

**SEPARATE DISSENTING OPINION OF JUDGES
A.A. CANÇADO TRINDADE AND M.E. VENTURA ROBLES**

1. We have concurred with our votes in adoption the instant Judgment of the Inter-American Court of Human Rights in the case of the *Yakye Axa Indigenous Community versus Paraguay*, with most of which we basically agree, with the exception of operative paragraph No. 4 and the respective Whereas paragraphs, regarding which we firmly differ, based on the grounds we will set forth below, in the instant Joint Dissenting Opinion. Furthermore, we believe that the Court's decision with regard to operative paragraph No. 4 failed to consider other points that we deem essential, especially with regard to the fundamental right to life, and compromised the balance and harmony of the instant Judgment of the Court as a whole.

2. The Inter-American Court has asserted a concept of the fundamental right to life that encompasses conditions for a decent life (Article 4(1) of the American Convention on Human Rights). In this regard, in a well-known *obiter dictum* in the *Villagrán Morales et al. versus Guatemala* case ("*Street Children*" case, Judgment on the merits, November 19, 1999, para. 144), the Court stated that:

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 decent existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.

3. In the instant case, the Court accepted this hermeneutics when it found, in operative paragraph 3 of this Judgment, an abridgment of Article 4(1) of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of the members of the Yakye Axa Community, for not taking steps to address the conditions that prejudiced their possibilities of having a decent life. In this regard, we fully agreed with the warning by the Court that the State must take steps to ensure the right to adequate nutrition, access to clean water, and health care, and specifically,

the State must care for the elderly with chronic diseases and those in a terminal phase, to avoid unnecessary suffering. In this case, it must take into account that in the Yakye Axa indigenous Community oral transmission of their culture to the younger generations is primarily entrusted to the elderly (para. 175).

4. Along these same lines of reflection, we have deemed, in our respective individual Dissenting Opinions in the previous case of the *Serrano Cruz Sisters versus El Salvador* (Judgment of 01.03.2005), that the fundamental right to life takes on a higher dimension when the right to personal and cultural identity is taken into consideration; the latter cannot be disassociated from the legal personality of the individual as an international subject. The right to identity clearly follows from the circumstances of the instant case (also see paras. 18-19, *infra*).

5. We must also state, regarding this subject matter, that personal identity encompasses not only strictly biological concepts, but also various other concepts such as the individual's cultural, historical, religious, ideological, political, professional, social, and family heritage, for which reason, in the instant case, detriment to the cultural identity of the Yakye Axa Community also injured the personal identity of each of its members. In the instant Judgment, the Court stopped at the issue of the juridical personality of the Yakye Axa indigenous Community under Paraguayan domestic law (paras. 83 and 84); it is our understanding that beyond this matter one must always take into account, at a different level, the legal personality of each of the members of the Yakye Axa Community under international human rights law, specifically under the American Convention.

6. In the instant case, what we do not understand is why the Court, once it found that Article 4(1) of the Convention had been abridged, in the aforementioned terms (para. 3, *supra*), deemed that it did not have "sufficient evidence to prove violation of the right to life" to the detriment of members of the Yakye Axa indigenous Community, who in fact died under the aforementioned conditions, that is, living, or surviving, along the route from Pozo Colorado to Concepción, outside the territory that they claim as their ancestral right.

7. In our opinion, the death of some of these individuals (cf. para. 8 *infra.*), based on the Court's own reasoning, rather than requiring a higher standard of proof of the causal link with the demise of these individuals, as the majority of the Court unfortunately deemed, is instead an aggravating circumstance of the abridgment of the right to life (Article 4(1) of the Convention), already established by the Court itself.

8. The following list clearly manifests what we stated above, regarding ten of the sixteen deceased,¹ with regard to whom there is no doubt, in our opinion, that they died due to lack of medical care and as a direct consequence of the completely destitute and truly subhuman conditions under which they lived or survived:

- 1) Griselda Flores (2 years old): died on March 2, 1997 due to dysentery without receiving medical care before her death;
- 2) Alcides Morel Chávez (6 years old): died in November 1997 due to dysentery and sores, without receiving medical care before his death;
- 3) Adolfo Ramírez (64 years old): died on August 15, 1998 due to cachexia, without receiving medical care before his death;

¹ With regard to the other six deceased persons, listed below, there may be some doubts regarding the cause of their death: **1)** Hilario Gómez (20 years old): he died on March 7, 2005 due to convulsions associated with a congenital neurological lesion, without receiving medical care before his demise; **2)** Mauro Fernández Gómez (1 year old): he died on January 20, 1998 of meningitis, without receiving medical care at a hospital before his death. He was discharged after 22 days of hospitalization with a diagnosis of meningitis with ensuing complications and no possibility of being cured; **3)** N/N Sosa Chávez (one month old) died in August 1998 due to tetanus. He was seen at the regional hospital in Concepción and released with a diagnosis of tetanus; **4)** Santiago Gómez (78 years old) died between June 30 and July 7, 2002, of suffocation, without receiving medical assistance before his death; **5)** Ignacio Torales (68 years old) died on January 2, 2003 due to mitral insufficiency –chronic congestive cardiac insufficiency-, without receiving medical assistance before his death; and **6)** Severa Benítez Alvarenga (80 years old) died on January 5, 2003 from arrhythmia –chronic congestive cardiac insufficiency- having been examined by physician Pablo Balmaceda prior to her death.

