

Kuna of Madungandí and the Emberá of Bayano Indigenous Peoples and Their Members v. Panama

ABSTRACT¹

In 1972, the State began construction of a hydroelectric dam in the areas inhabited by the indigenous Kuna groups from Madungandí and the Emberá groups from Bayano. The State removed many of the indigenous groups to allow construction of the dam and the subsequent flooding of the basin. However, the State failed to pay these groups the compensation that was originally agreed upon, and also failed to demarcate new territories for the indigenous groups in a timely manner. Without any title to their new lands, the indigenous groups struggled to keep non-indigenous squatters off their land. The Court found that the State violated the American Convention.

I. FACTS

A. Chronology of Events

1963: The State proposes to construct a hydroelectric complex to create a large water reservoir.² Studies conducted to limit the negative impact from construction classify the Bayano region as undeveloped and mostly unpopulated.³

1969: The State informs the Kuna of Madungandi (“Kuna”) and Emberá of Bayano (“Emberá”) they must abandon their ancestral lands

1. Kimberly Barreto, Author; Michelle Gonzalez, Editor; Erin Gonzalez, Chief IACHR Editor; Cesare Romano, Faculty Advisor.

2. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, Report No. 58/09, Inter-Am. Comm’n H.R., Case No. 12.354, ¶ 11 (Apr. 21, 2009).

3. Mary Finley-Brook and Curtis Thomas, *From Malignant Neglect to Extreme Intervention: Treatment of Displaced Indigenous Populations in Two Large Hydro Projects in Panama*, 3 WATER ALTERNATIVES 2, 269, 273 (2010).

and offers land and economic compensation, but the tribes are not informed in a manner they understand.⁴

May 8, 1969: Cabinet Decree 123 identifies inalienable and exclusive land offered to the Kuna and Emberá as compensation for their ancestral lands.⁵ The decree emphasizes that the State must relocate the indigenous peoples since the eviction is due to the dam's construction.⁶

July 8, 1971: Cabinet Decree 156 creates a compensation fund to pay the Kuna and Emberá.⁷ However, the Kuna are not compensated because they believe in collective ownership of land and the State requires a property title for compensation.⁸

1972-1976: The Bayano dam is built.⁹ The construction floods 80 percent of indigenous territory, displaces 2,000 Kuna and 500 Emberá, destroys the ecosystem, and causes cultural deterioration and widespread disease from decaying plants.¹⁰

Mid-1970's: The Pan-American Highway is built and farmers begin settling illegally on indigenous land the State failed to demarcate.¹¹

October 29, 1976: The State agrees to demarcate Kuna land and relocate settlers.¹²

January 29, 1977: The State establishes a compensation timetable for the relocation of the Kuna.¹³

4. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, Report No. 125/12, Inter-Am. Comm'n H.R., Case No. 12.354, ¶ 81 (Nov. 13, 2012).

5. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 20.

6. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 78.

7. *Id.* ¶ 82.

8. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 14.

9. *Id.* ¶ 12.

10. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 19.

11. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 16.

12. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 88.

13. *Id.* ¶ 90.

1977: The State stops compensation payments due to an alleged fund shortage.¹⁴

June 22, 1978: The State ratifies the American Convention.¹⁵

1980: The State agrees to continue the Kuna's compensation payments for five more years, but fails to fully carry out the agreement.¹⁶

April 23, 1982: The Government approves Decree 5-A, which allows the National Bureau of Agrarian Reform ("NBAR") to grant plots to settlers adjacent to the indigenous peoples' reserves and expressly acknowledges the State's failure to demarcate the Kuna and Emberá's land.¹⁷

August 3, 1984: The State agrees to establish a *comarca*, or region, for the Kuna.¹⁸

August 15, 1984: The Bayano Corporation, a State entity, agrees to demarcate Emberá land.¹⁹ However, the Corporation fails to do so and settlers continue to invade indigenous lands.²⁰

1989: The Kuna petitions to create an indigenous district to the Ministry of Interior and Justice and to the Legislative Assembly.²¹

March 23, 1990: The State recognizes the need to remove illegal settlers in response to the rapidly intensifying conflict sparked by the settlers invading Kuna and Emberá lands.²²

July 16, 1991: The State agrees to remove the settlers by September 15, 1991.²³

14. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 15.

15. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 30 (Oct. 14, 2014).

16. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 96.

17. *Id.* ¶ 98-99.

18. *Id.* ¶ 100.

19. *Id.* ¶ 101.

20. *Id.* ¶ 102.

21. *Id.* ¶ 103.

22. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 104-05.

September 15, 1991: The State fails to relocate the settlers and the Kuna blocks the Pan-American Highway in protest.²⁴

January 24, 1992: The State orders the relocation of the settlers and recovery of indigenous lands.²⁵

March 17, 1992: The police are given instructions to remove the settlers and maintain order.²⁶

May 1993: The Kuna and Emberá lead a national strike when settlers are not removed from their lands.²⁷ A commission is created to resolve the conflict.²⁸

June 13, 1995: Mr. Héctor Huertas González of the CEALP (*Centro de Asistencia Legal Popular*, "CEALP") submits a Request for Collective Land Title to the State for the Emberá.²⁹

January 12, 1996: Law 24 recognizes the boundaries of the Kuna of Madungandí Reserve and restricts settlers' activities.³⁰

August 1996: Settlers continue to invade Kuna territory and the Kuna attempt to block the Pan-American Highway, resulting in a confrontation with the National Police who injure several indigenous persons.³¹

December 16, 1996: The State promises to evict illegal settlers by January 30, 1997.³²

December 3, 1998: Decree No. 228 recognizes the boundaries of the Kuna territory and restricts further settlement.³³

23. *Id.* ¶ 106.

24. *Id.*

25. *Id.* ¶ 107.

26. *Id.*

27. *Id.* ¶ 108.

28. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 109.

29. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 39.

30. *Id.* ¶ 21.

31. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 114.

32. *Id.* ¶ 115.

33. *Id.* ¶ 35.

