

**CONCURRING AND DISSENTING OPINION
OF JUDGE AUGUSTO FOGEL PEDROZO**

I have participated in the judgment delivered by the Court in the XÁKMOK KÁSEK case and I have dissented with regard to some operative paragraphs of the judgment on the grounds described in the deliberations, which include the following considerations:

I. Concurring Opinion. Rejection of the State's request to suspend the proceedings

1. In item **1 of Chapter XIII “Operative Paragraphs,”** I expressed my agreement with the rejection of the State's request to suspend these proceedings, on the grounds described in paragraphs 36 to 50, and also because, although the different names of the ethnic group indicated by the representatives of the Xákmok Kásek Community constitute a problem for the transfer of ownership of the property, since the registration laws require due clarification of the change that occurred, this can be overcome by the expert appraisal conducted recently by the State's expert, who stated that the Xákmok Kásek Indigenous Community are part of the Sanapaná people, who belong to the same linguistic family as the Enxet-Lengua people. In Sanapaná villages, the families often coexist with members of the Maskoy linguistic group¹ (which Kalish refers to as Enlhet-Enenlhet). From a cultural point of view, it is difficult to determine to which people the children of couples from two different peoples belong, and it is necessary to determine to which people they are assigned by carrying out research among the members of the Community.

2. In the 2002 Indigenous Peoples Census, the Xákmok Kásek Community settled in the Salazar Ranch was identified as Sanapaná. Also, in the book “*Los Indígenas del Paraguay*” by José Zanardini and Walter Biederman, the Salazar Ranch is identified as one of the places where the Sanapaná ethnic group known as Xákmok Kásek lives. Furthermore, in 2003, the representatives of this community took part in meetings of Sanapaná communities in order to establish an Association of Sanapaná Communities.

II. Dissenting opinion. Right to Communal Property, Judicial Guarantees and Judicial Protection

3. Regarding the State's violation of the right to communal property, judicial guarantees and judicial protection, according to paragraph 170 of the judgment also in relation to the alleged violation of Article 21 of the American Convention, it is my understanding that the right to property cannot be interpreted in isolation, but rather taking into consideration the whole legal system in which it operates, as well as domestic and international law.

4. The Paraguayan Constitution guarantees private property – both individual and corporative – and the communal ownership to which the indigenous peoples have a right. Article 63 recognizes and guarantees the right of the indigenous peoples to preserve and develop their ethnic identity in their respective habitat. In addition, Article 64 of the Constitution indicates that:

¹ Zanardini, José and Walter Biedermann. *Los Indígenas del Paraguay*. Asunción. 2006.

The indigenous peoples have the right to communal ownership of land of sufficient area and quality to conserve and develop their characteristic way of life. The State shall provide them with these lands, free of charge, and such land shall be immune from seizure, indivisible, inalienable, non-transferable, inalienable, and ineligible for guaranteeing contractual obligations or lease; furthermore, they shall be exempt from taxes. Removal or transfer from their habitat, without their express consent, is prohibited.

5. Article 109 of the National Constitution establishes that:

Private property is guaranteed, and its content and limits shall be established by law, based on its economic and social function, in order to make it accessible to all.

Private property is inviolable.

No one can be deprived of his or her property unless this is based on a judicial decision, but expropriation is permitted for reasons of public utility or social interest, which will be determined by law in each case. The law will ensure the prior payment of fair compensation, established contractually or by judicial decision, except in the case of large unproductive estates earmarked for the agrarian reform, in accordance with the expropriation procedure to be established by law.

6. Meanwhile, Article 137 establishes:

The supreme law of the Republic is the Constitution. The Constitution, the international treaties, conventions and agreements acceded to and ratified, the laws enacted by the Congress, and other legal provisions of a lower rank that are approved in consequence, together constitute national positive law, in the said order of priority.

Whosoever attempts to change the said order, without respecting the procedures established in this Constitution, shall be guilty of offenses to be defined and punished by the law. [...]

Any provision or action of authority contrary to the provisions of this Constitution shall be invalid.

7. The subjects protected by the right to property include both the indigenous people of the Xákmok Kásek Community and the other indigenous peoples and, in general, all citizens, under the principle of the equality of all individuals, established in Article 46 of the Constitution, which stipulates: "All the inhabitants of the Republic are equal in dignity and rights. Discrimination is not allowed. The State shall remove the obstacles and prevent the factors that maintain or promote it."

8. "The protective measures established in relation to unfair inequalities shall not be considered discriminatory, but rather egalitarian factors." Those who should receive positive discrimination, in the Paraguayan context, include at least 2,000 indigenous families of the Chaco and 2,000 families of the Eastern Region, who lack land, as well as some 90,000 families of landless peasants, living in extreme poverty. In my opinion, it is in this context that the provisions of the American Convention should be interpreted.

9. Law 904/81, enacted in 1992 prior to the Constitution, regulates the access of the indigenous communities to the communal ownership of land. Its article 8 establishes that, following compliance with the established procedures, "the legal personality of the indigenous communities that existed before the promulgation of this Law shall be recognized, as well as of those communities composed of indigenous families that regroup in communities in order to obtain its benefits." In the latter case, the minimum number of indigenous families is 20 (Article 9). Regarding the settlement of the indigenous communities, Law 904 establishes:

Article 14. The settlement of indigenous communities shall be based, insofar as possible, on the actual or traditional possession of the lands. The free and express consent of the

indigenous community shall be essential for its settlement in areas other than its habitual territories, except for reasons of national security.

Article 15. When, in the cases foreseen in the preceding article, the transfer of one or more indigenous communities becomes essential, they shall be provided with suitable lands, of at least the same area as those they occupied, and shall be appropriately compensated for the damage suffered owing to the displacement and for the value of the improvements.

10. Meanwhile, article 22 of the said Law 904 establishes the procedure for the settlement of indigenous communities on public lands, and articles 24 and 25 establish the procedures for their settlement on privately-owned lands, occupied by the indigenous peoples. Article 26 of the law establishes that: "In cases of expropriation, the procedure and the compensation shall be adapted to the provisions of the Constitution and law, and for the payment of compensation, the necessary resources shall be included in the General Budget of the Nation."

11. Law 43/89 establishes a regime for the regularization of the indigenous community settlements. Its article 4 stipulates: "During the administrative and legal procedures established in article 2, the Paraguayan Indigenous Peoples Institute (INDI) and the Rural Welfare Institute (IBR) shall propose definitive solutions for the settlement of the indigenous communities, pursuant to Law 854/63, Agrarian Statute, and Law 904/81, Indigenous Communities Statute, proposing expropriation, pursuant to article 1 of Law 1372/88, when no solution is achieved by other means."²

12. In the absence of a formal agreement with the owner, the provisions of both Law 904 and Law 43/89 establish expropriation as the way to regularize the settlements of the indigenous communities established on private land. These provisions are consistent with the norms of the Civil Code, which establish that the ownership of property is lost based on: (a) transfer of title; (b) judicial transfer or declaration (c) execution of judgment; (d) expropriation, and (e) its abandonment declared in a public deed, duly registered with the Property Registry, and in the other cases established by law (article 1967). Also article 1966 lists specifically the ways to accede to the ownership of property: (a) contract; (b) accession, (c) *usucapio*, and (d) inheritance.

13. On this point, the contradiction between the constitutional provision and article 64 of Law 1863/02 should be noted. While the latter limits the possibilities of expropriation to property that is not exploited rationally, article 109 of the Constitution, the supreme law of the Republic, stipulates that, in the case of the expropriation of large unproductive estates earmarked for agrarian reform, the law itself establishes the amount of the compensation while, in other cases, this amount is established contractually or by judicial decision. The Constitutional Chamber of the Supreme Court has developed case law affirming that, for the expropriation to be admissible, it suffices that the legislator believes that there is a social interest or need, or reasons of public interest, and that they can be remedied with the expropriation of specific properties.

14. On these grounds, I dissent from the judgment when it declares that the State violated the right to property established in Article 21 of the Convention to the detriment of the Xákmok Kásek Community of the Enxet-Language people. The

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Law 854/63 was derogated by Law 1863/02.

measures taken to ensure the right of property of the Xákmok Kásek Community were not effective owing to the absence of norms under domestic law.

15. Regarding the alleged violation of Articles 8 and 25 of the American Convention (Judicial Guarantees and Judicial Protection) and, more specifically, with regard to the proceedings filed against the members of the Community, I consider that the harm caused to the Community relating to the violation of procedural guarantees, which originated in the early procedural stages in first instance, could have been remedied under domestic law in later stages of the same proceedings.

III. Dissenting opinion. Right to Life

16. With regard to the alleged violation of Article 4(1) of the American Convention (Right to Life), the Inter-American Commission's application affirms that the State of Paraguay failed to comply, to the detriment of the Xákmok Kásek Community, with the obligation to guarantee the right to life established in Article 4(1) of the American Convention, to the detriment of the duly identified deceased members of the indigenous Community, and that the State "has placed all the members of the Community, in a permanent situation of risk," affecting their exercise and enjoyment of their fundamental human rights, since the Community remains in a vulnerable situation. The said Article 4 of the Convention establishes:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

17. Regarding the indigenous persons who are deceased, it should be noted that, if complaints of possible negligence that could lead to avoidable deaths had been alleged opportunely, under domestic law it would have been possible to remedy, or at least alleviate, the ailments in question. If that path had been followed, it would have permitted the investigation of violations of the right to life, the punishment of those responsible, and the granting of reparation to the families of the victims. The absence of reparation, in proven cases of negligence by State agents, could have resulted in the responsibility of the State of Paraguay in the domestic sphere.

18. It is worth mentioning that, unlike other very isolated communities, the settlement of the Xákmok Kásek Community in the Salazar Ranch was a short distance from the Trans-Chaco highway and, therefore, it was possible to request an ambulance from the health clinic of the District of Irala Fernandez, under Dr. Rolon, located on this highway, less than an hour away. In addition, the Community had a health extension worker.

19. Nevertheless, the interpretation of the right to life to include positive measures of protection so that the indigenous peoples may enjoy their right to a decent life is based on legal doctrine and international jurisprudence and entails progress in international human rights law.

20. The Inter-American Court has indicated that the obligation of the State to take positive measures should be prioritized precisely in relation to the protection of the life of the most vulnerable individuals, such as the indigenous peoples. This concept of the right to life, referred to indigenous communities living in extreme poverty, which can be manifested in preventable illnesses and deaths, affirms the obligation to provide social protection and to eradicate extreme poverty. Owing to

their situation of severe deprivations, these indigenous communities lack strategies to enable them to adequately address the risks to which they are exposed in a way that would allow them to take advantage of opportunities to improve their living conditions and achieve the minimum conditions for a decent life.

21. The right to life is established in different instruments and, under them, the existence of extreme poverty, which is increasing in Paraguay, means the denial of economic, social, and cultural rights, including the rights to adequate nutrition, health, food, and work. The United Nations Commission on Human Rights recognized that extreme poverty threatens the fundamental right to life, and determined which human rights are essential for the protection of life (food, potable water, health). For its part, the World Conference on Human Rights, held in Vienna in 1993, considered that extreme poverty constitutes a threat to human dignity, as has been noted in previous judgments. In the case of the indigenous communities, particularly those affected by extreme poverty, that situation involves the systematic denial of the possibility of enjoying the inherent rights of the human being. The Xákmok Kásek Community is certainly affected by extreme poverty, as revealed by the testimony of witnesses and expert witnesses.

22. The State's interventions must prevent, mitigate and overcome the risks, such as malnutrition, the prevalence of anemia, morbidity, and mortality, creating the minimum conditions with regard to health care, adequate nutrition, education, job training, and income generation. In the case of the Paraguayan State, although it attends to the entire vulnerable population, it does not do so more adequately owing to its limited resources.

23. The State's obligation to take positive measures to protect the right to life, even though it includes providing services to vulnerable groups affected by extreme poverty, cannot be limited to this, because, by not attacking the root causes of poverty in general, and extreme poverty in particular, this assistance is unable to create the above-mentioned conditions for a decent life.

24. In my opinion, the evolving interpretation of the right to life established in the American Convention should take into consideration the socio-economic situation of Paraguay and of most Latin American countries, characterized by the increase in extreme poverty in both absolute and relative terms, despite the implementation of social protection policies. The interpretation of the right to life does not relate only to monitoring the State's compliance with the provision of social protection services that guarantee minimum living conditions temporarily without tackling the underlying causes of poverty, which reproduce the situation and create more poor people, as discussed within the United Nations. This implies the need to relate poverty eradication measures to all the factors that give rise to poverty, taking into account the impact of the decisions taken by States, and multinational and multilateral organizations: national and international actors and institutions are among those responsible for the reproduction of conditions of poverty.

25. In this context, the intervention capacity of the States of developing countries, including Paraguay, and the application of international norms relating to extreme poverty is not a legal issue that involves only the State, which is often conditioned both by the limited financial resources available to it and structural factors linked to the "adjustment process," which the State of Paraguay has no control over, considered in isolation. International responsibility is not limited to the right to international assistance in the event that a State Party is unable to achieve,

on its own, the model established by covenant, and embodied in the International Covenant on Economic, Social, and Cultural Rights.

26. Seen from this perspective, the increase in poverty is a result of decisions, basically of an economic and financial nature, taken by private actors and agreed to by public actors who have much more power than the States of developing countries. This is the context in which the responsibilities of the transnational corporations and multilateral agencies for violations of economic, social and cultural rights must be analyzed. Thus, the Commission on Human Rights, while recognizing that poverty threatens the fundamental right to life, has asked that the policies of the World Bank, the World Trade Organization, the International Monetary Fund, and other international organizations be examined.

27. Progress in international human rights law requires the international community to understand that poverty, particularly extreme poverty, is a way of denying all the human, civil, political, economic, and cultural rights, and act accordingly, in order to facilitate the identification of perpetrators who bear international responsibility. The system of economic growth related to a form of globalization that impoverishes growing sectors, is a “massive, flagrant, and systematic [way of] violating human rights,” in an increasingly interdependent world. In this interpretation of the right to life, which parallels the changing times and current living conditions, attention should be given to the causes of extreme poverty and to the perpetrators behind them. In this perspective, the international responsibilities of the State of Paraguay and of the other signatories of the American Convention do not cease, but they are shared with the international community which requires new instruments.

IV. Dissenting opinion. Recognition of the Right to Juridical Personality

28. The Commission argued (*para.* 245) that the State has not implemented mechanisms that provide the members of the Community with “the identity documents required to exercise their right to recognition of juridical personality.” It indicated that, according to the 2008 census, at least 43 of the 273 members of the Community did not possess identity documents; of these, at least 32 were minors.

29. The representatives added that “the large number of Xákmok Kásek individuals who do not have documents [...] prevents them from legally proving their existence and identity.”

30. In my opinion, these documentation shortcomings affected many of the communities and not only the indigenous people of Xákmok Kásek, owing to the lack of budgetary resources; however, they were alleviated by the indigenous “identity card,” issued by INDI.

31. This Institute responded to the requests of the community whenever vehicles and fuel were available.

V. Dissenting opinion. Non-compliance with the obligation not to discriminate

32. The Commission argued that “this case illustrates the persistence of structural discrimination factors in the Paraguayan legal system regarding the protection of their right to the ownership of ancestral territory and the resources found on it”;

Despite the general progress made in its laws towards recognizing the rights of the indigenous peoples, there are still legal provisions in its civil, agrarian, and administrative law that were applied in this case and that caused the State system to function in a discriminatory way, since it gave priority to the protection of the right to private property that was being exploited rationally over the protection of the territorial rights of the indigenous population.

33. For their part, the representatives indicated that there is “a policy of discrimination that features an easily-observable systematic pattern and that also enjoys a high level of consensus in Paraguay, which is rapidly leading to the extreme deterioration of the living conditions of the indigenous communities in general and, in this [specific] case [...] of the Xákmok Kásek [Community].” “The alleged factual and legal impossibility [of granting title to the land] mentioned by the State of Paraguay is nothing more than the deliberate application of a racist and discriminatory policy.”

34. In my opinion, although there is some discrimination among the population towards the indigenous peoples based on a legacy of colonialism, which the education system is trying to reverse, there is no deliberate agreement or consensus to apply a racist or discriminatory policy, which gives priority to the protection of the right to private property that is being exploited rationally over the protection of the territorial rights of the indigenous population. It is my understanding the obligation not to discriminate was not violated, although, in reality, the law needs to be adapted in order to expedite the procedures for the indigenous communities to have access to their ancestral lands, which endorses the opinion of the Court. However, meanwhile, the provisions of the Constitution are applied, such as those that guarantee private property, which is inviolable and can only be taken away by expropriation, by a decision of the courts, upon payment of fair compensation, and also because of the predominance of the Constitution over any international treaty or convention and the express indication that any provision or act of authority contrary to the provisions of the Constitution is invalid. Lastly, the immense resources allocated by the State in recent years to the acquisition of land should be assessed positively.

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