

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with the adoption of this Judgment which has been recently rendered by the Inter-American Court of Human Rights in the *Case of the Indigenous Community Yakye Axa v. Paraguay*, wherein the Court asserts the obligations of the respondent State with the Yakye Axa Community regarding “the definite transfer of the traditional territories to the Yakye Axa Community” (para. 34). I basically agree with the decision adopted by the Court and I highlight its consideration in that the possession of their traditional territories is “permanently” marked in the “ancestral memory” of the members of said Community, who have adopted “an identity of their own related” to their traditional territories; furthermore, “such ancestral memory and identity of their own should be particularly considered when identifying the territory to be given “ (para. 23). Regarding such consideration, in this Opinion I feel obliged to express my personal line of reasoning as the basis of my position.

2. Firstly, I must stress the relevance which, in circumstances such as those of the *Case of the Yakye Axa Community*, I ascribe to the definite transfer of the lands to the members of such Community. The Court has determined in the exercise of a power which is inherent thereto and pursuant to the provisions of Article 63(1) of the American Convention on Human Rights. With said transfer in circumstances such as those of the *cas d’espèce*, the principle of the effectiveness of norms (*effet utile*) is met under the terms of Articles 21 and 22 of the American Convention.

3. It may be recalled that, as a matter of fact, in the leading case of the Community *Mayagna Awas Tingni v. Nicaragua* (Judgment of August 31, 2001), in the application filed before the Court, the Inter-American Commission of Human Rights (ICHR) claimed for the first time in the history of the Court, the lack of demarcation of the lands possessed by such Community, as well as the lack of an effective procedure in Nicaragua for the demarcation of such lands. The Court ordered in its Judgment the creation of “an effective mechanism for the delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, uses and customs” (operative paragraph No. 3). That judgment forms part of the specialized juridical bibliography and constitutes a landmark in the Court’s jurisprudence regarding the question at issue..

4. Immediately afterwards, in the *Case of Moiwana Community v. Suriname* (Judgment of June 15, 2005), the victims’ representatives argued that the violations of the right to property (Article 21 of the Convention) by the State are “continued”, to the detriment of the “indigenous and tribal communities that have been forcibly displaced from their traditional lands,” and that the State has not established the legal mechanisms for the victims to “assert and secure their rights of tenure” (para. 122). In turn, the Court, after establishing its jurisdiction to render judgment regarding “the continued displacement of the community from its traditional territories” (para. 126), stated that the failure to “carry out an effective investigation” of the events occurred in the *cas d’espèce* “has prevented the members of the Community from living once again in safety and peace in their ancestral lands” (para. 128).

5. In the same case, the Court stated its understanding that in the case of the members of indigenous communities “the mere possession of the land should suffice

to obtain official recognition of their communal ownership and the subsequent registration thereof” (para. 131). It further stated that the members of the Moiwana Community should be deemed “legitimate owners” of their “traditional lands,” of which they have been deprived of this right to the present date as a consequence of the 1986 massacre and of the subsequent failure by the State to investigate those occurrences adequately (para. 134). The Court finally ordered that

“the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana Community in relation to their traditional territories, from which they were expelled, and provide for the members’ use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation, and titling of said traditional territories, in the terms of paragraphs 209-211 of this Judgment” (operative paragraph No. 3).

6. Shortly afterwards, in the instant case of the *Indigenous Community Yakye Axa v. Paraguay* (Judgment of June 17, 2005), the victims’ representatives claimed that “the right of the indigenous communities to the communal property ownership of their lands is made effective,” *inter alia*, “through the State’s obligation to delimit, demarcate and title the territory of the respective villages” (para. 121(d)). The Court, in turn, acknowledged the link of the “right to communal property of the indigenous communities over their traditional territories and the natural resources tied to their culture” with the term “goods” as stated in Article 21 of the Convention and gave value to the guarantee traditional expressions, customary law, the philosophy and the values of such communities (paras. 137 and 154), and ordered the State to “identify the traditional territory of the members of the *Indigenous Yakye Axa Community* and provide it free of charge” (operative paragraph No. 6).