January 27, 1999: A request for property title for the Emberá of Piriati is submitted.³⁴

August 25, 1999: The Ministry of Economy and Finance issues a plan recommending the State: (1) honor its agreements to demarcate indigenous lands; (2) purchase the settlers' land; (3) conduct an inspection of the land; (4) recognize Emberá rights; and (5) conduct a physical land study.³⁵

April 5, 2002: The Kuna presents an administrative proceeding to expel settlers to the Mayor of the District of Chepo.³⁶

June 26, 2003: The Kuna presents an administrative proceeding to evict settlers before the Governor of the Province of Panama.³⁷

August 2004: The Governor of the Province of Panama declares it lacks the authority to adjudicate the Kuna's administrative proceeding for the eviction of settlers and orders the record archived.³⁸

January 24, 2005: The Kuna presents an administrative proceeding to evict settlers to the President of the Republic of Panama, who refers the matter to the Ministry of the Interior and Justice.³⁹

December 20, 2006: The Kuna files a criminal complaint against 127 people to the Prosecutor General for harm to property, criminal conduct, and environmental offenses, as a result of illegal settling in the Kuna territory.⁴⁰

January 2007: Nearly 50 settlers enter indigenous lands and cut trees down to prepare the land for crops.⁴¹ The Kuna file a complaint with the National Environmental Authority (*Autoridad Nacional del Ambiente*, "ANAM") denouncing the Regional Administration of Eastern Panama

34. *Id.* ¶ 163.

35. *Id.* ¶ 120-21.

36. *Id.* ¶ 149.

37. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Report on the Merits, ¶ 150.

38. *Id.* ¶ 153.

39. *Id.* ¶ 153-54.

40. *Id.* ¶ 169.

41. *Id.* ¶ 11.

(*Administración Regional de Panamá Este*, “ARPE”) for clearing out the forest in their lands.⁴²

January 16, 2007: The Kuna files an environmental complaint with the Special Unit for Crimes for the destruction of their territory.⁴³

January 29, 2007: The Office of the Attorney General of the Nation forwards the investigation of the Kuna’s complaint against 127 people to the Prosecutorial Circuit of the First Circuit of Panama.⁴⁴

January 30, 2007: Mr. Huertas of the CEALP files a complaint with the Technical Judicial Police stating he was walking through a *comarca* and found four people indiscriminately cutting down trees.⁴⁵ The police preventatively detain the four perpetrators.⁴⁶

The ANAM confirms the ARPE violated the Forestry Law.⁴⁷

January 31, 2007: The Technical Judicial Police forward Mr. Huerta’s complaint to the Public Ministry, the *Personería Municipal* of Chepo, and recommend the four people remain in custody.⁴⁸

February 1, 2007: The Corporation of Indigenous Lawyers of Panama (*Corporación de Abogados Indígenas de Panamá*, “CILP”) files an environment criminal complaint with the Eleventh Prosecutor of Panama against three people.⁴⁹

March 14-15, 2007: The Office of the Fifth Prosecutorial Circuit opens an investigation into the Kuna’s environmental complaint and misplaces the complaint.⁵⁰

The ANAM investigates another complaint filed by the Kuna for logging on their lands and finds approximately three hectares of land logged.⁵¹

42. *Id.* ¶ 159.

43. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 171.

44. *Id.* ¶ 170.

45. *Id.* ¶ 176.

46. *Id.*

47. *Id.* ¶ 159.

48. *Id.* ¶ 177.

49. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 174.

50. *Id.* ¶ 170.

51. *Id.* ¶ 160.

May 21, 2007: The ANAM orders the people responsible for the clearing of the Kuna's lands to pay 500 Balboas, but this is not enforced.⁵²

July 29, 2007: The Fifth Specialized Prosecutor of the First Judicial Circuit of Panama recommends a provisional order to dismiss Mr. Huertas' complaint.⁵³

October 23-24, 2007: The Kuna peacefully protest the State's ineffectiveness in protecting their lands and the police violently quash the protesters and arrest 95 indigenous demonstrators.⁵⁴

December 27, 2007: Mr. Huertas' complaint is provisionally dismissed.⁵⁵

May 29, 2008: The State orders a temporary stay of the investigation into the Kuna's and CILP's environmental complaints.⁵⁶

June 4, 2008: The State establishes an administrative authority for the Kuna to adjudicate the administrative proceedings filed by the Kuna.⁵⁷

December 23, 2008: The State establishes the Ministry of Agricultural Development to recognize collective property rights of the Kuna and other indigenous peoples.⁵⁸

January 26, 2009: The NBAR grants a portion of Emberá land to a private party.⁵⁹

March 23, 2009: The CILP files an administrative action against the invaders settling the land.⁶⁰

52. *Id.* ¶ 159.

53. *Id.* ¶ 178.

54. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 18.

55. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 178.

56. *Id.* ¶ 174-75.

57. *Id.* ¶ 155.

58. *Id.* ¶ 51.

59. *Id.* ¶ 139.

60. *Id.* ¶ 156.

May 12, 2009: An epidemiological report confirms that the plant decomposition caused by the dam construction increased diseases among the Kuna, including malaria and yellow fever.⁶¹ The report further confirms that the loss of the lands the Kuna depended on for hunting, farming, traditional medicine, and fishing resulted in the severe malnutrition of the Kuna's children and elderly.⁶²

July 2009: A report establishes that the State still owes the Kuna and Emberá 9,512,894.30 balboas⁶³ from the construction of the hydroelectric dam.⁶⁴

October 27, 2009: The Emberá files a request for adjudication of their lands with the NBAR.⁶⁵

October 8, 2010: The State replaces the NBAR with the National Land Management Authority (*Autoridad Nacional de Administración de Tierras*, "ANATI").⁶⁶

January 26, 2011: The Emberá files another request for adjudication of their lands to ANATI.⁶⁷

February and March 2011: The Kuna territory is subjected to massive invasions by settlers and Emberá land titles are granted to non-indigenous persons.⁶⁸

August 16, 2011: The Kuna files a complaint with the Agency of Chapo for crimes against property in response to the illegal settlers logging roughly 400 hectares of Kuna land.⁶⁹

November 18, 2011: The Emberá protest the lack of recognition of their collective property rights.⁷⁰

61. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 182.

