid dependence on costly imported energy. The State points out that the project was carried out in order to meet this demand for energy, without disregarding the specific rights of the communities that lived in that region.

20. The State holds that the construction of the Bayano hydroelectric plant was preceded by technical studies with a view to limiting its adverse impact. Furthermore, agreements were reached with the indigenous Kuna and Emberá over their relocation and the conditions of their resettlement. Thus, after the Bayano dam was built, the indigenous lands were compensated for with other nearby lands, which were declared inalienable and exclusively for indigenous use by Decree No. 123 of May 8, 1969. The State argues that the petitioners accepted these terms, which means that there was no forcible relocation.

21. The State asserts that over the years, since the decision was made to build the Bayano hydroelectric plant, it has engaged in constant and periodic conversations with the members of the Kuna and Emberá peoples, endeavoring at all times, that through various agreements and laws passed, it ensures the full integrity of their culture and absolute respect for their inalienable rights and for the ecological system in which these different cultures live. As an example of the responses provided for the needs of the Kuna, the State cites the creation of the Kuna of Madungandí Reserve through Law 24 of January 12, 1996, which recognizes the boundaries of the Kuna territory and restricts the activities of colonists.⁹ It also recognizes the compensation granted through Cabinet Decree 156 of 1971.

⁷ Brief submitted by the petitioners on November 13, 2007, in connection with the request to the Commission for precautionary measures.

⁸ *Ibidem*.

⁹ The State points out that Article 21 of Law 24 of 1996 refers to an agreement signed by the colonists and the indigenous peoples, which recognizes the colonists who were already living on lands that became part of the Madungandí Reserve. The Continúa...

22. As regards the Emberá, the State indicates that a study for the legalization of their lands was initiated and is being carried out jointly with other Emberá and Wounaan communities. To that end, a Joint Government-Community Committee has been created to prepare a final draft for a collective land law. In this way, the government has met its obligations under the agreements with those communities.

23. With respect to compensation of the alleged victims, the State asserts that payments were made to the indigenous peoples from 1974 to 1978 by the Corporation for the Comprehensive Development of the Bayano Region,¹⁰ a state entity in charge of compensation matters. The State maintains that it has remained in permanent communication with the authorities of the communities concerned in order to address issues of development and natural resources on the lands they currently occupy.

24. As to admissibility requirements, the State contends that the petitioners have not exhausted the legal and administrative remedies provided by domestic law, which include an action for unconstitutionality, the contentious-administrative venue, actions and appeals that all instances of the administrative and judicial jurisdiction guarantee as part of due process, an *amparo* [constitutional relief] action, and the Ombudsman. At the same time, the State also mentions that it has addressed the complaints of the petitioners regarding the presence of colonists and that it opened an investigation into colonist activities that have caused environmental damage, which led to the arrest of a number of colonists on March 2007.

25. The State, therefore, moves that the petition be declared inadmissible on the grounds that it has not infringed the human rights of the alleged victims, since it has dealt with the complaints of violations lodged by the petitioners, and, moreover, because the petitioners have not exhausted the remedies under Panamanian domestic law.

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colonists may remain on those lands under the following conditions: they shall not expand their cultivated land beyond its current area; the lands of which they have usufruct shall not be granted in concession, exchanged with, or sold to third parties on pain of reversion of the lands to the Reserve. The State holds that Article 21 is the legal foundation of the agreement reached between the Kuna and the colonists and that it guarantees the patrimony of the Reserve and ensures harmonious coexistence between farmers and indigenous peoples.

¹⁰ Brief of the State submitted on July 2, 2001, p.6. The State said that a total of \$1,372,000 had been paid in compensation and housing payments.

IV. ANALYSIS

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

26. The petitioners, in principle, have standing under Article 44 of the American Convention to lodge petitions with the IACHR. The petition names as alleged victims the indigenous Kuna of Madungandí and Emberá of Bayano peoples and their members,¹¹ on whose behalf the State undertook to respect and guarantee the rights enshrined in the American Convention. As regards the State, the Commission notes that Panama has been a party to the American Convention since May 8, 1978, when it deposited its instrument of ratification. Thus, the Commission has *ratione personae* competence to examine the petition.

27. The Commission is competent *ratione loci* to examine the petition because it alleges violations of rights protected in the American Convention that are purported to have occurred within the jurisdiction of a State party.

28. The petitioners allege that the State violated rights enshrined in the American Declaration and the American Convention. In that regard, taking into consideration that the Court and the Commission have found that the American Declaration is a source of international obligations for OAS member States¹², the Commission is competent *ratione temporis* to examine the complaint inasmuch the obligation to observe and ensure the rights protected, initially under the American Declaration and subsequently under the American Convention, was already binding upon Panama at the time the events described in the petition are alleged to have occurred. Part of the alleged events occurred before August 5, 1978, when Panama ratified the American Convention, thus allowing the Commission to simultaneously apply both the American Declaration and American Convention. Finally, the Commission has *ratione materiae* competence because the petition alleges violations of human rights protected by the American Convention.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

29. Article 46(1)(a) of the Convention provides that admission of petitions shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2)(a) provides that said requirement shall not apply when: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and, c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. The jurisprudence of the Inter-American system clearly states that such remedies need only be exhausted if they are adequate and effective for repairing the alleged violation.

¹¹ The indigenous Kuna of Madungandí and Emberá of Bayano peoples constitute organized communities situated in specific geographical locations, whose members can be individually identified. According to the petitioners, at the time the dam was built, the Kuna population in the Bayano region numbered 3,000 persons while the Emberá of Bayano comprised 400 persons. In this respect, see I/A Court H.R., *Matter of the Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Court of March 6, 2003, preamble para. 9; *Matter of the Peace Community of San José de Apartadó*. Provisional Measures. Order of the Court of June 18, 2002, preamble para. 8; *Matter of the Peace Community of San José de Apartadó*. Provisional Measures. Order of the Court of November 24, 2000, preamble par.7; *The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001. Series C No. 79, para. 149; *Matter of Sarayaku Indigenous People*. Provisional Measures. Order of the Court of July 6, 2004, para. 9.

¹² I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, paras. 35-45; IACHR, James Terry Roach and Jay Pinkerton (United States), Case 9647, Res. 3/87, September 22, 1987, 1986-1987 Annual Report, paras. 46-49, Rafael Ferrer-Mazorra *et al.* (United States), Report No. 51/01, Case 9903, April 4, 2001. See also Statute of the Inter-American Commission on Human Rights, Art. 20.

30. The Commission will analyze the exhaustion of domestic remedies requirement taking into account that the petitioners allege that due to the construction of the Bayano Hydroelectric Dam, the collective rights of the Kuna of Madungandí and Emberá of Bayano peoples were violated because 1) the alleged victims were not paid the full amount of compensation agreed to by the State; 2) the lands currently inhabited by the Kuna of Madungandí have not been demarcated or protected; 3) the territory occupied by the Emberá of Bayano has not been recognized; 4) the intrusion by colonists into the lands presently inhabited by the alleged victims has generated a situation of constant conflict; and 5) indigenous culture has not been respected.

31. The petitioners argue that they have been prevented from exhausting remedies in the domestic jurisdiction because there is no domestic mechanism that forces the State to comply with the agreements it has made with indigenous peoples. In that respect, they provided documentation in order to demonstrate that the Kuna of Madungandí and the Emberá of Bayano, as indigenous peoples, have signed a considerable number of agreements with the State of Panama since 1976 in order to obtain full compensation for the construction of the Bayano Dam; the demarcation of the territory of the Kuna of Madungandí; the recognition of the Emberá of Bayano territory; and for the eviction of the colonists. However, they assert that the State has not carried out these agreements and they state there is no existing legal mechanism to enforce its compliance, consequently, they allege that it is not possible to exhaust domestic remedies.

32. With regards to the situation of the colonists, the petitioners state that in addition to the agreements signed with the State, they have instituted administrative and judicial proceedings before the Office of the Governor of the Province of Panama, the Office of the President of the Republic and the Office of the Attorney. However, these actions have not been effective and the problem continues.

33. The petitioners conclude that within the domestic laws of Panama, there is no legal process to safeguard the collective rights to property of the alleged victims. As an example, they state that the only collective actions permitted are those provided in the Consumer Protection and Antimonopoly Law (Law 29 of 1996) to protect consumers from defective products or services. The petitioners also hold that they are denied access to the remedies under domestic law by reason of indigence, the geographical isolation of the alleged victims, and because State institutions impart Justice in Spanish and do not recognize the indigenous language. They say that the only judicial organ with jurisdiction over the Madungandí Reserve is the Office of the Circuit Public Prosecutor in Panama City, which is 300 km away from the Reserve, a distance that represents an obstacle for seeking investigation of offenses committed by colonists. They added that the State only provides very limited assistance to enable indigenous peoples to protect their rights in the national courts, and often none at all.

34. The State, for its part, holds that the exceptions invoked by the petitioners are not applicable because it is not true that the local tribunals are inaccessible to the petitioners. The State adds in this respect that the Kuna have developed their own system of organization to negotiate with international and national public bodies, which proves that they are not genuinely vulnerable or isolated.

35. The State alleges that the petitioners have not exhausted all the judicial and administrative actions available under domestic law. They also indicate that the grievances of the alleged victims regarding the presence of colonists are being addressed by the State because the petitioners have lodged complaints with the Office of the Attorney General and a criminal complaint with the Office of the Assistant Public Prosecutor, which has prompted investigations by the National Environmental Authority of alleged environmental offenses reportedly committed by colonists. The State also points to the arrest of colonists for environmental offenses.¹³

¹³ Brief submitted by the State on April 27, 2007, in response to the request for information from the IACHR on account of the petitioners' application for precautionary measures.

36. The State has indicated that the following remedies under Panamanian law have been available to the petitioners: action for unconstitutionality, the contentious-administrative venue, actions and appeals that all instances of the administrative and judicial jurisdiction guarantee as part of due process, the *amparo* action, and the office of the Ombudsman.

37. In that respect, the Commission finds that the facts alleged in the instant case have to do with effective protection of the right of indigenous peoples to collective property. The jurisprudence of the inter-American system for protection of human rights has determined that, as regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.¹⁴

38. In this connection, the Commission observes that the alleged victims, through their representative institutions, have for three decades negotiated with State authorities in order to address the three central issues of the present petition: the compensation for their relocation, the legal recognition of their lands and the problems related to the intrusions by colonists. These negotiations have resulted in the signing of a series of political accords, resolutions, and decrees. Indeed, the documents submitted by the petitioners as part of the record before the IACHR include the following decrees, resolutions, and agreements between the Kuna and Emberá peoples and the State concerning commitments made by the State on the matters of relocation, compensation, and the colonists: Cabinet Decree 123 of May 8, 1969; Decree Law 156 of July 8, 1971; Agreement of Farallón, October 29, 1976; Agreement of Fuerte Cimarrón, January 29, 1977; Agreement of September 6, 1983; Agreement of Mutual Consent of August 3, 1984; Record of the meeting with the Indigenous Kuna of Bayano at the Bayano Corporation Inn, August 7, 1984; Resolution 4, March 16, 1989; Decision of the Committee for the Problem of Land Invasions in the Bayano Area, Chepo, March 23, 1990; Resolution 002 of January 24, 1992; Resolution 63 of March 17, 1992; and Law 24 of January 12, 1996, which created the Kuna of Madungandí Reserve.

39. In addition, the Commission observes that the Emberá of Bayano undertook a series of actions over the years, particularly before the office of the President of the Republic, in order to obtain the recognition of their legal personality and the legalization of their lands. In the documents provided by the petitioners, which are part of the case file before the IACHR, are contained the following petitions to state authorities in order to obtain legal recognition for the lands of the Emberá communities of Ipeti and Piriati: Request for Collective Land Title (for the Emberá community of Ipetí), submitted by Héctor Huertas González to the President of the Republic of Panama, June 13, 1995; Request for legal personality for the Ipetí-Emberá Association from Bonarge Pacheco to the President of the Republic of Panama dated January 11, 1999; Brief to the President of the Republic of Panama by Gregorio Carlos Cunampia of January 11, 1999, requesting a property title for the Emberá community of Piriati.

40. A State claiming non-exhaustion of domestic remedies has the obligation to show the effectiveness of the remedies it asserts have not been exhausted. In that respect, the State has indicated that the following remedies under Panamanian law have been available to the petitioners: the action for unconstitutionality, the contentious-administrative venue, actions and appeals that all instances of the administrative and judicial jurisdiction guarantee as part of due process, the *amparo* action, and the office of the Ombudsman.

41. With regards to the action for unconstitutionality,¹⁵ referred to by the State, the IACHR finds that this would not be an adequate remedy in the present case. Said action is intended to challenge laws, decrees, decisions, resolutions and other acts of authority considered to be unconstitutional, whereas the petitioners are not alleging the unconstitutionality of the agreements signed by the State with the alleged victims but instead that these are not being observed.

¹⁴ I/A Court H.R., *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 63.

¹⁵ Judicial Code of Panama, Chapter IV. Article 2559: Anyone, through legal counsel, may challenge before the Supreme Court of Justice laws, cabinet decrees, decree laws, decrees, decisions, resolutions, and any other acts of authority, which they consider unconstitutional, and request the respective declaration of unconstitutionality.

42. As to the administrative and contentious-administrative remedies which the State has stated are available, as well as judicial actions before the Office of the Attorney dealing with the presence of colonists in the territory of the alleged victims, the Commission observes that the petitioners have filed complaints with administrative and judicial bodies which have failed to elicit an effective response from the State to resolve that issue.¹⁶ As for judicial actions against the colonists for environmental offenses,¹⁷ the Commission finds that these have also proved unsuccessful given that the invasion of colonists has continued.

43. As to the *amparo* action referred to by the State as one of the remedies that the alleged victims could and should have utilized, its stated purpose is to call for the revocation of an injunction to do or not do issued or executed by a public servant in violation of the rights and guarantees enshrined in the Constitution. The Commission observes that said action would be inadequate in the present case, since the petitioners are not alleging that the orders issued by the State through the agreements it signed violated the rights and guarantees enshrined in the Constitution, but instead that said orders have not been complied with.

44. With regards to the office of the Ombudsman, the Commission observes that this is not a domestic remedy that the petitioners are required to pursue.

45. The State offers no evidence in its arguments to show that the legal remedies which it says are available are indeed effective for protecting the rights invoked by the Kuna of Madungandí and Emberá of Bayano peoples. On the contrary, it has been attested that the political, administrative, and judicial actions that have been taken over the course of three decades have failed to ensure quick, timely and effective protection for the rights to property of the members of the Kuna of Madungandí and Emberá of Bayano peoples. In spite of these measures, colonist invasions threaten the integrity of the lands currently inhabited by these peoples even though, in the case of the Kuna of Madungandí, there is a Reserve Law [*Ley de Comarca*] that recognizes their property rights. Furthermore, the lands inhabited by the Emberá of Bayano still lack legal recognition. Based on the foregoing, the Commission considers that the State has not proven the effectiveness of the legal remedies it considers should have been exhausted by the alleged victims.

46. The Commission notes that, with respect to the demands for full payment of compensation agreed to by the State as a result of the construction of the Bayano Hydroelectric Dam in the ancestral territory of the alleged victims, the lack of demarcation of the Kuna of Madungandí territory,

¹⁶ The documents submitted by the petitioners that are part of the record before the IACHR refer, inter alia to the following administrative and contentious-administrative proceedings against the activities of the squatters: Administrative proceeding for eviction presented on February 20, 2002, to the Mayor of the District of Chepo by representatives of the Kuna de Madungandí General Congress; Administrative proceeding for expulsion of colonists as trespassers presented to the Mayor of the District of Chepo by representatives of the Kuna of Madungandí Congress on April 5, 2002; Letter to the Governor of the Province of Panama requesting eviction of colonists dated February 16, 2003; Administrative proceeding for eviction presented by representatives of the Kuna of Madungandí Congress to the Governor of the Province of Panama on March 7, 2003; Administrative proceeding (Correction) for eviction of the colonists Melquiades Chávez at al. presented by representatives of the Kuna of Madungandí Congress to the Governor of the Province of Panama on June 26, 2003; Administrative proceeding in motion to proceed presented by representatives of the Kuna of Madungandí Congress to the Governor of the Province of Panama on August 13, 2003; Administrative proceeding for eviction of colonists presented by representatives of the Kuna of Madungandí Congress to the President of the Republic of Panama on January 24, 2004.

¹⁷ The documents submitted by the parties that are part of the record before the IACHR include, at least, the following petitions and criminal complaints against individual colonists for environmental offenses that in some instances were investigated and punished. However, they have not stopped the problem of continuing invasions by colonists: Criminal complaint filed by representatives of the Kuna of Madungandí Congress with the Prosecutor General against Ignacio Pérez *et al.* for environmental offenses, dated December 20, 2006; Environmental complaint lodged by representatives of the Kuna of Madungandí Congress with the Judicial Technical Police, Special Unit for Crimes against the Environment, dated January 15, 2007; and criminal complaint lodged by representatives of the Kuna of Madungandí Congress with the 11th Panama Circuit State Prosecutor against the colonists Ivan Batista, Arnulfo Batista Rubio and Alcibiades Batista, dated February 1, 2007; Criminal suit in request for evidence and inspection presented by representatives of the Kuna of Madungandí Congress to the 11th Panama Circuit State Prosecutor, dated February 7, 2007; Formal presentation of a criminal suit by representatives of the Kuna of Madungandí Congress to the 5th Criminal Circuit Prosecutor of the First Judicial Circuit of Panama, April 20, 2007.

the legal recognition of the territory of the Emberá, that the actions taken by the alleged victims for three decades have been the only means available to them in order to demand the protection of their rights before the State. Therefore, the Commission considers that the exception under Article 46(2) of the American Convention is applicable.

47. As regards the unauthorized presence of colonists on the alleged victims' lands, the Commission finds that even though actions of an administrative and judicial nature have been filed, these have not offered an effective protection for the rights of the alleged victims, since the presence of colonists has continued to threaten the integrity of their territory. Based on the foregoing, the Commission considers that the petitioners have exhausted that domestic remedies that have been available to them, thus the exception under Article 46(2) of the American Convention is applicable.

48. Concerning the demands for compensation for the loss of their lands and the legal recognition of the Emberá of Bayano lands, the legal remedies mentioned by the State do not offer the type of protection needed because they do not take into account the particular characteristics of indigenous peoples, especially concerning the collective nature of their demands since collective actions in Panama have been limited only to the protection of consumer rights.

49. The Commission finds that despite the fact that the Panamanian Constitution recognizes the property rights of indigenous peoples,¹⁸ that the alleged victims have not been able to protect their territories from colonist invasions. Furthermore, in the case of the Emberá of Bayano, they have not been able to obtain the recognition of their lands since the State has not established the procedures that the Constitution itself deems as necessary for these communities to obtain the legal recognition of their lands, unless said communities have a reserve.¹⁹ With respect to the creation of indigenous reserves in Panama, the Commission observes that it entails a political process that must be initiated by indigenous peoples in Panama before the legislative power which has discretion to approve the creation of reserves by means of specific legislation.²⁰ This has meant that the Emberá of Bayano, along with other indigenous communities that have not found themselves included within a reserve, have not had an effective and permanent mechanism to request and obtain the legal recognition of their lands. Therefore, regarding the legalization of the lands of the Emberá of Bayano, there has not been an effective legal remedy available to the petitioners.

50. Therefore, given the complexity of the matter, the Commission finds that the exception to the rule of prior exhaustion of domestic remedies provided in Article 46(2)(a) and (b) of the Convention applies in this case. This finding is based on the fact that, according to the events complained of, the domestic legislation of Panama does not afford due process of law for the protection of the rights of the alleged victims; the alleged victims have been denied access to the remedies under domestic law, and there has been unwarranted delay in rendering a judgment under the remedies invoked by the Kuna of Madungandí and Emberá of Bayano indigenous peoples.

51. All that remains is to mention that invocation of the exceptions to the rule of exhaustion of domestic remedies provided in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights set forth therein, such as guarantees of access to justice. However,

¹⁸ The Constitution of the Republic of Panama of 1972, provides the following at Article 123: The State guarantees for indigenous communities the reservation of the necessary lands, and collective ownership thereof, for their economic and social well-being. The Law shall set forth the procedures to be followed in order to accomplish this purpose and the definition of the respective limits within which private appropriation of lands is prohibited.

¹⁹ Indigenous Reserves [*Comarcas*] consist of territories with defined boundaries which are administered by the respective indigenous authorities and enjoy various levels of autonomy. The reserves are part of the political division of the Panamanian State under Article 5 of the Political Constitution which states that national laws "can create other political divisions, in order to hold them under special regimes or for reasons of administrative convenience or public service."

²⁰ There are five indigenous reserves in Panama, each one created by the following legislative statutes: Law 16 of February 19, 1953 creating the Kuna Yala Reserve; Law 22 of November 8, 1983 creating the Emberá-Wounaan Reserve; Law 10 of March 7, 1997 creating the Ngöbe Buglé Reserve; Law 24 of January 12, 1996 creating the Kuna of Madungandí Reserve; and Law 34 of July 26, 2000 creating the Kuna of Wargandí Reserve.

Article 46(2), by its nature and purpose, is a provision with autonomous meaning *vis á vis* the substantive provisions contained in the Convention. Therefore, to determine whether or not the exceptions to the rule of exhaustion of domestic remedies provided in said provision are applicable to a particular case, requires an examination carried out in advance of and separate from the analysis of the merits of the case, since it depends on a different standard of appreciation to that used to establish whether or not there has been a violation of Articles 8 and 25 of the Convention. It should be clarified that the causes and effects that have prevented exhaustion of domestic remedies in the instant case will be examined, where pertinent, in the report that the IACHR adopts on the merits of the dispute, in order to determine if they do indeed constitute violations of the American Convention.

2. Timeliness of the petition

52. Pursuant to Article 46(1)(b) of the American Convention for a petition to be admissible it must be lodged within a period of six months from the date on which the party alleging violation of their rights was notified of the judgment that exhausts domestic remedies. Article 32 of the Rules of Procedure of the IACHR provides, "In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

53. In the instant case, the Commission expressed its view *supra* regarding the applicability of the exception to the rule of prior exhaustion of domestic remedies. Bearing in mind that the alleged victims first initiated actions with the Panamanian State in 1976, the evolution and continuity of the alleged violations, and the date on which the petition was lodged with the IACHR, the Commission finds that the petition was presented within a reasonable time. Therefore, the requirement with respect to the presentation deadline has been met in accordance with Article 32 of its Rules of Procedure.

3. International duplication of procedures and *res judicata*

54. Articles 46(1)(c) and 47(d) of the Convention establish as admissibility requirements that the subject matter of the petition or communication is not pending in another international proceeding for settlement and that it is not substantially the same as one previously studied by the Commission or by another international organization.

55. There is nothing in the record to suggest that the subject matter of the petition is pending in another international proceeding or that it is substantially the same as one previously studied by the Commission or by another international organization.

56. Accordingly, the Commission concludes that the requirements established in Article 46(1)(c) and 47(d) of the Convention are met.

4. Characterization of the alleged facts

57. With regard to admissibility, the Commission must decide whether the alleged facts would amount to a violation of rights, as laid down in Article 47(b) of the American Convention, or whether the petition is "manifestly groundless" or "obviously out of order" in accordance with paragraph (c) of the above-mentioned Article. The standard by which to assess these extremes is different from the one used to decide the merits of a petition; the IACHR must perform a summary *prima facie* evaluation, not to establish the existence of a violation, but to examine if the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention. This determination involves a summary analysis which does not imply a prejudgment or advance opinion on the substance of the matter.

58. At the stage on the merits of the instant matter, the Commission will examine the allegations regarding failure to make effective and timely payment of the compensation which the State undertook to provide in accordance with Article 21(2) of the Convention in cases of deprivation of property. Furthermore, with respect to the allegations of lack of protection of the boundaries of the Kuna

of Madungandí people's lands legally recognized by the State, and of the failure to physically demarcate and officially recognize the lands at present inhabited by the Emberá of Bayano people, the Commission finds that they tend to establish a violation of Article 21 of the American Convention.

59. With respect to the alleged ineffectiveness of the State and its legal apparatus in protecting the lands of the petitioners against colonists, the Commission, in keeping with the principle of *iura novit curia*, finds that they constitute a potential violation of Articles 8 and 25 of the American Convention. Furthermore, the allegations concerning the ineffectiveness of domestic legal provisions for meeting the needs of the alleged victims as regards their recognition and protection of their lands, would tend to constitute a violation of Article 2 of the American Convention. Furthermore, the Commission also notes that the allegations regarding the alleged victims' lack of access to justice on account of their ethnicity could, if proven, amount to a violation of Article 24 of the American Convention.

60. The IACHR finds that the facts described in the petition do not provide a sufficient basis to characterize a violation of the right to compensation under Article 10 of the American Convention, which recognizes the right of a person to be compensated in accordance with the law in the event they have been sentenced by a final judgment through a miscarriage of justice. Neither does the Commission find that the petition contains sufficient information to characterize a violation of Articles 4, 7, 12, 17, and 19 of the American Convention, nor of Articles I, III, V, VI, VII, XI and XIII of the American Declaration.

61. Based on the foregoing, the Commission will analyze in the merits stage if a possible violation exists of Articles 2, 8, 21, 24, and 25 of the American Convention, in connection with Article 1(1) thereof, to the detriment of the Kuna of Madungandí people and the Emberá of Bayano people.

62. Consequently, the Commission considers that the requirements set forth in Article 47 (c) of the American Convention have been met.

V. CONCLUSION

63. The Commission concludes that it is competent to take up the complaint and that the petition is admissible in accordance with Articles 46 and 47 of the Convention for the alleged violation of Article 21 of the American Convention in connection with Article 1(1) thereof. Furthermore, under the principle of *iura novit curia*, the Commission will analyze in the stage on merits the possible application of Articles 2, 8, 24, and 25 of the Convention.

64. The Commission also concludes that the petition is inadmissible with respect to Articles 4, 7, 10, 12, 17, and 19 of the Convention as well as of Articles of I, III, V, VI, VII, XI and XIII of the American Declaration.

65. Based on the factual and legal arguments given above and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant petition admissible with respect to Article 21 of the American Convention in connection with Article 1(1) thereof. Furthermore, in keeping with the principle of *iura novit curia*, the Commission concludes that the petition is admissible as regards supposed violations of Articles 2, 8, 24, and 25 of the American Convention.

2. To declare the instant petition inadmissible with respect to the alleged violations of rights recognized in Articles 4, 7, 10, 12, 17, and 19 of the American Convention as well as of Articles of I, III, V, VI, VII, XI and XIII of the American Declaration.

3. To transmit this report to the petitioners and the State.

4. To continue with its analysis of merits in the case.
5. To publish the instant report and include it in its Annual Report to the OAS General Assembly.

Done and signed on the 21th day of the April 2009. (Signed): Luz Patricia Mejía Guerrero, President; Víctor Abramovich, First Vice-Chairwoman; Felipe González, Second Vice-Chairman, and Paolo G. Carozza, member of the Commission.