- 4) Isabel García de Ramírez (64 years old): died on August 22, 1998 due to cachexia, without receiving medical care before her death;
- 5) Justina Chávez (1 year old): died on August 10, 1999 due to bronchitis, without receiving medical care before her death;
- 6) Ramón Chávez (1 year and 11 months old): died on September 6, 1999 due to bronchitis, without receiving medical care before his death;
- 7) N/N Morel Chávez (1 day old): died on January 1, 2000 for reasons unknown, without receiving medical care before his death;
- 8) N/N Morel Chávez (2 days old): died on January 2, 2000 for reasons unknown, without receiving medical care before his death;
- 9) María Adela Flores Gómez (12 days old): died in January 2003 due to bronchitis; and
- 10) Silvino Martínez Gómez (2 months old): died in February 2003 due to bronchitis.

9. Under the American Convention, the right to life is not limited to protection against arbitrary deprivation of life, but also requires *positive measures* by the State to ensure its full enjoyment. It is a basic right, whose importance has been duly emphasized by the Court in all its jurisprudence on this subject (paras. 21-22, *infra*). Likewise, the thesis of the positive obligations of the State is today universally reflected in doctrine.

10. Said obligations, regarding the right to life, are clearly shown by jointly reading Articles 4(1) and 1(1) of the American Convention. Thus, the deaths of the ten aforementioned individuals (para. 8, *supra*), instead of requiring that the Court have additional evidence, in our opinion constitute an *aggravating* circumstance of the violation, previously established by the Court, of Articles 4(1) and 1(1) by the State.

11. In our opinion, the “causal link” sought by the majority of the Court is clearly established by lack of due diligence by the State regarding the living conditions of *all* members of the Yakye Axa Community (objective international responsibility of the State). The Court has, in fact, acknowledged this explicitly in the instant case, when it pointed out that

This Court notes that lack of effective exercise of the right to communal property of the members of the Yakye Axa Community, as well as the grave living conditions to which they were subjected as a consequence of the delay by the State in making their territorial rights effective, must be taken into account by the Court when it sets non-pecuniary damages.

12. The Court has acknowledged, in the instant Judgment, that it must assess both the lack of effective exercise of the right to communal property and *the grave living conditions* of the members of the Yakye Axa Community (para. 202); this established the causal link to set non-pecuniary damages. The Court should have explicitly stated that the extremely destitute situation that was established led directly to the death of several members of the Community.

13. The Court also established, in the instant Judgment, that the respondent State must “provide regular medical care and appropriate medicine to protect the health of all individuals, especially children, the elderly and pregnant women, including medicine and adequate treatment to deworm all the members of the

Community” (para. 221). In our opinion, the very Judgment of the Court clearly establishes the causal link between the inhumane living conditions of the members of the Community and the death of some of them.

14. Regarding this point, in his expert opinion at the public hearing before this Court on March 4 and 5, 2005, expert witness P. Balmaceda Rodríguez pointed out² the precariousness of the living conditions of the members of the Yakye Axa Community, who lived in huts, and the lack of healthcare posts or community clinics, as the Community’s settlement is 356 kilometers from the capital city, Asunción, and 70 kilometers from the nearest hospital (para. 40.g) of the instant Judgment).

15. In addition to said expert opinion at the aforementioned hearing before the Court, the representatives of the victims sent the Court, as an annex to their brief with pleadings, motions and evidence, a public health-medical report on the Yakye Axa indigenous Community, prepared by expert witness Pablo Balmaceda himself, together with his team. Said report literally asserted that

The community as a whole has for many years been living in an absolutely precarious situation, in huts that cannot be considered housing, in indescribable overcrowding, without a single latrine in all the community, without drinking water and without sufficient water for even the most basic needs.

They have not the slightest possibility of living their lives in accordance with the Enxet traditions, hunting, gathering, and farming on a small scale.

Furthermore, the State is absent, there are no police, judiciary or public health authorities, as we can corroborate through the deaths. They all died without medical care. The two or three who were able to reach a medical professional did so belatedly.

In view of all this, we can say that the Yakye Axa community is in a completely destitute state.

16. As if the above were not enough, the Court, in operative paragraph No. 7 of the instant Judgment –which, together with operative paragraph No. 3 of this Judgment, conclusively proves the flagrant contradiction between operative paragraph No. 4 and the Judgment as a whole,- has correctly decided that

as long as the members of the Yakye Axa indigenous Community are without land, the State must provide them the necessary basic services and goods for their subsistence, pursuant to paragraph 221 of the instant Judgment.

17. In whereas paragraphs 219-221 of the instant Judgment, the Court has noted that

The Commission and the representatives, in their main briefs, stated the need to provide basic services to the Yakye Axa indigenous Community, including drinking water and sanitary infrastructure, a public health center, and a school. They also asserted the need to permanently provide culturally pertinent medical and educational care to the members of the community, bearing in mind its customs and traditions. The State, in turn, pointed out that

It likewise acquiesces to the request to establish a healthcare post, a school, drinking water supply, and sanitary infrastructure for the Community, at a place where the State can provide said services as close as possible to a provisional settlement. (...)

² As can be corroborated in the recording and transcript of the public hearing before this Court, held on March 4 and 5, 2005, at the seat of the Court in San José, Costa Rica, available in the Court’s archives.

Insofar as possible, it accepts [the request to provide] medical care and education in accordance with the States' education and health care plans.

In light of the above, the Court deems that, while the Community has no land, given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms, the State must, immediately and on a regular basis, provide sufficient drinking water for consumption and personal hygiene of the members of the Community; it must provide regular medical care and appropriate medicine to ensure the health of all individuals, especially boys, girls, the elderly and pregnant women, including medicine and appropriate treatment for deworming all members of the Community; delivery of sufficient food, with the appropriate variety and quality, for the members of the Community to have minimum conditions for a decent life; to provide latrines or any other type of appropriate sanitary facilities for effective and salubrious biological waste management in the Community; and to provide sufficient bilingual material for the educational requirements of the students at the school in the Community's current settlement.

Cultural identity has historical roots, and under the circumstances of the instant case of the Yakye Axa indigenous Community, it is tied to ancestral lands. We must emphasize that cultural identity is a component or is attached to the right to life *lato sensu*; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitable suffers. An expert opinion submitted to this Court at the public hearing on 04.03.2005 asserted that the only ones to "humanize" the region of El Chaco were the indigenous people themselves, with their culture, their way of life, the way they themselves organized.

19. During their displacement, in recent years, from their "ancestral lands," the *cultural identity*, as well as the very right to life of the members of an indigenous community such as the Yakye Axa, has seriously suffered. As the Inter-American Commission on Human Rights pointed out at the public hearing on 05.03.2005 before this Court –and this was not disputed by the State– as a consequence of the aforementioned situation, when the children of the Yakye Axa Community are born, they are predestined to disease, to lack of access to education, and to servitude. It is our understanding that this clearly constitutes, in itself, a violation of the basic right to life.

20. In our opinion, the Court should have reasoned in greater depth on the basic right to life, as it did in connection with the right to property (of ancestral lands). Ultimately, the right to life is a non-derogable right under the American Convention, while the right to property is not. In the instant case, the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life.

21. This Court has pointed out in its *jurisprudence constante* (e.g., "*Street Children*" (*Villagrán Morales et al.*), 1999; *Bulacio* case, 2003; *Myrna Mack Chang* case, 2003; case of the "*Juvenile Reeducation Institute*", 2004; *Huilca Tecse* case, 2005), that the right to life, whose full enjoyment is a prerequisite for enjoyment of all the other rights, is basic in its nature, and it requires that the States take positive steps to ensure conditions for a decent life. In the case of the *Gómez Paquiyauri Brothers* (2004), the Court asserted that the States' duty to respect the right to life "has special aspects in the case of minors," given their vulnerability and the special protection that they require to "prevent situations that might lead, by action or by omission," to abridgment of said basic right (para. 124).

22. And in the cases of *Juan Humberto Sánchez* (2003, para. 110) and the *19 Tradesmen* (2004, para. 153), the Court explicitly stated that

The right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights. When the right to life is not respected, all other rights lack meaning. The States have the obligation to ensure creation of the conditions required to avoid violations of this inalienable right and, specifically, the duty of avoiding violations of this right by its agents. Compliance with Article 4, in combination with Article 1(1) of the American Convention, not only requires that no person be deprived of his life arbitrarily (negative obligation), but also that the States take all appropriate measures to protect and preserve the right to life (positive obligation), as part of their duty to ensure full and free exercise of the rights by all persons under their jurisdiction. This active protection of the right to life by the State does not only involve legislators, but all State institutions.

23. For all the aforementioned reasons, we find that for operative paragraph n.4 of the instant Judgment not to contradict the body of the judgment, and specifically its operative paragraphs ns. 3 and 7, the Court should have found the State to be objectively responsible internationally, also due to lack of due diligence, as a causal link to the death of the ten members of the Yakye Axa Community listed in paragraph 8 (*supra*) of our Dissenting Opinion. We hope that our reasoning will help to correct, as soon as possible, the regression that operative paragraph 4 of the instant Judgment constitutes in connection with evolution of the jurisprudence of this Court.

24. We the undersigning Judges decided to state our position and issue the instant Joint Dissenting Opinion on the objective international responsibility of the State for violation of the right to life of ten members of the Yakye Axa Community, including eight helpless children (see paragraph 8, *supra*), because in cases such as this one, in which lack of due diligence by the State has a direct impact in terms of loss of human lives, it is our understanding that the Judges of the Inter-American Court of Human Rights must enhance the awareness of all inhabitants of our region so that facts such as those of the instant case do not happen again, to the detriment of those who most need protection, who have no one else to resort to in our societies, and of all those who are socially marginalized and excluded, who suffer in silence, but who in no way can be forgotten by the Law.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary