SEPARATE OPINION OF JUDGE VENTURA-ROBLES

1. I have concurred with great satisfaction with my vote to the unanimous adoption of the instant Judgment in the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, because it meant a substantial shift in the criteria of the majority of the Court who, in an identical case, i.e. *Case of the Indigenous Community Yakye Axa v. Paraguay*, did not find that Article 4(1) of the Convention had been violated to the detriment of the members of said community who died as a result of the living conditions to which they were subjected, something they indeed have done in the instant case, for Article 4(1) (Right to Life), in relation to Article 1(1) (Obligation to Respect Rights) and Article 19 (Rights of the Child), all of them of the American Convention on Human Rights, have been found to have been violated to the detriment of the demised victims.

2. This change in the criterion of the Court is meaningful, for these two cases are identical. The only difference between the Case of the Yakye Axa Community and the Sawhoyamaxa Community is the name of the victims, since all other aspects are the same. Two indigenous communities, the *Yakye Axa* and the *Sawhoyamaxa*, which demand from the same Paraguayan State the return of their ancestral lands; both indigenous communities evolved from a common ancestry: the *Chanawatsan*; both communities are located along the road from Pozo Colorado to Concepción, in the *"Presidente Hayes"* Department; both communities were declared in state of emergency by means of Executive Order No. 3789/99 of June 23, 1999 as a result of the precarious living conditions these communities were enduring, and still are enduring, which have resulted in, among other things, the loss of human lives, especially among children.

3. The lack of acknowledgment of the strict liability of the State as sufficient grounds to find the State responsible for the death of human beings in the *Case of the Indigenous Community Yakye Axa v. Paraguay* on the part of the majority of the judges of the Inter-American Court, prompted Judge Cançado Trindade and myself to give a joint dissenting opinion holding the State liable for the violation of Article 4(1) of the American Convention. Judge Abreu-Burelli followed suit with his dissenting opinion.

4. In that case, the majority of the Court judges did not find a causal connection on the basis of which the death of ten members, mostly children, of the Indigenous Community Yakye Axa could be attributed to the Paraguayan State, when the only causal connection to be found was the one with the poor living conditions attributable to the State by having failed to quickly resolve the claim of the Yakye Axa Community regarding their ancestral land and to efficiently address the problem of supplying water, food, and medicine to said Community, pursuant to the provisions of Executive Order No. 3789, which had declared it to be in a state of emergency.

5. In said case, the burden of proof should have been shifted to the State, for it to prove that it was not responsible for the death of those persons, establishing another causal connection with other specific causes that could have relieved the State of all liability.

6. This thesis regarding the need to shift the burden of proof to exonerate the State of responsibility was obliquely advanced by the Court in the instant case in paragraph 176 of the judgment:

> Taking the foregoing into account, the Court considers that the facts stated in the above paragraphs, which have not been contested by the State, and in respect of which the State has not filed any specific evidence to the contrary, confirm the statement by expert witness Balmaceda, in the sense that "the few [ill persons in the Community] that managed to reach a doctor or a medical center, did so when it was too late or were very deficiently treated, or more precisely, were inhumanely treated." Therefore, the Court considers that such deaths are attributable to the State.

7. The same situation in the *Case of the Yakye Axa Community* is present in the *Case of the Sawhoyamaxa Community*. The lack of timely restitution of ancestral lands, failure by the State to supply the Community with water, food and medicines, and the lack of timely and comprehensive provision of health care has caused, in the instant case, the death of the following persons (para. 178): NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres-Chávez, Diego Andrés Ayala, Francisca Brítez, Silvia Adela Chávez, Esteban Jorge Alvarenga, Arnaldo Galarza and Fátima Galarza.

8. From the analysis of the specific circumstances surrounding each one of these deaths, we find that the illnesses suffered by Rosana López, Esteban González, NN Yegros, Guido Ruiz-Díaz, Luis Torres-Chávez, Francisca Brítez and Diego Andrés Ayala were not treated (para. 172). They simply died in the Community. The State has produced no evidence to the contrary, in spite of having been requested to do so by the Court (paras. 55 and 57). Consequently, said deaths had to be attributed to the lack of adequate prevention and of adoption of enough positive measures by the State, which was aware of the situation of the Community and was reasonably expected do something about it.

9. Likewise, despite extreme poverty, some people got to health centers and received some kind of medical care, but it was insufficient, untimely or incomplete. The newborns NN Galarza and NN González both suffering from tetanus, were released by their respective treating doctors since "nothing could be done" for them. They died in the Community "with the typical rigidity of those who suffer from tetanus." The brothers Eduardo and Eulalio Cáceres died of pneumonia. The former was admitted in the Concepción hospital, but did not get any medicines because "the mother could not buy them." He died in hospital eight days after admission. After Eduardo's death, "the mother was requested to take away Eulalio from the hospital if she was not going to buy the medicines and they issued the hospital certificate of discharge." Six days after this, Eulalio died in the Community. The girls González-Aponte and Jenny Toledo were discharged from the medical center they were in "with scarce health improvement" the former, and the latter "without any medication." The González-Aponte girl died 8 days after this, of enterocolitis / dehydration, whereas Jenny, who was apparently in good conditions, had a relapse and "there was no opportunity to take her back" to hospital. She died of dehydration. Esteban Jorge Alvarenga, a newborn, who suffered from dyspnoea and respiratory failure could be taken to the Concepción hospital but he was not admitted there. The treating doctor provided a medical prescription that, "due to her scant resources, it was impossible for his mother to buy, and the newborn died a few days later." Silvia Adela Chávez, a newborn, was assisted by a "medical delegation" which did not provide her with any medicines and recommended her mother to get such medicines

form a "Sanitary Registry." The newborn died a month later. Belén Galarza, the mother of Arnaldo and Fátima Galarza had a post-delivery haemorrhage that extended for over fifteen days, for which reason she was admitted to hospital together with Arnaldo and Fátima, who had "a malnutrition condition," since they had not had any intake "for at least a week." Arnaldo could never recover his strength and died. Fátima, though showing a certain improvement, died a month after her brother.

10. The reason or reasons to determine the international responsibility of the State in the Case of Sawhoyamaxa Community are explicitly indicated by the Court itself in the *Villagrán-Morales et al. v. Guatemala* (*Case of the "Street Children"* Judgment on the Merits of November 19, 1999, para. 144), cited in the joint opinion which I pronounced with Judge Cançado Trindade in the *Case of Indigenous Community Yakye Axa v. Paraguay,* and which I transcribe hereinbelow:

> The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur, in particular, the duty to prevent its agents from violating it.

11. Such interpretation of the right to life, enshrined in Article 4 of the American Convention, which the Court advanced in the famous case of the "Street Children", was not restrictive, as it was in the case of Yakye Axa. The right to life should never be accorded restrictive interpretations since, as asserted by the Court in other cases,[1] it is the basic and fundamental right, without which all other rights protected under the American Convention may not be exercised. The failure by the State to adopt positive measures in order to ensure the life of the members of the Sawhoyamaxa Community generates, in my opinion, a violation of Articles 4(1) and 1(1) of the Convention. In other words, the State's lack of due diligence to prevent the problems of shortage of land, water, food and medicines, as well as the insufficient or non-existent health care, which resulted the deaths, generates in the instant case the international responsibility of the State, and hence the deaths of the members of the Sawhoyamaxa Community can be attributed to it.

12. The expert report prepared by Dr. Pablo Balmaceda, which was submitted to this Court by means of a statement rendered before a public official whose acts command full faith and credit (affidavit), speaks for itself:

> To start with, we must clarify that the [C]ommunity has no source of drinking water. The most reliable source of water may be the rainwater they gather, but it is always very scarce because of inadequate storage facilities. The main source of water are the small earth dams located inside the wire-fenced lands that they claim for their own, so the members of the community have to enter private property to be able to get the vital liquid. These small earth dams are exposed to contact with animals and their water is used both for human consumption and for personal hygiene. Rainwater washes all kinds of

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[1] *Cf. Case of the Pueblo Bello Massacre.* Judgment of January 31, 20.06. Series C No. 140, para. 120; *Case of 19 Merchants*. Judgment of July 5, 2006. Series C No. 109, para. 153; *Case of Myrna Mack-Chang*, Judgment of November 25, 2003, Series C No. 101, para. 152; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 110, and *Case of the "Street Children"* (*Villagrán-Morales et al*.). Judgment of November 19, 1999. Series C No. 63, para. 144.

> waste into these small earth dams. Entry into the property is expressly forbidden by its current holders. In November 2002, the members of the Community received a 5,000-liter fiberglass water tank supplied by tank trucks from the *Centro Nacional de Emergencia* [National Emergency Center] with water from some small earth dam or other, that is to say non-drinking water. In January 2003, they received another high-capacity fiberglass tank. Currently[,] one of the tanks is broken because it was wrongly laid down. The other one is unused. Water has not been supplied for several months and they again depend on water carried in from the nearby small earth dams.
> The 24 huts comprising the [C]ommunity are made from *karanda'y*[,]a palm tree found in the Chaco region […]. People use the word *karanda'y* to refer to the trunk of this palm tree, generally cut in half lengthwise. In order to build the roof they carve out the inside of the trunk to form a chute. The walls or roofs of several huts are completed with pieces of plastic or any waste material, others had parts of the roof covered with zinc plates[,] and those that have been recently rebuilt had roofs made from reed. None of the huts have floors made of some solid material, all of them have untamped earth floors [,] only some of them are above ground level. Many of them are precariously divided into two rooms. Fire for cooking is made outdoors. When it rains they must make it inside the only *izba* they have […]. It must be clarified that all the constructions described above are precariously built; the walls have big chinks, the roofs leak; if they have doors, they are very difficult to close, if they […]can close them at all.
> […]
> The data collected confirm what can be painfully observed when visiting the [C]ommunity. There is not much to say about the conclusive figures before us. All the [C]ommunity has been living in severely straitened circumstances for many years, in huts that in no case could ever be called dwellings, in extremely cramped conditions defying description, without even one latrine, worthy of the name throughout the entire [C]ommunity, without drinking water, there is not even enough water to meet the mininum basic needs. They have no chance whatsoever to live their lives according to the traditional practices of the Enxet, i.e. hunting, gathering and small-scale agriculture. In addition[,] State presence is non-existent, there are no representatives of police, judicial, or welfare authorities, such as health care authorities. As can be observed in most of the deaths[,] people died without medical care. The few that managed to get to a health care center or professional, either did so when it was too late or were very deficiently treated, or more precisely, they were treated in a manner that is degrading to the human condition. During the last visit (07/01/06), one could see, at a glance, how the dwellings had deteriorated since the previous visits. The room they use as a school is leaning and about to collapse. Nothing had changed, except for those who had died as a result of the neglect by the Paraguayan State and their families. In the face of this, I can only say that: **The Sawhoyamaxa Community lives in extreme poverty.**" (emphasis in original)

13. In the instant case, the living conditions of the Sawhoyamaxa Community affect both their personal and cultural identity. The fact that I pointed out in my separate opinion in the *Case of the Serrano-Cruz Sisters v. El Salvador,*[2] that the disappearance of the girls violated their right to personal and cultural identity, is even more apparent in the instant case of the Sawhoyamaxa Community, in which the identity of its members and their culture is closely tied to the land, all of which determines their way of life and beliefs. The fact of having had to leave their ancestral lands and of lacking the possibility of hunting, fishing or gathering fruit constitutes a direct causal connection with the loss of their personal and cultural identity.

14. By way of conclusion, regarding the violation of Article 4(1) in relation to Articles 1(1) and 19 of the American Convention, the Court stated:

> Considering the aforesaid, the Court finds that the State violated Article 4(1) of the American Convention, as regards Article 1(1) thereof, since it has not adopted the necessary positive measures within its powers, which could reasonably be expected to

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[2] Dissenting Opinion of Judge Ventura-Robles, *Case of the Serrano-Cruz sisters v. El Salvador*. Judgment of March 1, 2005.

prevent or avoid risking the right to life of the members of the Sawhoyamaxa Community. The Court considers that the deaths of 18 children members of the Community, to wit: NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban González-Aponte, NN González-Aponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Esteban Jorge Alvarenga, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza (supra para. 73(74)) are attributable to the State, precisely for the lack of prevention, which furthermore additionally violates Article 19 of the Convention. Likewise, the Court finds that the State violated Article 4(1) of the American Convention, as regards Article 1(1) thereof, due to the death of Luis Torres-Chávez, who died of enterocolitis, without any kind of medical care (supra para. 73(74).

15. By entering an unanimous judgment in the case of the Sawhoyamaxa Community, the Inter-American Court rectified a judgment — *Case of the Indigenous Community Yakye Axa* — in which a restrictive interpretation of the right to life had prevailed, and returned to the path, taken in previous judgments, specifically in the *Case of the Street Children*,[3] in which a broad interpretation of human rights violations, especially the breach of the right to life, had at all times guided the Court's decisions. And this should have always been the case.

Manuel E. Ventura-Robles
Judge

Pablo Saavedra-Alessandri
Secretary

[3] IACHR. *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Judgment of November 19, 1999.