62. *Id.* ¶ 183.

63. In 2009, the exchange rate between Panaman balboas and United States dollars was 1:1. Source: <https://www.irs.gov/businesses/small-businesses-self-employed/treasury-reporting-rates-of-exchange-as-of-december-31-2009>.

64. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 134.

65. *Id.* ¶ 135.

66. *Id.* ¶ 166.

67. *Id.* ¶ 135.

68. *Id.* ¶ 13.

69. *Id.* ¶ 179.

December 2011: The Ministry of Health releases a report confirming that 80 percent of the Kuna's children under five years old suffer from malnutrition.⁷¹

January 30, 2012: Roughly 150 to 185 settlers invade Emberá lands, which sparks protests from the Emberá, who publicly denounce the invasion and the failure of the State to protect their rights.⁷²

February 8, 2012: The State creates a commission to monitor the granting of the Emberá's collective land titles and promises to grant and deliver the first title no later than March 2012.⁷³ However, the State does not grant any titles to the Emberá.⁷⁴

August 22, 2012: The State orders the expulsion of the invading settlers.⁷⁵

August 13, 2013: ANATI grants title to a portion of Kuna territory to a private party.⁷⁶

B. Other Relevant Facts

According to the 2010 census, the State's indigenous population comprises 12.3 percent of its total population, approximately 417,500 people.⁷⁷ The Kuna and the Emberá are two of the seven indigenous groups in the State, and their territories comprise roughly 22.7 percent of the State.⁷⁸

The Kuna is the second largest indigenous group in the State and their population comprises 19.28 percent of the total indigenous population.⁷⁹ The Kuna have resided on their lands since at least the

70. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Report on the Merits, ¶ 136.

71. *Id.* ¶ 184.

72. *Id.* ¶ 137.

73. *Id.* ¶ 138.

74. *Id.*

75. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 91.

76. *Id.* ¶ 82.

77. *Id.* ¶ 58.

78. *Id.*

79. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Report on the Merits, ¶ 56.

sixteenth century.⁸⁰ Their traditional agriculture involves slashing-and-burning and a reforestation process that is beneficial for environmental conservation.⁸¹ They depend on the natural resources from the land, and their survival is closely linked to their territory.⁸²

According to the National Institute of Statistics and Census, the Emberá is the third largest indigenous tribe in Panama, and constitutes 7.5 percent of the State's indigenous population.⁸³ Traditionally, the Emberá farm corn, plantains, and rice,⁸⁴ as well as hunt and fish.⁸⁵ The tribe heavily depends on the wood in their jungle habitat for housing, furniture, sugar crushers, and mortars used to hull rice and grind corn.⁸⁶

The hydroelectric dam in the Bayano region is one of many government projects planned by the State to both avoid importing energy.⁸⁷ At the time the State begins building the dam, about 3,000 Kuna and 400 Emberá live in the area of the Bayano region that is later flooded by the construction.⁸⁸ Once the dam is built, the Kuna and Emberá are not provided with electricity and water, but instead are told to buy electric generators if they wanted electricity.⁸⁹

II. PROCEDURAL HISTORY

A. Before the Commission

May 11, 2000: The International Human Rights Law Clinic of the Washington College of Law, the Popular Legal Assistance Center (*Centro de Asistencia Legal Popular*; "CEALP"), the Napguana Association (*Asociación Napguana*), and Ms. Emily Yozell file a petition on behalf of the members of the Kuna of Madungandí and the Emberá of Bayano indigenous peoples.⁹⁰ The petitioners allege that the

80. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 57.

81. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 60.

82. *Id.*

83. *Id.* ¶ 64.

84. *Id.* ¶ 67.

85. *Id.*

86. *Id.*

87. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, ¶ 19.

88. *Id.* ¶ 26; n.11.

89. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 185.

90. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 2.

construction of the Bayano Hydroelectric Dam flooded Kuna and Emberá territories and forced them to abandon their homes.⁹¹

November 12, 2001: The Commission holds a hearing where both parties agree to try to reach a friendly settlement.⁹² The State and the Kuna and Emberá establish an Indigenous-Government Commission to attempt to reach a friendly settlement⁹³ with the following objectives: (1) clear the land titles for the indigenous tribes; (2) determine compensation due to the Kuna and Emberá and establish a compensation schedule; and (3) determine the quantity of social investments as collective compensation.⁹⁴

August 19, 2006: The Kuna and Emberá terminate the friendly settlement process, citing the State's refusal to resolve the conflict in their lands.⁹⁵

March 14, 2007: The Kuna and the Emberá, through the International Human Rights Law Clinic of the Washington College of Law, file a request for precautionary measures after nearly fifty invading settlers enter the indigenous lands and destroy the tropical forest to prepare the land for crops.⁹⁶

April 21, 2009: The Commission approves Admissibility Report No. 58/09 and concludes it is competent to hear the case.⁹⁷ The State of Panama argues that since the Kuna and the Emberá have already been well compensated for their evictions and because the State met their demands, there are no human rights violations.⁹⁸ The State further argues that the petition is inadmissible because domestic remedies are not yet exhausted.⁹⁹

91. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Report on the Merits, ¶ 1.

92. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Admissibility Report, ¶ 8.

93. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Report on the Merits, ¶ 126.

94. *Id.*

95. *Id.* ¶ 130.

96. *Id.* ¶ 11.

97. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 2.

98. *Id.* ¶ 3.

99. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Admissibility Report, ¶ 3.

March 15, 2011: The Kuna and Emberá, through the CEALP, again request precautionary measures, following the mass invasion of their territories in February and March 2011 and the State grants Emberá land to settlers.¹⁰⁰

April 5, 2011: The Commission requests that the State take necessary precautions to safeguard the Kuna and Emberá's territories.¹⁰¹

November 13, 2012: The Commission adopts Report on the Merits No. 125/12 and concludes that the State violated Article 8 (Right to a Fair Trial), Article 21 (Right to Property), Article 24 (Right to Equal Protection), and Article 25 (Right to Judicial Protection), all in relation to Articles 1(1) (Obligation of Non-Discrimination) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the Convention to the detriment of the indigenous peoples of the Kuna of Madungandí and the Emberá of Bayano and their members.¹⁰²

The Commission recommends that the State promptly formalize, delimitate, and demarcate the territories of the Kuna and the Emberá and provide them just compensation for the costs of transferring, resettling, and flooding their ancestral territories.¹⁰³ The Commission further recommends the State protect their territories, guarantee their cultural and physical survival, and provide the Kuna and Emberá with health and culturally relevant education programs.¹⁰⁴ Finally, the Commission recommends that the State attempt to stop the entry of non-indigenous peoples and protect the rights of non-indigenous peoples.¹⁰⁵

B. Before the Court

February 26, 2013: The Commission submits the case to the Court after the State failed to adopt its recommendations.¹⁰⁶

100. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, ¶ 307.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 1.

1. Violations Alleged by Commission¹⁰⁷

Article 8 (Right to a Fair Trial)

Article 21 (Right to Property)

Article 24 (Right to Equal Protection)

Article 25 (Right to Judicial Protection)

all in relation to:

Article 1(1) (Obligation of Non-Discrimination)

Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.

2. Violations Alleged by Representatives of the Victims¹⁰⁸

Same Violations Alleged by Commission, plus:

Article 4 (Right to Life)

Article 7 (Right to Personal Liberty)

Article 10 (Right to Compensation in the Event of Miscarriage of Justice)

Article 12 (Freedom of Conscience and Religion)

Article 17 (Rights of the Family)

Article 19 (Rights of the Child)

July 15, 2013: The State submits written preliminary objections and claims that domestic remedies are not yet exhausted, the Court has no *temporal* jurisdiction, and lack of competition by prescription.¹⁰⁹

October 25, 2013: The President of the Court approves the indigenous peoples' request to receive necessary assistance through the Legal Assistance Fund for Victims.¹¹⁰ The financial aid is specifically designated for two representatives to attend the public hearing, for

107. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Report on the Merits, ¶ 5.

108. Mr. Alexis Oriel Alvarado Avila and members of the Human Rights Clinic American University International under the supervision of Mr. Richard Wilson, Mr. David Baluarte and Ms. Shana Tabal served as representatives of the Kuna of Madungandí. Mr. Héctor Huertas Gonzalez of the CEALP served as representative of the Emberá Indigenous People of Bayano; Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Provisional Measures, Order of the President of the Court, Inter-Am. Ct. H.R. (ser. E) "Viewed:" n.1 (Mar. 3 2014).

109. *Id.* n.8

110. *Id.* ¶ 7.

producing four testimonial statements or experts in the hearing, and for a Spanish-Kuna interpreter.¹¹¹

III. MERITS

A. *Composition of the Court*¹¹²

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

Pablo Saavedra Alessandri Secretary
 Emilia Segares Rodriguez, Deputy Secretary

B. *Decision on the Merits*

October 14, 2014: The Court issues its Judgment on Preliminary Objections, Merits, Reparations and Costs.¹¹³

The Court decided by five votes to one:

To accept the State's preliminary objection on the "lack of jurisdiction *ratione temporis*" regarding to the alleged failure by the State to compensate the victims,¹¹⁴ because:

The State did not recognize the Court's jurisdiction until May of 1990.¹¹⁵ The Court emphasized that it therefore only has jurisdiction over events prior to May of 1990 if violations began before that date but continued afterwards.¹¹⁶ The Court can only consider prior acts when they constitute a continuing violation – a breach of an international obligation extending over the entire time the act occurs – as opposed to an instantaneous act, which is a violation of a State's international

111. *Id.*

112. Judge Alberto Pérez recused himself from the deliberation of judgment for reasons of *force majeure*. *Id.* n*.

113. *See generally id.*

114. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, "Decides" ¶ 1.

115. *Id.* ¶ 30.

116. *Id.*

obligation that has lasting effects.¹¹⁷ The alleged violations by the State could be separated into two legal issues: (1) the displacement of the indigenous peoples, which occurred from 1973 to 1975, and (2) the State's promise to compensate for the displacement, continuous invasions by settlers and failure by the State to recognize indigenous lands.¹¹⁸ The Court noted that the preliminary objection only referred the alleged lack of compensation payments by the State, due to the Court's lack of jurisdiction, and did not address other alleged violations by the State.¹¹⁹ The decrees and agreements regarding compensation repayments occurred in 1971, 1976, 1977, and 1980.¹²⁰ As the agreements regarding the compensation payments to the Kuna and Emberá were all executed prior to the State accepting the Court's compulsory jurisdiction in 1990, the Court lacks the jurisdiction to consider reallocation of the agreed funds to review payments already made by the State.¹²¹ Thus, the Court accepted the State's preliminary objection asserting lack of jurisdiction.¹²²

To disregard the State's preliminary objection for "lack of competition for prescription,"¹²³ because:

*The Court already established it lacked jurisdiction over the State prior to May 1990, and since this preliminary objection addressed the lack of compensation prior to May 1990, the Court could not accept the preliminary objection because the Court did not have jurisdiction over the issue.*¹²⁴

The Court found unanimously:

To reject the State's preliminary objection that the Kuna and Emberá had failed to exhaust domestic remedies,¹²⁵ because:

117. Andrés Sarmiento-Lamus, *Case of Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its Members v. Panama*, 27 INT'L. L. REVISITA COLOMBIANA DE DERECHO INTERNACIONAL, 9, 16-17 (2015).

118. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 31.

119. *Id.* ¶ 27.

120. *Id.* ¶ 38.

121. *Id.* ¶ 40.

122. *Id.* "Decides" ¶ 1.

123. *Id.* "Decides" ¶ 2.

124. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 45.

125. *Id.* "Decides" ¶ 3.

For a State to properly submit a preliminary objection for failure to exhaust domestic remedies, the objection must be submitted first with the Commission during the admissibility stage and specify what resources have not been exhausted.¹²⁶ Here, the State submitted five possible general remedies to the Commission for the Kuna and Emberá to pursue.¹²⁷ When the State submitted the preliminary objection again to the Court, the State was required to list the same available remedies for the alleged victims.¹²⁸ Here, when the State submitted its preliminary objections to the Court, it listed an additional remedy by indicating a possibility for relief through the Third Chamber Administrative Litigation of the Supreme Court of Panama.¹²⁹ The Court therefore rejected the preliminary objection for failure to exhaust domestic remedies because the State failed to raise the objection during the appropriate procedural stage with the Court.¹³⁰

The Court found unanimously that the State had violated:

Article 21 (Right to Property), in relation to Article 1(1) (Obligation of Non-Discrimination), of the Convention, to the detriment of the Kuna and the Emberá and their indigenous peoples,¹³¹ because:

Article 21 (Right to Property) protects the intimate relationship indigenous peoples have with their land even though their concept of community property does not necessarily correlate to the classic definition of property.¹³² Because of this relationship, it is critical to protect indigenous peoples' right to land to ensure their physical and cultural survival for them to continue their traditional way of life, and to respect their beliefs, customs, and cultural identity.¹³³ The State was obligated to recognize legally those rights when the Constitution entered into force in 1972.¹³⁴

Previously, the Court has established that the traditional community property possessed by indigenous peoples gives them the right to

126. *Id.* ¶ 21.

127. *Id.* ¶ 22.

128. *Id.* ¶ 21.

129. *Id.* ¶ 22.

130. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 23.

131. *Id.* "Declares" ¶ 4.

132. *Id.* ¶ 111.

133. *Id.* ¶ 112.

134. *Id.* ¶ 114.

demand recognition of indigenous property, and requires the State to title, delimit, and demarcate the collective land to indigenous communities and their members.¹³⁵ The Court has ruled that a failure to uphold these obligations entails a violation of the enjoyment and use of property of indigenous peoples.¹³⁶ However, this right is specifically for ancestral lands and the right to recover them.¹³⁷ Here, as the ancestral lands of the Kuna and Emberá are permanently flooded, the recovery of those lands is impossible.¹³⁸ Thus, there is no traditional possession or occupation of the land and the Court must determine the rights granted to alternative land that was allocated by the State.¹³⁹ Ultimately, the Court found the State has the same obligations for alternative land as they would in cases where the indigenous peoples are able to recover their ancestral land, especially because the loss of the Kuna and Emberá's indigenous land was out of their control and conducted by order of the State.¹⁴⁰ The Court further noted that the State repeatedly recognized the communal ownership of the alternative lands, but failed to delimit, demarcate, and title them.¹⁴¹ Therefore, the Court concluded that the State violated Article 21 (Right to Property) because of its delays in delimiting, demarcating, and titling the lands to the Kuna and Emberá.¹⁴²

Additionally, the Court noted that the State violated its own internal regulations by awarding titles to independent third parties because the domestic legislation rendered indigenous land not justiciable, which means that when the State gave title to private entities, it violated its own laws.¹⁴³ Because of the State's actions, a private third party and the Emberá have title to the same land, which prevents the Emberá from full use and enjoyment of their land.¹⁴⁴ Accordingly, the Court ruled the State will continue to violate Article 21 (Right to Property) until it revokes the private entity's land title.¹⁴⁵

135. *Id.* ¶ 117.

136. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 119.

137. *Id.* ¶ 120.

138. *Id.*

139. *Id.*

140. *Id.* ¶ 122.

141. *Id.* ¶ 123-24.

142. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 137.

143. *Id.* ¶ 141.

144. *Id.* ¶ 145.

145. *Id.* ¶ 146.

Article 2 (Obligation to Give Domestic Legal Effects to Right), in relation to Articles 21 (Right to Property), 8 (Right to be Presumed Innocent) and 25 (Right to Judicial Protection) of the Convention, to the detriment of the Kuna and Emberá,¹⁴⁶ because:

During the period of 1972 to 2008, the State obligated itself to provide effective enjoyment of collective indigenous land, which implies the land is delimited and demarcated.¹⁴⁷ Before 2008, no legal procedure was established to grant titles of collectively owned indigenous land; instead, the procedure was delegated in the different laws establishing the five indigenous regions.¹⁴⁸ Despite the State assuming the international obligation to delimit, demarcate, and title indigenous territories by accepting the compulsory jurisdiction of the Court,¹⁴⁹ most of these laws did not discuss demarcation of the land.¹⁵⁰ This, combined with the State's ineffective legislation (as the only mechanism to fulfill this property right), and the failure to establish internal rules and mechanisms that grant titles or delimit and demarcate lands for the Kuna and Emberá,¹⁵¹ influenced the Court to find that the State violated Article 2 (Obligation to Give Domestic Legal Effects to Right) in relation to Articles 21 (Right to Property), 8 (Right to be Presumed Innocent), and 25 (Right to Judicial Protection) of the Convention.¹⁵²

Articles 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) and 25 (Right to Judicial Protection), in relation to Article 1(1) (Obligation of Non-Discrimination) of the Convention, to the detriment of the Kuna and Emberá,¹⁵³ because:

The State is obligated to provide alleged human rights victims effective judicial resources and remedies under Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal), in accordance with Article 25 (Right to Judicial Protection).¹⁵⁴ Article 25

146. *Id.* "Declares" ¶ 5.

147. *Id.* ¶ 151-52.

148. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 152.

149. *Id.* ¶ 155.

150. *Id.* ¶ 153.

151. *Id.* ¶ 156.

152. *Id.* ¶ 157.

153. *Id.* "Declares" ¶ 6.

154. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 165.

(Right to Judicial Protection) requires that available remedies must be genuinely effective in finding human rights violations and providing due reparations.¹⁵⁵ Furthermore, the right to an effective judicial remedy is a fundamental rule of law for a democratic society within the Convention, and States have an international and national legal duty to investigate, prosecute, and punish human rights violators.¹⁵⁶

The Court routinely analyzes four factors to determine whether the proceeding is completed within a reasonable time: (1) the complexity of the case; (2) the applicant's conduct; (3) judicial conduct; and (4) the alleged victim's legal impairment, or whether the length of the proceedings has adversely affected the legal status of the person involved in the controversy.¹⁵⁷ If time relevantly impacts the person's legal situation, it is necessary for the proceedings to move through the system quickly.¹⁵⁸

Here, the Kuna and Emberá brought actions in various courts to enforce their agreements and resolutions, to request the recognition of their land, and to request protection against invading settlers.¹⁵⁹ The Emberá submitted multiple requests for title before the State finally granted them collective title in 2014.¹⁶⁰ The failure to effectively respond to these requests constituted a violation of Articles 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) and 25 (Right to Judicial Protection).¹⁶¹

Additionally, the Kuna filed several administrative and environmental criminal proceedings with the National Environmental Authority ("NEA").¹⁶² Some proceedings were still open at the time of the Court's deliberations.¹⁶³

The Court ruled that the State appeared to have impeded the development of the cases because authorities failed to investigate and conclude the administrative proceedings quickly and diligently. The

155. *Id.*

156. *Id.* ¶ 167-69.

157. *Id.*

158. *Id.*

159. *Id.* ¶ 170.

160. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs*, ¶ 171.

161. *Id.*

162. *Id.* ¶ 175.

163. *Id.* ¶ 176-77.

*State spent six years trying to decide who was competent to handle the requests by the Kuna and the criminal proceedings had been open between three and seven years, with no explanation for the delay.*¹⁶⁴ *Therefore, the Court found that the length of the two criminal proceedings and the administrative proceeding were not compatible with the meaning of reasonable time established in Article 8(1) (Right to a Hearing Within Reasonable Time by a Competent and Independent Tribunal) and thus constituted a violation of the Article.*¹⁶⁵

The Court found unanimously that Panama had not violated:

Articles 2 (Obligation to Give Domestic Legal Effect to Rights), in relation to Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention, to the detriment of the Kuna and Emberá,¹⁶⁶ because:

*States are obligated to adopt legislative and other necessary measures to protect the rights of the Convention and to refrain from adopting measures that inhibit the free exercise of the rights enshrined within.*¹⁶⁷ *Here, the State does not appear to have a special procedure implemented to handle settler invasions onto Kuna and Emberá land.*¹⁶⁸ *However, representatives of the Kuna have initiated several actions against third party settlers, some of which concluded in favor of the indigenous tribe.*¹⁶⁹ *These actions were implemented by representatives of the Kuna through criminal and administrative jurisdictions.*¹⁷⁰ *Furthermore, neither the Commission nor the representatives of the alleged victims offered any evidence showing that going through the State's court system was less effective in examining the cases and protecting indigenous rights than by establishing a special procedure to handle these cases.*¹⁷¹

Additionally, neither the Commission nor the representatives specified how the absence of a competent authority to address invading settlers

164. *Id.* ¶ 182-84.

165. *Id.* ¶ 185; 187. However, the Court noted that the Kuna's third criminal proceeding occurred within a reasonable time. *Id.* ¶ 186.

166. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, "Declares" ¶ 7.

167. *Id.* ¶ 192.

168. *Id.* ¶ 194.

169. *Id.*

170. *Id.* ¶ 195.

171. *Id.* ¶ 195-96.

affected indigenous rights.¹⁷² Rather, they argued that the failure of the State authorities to exercise due diligence resulted in ineffective measures.¹⁷³ Therefore, the Court found no evidence of a violation of Article 2 (Obligation to Give Domestic Legal Effect to Rights).¹⁷⁴

The Court unanimously chose not to make a judgment on the State's alleged violations of

Articles 24 (Right to Equal Protection) and 1(1) (Obligation of Non-Discrimination) of the Convention, to the detriment of the Kuna and Emberá,¹⁷⁵ because:

Neither the Commission nor the representatives of the alleged victims submitted evidence indicating how Article 24 (Right to Equal Protection) was violated; only alleging that the State granted land titles faster to individuals outside of the community than granting collective titles.¹⁷⁶ The Court decided the allegations in question were already decided by its judgment on, "the right to property and the right to judicial protection for the Kuna and Emberá peoples...."¹⁷⁷

C. Dissenting and Concurring Opinions

1. Partially Dissenting Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot

In a separate opinion, Judge Mac-Gregor Poisot disagreed with the Court's decision to accept the State's preliminary objection that the Court lacked jurisdiction for issue of compensation payments.¹⁷⁸ He found that the State's failure to compensate was a situation within the Court's jurisdiction.¹⁷⁹

Judge Mac-Gregor Poisot discussed the factors to be taken into consideration when determining if a violation is instantaneous or

172. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 197.

173. *Id.* ¶ 197.

174. *Id.* ¶ 198.

175. *Id.* "Declares" ¶ 9.

176. *Id.* ¶ 203.

177. *Id.* ¶ 204.

178. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Separate Opinion of Judge Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 4 (Oct. 14, 2014).

179. *Id.*

continuous involves whether the violations continue, or whether the violation has effects that continue:¹⁸⁰ (1) applicable international and national legal norms; (2) the nature of the facts of the case; and (3) the effects of the alleged victim's human rights.¹⁸¹

Article 21's (Right to Property) requirement for just compensation entailed that the payments must be effective, adequate, and prompt.¹⁸² Additionally, the Court previously found the right for just compensation extends to instances where a person can no longer regularly use and enjoy their property.¹⁸³ In this case, since the beginning of the project of the hydroelectric dam the State contended that its duty to compensate the Kuna and Emberá with lands was not justiciable.¹⁸⁴ The State established several other decrees highlighting the heavy economic costs of migration and established a special compensation fund to reimburse the indigenous peoples for the loss of their ancestral land and for the cost of their move.¹⁸⁵ From 1975 to 1996, the State established several decrees, committees, and acts to settle the continuous conflicts with the Kuna and Emberá and to fulfill the responsibilities the State had committed itself to.¹⁸⁶ Thus, Judge Mac-Gregor Poisot concluded that the Court failed to decide whether the failure to compensate the Kuna and Emberá constituted a continuous act.¹⁸⁷

IV. REPARATIONS

The Court ruled unanimously that the State had the following obligations:

180. *Id.* ¶ 50.

181. *Id.* ¶ 51.

182. *Id.* ¶ 54.

183. *Id.* ¶ 56.

184. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, Separate Opinion of Judge Ferrer Mac-Gregor Poisot, ¶ 61.

185. *Id.* ¶ 62.

186. *Id.* ¶ 64-69.

187. *Id.* ¶ 76.

A. Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)

1. Publish and Disseminate the Judgment

Establishing that the judgment is a *per se* form of reparation,¹⁸⁸ the Court ordered the State must publish the following: (1) the Court-prepared official summary of the judgment in the State's Official Gazette and a nationally circulated newspaper; and (2) the entire judgment on an official website of the State for one year.¹⁸⁹ Further, the Court found that the State must broadcast the official summary of the judgment in the Kuna and Emberá's official languages and in Spanish in a radio transmission through a radio station, "every first Sunday of the month for at least three months."¹⁹⁰ The State must provide "notice of the date and station schedule that will broadcast the summary."¹⁹¹

2. Public Act Acknowledging Responsibility

The Court ordered the State to make a public act recognizing its international responsibility for the human rights violations committed against both the Kuna and Emberá.¹⁹² The State must consult both indigenous peoples as to when, where and how the act should be carried out.¹⁹³ Further, the act must be done in accordance with the traditions and customs of the Kuna and Emberá and must be widely publicized by the media with State officials and members of both tribes present.¹⁹⁴ Finally, the public act should be conducted in both Spanish and the traditional languages of the Kuna and Emberá.¹⁹⁵

3. Finalize the Formalization, Delimitation, and Demarcation of the Emberá Physical Territories

The Court ordered the State must demarcate the lands of the Emberá communities of Piriati and Ipetí and grant them collective

188. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 211.

189. *Id.* ¶ 216.

190. *Id.* ¶ 217.

191. *Id.*

192. *Id.* ¶ 219.

193. *Id.*

194. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, ¶ 219.

195. *Id.*

property rights while considering their traditional customs and values.¹⁹⁶ Until the State demarcates the land, it must not act in a way that grants land title or access to third parties, or affect the Emberá's ability to enjoy their land.¹⁹⁷ The State must also revoke the land title granted to the private party in the Emberá's territory.¹⁹⁸

B. Compensation

The Court awarded the following amounts:

1. Pecuniary Damages

Because of the Court's lack of jurisdiction prior to the State accepting the jurisdiction of the Court, no pecuniary damages were awarded for the damage to the Kuna and Emberá resulting from their relocation, resettlement, and flooding of their ancestral lands.¹⁹⁹ Further, pecuniary damages were not awarded for the State's failure to compensate the victims pursuant to their original agreement as that fell outside the Court's jurisdiction.²⁰⁰

Although the Court determined the victims did not provide sufficient information to determine how much they should be compensated, the Court still found that the indigenous peoples must be compensated for the damage to their collective land from the State's failure to demarcate, delimit, and title the land and for the damage from invading settlers.²⁰¹ Thus, the Court ordered the State deliver \$1,000,000 to representatives of the Kuna and \$250,000 to representatives of the Emberá.²⁰²

2. Non-Pecuniary Damages

The Court determined that non-pecuniary damages were appropriate considering the failure of the State to recognize the Kuna and Emberá's right to collective property and the deteriorating conditions of life they were subjected to over the course of the

196. *Id.* ¶ 232.

197. *Id.*

198. *Id.*

199. *Id.* ¶ 237.

200. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 237.

201. *Id.* ¶ 239.

202. *Id.* ¶ 240.

conflict.²⁰³ Further, the Court noted that non-pecuniary damages were especially appropriate in this case because of the important ties and the dependency indigenous peoples have on their lands, and the failure to allow the Kuna and Emberá to enjoy and exercise their rights to collective property amounted to irreparable damage to their way of life and cultural heritage.²⁰⁴ The Court therefore ordered that the State must pay the representatives of the Emberá \$250,000 and the representatives of the Kuna \$1,000,000.²⁰⁵

3. Costs and Expenses

The Court determined that reimbursement for costs and expenses should include the expenses incurred by the Kuna and Emberá in the multiple domestic proceedings where they attempted to claim their rights as well as expenses occurred with the Court itself.²⁰⁶ Thus, the Court ordered that the State pay \$60,000 to representatives of the Kuna and \$60,000 to representatives of the Emberá, totaling \$120,000 in costs and expenses for their domestic and international proceedings.²⁰⁷

By Order of the President of the Court dated October 25, 2013, a Victims' Legal Assistance Fund was established to help the Kuna and Emberá pay for the necessary costs relating to gathering testimony, finding a translator, and enabling the attendance of representatives.²⁰⁸ The Court ordered that the State pay the Court \$4,525.49 for reimbursement of the Fund.²⁰⁹

Because costs would be accrued through the monitoring compliance judgment, the Court held that the State may reimburse the Kuna and Emberá or their representatives for the reasonable expenses incurred.²¹⁰

4. Total Compensation (including Costs and Expenses ordered):

\$ 2,624,525.49

203. *Id.* ¶ 246.

204. *Id.*

205. *Id.* ¶ 247.

206. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs. ¶ 251.

207. *Id.* ¶ 253.

208. *Id.* ¶ 255.

209. *Id.* ¶ 257.

210. *Id.* ¶ 253.

C. Deadlines

The State must publish and disseminate the judgment within six months in various media forms, including their Official Gazette, a nationally circulated newspaper, on an official website, and over radio broadcast.²¹¹ Additionally, the State must give the public a two-week notice before broadcasting over the radio.²¹²

The State must conduct a public act broadcasted over the media acknowledging their international responsibility of human rights violations in accordance with Kuna and Emberá customs in the presence of governmental officials and members of both tribes within one year.²¹³

The State must demarcate and grant collective title to the land in the Emberá communities of Ipetí and Piriati within one year, and must revoke the private property land title granted to the private party within one year.²¹⁴

The State must pay within one year \$1,000,000 to the Kuna and \$250,000 to the Emberá in pecuniary damages for damage to their property occurring from the State's failure to delimit, demarcate, and title their land and the State's failure to protect the indigenous lands from invading third parties.²¹⁵

The State must pay within one year \$1,000,000 to the Kuna and \$250,000 to the Emberá in non-pecuniary damages for the State's failure to recognize and allow the indigenous peoples to freely exercise their collective property rights and for the resulting irreparable damage to their way of life and cultural heritage.²¹⁶

The State must pay within one year \$60,000 to the Kuna and \$60,000 to the Emberá for expenses incurred resulting from their domestic and international proceedings.²¹⁷

The State must pay within 90 days \$4,525.49 to the Court for the reimbursement of the Victims' Legal Assistance Fund.²¹⁸

211. *Id.* ¶ 216.

212. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Cost., ¶ 217.

213. *Id.* ¶ 219.

214. *Id.* ¶ 232.

215. *Id.* ¶ 240.

216. *Id.* ¶ 247.

217. *Id.* ¶ 253.

218. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, ¶ 257.

V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

VI. COMPLIANCE AND FOLLOW-UP

August 28, 2015: The Court found that the State fulfilled its duty of paying to the Court \$4,525.49 for reimbursement of the Victims' Legal Assistance Fund.²¹⁹ However, the State paid 106 days after the 90-day payment period had passed.²²⁰ Because of the late payment, the State paid more than the amount requested, which the Court found to be acceptable as it corresponded to the default interest incurred from the delay.²²¹

May 23, 2017: The Court found that the State complied with its order to publish and disseminate the judgment in the Official Gazette and a nationally circulated newspaper within one year.²²²

The State disseminated the judgment over radio broadcast through the State Radio and Television.²²³ Additionally, the State willingly broadcasted the transmission an extra time because the Kuna and Emberá did not receive two weeks notice of the previous broadcast.²²⁴ The Kuna and Emberá objected to the time the judgment was broadcasted (9 p.m.), because most of their people are not awake at that time.²²⁵ However, the Court found that the indigenous peoples' objection occurred more than six months after the State conducted its broadcasts, and thus found that the State fully complied with the Court's order regarding dissemination via radio broadcast.²²⁶

The State informed the Court's special rapporteur that the State fulfilled its obligation of a public act of recognition of its international responsibility on October 13, 2015.²²⁷ With the Kuna and Emberá's

219. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) No. 284, "Considering That" ¶ 3 (Aug. 20 2015).

220. *Id.*

221. *Id.*

222. *Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. "Considering That," ¶ 8 (May 23, 2017).

223. *Id.* "Considering That" ¶ 10.

224. *Id.*

225. *Id.*

226. *Id.* "Considering That" ¶ 11.

227. *Id.* "Considering That" ¶ 13.

consent, the State further paid the total compensation and held the event in Spanish and indigenous languages in front of the media.²²⁸

However, the Emberá objected because they argued that the State's public act of recognition of its international responsibility was improvised, as the community was unable to attend.²²⁹ When the Court requested more information from the Emberá or their representatives, they received no response and accordingly decided that the characteristics of the public demonstration were in accordance with the demands of the judgment and that the State therefore complied with the order.²³⁰ The Court further emphasized that the State had shown good will and a willingness to make reparations by covering the costs of the supervisory hearing on October 15, 2015.²³¹ Finally, the Court declared that the compensation payment for pecuniary and non-pecuniary damages and for reimbursement of costs and expenses was fulfilled at the public recognition.²³²

In terms of expenses accrued in the monitoring compliance process, both the Kuna and Emberá demanded funds from the State without providing sufficient information to determine the amount the State should compensate them.²³³ The Court ordered both tribes to ascertain a compensation amount, the reasonableness of the expenses accrued, and file an official request with the Court.²³⁴

VII. LIST OF DOCUMENTS

A. *Inter-American Court*

1. Preliminary Objections

[None]

2. Decisions on Merits, Reparations and Costs

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations](#)

228. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Monitoring Compliance with Judgment, Order of the Court, "Considering That" ¶ 13.

229. *Id.* "Considering That" ¶ 14.

230. *Id.* "Considering That" ¶ 16-17.

231. *Id.* "Considering That" ¶ 18.

232. *Id.* "Considering That" ¶ 20.

233. *Id.* "Considering That" ¶ 23.

234. Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Monitoring Compliance with Judgment, "Considering That" ¶ 24.

[and Costs, Judgment, Inter-Am. Ct. H.R. \(ser. C\) No. 284, \(Oct. 14, 2014\).](#)

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Preliminary Objections, Merits, Reparations and Costs, Separate Opinion of Judge Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H.R. \(ser. C\) No. 284, \(Oct. 14, 2014\).](#)

3. Provisional Measures

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Provisional Measures, Order of the President of the Court, Inter-Am. Ct. H.R. \(ser. E\) \(Mar. 3 2014\).](#)

4. Compliance Monitoring

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. \(Aug. 28, 2015\).](#)

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. \(May 23, 2017\).](#)

5. Review and Interpretation of Judgment

[None]

B. Inter-American Commission

1. Petition to the Commission

[Not Available]

2. Report on Admissibility

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Admissibility Report, Report No. 58/09, Inter-Am. Comm'n H.R., Case No. 12.354, \(Apr. 21, 2009\).](#)

3. Provisional Measures

[None]

4. Report on Merits

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Report on the Merits, Report No. 125/12, Inter-Am. Comm'n H.R., Case No. 12.354, \(Nov. 13, 2012\).](#)

5. Application to the Court

[Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama, Petition to the Court, Inter-Am. Comm'n H.R., Case No. 12.354, \(Feb. 26, 2013\).](#)

VIII. BIBLIOGRAPHY

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Andrés Sarmiento-Lamus, *Case of Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its Members v. Panama*, 27 INT'L. L., REVISITA COLOMBIANA DE DERECHO INTERNACIONAL, 9-38 (2015).

Mary Finley-Brook and Curtis Thomas, *From Malignant Neglect to Extreme Intervention: Treatment of Displaced Indigenous Populations in Two Large Hydro Projects in Panama*, 3 WATER ALTERNATIVES 2, 269-90 (2010).