7. I understand that the definite transfer of the lands to the members of the *Indigenous Yakye Axa Community* is a legitimate and necessary form of non-pecuniary reparation in the circumstances of the *cas d’espèce*, which the Inter-American Court has full authority to order in the light of the provisions of Article 63(2) of the American Convention. It is not just a matter of a mere *restitutio*, turning back to the vulnerable *statu quo ante* of the victimized Community, but also ensuring the *guarantee of non-repetition* of the particularly serious harmful events that led to the victims’ displacement (and to the death of some of them).

8. The definite transfer of the communal lands has in the instant case consequences which are quite more far-reaching than one can *prima facie* anticipate, since, in the last resort, it is a question of survival of the cultural identity of the members of such Community. Only through such measure will their fundamental right to life *lato sensu*, including their cultural identity, be properly protected.

9. The *universal juridical conscience*, which, in my opinion, is the material source of all Law, has evolved in such a way as to recognize this urgent need. This is evidenced by the significant triad of the UNESCO Conventions, namely, the 1972 Convention on the Protection of the World Cultural and Natural Heritage; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; and, more recently, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

10. The 1972 UNESCO Convention in its Preamble warns that the deterioration or disappearance of any item of the cultural or natural heritage regrettably weakens the heritage of “all the nations of the world”, since parts of the cultural or natural

heritage are of outstanding interest and therefore need to be preserved as “part of the world heritage of mankind as a whole”; hence the need to establish an “effective system of collective protection of the cultural and natural heritage of outstanding universal values.”¹ The 2003 UNESCO Convention seeks to safeguard the *intangible cultural heritage* (to this end, it invokes the international instruments on human rights), defined as “the practices, representations, expressions, knowledge, skills (...) that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”²

11. The recent 2005 UNESCO Convention was preceded by its 2001 Universal Declaration on Cultural Diversity, which defines cultural diversity as the *common heritage of humanity*, and states its aspiration to greater solidarity on the basis of recognition of cultural diversity, of “awareness of the unity of humankind.”³ Following the 2001 Declaration, the 2005 Convention, adopted (on October 20, 2005) after extensive debates,⁴ reaffirmed the definition of cultural diversity as the *common heritage of humanity*, explaining that “culture takes diverse forms across time and space” and this diversity is embodied “in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity.”⁵ The Convention added that cultural diversity can only be protected and promoted through the safeguard of human rights.⁶

12. In my opinion, the universal juridical conscience has evolved towards a clear recognition of the relevance of cultural diversity for the universality of human rights and vice-versa. It has further developed toward the *humanization* of International Law and the creation, at the beginning of the XXI century, of a new *jus gentium*, a new International Law for humankind, and the aforementioned triad of UNESCO Conventions (of 1972, 2003 and 2005) are, in my opinion, one of the many contemporary manifestations of human conscience in this respect.⁷

13. One cannot live in constant exile and displacement. Human beings share a spiritual need for roots. The members of traditional communities attribute particular

1 *Consideranda* 1 and 5.

2 Preamble and Article 2(1).

3 Preamble and Article 1 of the 2001 Declaration.

4 Cf., e.g., UNESCO/General Conference, document 33-C/23 of August 4, 2005, pp. 1-16, and Attachments; and cf. G. Gagné (ed.), *La diversité culturelle: vers une Convention internationale effective?*, Montréal/Québec, Éd. Fides, 2005, pp. 7-164.

5 Preamble, *consideranda* 1, 2 and 7 of the 2005 Convention.

6 Article 2(1) of the 2005 Convention. Cf., regarding, in general, v.g., A.Ch. Kiss and A.A. Cançado-Trindade, “Two Major Challenges of Our Time: Human Rights and the Environment”, in *Human Rights, Sustainable Development and Environment* (Brasília Seminar of 1992, ed. A.A. Cançado-Trindade), 2nd ed., Brasília/San José de Costa Rica, IIDH/BID, 1995, pp. 289-290; A.A. Cançado-Trindade, *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brasil, S.A. Fabris Ed., 1993, pp. 282-283.

7 Cf. A.A. Cançado Trindade, “General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*”, *Recueil des Cours de l'Académie de Droit International de la Haye* (2005), chapter XIII (in print).

value to their land, which they consider belongs to them, and alternatively, they “belong” to their land. In the instant case, the definite transfer of the lands to the members of the *Yakye Axa Community* is a necessary measure of reparation, which further protects and preserves their own cultural identity and, in the last resort, their fundamental right to life *lato sensu*.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary