

PARTIALLY DISSENTING OPINION OF JUDGE A. ABREU BURELLI

1. When we voted on the merits in the “Yakye Axa indigenous community” case, I stated my dissent regarding operative paragraph 4 in which the Court declared that it *“does not have sufficient evidence to find a violation of the Right to life enshrined in Article 4(1) of the American Convention on Human Rights, against sixteen members of the Yakye Axa indigenous community [...]”*.

2. Since the judgment on the merits in the Villagrán Morales et al. vs. Guatemala case (November 1999), the Court has repeatedly stated that the right to life involves not only the negative obligation to not deprive anyone of their life arbitrarily, but also the positive obligation to take steps to ensure that said basic right is not abridged. Said interpretation of the right to life, to encompass measures of protection by the State, is supported today both by international jurisprudence and by legal doctrine.

3. It has been said, with regard to these criteria of the Court, that the right to life can no longer be viewed in a restrictive manner, as it was in the past, regarding not only the prohibition to arbitrarily deprive of physical life. There are various ways to deprive an individual of life arbitrarily: when the person’s death is directly caused by the unlawful act of homicide, and when circumstances that can likewise lead to a person’s death are not avoided, especially in the case of vulnerable individuals, with regard to whom life, before losing it physically, lacked meaning, because they had lost the possibility of developing their life aspirations and even of finding a meaning for their own existence.¹

4. It has also been deemed that this broad interpretation of the right to life under the American Convention (Article 4 in combination with Article 1(1)) is in accordance with the evolutionary interpretation of international rules on protection of the rights of human beings. *“In the last years, the conditions of life of large segments of the population of the States Parties to the American Convention have deteriorated notoriously, and an interpretation of the right to life cannot make abstraction of this reality,”*² especially with regard to vulnerable persons: children, the elderly, and destitute persons.

5. The Court has likewise deemed, in other judgments, in the cases of the “Instituto de Reeducción del Menor”, on September 2, 2004, “Gómez Paquiyuari brothers,” July 8, 2004, that the right to life is fundamental in the American Convention, as realization of other rights depends on safeguarding the right to life. When it is not respected, all the other rights disappear, as the person entitled to them is extinguished. In view of this fundamental nature, approaches that restrict the right to life are inadmissible. The Court has essentially asserted that this right encompasses not only the right of all human beings to not be arbitrarily deprived of their life, but also the right to not be subjected to conditions that impede or make it difficult to enjoy a decent existence.

¹ Case of the “Street Children” (Villagrán Morales et al.) vs. Guatemala. Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli.

² Idem.

6. These criteria, ratified in the Whereas section of the judgment in the case of the “Yake Axa indigenous community,” in the course of an analysis of Article 4(1) of the Convention, are part of the Court’s contribution to an evolutionary interpretation of international human rights law. Said criteria also include acknowledgment of the right to life aspirations, broadening of the concept of the victim, inclusion of the victim in the contentious proceeding through amendments to the rules of procedure, the right to consular assistance of persons detained by the police or the judiciary, as part of the right to due process, and acknowledgment of the labor rights of undocumented migrants.

7. Therefore, my dissenting opinion is not because I believe that the Court, in operative paragraph 4 of the judgment, has distanced itself from the broad interpretation of the right to life, in this case to the detriment of sixteen members of the Yake Axa indigenous community, but rather my dissent is because the evidence was not assessed in a manner consistent with the criteria that this Court has asserted on that issue.

8. When it examined the evidence submitted at the respective hearing, the Court included the statement or report of expert witness Pablo Balmaceda Rodríguez as follows:

Blood and fecal tests were conducted on samples taken from the members of the Community. These studies demonstrated that the members of the Yake Axa Community suffer significant parasitism and anemia. Samples were also taken from the water used by the Community. The study corroborated that the Community has a single source of non-drinkable water, which is a water deposit... which is a pool, roughly sixty by forty meters, to store rainwater. This pool is behind the barbed wire fence of the land they claim, so the members of the Community have to enter furtively to fetch water for personal hygiene and use. The water is subject to contact with wild animals and with livestock raised on the farm.

The huts in which the inhabitants of this community live are very precarious. They are built with a material that is abundant in the area, a palm from which they make walls and roofing. When it rains, everything is flooded, including the rooms in which they live in overcrowded conditions. Given the characteristics of the lands of the Chaco, the water is not easily absorbed by the soil, so all that water remains there without draining. To this we should add that there are no toilets in the community, for its members to use, for which reason they use the existing plants. Thus, the rainwater floods the area and carries the fecal remains with it toward the dwellings and the little school. Miserable conditions of this abandoned Community make its situation disastrous. There is no need to be an expert to corroborate these circumstances.

9. The expert witness then referred to the difficulty of obtaining information from the indigenous people on their next of kin allegedly deceased due to diseases; since there are no records of these deaths, it was not possible to precisely establish their dates. He added that for the Enxet indigenous people it is not easy to remember their deceased, given their special relationship with death, for which reason they had to make a very significant psychological effort to accept being asked about their deceased next of kin. Based both on their accounts and on his own observations, the expert found in his study that:

In most cases of deaths that were recorded, there was no prior medical care. Two cases reached the hospital, where they were diagnosed and sent back to their homes, as the physicians found that there was nothing that could be done. The mothers’ accounts show that several children died from bronchitis o bronchopneumonia. The symptoms described by the mothers are fully in accordance with this diagnosis: the children were coughing, had a high fever, and found it difficult to breathe, until they died without having received medical care or medicine. Those interviewed also stated that during the dry season the children died from diarrhea, and that is in fact the time

of year in which said health problems are most frequent. These children died with all the symptoms of diarrhea: fever, constant diarrhea, sometimes with blood, and vomiting. There were also cases of adults who died for lack of adequate and timely medical care and due to lack of food.

There is no health care post, clinic or health promoter in the Community. The village is 356 kilometers from the capital and 70 kilometers from the closest hospital. The closest regional hospital is 225 kilometers away, very close to Asunción, for which reason it is not easy for the members of the community to go to those health centers.

Currently the nutritional conditions of the children of the Community are quite precarious. Malnutrition among children is evident. Children's hair is discolored, their bellies are swollen, and their height is lower than it should be at their age. Furthermore, this has negative consequences such as learning and intellectual development problems. This situation can be changed by beginning, as soon as possible, a deworming therapy and adequate, permanent nutrition.

10. In Chapter VI of the Judgment on proven facts, and under the title of "living conditions of the members of the Yakye Axa indigenous community", the Court found that they *"do not have access to clean water and the most reliable source is rainwater. The water that they use on a regular basis comes from pools (water deposits) located in the lands that they claim; however, it is used both for human consumption and for personal hygiene, and it is not protected from human contact."*

11. The State of Paraguay, in turn, in its reply to the application, stated that it acquiesced to the request to establish a healthcare center, a school, drinking water supply and sanitary infrastructure for the community, wherever the State can establish said services as close as possible to the provisional settlement. Also, that *"insofar as possible it acquiesces (to the request to provide) medical care and education in accordance with the State's education and health programs."*

12. The latter point gave rise to the Court's decision, with regard to reparations, to order that *"...as long as the Community remains landless, given its special state of vulnerability and its inability to resort to its traditional subsistence mechanisms, the State must provide sufficient drinking water for consumption and personal hygiene of the members of the Community; it must provide medical care on a regular basis and adequate medicines to protect all persons' health, especially that of the children, the elderly, and pregnant women, including medicine and adequate treatment for deworming of all members of the Community; it must provide sufficient food, in appropriate variety and quantities, for all members of the Community to have minimum conditions required for a decent life; it must provide latrines or any other appropriate type of sanitary facilities for effective management of the Community's biological wastes, in a manner consistent with public health..."*

13. Both the partial acquiescence by the State and the reparations ordered by the Court show beyond a doubt that there has been and currently is a lack of basic services, including drinking water, indispensable for the health and life of the members of the Community. Therefore, it is not difficult to infer that the death of children, among others: a two year old, due to dysentery; a six year old due to dysentery and sores; a one year old, due to meningitis; a two year old, due to tetanus; a one year old, due to bronchitis; a twelve-day old baby, due to bronchitis; a two year old, due to bronchitis, were due to their precarious living conditions.

14. Article 19 of the American Convention on Human Rights establishes that “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” The Convention on the Rights of the Child, whose provisions are part of the domestic law of the States, establishes, among other measures, those *to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.*

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15. I wish to emphasize that my dissent with regard to operative paragraph 4 of the Judgment is due only to my specific consideration of the evidence in this case.

16. As grounds for my opinion that the Court should have considered the circumstances that caused the death of some of the persons listed in the application to have been sufficiently proven, I will quote the reasoning of Judge De Roux Rengifo, in his partially dissenting opinion in the judgment on the “Durand and Ugarte” case (August 16, 2000):

“...In its recent jurisprudence on evidence appraisal (including the one having an effect on the judgment related to this opinion), this Court has stated the following three criteria: 1) an international court of human rights has a significant scope of flexibility when assessing evidence, according to logic rules and based on experience; 2) international courts can largely base their decisions on circumstantial or indirect evidence, on presumptions as long as these means can give rise to solid conclusions on the facts; 3) in processes of violations of human rights the State defense cannot be grounded on the failure of the plaintiff to gather evidence because, very frequently, these cannot be obtained without the cooperation of the State itself, which precisely has the necessary resources to clarify the facts that have taken place in its territory.”

17. Just as Judge De Roux Rengifo stated at the time in his partly dissenting opinion, *mutatis mutandi*, I myself deem that if the Court had applied its own criteria on assessment of the evidence, it would have issued a different ruling in operative paragraph 4 of the Judgment in the case of the “Yakye Axa indigenous community vs. Paraguay”.

18. I thus respectfully set forth the grounds for my partly dissenting opinion, announced in the operative section of the aforementioned judgment.

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19. Besides referring to my dissenting opinion, I believe it appropriate to refer to the right to cultural identity, which is mentioned several times in the text of the aforementioned Judgment and with which I fully concur.

20. In this regard, in my view, among the various definitions of culture, one that stands out defines it as the set of distinctive spiritual and material, intellectual and emotional traits of a society, a social group or an individual and which, in addition to

arts, includes ways of life and of living together, value systems, traditions, and beliefs.³

21. In the framework of international human rights law, the right to cultural identity is still undergoing permanent construction and it is primarily dependent on cultural rights.

22. In the regional framework of the Americas, Article XIII of the American Declaration of the Rights and Duties of Man establishes that

[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.
He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

23. Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the "San Salvador Protocol," sets forth that:

The States Parties to this Protocol recognize the right of everyone:

- a. To take part in the cultural and artistic life of the community;
- b. To enjoy the benefits of scientific and technological progress;
- c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.

3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

24. As regards the American Convention, the right to cultural identity, while not explicitly set forth, is protected in the treaty based on an evolutionary interpretation of the content of the rights embodied in its Articles 1(1), 5, 11, 12, 13, 15, 16, 17, 18, 21, 23 and 24, depending on the facts of the specific case. In other words, the right to cultural identity is not abridged every time one of said articles is breached.

25. Protection under Article 5 (Right to Humane Treatment) of the American Convention, in combination with Article 10 (Right to Health) of the San Salvador Protocol includes the right of the members of ethnic and cultural groups to use their own medicine and traditional health practices, as well as the right of access to public health institutions and medical care provided to the rest of the population, to ensure their physical, psychological and moral wellbeing.

26. Protection under Article 11 (Right to Privacy) of the Convention includes the right of the members of ethnic and cultural groups not to suffer arbitrary or abusive

³ See Preamble of UNESCO's Universal Declaration on cultural diversity.

interference with their private, family and community life, which involves protection of their culture and respect for the integrity of the values, practices and institutions of these peoples.

27. Protection under Article 12 (Freedom of Conscience and Religion) of the Convention entails the right of members of ethnic and cultural groups to protect, express, disseminate, develop, teach and change their practices, ceremonies, traditions, and spiritual customs, both in the public and private spheres. It also involves their right to not be forcefully converted and for beliefs not to be imposed upon them against their will.

28. Protection under Article 13 of the Convention (Freedom of Thought and Expression) includes the right of the members of ethnic and cultural groups to express their own culture, both in public and privately, that is, to use their dress, artistic expressions, their entertainment; to preserve their own language; to seek and obtain information on their culture; to participate in generating and disseminating information and to request that information they deem erroneous regarding their culture and history be corrected; to have access to the media and to establish their own media; to contact and conduct activities with other cultures or with members of their own culture who are outside their territory; and to be informed regarding all matters that affect their spiritual, social, cultural life, as well as their movable and real property.

29. Protection under Articles 15 (Right of Assembly) and 16 (Freedom of Association) of the Convention includes the right of the members of ethnic and cultural groups to meet and to establish associations in accordance with their own culture, values, and customary law. These rights, in combination with Article 23 (Right to Participate in Government) of the Convention, allow these persons to organize in accordance with their own traditional forms of organization, to elect their representatives in accordance with their own forms of election, and to foster their development in accordance with their aspirations and needs.

30. Protection under Article 17 (Rights of the Family) of the Convention asserts the right of the members of these groups to maintain their own forms of family organization and of kinship.

31. Protection under Article 18 (Right to a Name) of the Convention includes their right to name their communities, places and persons in their own language, and to maintain those names.

32. Protection under Article 21 (Right to Property) of the Convention includes the right to use and enjoy their material and non-material property.

33. Protection under Article 23 (Right to Participate in Government) of the Convention is based on acknowledgment of the right of members of ethnic and cultural groups to freely participate at all decision-making levels in public institutions responsible for policies and programs that concern them.

34. Finally, Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the American Convention are two cross-cutting themes that run through all the aforementioned aspects, as members of ethnic and cultural groups are free and equal to all persons in dignity and rights and must fully enjoy human rights and basic freedoms, with no obstacles or discrimination of any sort. Furthermore, in some

cases, the States must adopt positive measures to ensure full exercise of all their human rights.

35. The right to cultural identity and all the rights that stem from it are subject to the same limitations as the other rights embodied in the American Convention, that is: “by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”⁴.

36. In view of the above, it is possible to establish that cultural identity is expressed in various ways that fall under the protection, as well as the limitations, set forth in the American Convention on Human Rights.

Alirio Abreu Burelli
Judge

Pablo Saavedra Alessandri
Secretary

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Art. 32 of the American Convention.