SEPARATE OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN THE JUDGMENT ON REPARATIONS IN THE CASE OF THE PLAN DE SANCHEZ MASSACRE OF NOVEMBER 19, 2004

A. INDIVIDUAL AND COLLECTIVE RIGHTS

1. The considerations and decisions included in the judgment on reparations delivered by the Inter-American Court of Human Rights in the Case of the Plan de Sánchez Massacre on November 19, 2004, following the judgment on merits handed down on April 29, 2004, allowed the Court to return to an issue it has considered in other rulings; the ownership of the rights protected by the American Convention and, when applicable, other international instruments with a similar perspective, which grant contentious jurisdiction to the Inter-American Court. These judgments include those delivered in the Case of the Mayagna (Sumo) Awas Tingni Community, in its own specific domain, and the Case of Cantos, from the point of view on which I will refer to in this opinion.

2. In these cases, the parties' positions were based on specific individual rights and determined rights of moral or collective persons. They raised the issue of the latter's ownership of "human" rights and, consequently, of the scope of the Court's protective powers and decisions. There have been differing opinions in this regard; the issue should therefore be re-examined, based on the judgment to which I add this separate opinion.

3. In the Mayagna Community case, it was acknowledged – in the domestic instances and during the proceedings before the organs of the inter-American system – that this indigenous community was the holder of rights to the property it had owned for many years, which was the source of the community's "material subsistence" and also of elements related to its culture and, in this regard, aspects of community integration, continued existence and transcendence, in other words, of the "spiritual survival" of the group, if I may be allowed this expression.

4. Given that the material and spiritual aspects of the life of each member of the indigenous community are intimately linked to those of the community, the sum of the rights of the members is made up of the powers, liberties or prerogatives they possess independently of the community itself (such as the right to life and the right to humane treatment), and the rights that arise precisely from their membership in the community, which are justified and exercised in function of the latter, and which, in these circumstances, acquire their maximum meaning and content: for example, the right to participate in the use and enjoyment of certain property, and the right to receive, preserve and transmit the benefits of a specific culture.

5. The collective rights of the community are not blended with those of its members, and the individual rights of the members are not absorbed or subsumed in the former. Each "category" retains its own entity and autonomy. Both of them, deeply and closely interrelated, retain their own character, are subject to protection and require specific measures of protection. In this context, recognition of each of these aspects becomes relevant and even essential for the other. There is no conflict between them, only harmony and mutual dependence. Finally, the collective life becomes part of the individual life, and the latter acquires meaning and worth in the

framework of the collective existence. While it is true that this phenomenon can be seen in many societies, perhaps in all, it is also true that in some – such as the indigenous groups of the Americas – it has special, more intense and decisive characteristics.

6. When the Court – and, in particular, I myself, as a judge of the Court – examined the proven facts and the claims made in the Mayagna Community case, I had to bear in mind the terms of the American Convention, and particularly Article 1(2), which emphatically states: "For the purposes of this Convention, "person" means every human being," in order to define the issues raised and the exercise of its own competence.

7. That perspective, which is very clear – and reflects the ideas and decisions that prevailed when the Convention was drafted – explains the numerous allusions in international instruments to the rights of the person. Several articles state: "Every person/everyone has the right..."; in other words, the human being is recognized as having the right expressed in that article. This is the case of Article 21 concerning property, the first paragraph of which begins with the reiterated formula: "Everyone has the right...." It alludes, thus, to a right of the human being.

8. Other provisions of the American treaty system have used this approach. For example, Article 8(1)(a) of the Protocol of San Salvador, which refers to aspects of individual and collective labor laws, both sectors of modern labor law. The Protocol recognizes rights to individual workers and alludes to the obligations of States towards them as natural persons, as well as towards the trade unions and workers federations, collective or legal persons composed of the former or of groups of natural persons.

9. The same article, which refers to the "right of workers to organize trade unions," characterizes the latter's powers, in correlation to the obligations of the States, as an "extension" of the individual right of workers to organize trade unions and join them for the purpose of protecting and promoting their interests. Consequently, the Protocol protects directly the rights of the human being, and only indirectly promotes – through the rights of the person, which are always foremost – the powers of collective persons.

10. I consider that the judgment delivered in the Mayagna Community case should be understood in the context of these considerations. In this regard, in paragraph 14 of my concurring opinion to that judgment, I indicated: "In its analysis of the matter subject to its jurisdiction, the Inter-American Court regarded the rights to use and enjoy property, protected under Convention Article 21, from a perfectly valid perspective, that of the members of the indigenous communities. In my opinion, the approach taken for purposes of the present judgment does not in any way imply a disregard or denial of other related rights that differ in nature, such as the collective rights so frequently referenced in the domestic and international instruments that I have cited in this opinion. It must be recalled that individual subjective rights flow from and are protected by these community rights, which are an essential part of the juridical culture of many indigenous peoples and, by extension, of their members. In short, there is an intimate and inextricable link between individual and collective rights, a linkage that is a condition *sine qua non* for genuine protection of persons belonging to indigenous ethnic groups."

11. There is a considerable body of instruments or draft instruments that refer to the collective rights of indigenous peoples, as indicated above. The judgment in the Mayagna case alludes to them and, in my concurring opinion, I cited some. Likewise, there are numerous high-ranking provisions in domestic law (for example, the Constitutions of several countries of the hemisphere), which affirm the existence of these same rights, based on the pre-Colombian legal system and the specific relationship of the indigenous groups to the land they have owned – not without interferences arising from other ownership claims – and where they have led their lives and preserved ancient customs and beliefs. This specific relationship has characteristics that go beyond the mere possession or ownership of the land.

12. The status of these peoples and their property, which constitutes a timeless basis for the social relationships of a large part of the Americas, must be adequately protected. The liberal legislation of the nineteenth century did not do this; it militated in favor of individual property and denied or weakened the original rights of the American peoples. The legislation deriving from the social trend of law, enacted in the first half of the twentieth century, has attempted to do this, with relative success. This is the context within which the rights of members of the indigenous peoples, members of ancient communities, are examined. Their rights do not arise from recent laws, which merely recognize such rights.

13. I emphasize that this way of interpreting the Convention and the corresponding rulings of the Court, in no way disregards or diminishes the collective rights of the indigenous groups, fully included in international instruments and national laws that try to do justice to the original inhabitants of the hemisphere, victims of habitual plunder. To the contrary, they underscore the significant legal, ethical and historical value of these community rights and recognize that they are the source of individual rights and that the latter, based on the former or fed by them, are, in turn, human rights with the same ranking as any treaty-based rights.

14. I also referred to the Case of Cantos, as a precedent in delimiting individual and collective rights. In this context, the Court examined the participation of a natural person in the patrimony of a collective person, an issue regulated by civil and commercial law. I will merely recall that in its judgment in that case, the Court stated: “This Court considers that, although the figure of legal entities has not been expressly recognized by the American Convention, as it is in Protocol No. 1 to the European Convention on Human Rights, this does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law" (para. 29).

B. REPARATION AND PRESERVATION OF CULTURE

15. The judgment of November 19, 2004, in the Case of the Plan de Sánchez Massacre was delivered based on the abovementioned judgment of April 29, which, in turn, took into consideration the State’s acknowledgement of international responsibility of April 23, 2004, admitted by the Court in an order of the same date. The judgment of November 19, which this opinion accompanies, orders certain reparations as compensation for the non-pecuniary damage resulting from the need to preserve the traditional culture of the victims and their descendants.

16. The aggression they suffered destroyed or was intended to destroy the historical link between the old and the new generations that ensured the transmission of the cultural traditions, which are the condition and expression of the identity of the members at both the individual and the collective level. The women and the elders were sacrificed in an effort to restrict the reception and transmission of the culture, which gives identity, continuity and historical transcendence to certain human groups. This very severe violation was carried to extremes when the surviving men were obliged to enlist with their aggressors and act in concert with them, as if they were members of that group, rather than the one that had been abused.

17. I believe that this point has been covered satisfactorily in some points of the judgment on reparations in this case; such as when it is said that "With the death of the women and the older people, oral transmitters of the Maya Achí culture, their knowledge could not be transmitted to the new generations, and, today, this has produced a cultural vacuum. The orphans did not receive the traditional education handed down from their ancestors. In turn, the militarization and repression to which the survivors of the massacre were subjected, particularly the young men, has caused them to lose their faith in the traditions and knowledge of their forefathers" (para. 49(12)).

18. The right to the benefits of culture is established in Article 14 of the Protocol of San Salvador. The Court has not attempted to apply this norm, but has merely established the evident consequences of the pecuniary and non-pecuniary damage suffered by the victims of the declared violations of the American Convention, violations that are included in the State's acknowledgment of international responsibility, according to the Inter-American Court's judgment of April 29, 2004, in this case. Clearly, there are connections between the juridical rights preserved directly by the American Convention and those established in the Protocol of San Salvador; to such an extent, that the protection granted by the former instrument contributes to the protection of the rights established in the Protocol.

19. It is pertinent to recall that the State's acknowledgment of international responsibility includes violations of Articles 1(1), 5(1) and 5(2) (Right to Humane Treatment, specifically the attack on physical, mental and moral integrity, torture, and cruel, inhuman and degrading treatment), 8(1) (Right to a Fair Trial), 11 (Right to Privacy), 16(1) (Freedom of Association), 21(1) and 21(2) (Right to Property, specifically the use and enjoyment of property and prohibition to deprive anyone of this), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection). Also, violations of Articles 12(2) and 12(3) (Right to Freedom of Conscience and Religion, specifically, harm to freedom of religion and beliefs, and limitation to manifest religion and beliefs), 13(2)(a) and 13(5) (Freedom of Thought and Expression; in this case, respect for rights or reputation, and prohibition of war propaganda and advocacy of hate that constitute incitement to lawless violence on grounds of race, color, religion, language or national origin, *inter alia*).

20. The deprivations endured by the victims caused them severe physical, mental and moral suffering, as established in Article 5(1) and 5(2) of the Convention. They also gave rise to the violation of several aspects of the exercise of freedom of conscience and religion, as established in Article 12(2) and 12(3) of the Pact of San José, and also of freedom of thought and expression in relation to the incitement to violence, in accordance with Article 13(2) and 13(5), provisions invoked, *inter alia*, by the Court in its judgment of April 29, to which I now refer.

21. In view of the above, it is pertinent that the Court order reparation measures that alleviate the harm suffered by the victims and their successors, avoid the repetition of violations of this nature, and re-establish, insofar as possible, some of the conditions that existed before the massacre occurred, producing its grave and notorious consequences. These measures of reparation are of diverse types. They include those that, based on the violation of Article 5 of the Pact of San José, relate to the preservation of the culture of the communities affected and the provision of certain goods and services that contribute to mitigating the suffering caused and avoiding fresh violations of the same nature.

C. INTEGRATION OF THE COMPENSAATION

22. When exercising its jurisdiction to protect human rights, which occurs when a fundamental right of a specific individual has been violated, the system to which this jurisdiction belongs has several objectives: to re-establish the legal order that has been breached, to restore social peace and tranquility based on freedom and justice, to avoid self-defense, and to repair the damage caused to the victim. I will not try and establish a ranking of these objectives in the sphere of the protection of human rights. My interest is to underscore the need to provide effective legal protection to the victim, or his successors if applicable, once the violation has been committed, which translates into a specific reasonable reparation that lessens the consequences of the violation and mitigates the damage caused. This reparation must be based on justice and, particularly, on fairness.

23. The judge cannot lose sight of this need, which is based on the consideration due to those who have been directly affected by the violation. It is true that, based on these often very moving and distressing cases, it is possible, and necessary, to establish general concepts and legal doctrine that contribute to the development of law, but it is also true that the judge cannot – or, in my opinion, should not – ignore the "individual case" and focus his attention on the "general concept," leaving the victim in the distant background, reduced to a mere motive for reflection and conclusions that transcend him and, finally, leave him abandoned.

24. When taking a decision on compensation for the deprivation of juridical rights that are not of a strictly patrimonial nature, the judge confronts problems that are difficult to resolve. This happens when he wants to compensate the suffering caused by the arbitrary deprivation of the life of a loved one, but also when he decides compensation for other violations that lead to suffering. In this case, the arbitrary deprivation of life, in itself, is outside the jurisdiction of the Inter-American Court, because of the date on which the State accepted this jurisdiction. When considering intense suffering, the damage caused can and must be compensated or alleviated only by financial compensation. In the absence of a better solution, it has been accepted that a violation entails the obligation to provide compensation.

25. In these cases, it is obviously impossible to compensate the damage suffered as to when the loss of a possession can be compensated by providing a new one of identical nature and value to the one lost, an operation that approximates *restitutio*. In such cases, a payment in cash or in kind, or both, is decided; this contributes, on the one hand, to expressing reproach for the violation committed and, on the other hand, to mitigating the suffering caused.

26. Even though, in the instant case, for the reasons mentioned in paragraph 24, the Court is not attempting to compensate the deprivation of life, but only the suffering resulting from the violations submitted to the Court's consideration, I believe it is necessary to clarify the applicable reparation criteria, as a general point of reference.

27. All human beings are equal before the law and before justice. Their property merits identical protection. The harm to the latter must be evaluated equally in all cases. However, the court can take into account the circumstances of the beneficiaries of a possible compensation when deciding its characteristics in each case. This case-by-case consideration of non-pecuniary damage (the consideration of pecuniary damage may lead to different conclusions), does not mean that a different value is assigned to the suffering caused by the violation, but that the Court considers the best way to make reparation, so that, on the one hand, it provides the most benefit to the beneficiary of the compensation and, on the other hand, it results in maximum compliance by the obliged party on which the compensation depends.

28. I believe that these consideration justify the fact that the Inter-American Court has decided compensation of twenty thousand dollars for each of the surviving victims of the massacre, an amount that may be less than that assigned in other cases for non-pecuniary damage arising from the same source. The appreciation of human suffering is no less in this case, owing to the number of victims or the characteristics of the events. To meet the goal mentioned in the preceding paragraph, the Court considered it was also pertinent to grant other measures in favor of these victims, which are added to the financial compensation and, with it, constitute a single compensation.

29. Once again, in this part of the judgment on reparations, the Court considered the collective nature of the life of the beneficiaries of the compensation. Hence, it considered and agreed that, from a practical point of view, certain services to improve the victims' situation should be provided, in addition to the delivery of specific sums of money. As the sentence explains: "Given that the victims in this case are members of the Mayan people, this Court considers that an important component of the individual reparation is the reparation that the Court will now grant to the members of the community as a whole" (para. 86).

30. Some of the measures with "public repercussion" (para. 93) respond to this concern of the Court, which attempts to expand the real benefit and scope of the compensation. They include those relating to the housing program and the development program (health, education, production and infrastructure) referred to in the judgment (paras. 105 and *ff*.). Thus, the Court continues to construct its case law on reparations, which is one of the most interesting and detailed aspects of the jurisdictional work of the Court, along the lines initiated in the Aloeboetoe and the Mayagna Community cases, which has been developed more fully in the Case of the Plan de Sánchez Massacre, in the judgment on reparations of November 19, 2004.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

Judge Medina Quiroga adhered to this opinion of Judge García Ramírez.

Cecilia Medina-Quiroga
Judge

Pablo Saavedra-Alessandri
Secretary