

**SEPARATE OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ
IN THE JUDGMENT RENDERED BY THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
ON MARCH 29, 2006
IN THE CASE OF SAWHOYAMAXA INDIGENOUS COMMUNITY V. PARAGUAY**

I. Procedural matters: effective procedures and reasonable time

1. In the case at hand, —as in other disputes brought before the Court generating an ever wider and comprehensive case law— the problems associated with the effective protection —whether in court or out of court— of the individual rights —that is to say, from a certain standpoint— with the access to justice have become evident once again. As Mauro Cappelletti has said, the right to justice is the “most essential right”, as I recalled on March 28, 2006 in my opening speech at the 27th Special Session held in Brasilia, where the Inter-American Court tried the *Case of Sawhoymaxaxa Indigenous Community v. Paraguay* and rendered the judgment to which I join this *Opinion*.

2. Certainly, rather than placing the right to justice, which belongs to all individuals, above the right to life, which is a condition preceding the existence of all the other rights, the fortunate expression by the Italian legal scholar singles out the right to justice as a requirement for the enforcement of all other rights when the be at risk, disregarded or infringed, that is to say for them to go from the aura of good propositions to the reality of existence. The right to justice is a gateway to the defense of all rights: it is a condition for the enjoyment and the exercise —a vitality requisite, if I may say so— of rights, freedoms and prerogatives.

3. The right to justice is often impaired by a myriad of obstacles. Some are linked to the very existence of legal means to claim an interest or right and enforce the corresponding obligation; others to the legal standing to get started on the way to thereto; yet some other hindrances —connected with the former— bearing on legal representation at trial; not a few others are linked to the conditions, requirements and intricacies of the procedure; and more than a few others are linked with lengthy trials —or more broadly— with the length of the proceeding aimed at enforcing the enjoyment and exercise of the right challenged, a lengthiness which may become a denial of justice. As the popular aphorism goes, “justice delayed, justice denied.”

4. Such vicissitudes, springing from many sources —not always from malice— are wont to appear with particular frequency and intensity in the path that must be trod by the individuals least provided with support and fortune, belonging to marginalized social strata, who often have little awareness of their own rights and little power to enforce them, and who are enervated by factors stemming from long-standing and persistent inequalities. The impossibility of accessing justice is precisely a typical characteristic of inequality and marginalization. This is where it appears most evidently that there is a need for the State —as the benefactor of those who could not proceed by their own means— to help overcome obstacles and inequalities, providing material and formal means for compensation to open the gateway to justice. The idea is not for the State to tilt the balance of the scale at will, but for it to safeguard the existence of the scale itself and to ensure that it is not unbalanced beforehand.

5. The claims of indigenous groups, communities and peoples and their members are a good example—or perhaps we should say a terrible example—of delayed justice. There is abundant enough evidence for it not to be an overstatement to say that in these cases the delay has spanned centuries: first, the delay in recognizing that “the original peoples could have a property right”, in spite of the law imposed over them by a new domination which disregards the original claims; afterwards, once the recognition is achieved—after historical endeavors—the delay in “recognizing specifically that such right is to be exercised by certain claimants.” The former is a general legal reparation readjusting the horizon of domestic law, whereas the latter is an individual legal restitution specifically reconstituting the heritage of communities and individuals.

6. Issues of such kind arose in the instant case. They included the delays in the processing the recognition of leaders—something which was excluded *ratione temporis*, from the competence of the Court as it pointed out—, the recognition of the community's juridical personality and its claim for lands. We are aware that it is not possible—at least it has not been so thus far—to define precise time frames for the proceedings to achieve their purpose, in other words, it is impossible to identify the reasonable time stated in the American Convention with a strictly defined time limit. The characteristics and contingencies of each case carry their own specific weight, and they must be individually addressed in order to declare the existence or inexistence of a violation. In spite of the relative span of the reasonable time, there has been a general progress in fixing some conditions thereof, particularly in order to rationalize and facilitate decision by the Court.

7. On the one hand, it is meet to consider certain factors, as the Inter-American Court has done following in the wake of the European Court, to wit: the complexity of the matter in dispute, the behavior of the authorities seized with the case, and the behavior of the interested party. In my recent *Separate Opinion* in the judgment rendered in the *Case of López Alvarez v. Honduras*, of February 1, 2006, I suggested that the “*actual infringement of the rights and duties of the individuals—i.e., the their legal position—caused by the proceedings should be taken as a fourth factor in calculating the reasonable time.*” In explaining this budding notion, I elaborated in the sense that “such factor could have little impact upon the legal position held; if that is not the case, that is, if the impact gets higher to the point of being great, then it will become necessary, in furtherance of justice and security that are seriously jeopardized, to speed up the proceedings so that the situation of the individuals, which has started to severely affect their life, is decided promptly, i.e. within a “reasonable time”. The infringement must be actual, and not merely possible, likely, incidental or remote.”

8. On the other hand, it is necessary to establish the acts commencing and ending the proceedings, focusing on the protection of the fundamental rights at issue rather than on the formal acts which, strictly speaking, start and end each stage in a proceeding, in order to determine the *dies a quo* and the *dies ad quem* of the term the “reasonableness” of which is to be tested under Article 8(1) of the American Convention.

9. In my opinion, all of these factors were brought to bear on the position of the Court regarding the possible violations of Article 8 of the Convention, which in fact occurred. In the case at hand, the Court has found that the legal proceedings and other measures associated thereto resulted in themselves ineffective or failed to

meet the standards of the rule in the Convention as well as those in Article 25 — concerning the prompt recourse for the protection of fundamental rights— and thus ordered, by way of reparation in the broad sense, the adjustment of domestic law so as to provide an effective mechanism for asserting claims and, if it were the case, for laying claim to the ancestral lands of the members of the indigenous groups.

II. Claim on lands

10. The infringement of rights of the members of the indigenous communities perpetrated in the context of the infringement of the rights of the communities as such, adopted various forms in history, whether successive or simultaneous, which I have addressed elsewhere. In this connection, I refer to my *Opinion* accompanying the judgment rendered in the *Case of Yatama v. Nicaragua* on June 23, 2005, wherein I attempted to establish certain “categories” of violations —whether successive or simultaneous, as stated earlier— committed against such individuals. The most violent and spectacular ones are those falling into the category of physical elimination, which includes some of the events related to the *Case of Moiwana Community v. Surinam*. Others relate mostly to measures barring the use or enjoyment of property, as in the *Cases of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and of the *Indigenous Community Yakye Axa v. Paraguay*. Finally, it is possible to identify hypotheses of “contention”, i.e., refusal to recognize and allow the exercise of certain rights, such as were apparent in the *Case of Yatama v. Nicaragua*.

11. In the matter disposed of in the judgment to which I attach this *Opinion*, the members of an indigenous community were deprived of property they had owned under ancestral title. Once again, the Court has had to look at communal rights from the perspective of individual rights admitted under to Article 1(2) of the American Convention. Hence, the language of the judgment refers to the members of the indigenous groups and not necessarily to the groups collectively. However, the approach in the Convention, which provides grounds for the Court to be seized, does not imply the denial of, or exception against, collective rights. Moreover, it is generally granted —as I myself have done, since my *Separate Opinion* in the *Case of Mayagna (Sumo) Awas Tingni Community*— that individual rights, which constitute human rights under the Pact of San José, originate from, and acquire existence, effectiveness and significance in, the context of collective rights. Therefore, it follows that protecting the former is a way of preserving the latter, and the opposite also stands: protecting collective rights, through the rules and instruments pertaining thereto, helps understand and furthers the preservation of individual rights. Thus, there is no conflict at all, between these two “ways of looking at the status of persons” that strictly complement each other.

12. In this *Opinion*, I wish to emphasize the nature of the right of the members of the communities —and, in their environment, and to the appropriate extent, of the communities themselves— over the lands that they lawfully claim: ancestral lands they have owned under title predating the forms of land appropriation that came with the empire of conquest and colonization. Even though the Pact of San José does not expressly mention this form of landholding, it was already said in the judgment passed in the *Case of Mayagna Community*, “through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention — which precludes a restrictive interpretation of rights—, it is the opinion of this Court

that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property (...). This recognition is also part of several American legal systems.

13. When property is mentioned in connection with the rights vested in the members of the indigenous communities or the communities as such over certain lands—to which they furthermore attach traditions, traditions and beliefs, spiritual relations that transcend the mere possession and economic enjoyment—the meaning labeled should not necessarily be confused with the absolute ownership that is characteristic of ordinary civil law. The property rights of the indigenous people are different—and so it must be recognized and protected—from this other form of ownership created by the European law rooted in liberal ideology. Moreover, the forced introduction of the notions of property rights stemming from Roman law and received, albeit with variations, by the nineteenth-century law that took root in America involved an extensive process that plundered and dispersed the communities, the consequences of which can still be seen.

14. The property the indigenous groups had held and enjoyed under their own original Law were occupied pursuant to a second-generation legal system, imposed from overseas on the Indies. Subsequently, the third-generation legal system that flourished under the liberal ideology, dissuaded the indigenous claims even further, blurring them into the past. There would yet come the time of a fourth-generation law, the order deriving from agrarian reform and the recognition of the original peoples, which retrieved legal institutions from the old system and brought them into the present and the future system, simply in furtherance of justice. It was necessary to make up for the lost four hundred years in a very short time—with dubious results.

15. Thus, from the conquest on, the original population of America—who had formerly held sway over their territories and played the leading role in their own history—exited both their history and their rights over them; they roamed their old lands, now turned over to new lords, and fruitlessly claimed on their ancestral titles before new powers. Finally they became exiles, and as such watched the centuries go by, almost offhandedly. The damage caused to the groups and individuals was extremely severe and deep. At the heart of the cases filed before the Inter-American Court lies this phenomenon excluding the old forms of landholding and replacing them with new types of ownership, under the aegis of the Western concept of private property.

16. I am forced not to object to the use of the term 'property' to describe the rights of the indigenous peoples rights over the lands they have owned and over those they currently own, provided it be understood that, in the instant case, the property rights are "qualified", that is to say it has unique characteristics, which correspond in some aspects to ordinary ownership, but differ radically from it in others. The idea of putting the indigenous form of ownership—i.e., the indigenous landholding under their particular customary law—on the same footing as that of the civil law also preserved under Article 21 of the Convention may prove extremely disadvantageous to the legitimate interests and lawful rights of the indigenous people. None of this would go on under a rigorous interpretation of the Pact of San José, which the Court has already established in the *Case of the Mayagna Community*.

III. Right to life

17. The Inter-American Court has issued a large number of decisions concerning the right to life —essential right, root of all others, supporting all the rest of the rights and freedoms as a whole. Article 4 of the American Convention, which addresses this issue, lays the primary stress on curtailing the arbitrary deprivation of existence and on restricting capital punishment. This is the main focal point of most of the paragraphs of the article. Thus, the rule in the Convention protects individual life against any excesses committed by the State —an active and often deliberate behavior—, invariably threatened by acts of public agents either through illegal violation or lawful breach pursuant to laws providing for the termination of life as a punishment. The central features of such provision are thus arbitrary death and death.

18. Some remarkable decisions by the Court have shifted the focus towards the other side of the right to life which, seen from yet another perspective, constitutes the other face of State duties: beyond the mere omission curbing arbitrariness or mitigating punishment, action is required to create conditions to guarantee a decent existence. In this view, the right to life is restored to its original status as an opportunity to choose our destiny and develop our potential. It is more than just a right to subsist, but is rather a right to self-development, which requires appropriate conditions. In such framework, a single right with a double dimension is set, like the two-faced god Janus: one side, with a first-generation legal concept of the right to life; the other side, with the concept of a requirement to provide conditions for a feasible and full existence, that is to say a concept among the ones considered “second-generation rights”, to employ a figure of speech that has become successful. Hence the principle “you may not kill” and its counterpart “you shall favor life.” Both concepts protect the human being and bind the State.

19. This rule, which is a dogma of humanism, one of very few unimpeachable dogmas that enables, and even calls for, a democratic society, charges the State with an ethically-driven, teleological task, and crystallizes the conviction that political society has been established, as propounded in the late 18th century, for the protection of natural rights and the well-being of people. This is what justifies the State. This idea, which influenced the anthropocentric constitutionalism of the 18th, 19th and 20th centuries, lies at the heart of International Human Rights Law and governs the language and the spirit of the American Convention.

20. Such is the origin of the protective function of the State: it is vested with powers so that it fulfil its duties —otherwise, such power would lack an ethical basis and legal grounds—, which are aimed at furthering, in the best practicable conditions, the development of the human being, respecting its dignity and its own decisions. Needless to say, the State does not relieve individuals from running their lives, but rather it provides them —or should provide them— with favorable conditions for their self-development, which involves supplying a large number of pertinent means. This is where a number of rights including the right to work, education, health, and housing come into play, together with their corresponding duties.

21. The Inter-American Court has forcefully gone a long way in this direction. It has affirmed the duty to provide decent living conditions. It has highlighted the positive duties of the State, and not only its negative obligations. By doing so, it has

broadened the horizons of human rights under the aegis of the American Convention. This has been the doctrine firmly upheld by the Court in each and every one of its most recent decisions. The foundations of such doctrine is discussed at length in each of them. A very recent example of this has been the decision rendered in the case of *Indigenous Community Yakye Axa v. Paraguay*, in which, following the same line of thought, the Court has upheld the positive duties concerning the right to life and the legal consequences of the failure by the State to fulfill them.

22. In the case of *Yakye Axa*, the Court addressed the violation of the right recognized by Article 4 of the Convention. However, the Court found, by a majority, that there was not enough evidence to hold the State liable for the death of several people. A respectable decision—as respectable as the dissenting opinion—that did not absolve, but rather halted at the fence a judge must honestly heed in each case: evidence. In the instant case, however, the Court is unanimously satisfied that all the weight of evidence necessary and sufficient to find, once judicial conviction is formed, that the circumstances in which the victims were caused their death; that for each and every fact quoted in the judgment there is enough proof—beyond a reasonable doubt—to establish that the ill health of the victims was the result of the situation they were enduring; that this, in turn, was the direct consequence of the living conditions imposed by the dwelling and marginalization problems they suffered, the final, unequivocal and direct outcome of which was their demise; that such circumstances were particularly severe for minors, who were—or should have been—protected in a special, more strict way; that the resulting deaths are attributable to the State, not because of the action taken by its agents as in other cases, but rather as a result of its omission—which is just as disapprovable, since it implies the failure to perform strict duties—to foresee such outcome, perfectly foreseeable, and to take the necessary steps to prevent it—something the State was in a position to do; and that it is not reasonable to blame the victims for such outcome, because the State had, as has been said, the means to foresee and prevent them, and it was under a duty to do so.

23. In sum, the judgment to which I join this *Opinion* has confirmed the essential criteria upheld in the cases of the “*Street Children*” (*Villagrán Morales et al.*), *Gómez Paquiyauri Brothers*, *Juvenile Reeducation Institute* and *Yakye Axa*. The Court has once again reaffirmed its progressive construction of the scope of the right to life under Article 4 of the American Convention on Human Rights, has insisted in the positive duties—rather than just the duties to refrain from acting—the State has a derivation of such scope, and it has highlighted the ethical relationship—as opposed to the political relationship of power and subordination—between the State and the citizen, and it has based its decision on the consideration of the facts, the application of the law and the weighing of the evidence, which a court must subject to the unbiased scrutiny of its reason and its conscience, with the care required to issue a condemnatory judgment.

IV. Recognition of juridical personality

24. In this judgment, the Court has considered certain facts that give rise to novel considerations regarding an issue that the Court had initially explored in past cases such as *Case of Bámaca Velásquez v. Guatemala* and *Case of the Girls Yean and Bosico v. Dominican Republic*, namely, the recognition of legal personality endorsed by Article 3 of the Pact of San José, in an emphatic language: “Every person has the

right to recognition as a person before the law". The Court found that this right has been violated to the detriment of several people.

25. Of course, it is worth analyzing the various aspects or expressions of the right in hand, which is the crux of any democratic legal system, taken as a whole, as well as of the system established by the American Convention. Note that the Convention provides for the rights of persons and, under Article 1(2), the Pact of San José it takes it that human beings are the persons to whom the Pact applies. The idea of a person and the corresponding concept of personality are the gateway to the legal system, and denying the latter would necessarily imply denying or degrading the former.

26. It can be affirmed that the right to personality implies the recognition that the human being, as a member of a politically organized society and ruled by of law, necessarily has rights and duties; that it is essential that such status, with its manifold consequences, be protected by the legal system and by those enforcing it; that no one can be excluded from such primary condition as a "person before the law", and be cast out of the legal system, and deprived of rights, freedoms, powers, guarantees, etc., which are the signs, the implications or the consequences of the recognition of personality by the State, notwithstanding, of course, the lawful restrictions or conditions that could be imposed thereon. This perspective casts light on one of the dimensions of juridical personality: the one having a material or substantive character.

27. The material recognition of juridical personality would be pointless or non-existent in the absence of the means to assert it, which would result in a —*de jure* or *de facto*— deprivation of personality before the legal system, or at least of legal standing to take the consequences thereof, particularly to the extent that such benefits involve rights on which development, well-being or perhaps even life hinge. Therefore, the availability of such means or instrument constitutes an implicit requirement for the effectiveness of the express recognition of personality before the law under Article 3 of the Pact. This is the formal or instrumental dimension of this right.

28. Article 3 of the Convention was violated inasmuch as the persons mentioned in the Judgment by the Court were outside the official records, which meant that they could not be issued and given the documents enabling them to receive vital services, for which reason they had to go without them and were barred from any real possibility of accessing them. Once again, we are faced with failure by the State to comply with its duty to provide goods and services, not through a positive violation by excluding individuals from their previously acquired status of persons before the law or by striking them from records or by withdrawing their documents, but by omitting to perform a duty, a conduct of abstention that could and should have been rectified, bearing in mind the conditions of marginalization and vulnerability of the victims and considering the characteristics the guarantor role of the State could reasonably be expected to assume.

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