

**PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF
JUDGE RAMON FOGEL**

I participated in issuing the judgment of the Court in the Yakye Axa case, and I have dissented with regard to some of its operative paragraphs, based on the reasons stated during the deliberations, including the following:

1. The Yakye Axa Indigenous Community is part of the Chanawatsan group and of the Enxet-Lengua people. The Enxet are a nomad people with a hunting, gathering, horticultural and pastoral way of life; the Yakye Axa Community is constituted by a variable number of families, 28 at the time of the 2002 Indigenous Peoples Census, and 57 in 1993¹. The facts described by the Commission and by the Representatives of the alleged victims state that the community includes 57 families, some of whom live in the settlement called El Estribo or in places neighboring the farms that they claim. El Estribo settlement covers 27,741 ha and includes 266 families, according to the 2002 Indigenous Peoples Census.

2. The Chanawatsan, an Enxet-Lengua group, traditionally inhabited the territory whose limits are the Verde river to the North, the Montelindo river toward the South, the Paraguay river toward the East, and a band parallel to this river some 70 kilometers inland in the Chaco. The Chanawatsan, like other Enxet groups, are hunters, gatherers, horticulturalists, and herdsmen.

3. With more intense economic occupation of the lower Chaco since the early 20th century, livestock ranches were established in the Chanawatsan's traditional territory. The 1978 Anglican Mission census found 47 indigenous people in one of those 'estancias', Loma Verde, and today they are part of the Yakye Axa community.²

4. Due to the very difficult living conditions at Loma Verde, the Community moved to another cattle ranching area, El Estribo, in 1986.³ They were not forced to move, and the State was not involved in this process. In their new settlement at El Estribo, the community was unable to overcome the problems associated with extreme poverty, and in 1996 they decided to return to the vicinity of the Loma Verde ranch, part of their ancestral territory, where they settled along the road between Pozo Colorado and Concepción, around kilometer 80.

5. At the community's makeshift settlement, between the public road and the barbed wire fence of the Estancia, it is not feasible to build basic sanitary infrastructure, and the possibility of providing basic social services is severely hampered by the very

¹ The 2002 Indigenous Census records 28 dwellings with 147 individuals, and it defines a dwelling as the lodging for individual homes; the Census defines a home as all persons living together under the same roof and sharing food expenses (common pot).

² Autonomous submission by the representatives of the victims before the Inter-American Court of Human Rights. Historical Background of the Yakye Axa Community.

³ The colony at El Estribo encompasses 27.741 hectares and in 2002 it included 266 homes or dwellings. 2002 National Indigenous Census.

limited physical conditions of the settlement.⁴ No productive activities can be carried out there, and in general terms the place does not allow acceptable living conditions.

6. On December 10, 2001, pursuant to the provisions of Law 904/81, the government acknowledged the legal personality of the “Yakye Axa Community established in the Pozo Colorado district, in the Presidente Hayes Department,”⁵ enabling it to take steps to obtain public or private lands.

7. In 1993, a file was opened on “El Estribo –Pozo Colorado- Yakye Axa Indigenous Community on legal registration of land, 15,000 ha.” In this file, the IBR stated that it could not request expropriation because the real estate claimed was under rational use. The owners of the aforementioned real estate refused to sell it.

8. Having exhausted the administrative steps, the Community requested that Congress expropriate the 18.189 has. Of Estancia Loma Verde; the expropriation bill was withdrawn on November 28, 2000. Subsequently, on January 30, 2002, the Executive submitted another bill to Congress to expropriate 7,901 ha of that same ranch, Estancia Loma Verde; the Senate rejected this proposal, exercising its constitutional authority.

9. Conditions in the petitioning Community’s makeshift settlement worsened its risky and vulnerable situation, as the community was without its traditional means of subsistence and there were objective difficulties for the State to provide means to protect the community against the risks faced by its members, to ensure minimum living conditions.⁶

In this context, in just under six years, six indigenous members of that same settlement died. Based on its submission of the facts, the Commission argues that the State of Paraguay has not complied with its obligation to ensure the right to life set forth in Article 4 in combination with Article 1(1) of the American Convention, to the detriment of the Yakye Axa Indigenous Community.⁷

In its reply to the application, the State of Paraguay rejects the aforementioned accusation, and it acquiesces to the proposal by the representatives of the alleged victims to resort to an expert opinion regarding the causes of those deaths, and it states that the claim has not been made under the domestic judicial system.⁸

10. With regard to the legal grounds, we must take into account that the Inter-American Court, exercising its adjudicatory jurisdiction, must interpret the provisions of the American Convention, pursuant to the provisions of the Convention as well as

⁴ Under domestic law, investment of public funds to build sanitary infrastructure alongside the public road.

⁵ Articles 8, 9 and 16 of Law 904/81.

⁶ Application by the Commission, para. 178. The protective factors include medical services, establishment of physical conditions for production of their own food, educational services, etc. According to domestic law, use of public funds to build a drinking water system or other infrastructure alongside a public road and its public domain area constitutes the crime of misappropriation.

⁷ Application by the Commission, para. 192.

⁸ Reply to the application para. 166 to 170, 189.

others that might be invoked in the juridical framework of the pertinent Treaties. In this regard, Article 31(1) of the Vienna Convention on Treaties sets forth: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The object and purpose of the American Convention aim at acknowledgment of human dignity and the need to protect all persons, ensuring their basic rights, including the development of the latter.

The Inter-American Court noted that

"the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (...), but also the system of which it is part", quoting the International Court of Justice when it held that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J Reports 1971, p. 16 ad 31)⁹.

11. With regard to the alleged violation of Article 21 of the American Convention, I believe, as the Court has asserted, that the right to private property cannot be interpreted in an isolated manner, but rather bearing in mind the overall juridical framework of which it is a part, taking into account domestic and international law.¹⁰

In this same regard, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries sets forth, in Article 8(1), that:

"In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws" and Article 8(2) asserts: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."¹¹

12. The National Constitution guarantees the right to private property –both individual and corporate- and to community property to which the indigenous peoples are entitled; Article 63 acknowledges and guarantees the right of indigenous peoples to preserve and develop their ethnic identity in the respective habitat. Furthermore, Article 64 of this Constitution states that:

Indigenous peoples have the right to community ownership of the land, to a sufficient extent and of sufficient quality for conservation and development of their own manner of life. The State will provide these lands to them free of cost, and these will be non-encumberable, untransferable, inextinguishable, not subject to use as guarantees for contractual obligations nor can they be rented; also, they will not be subject to taxation.

⁹ Advisory opinion OC - 16/99 – The Right to Information on Consular Assistance in the framework of the Guarantees of Due Criminal Process, para. 113. Separate concurring opinion of Judge Sergio García Ramírez to the Judgment on the Merits and Reparations in the case of the Mayagna (Sumo) Awas Tingni Community.

¹⁰ Article 29. Rules of Interpretation. American Convention on Human Rights; Application by the Inter-American Commission in the instant case, para. 136; I-A Court of HR. Case of the Five Pensioners. Judgment of February 28, 2003, para.103

¹¹ Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted during the 76th International Labor Conference, held in Geneva on June 7th, 1969, ratified by Law 234/93.

Indigenous peoples may not be moved or removed from their habitat without their explicit consent.

13. With regard to the right to private property, the American Convention provides that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 109 of the National Constitution states:

Private property is guaranteed, and its content and limits will be set by law, taking into account its economic and social function, with the aim of making it accessible to all.

Private property cannot be violated.

No one can be deprived of his property unless this is ordered by the courts, but there may be expropriation for reasons of public utility or social interest, and this will be established in each case by the law. The law will guarantee prior payment of fair compensation, established by conventional means or by the decision of a court, except in the case of non-productive latifundia, in accordance with procedures for expropriation set forth in the law.

14. Individuals entitled to private property include both the indigenous people of the Yakye Axa community and the other indigenous peoples, as well as all citizens, in the framework of the principle of equality of all persons, enshrined in Article 46 of the National Constitution, which states: "All inhabitants of the Republic are equal in dignity and rights, and no discrimination is allowed. The State will remove obstacles and impede factors that maintain or foster discrimination.

Protection established regarding unfair inequalities will not be considered discriminatory factor, but rather an egalitarian one." Those requiring positive discrimination, in the Paraguayan context, include at least 2,000 indigenous families in the Chaco and 2,000 families in the Eastern Region who are landless, as well as some 100,000 landless peasant families living in extreme poverty. In my view, the provisions of the American Convention must be interpreted in this context.

15. Law 904/81, prior to the 1992 National Constitution, regulates access of indigenous communities to community landholding. In Article 8, it provides that, after completing the established procedures, "legal personality of the indigenous communities that existed before enactment of this law will be recognized, as well as that of indigenous families regrouping in communities to benefit from it." In the latter case, the minimum amount of indigenous families is 20 (Article 9). With regard to settlement of the indigenous communities, Law 904 provides the following:

Article 14. Settlement of the indigenous communities will take into account insofar as possible current or traditional possession of land. Free and express consent of the indigenous community will be essential for their settlement in places other than their territories, except for reasons of national security.

Article 15. When in the cases foreseen in the previous article it is imperative to transfer one or more indigenous communities, they will be given appropriate land of at least equal quality to the land they occupied, and they will be adequately compensated for the damage and detriment suffered due to the displacement, as well as for the value of the improvements made to the land.

Article 22 of said Law 904, in turn, sets forth the procedure for settlement of indigenous communities on public lands, and Articles 24 and 25 lay out the procedures for settlement on private lands occupied by the indigenous peoples. Article 26 of the law states that: “in case of expropriation, the procedure and compensation will be in accordance with the provisions of the Constitution and the law, and the national budget will set aside the necessary funds.”

16. Law 43/89, which establishes a system to normalize the situation of indigenous communities' settlements, provides in Article 4: “During the administrative and judicial proceedings set forth in Article 2, the Instituto Paraguayo del Indígena (INDI) and the Instituto de Bienestar Rural (IBR) must offer definitive solutions to the indigenous communities' settlements, pursuant to Law 854/63 Estatuto Agrario and Law 904/81, Estatuto de las Comunidades Indígenas, proposing expropriation under Article 1 of Law 1372/88 when solutions are not attained by the other means foreseen.”¹²

The provisions of both Law 904 and Law 43/89 establish, when there is no contractual agreement with the owner, expropriation as a way to normalize the situation of indigenous communities settled on private lands. These provisions are consistent with the Civil Code provisions according to which private domain or real estate is lost by: a) sale; b) judicial transmittal or statement; c) execution of a judgment; d) expropriation; and e) abandoning said domain by means of a public writ, duly registered in the Registro de Inmuebles, and in other cases set forth in the law (Article 1967). Article 1966, in turn, specifically lists the ways to acquire ownership of real estate: a) contract; b) accession; c) usucapion; and d) inheritance.¹³

17. Article 94 of Law 1863/02, which abrogates Law 854/63, in turn specifies the rural real estate that may be expropriated:

The following private domain rural landholdings are declared to be of social interest and subject to expropriation:

- a)** landholdings that are not utilized rationally, that are appropriate for establishing agricultural settlements, and that are located in areas with social problems;
- b)** those where there are stable settlements, well established for over ten years, under the terms and requirements of Law N° 622/60 on de facto urbanization and settlements; and,
- c)** landholdings subject to Law N° 662/60, on proportional subdivision of large landholdings, in accordance with the procedure set forth in said law.

18. Regarding this point, we should note the clash between the constitutional provision and Article 64 of Law 1863/02; while the latter limits the possibility of

¹² Law 854/63 was abrogated by Law 1863/02.

¹³ Reply to the application, para.148.

expropriation to landholdings that are not utilized rationally, Article 109 of the National Constitution, the supreme law of the Republic, establishes that in case of unproductive latifundia for the agrarian reform, the law itself sets the amount of compensation, while in other cases said amount is set by agreement or a court ruling. The Constitutional Court of the Supreme Court of Justice, itself, has established case law asserting that for expropriation to be in order it is sufficient for the legislators to be convinced of the existence of a social or public interest or need that can be remedied by expropriation of specific landholdings.

To the aforementioned extent, it is not necessary to demonstrate lack of rational use of the farms whose expropriation is sought.

19. Certain paragraphs of Agreement and Ruling No. 377 are especially relevant:

“Constitutional motion regarding lawsuit by Comercial Inmobiliaria Paraguayo-Argentina S.A. CIPASA against Law 517/95”.

(...) the Constitution itself orders that decisions regarding expropriation be made by Congress, in its typical manner of action, that is, that of a law. Furthermore, it is a political act, in the highest sense of the word. As stated in said decree, Congress acts “not precisely as legislator, but rather as representative of the political community interested in defining a given matter.”

(...) The State that expropriates does not enter into a contractual relationship with the person suffering the expropriation: the State subjects this person to its authority...”

“Taken as a juridical act under public law, expropriation is “unilateral” in its structure or manner of formation: the will of the person suffering the expropriation is not involved in said act... the currently acknowledged nature of expropriation as an act of “power” excludes the consent of the person subject to it (...) Given the juridical nature of expropriation, clearly when the State orders an expropriation it exercises an “authority” and not a “right”.

(...) It is a limitation of the right to property inasmuch as it refers to perpetuity of domain, that is, in connection with time. This limitation derives from prevalence of the interest of the community, represented by the State, over the interest of the individual who must yield to public requirement.”

(...) Clearly, then, since expropriation is a unilateral act of the expropriating agency (Congress), as a result of exercising State power, of the “jus imperii”, all the more so when said act must be expressed in the form of a law, intervention of the owner in actions of the chambers in the process of expropriation is not in order.

(...) The decision adopted by Congress must be based on concrete facts that generate that “cause of public or social interest” mentioned in the Constitution, leading the legislators to the conviction that the expropriation must take place. Congress has the authority to assess whether in a given situation said “cause of public or social interest” actually exists and is sufficiently significant to justify the exceptional action to which we have referred.

(...) In this same regard, the veto by the Executive branch states the following: “As a logical corollary of this ideal of providing access to landholding for the largest possible number of countrymen, we must highlight that the spirit of the Constitution reflects rejection of large scale landholdings, whether or not they are latifundia”...

20. Involvement of the Legislative branch of government in the two requests for expropriation of lands of Estancia Loma Verde must be assessed in this legal framework (para. 8). In the first case, the expropriation bill submitted by Members of Congress Sonia de León and Rafael Filizzola was withdrawn by means of a Congressional Resolution, in response to a request by the proponents of the bill,

given the involvement of the Inter-American Commission on Human Rights and the interest of the Paraguayan State in attaining a friendly settlement.¹⁴

The second expropriation request was rejected by the Senate. In this case, the senators, exercising their constitutional authority, did not find that the social problems of the Yakye Axa Community could be solved exclusively by expropriation of the farms mentioned in the bill. The minute of the regular meeting of June 27, 2002 does not reflect non-recognition of the rights of the indigenous community to landholding, but rather rejection of expropriation of the farms of Estancia Loma Verde. Senator Rachid Lichi, specifically, mentioned the provisions of Law 904, which in fact require, for expropriation of private lands, that they be occupied by the community benefiting from the expropriation.¹⁵

21. When they rejected the aforementioned expropriation bill, the Senators acted on the basis of the conviction that their decision was based on their constitutional authority, pursuant to the respective provisions of domestic legislation. However, in their decision to reject the bill, the Senators did not refer to any of the provisions of Articles 63 and 64 of the National Constitution, which are not reflected in laws that enable effective exercise of the rights acknowledged therein.

Insisting on expropriation of those same farms, in the framework of existing legislation, without correcting the aforementioned gaps, may be ineffective, insofar as the legislators can resort to the same reasoning, based on constitutional provisions, to once again reject the expropriation, even though this possible decision could reproduce existing inequalities and once again the law could be at odds with justice.

22. Based on the grounds set forth above, I disagree with the judgment insofar as it asserts that the State violated, to the detriment of the Yakye Axa Community of the Enxet-Lengua people, the right to property embodied in Article 21 of the American Convention. The steps taken to ensure the right to property of the Yakye Axa Community were not effective due to the domestic legal gaps, and due to inappropriate procedures, especially the insistence on claiming a single space regarding the traditional territory; in connection with this point, we must bear in mind that the testimony as a whole leads to the conclusion that at times the State did not carry out consultations with the Community when it took steps to purchase lands for the Community, but at other times it did but without attaining acceptance by the Community, which insisted on acquiring Loma Verde; this leads to the need to establish a difference, in terms of legal provisions, between consultation and consensus.

23. Given the delays to date, the State of Paraguay must ensure, within a reasonable time, the right to community property of the land in accordance with the demands of the Yakye Axa Community. The land for the community must be located within the ancestral territory of the Chanawatsan group of the Enxet-Lengua people

¹⁴ Note by the Members of Congress who proposed the bill, received on November 17, 2000, file 3886, leaf 2.

¹⁵ Minutes of the Regular Meeting of the Senate on June 27, 2002. Payment of fair compensation for expropriation of a farm with modern facilities, in accordance with domestic legislation and Article 21 (2) of the American Convention, would in fact limit the possibility of the State to intervene with the aim of protecting the rights of other indigenous communities entitled to said protection.

and must encompass an appropriate area for the community to maintain and develop its ethnic identity. This action must take into account the principles of universality, indivisibility, and interdependence.

24. Analysis of the case leads to the conclusion that currently there are no domestic legal provisions to enable expropriation of lands that were part of the traditional habitat of indigenous peoples but are not currently occupied by them, unless the legislators are convinced, in specific cases, that said expropriation is in order; if the right to ancestral territory does not go hand in hand with possession of the lands claimed, there is no recognition of said right under domestic legislation.¹⁶ Furthermore, there are no suitable legal instruments for recovery of the lands of indigenous peoples that have been invaded and are currently occupied by third parties. Therefore, the Paraguayan State is under the obligation to take special steps to ensure effective exercise by the indigenous peoples of basic human rights enshrined in Articles 63 and 64 of the National Constitution, pursuant to the provisions of Article 2 of the American Convention:

Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

In its compliance with this obligation, the Paraguayan State must take into account Article 14 (3) of Agreement 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which establishes the need to establish appropriate procedures in the framework of the national legal system to address the land claims of the peoples involved. These are the grounds for my partly concurring vote regarding operative paragraph one of the Judgment.

25. With regard to the alleged violation of Article 4 of the American Convention (Right to Life) the application filed by the Inter-American Commission asserts that the State of Paraguay failed to comply, to the detriment of the Yakye Axa Community, with the obligation to ensure the right to life embodied in Article 4 of the American Convention, to the detriment of eight members of the indigenous community, duly identified by that community, and that the State “has placed all members of the community in a situation of constant risk,” affecting their enjoyment and exercise of basic human rights, through continuation of a situation of vulnerability of the community.¹⁷ Said Article 4 (1) of the Convention establishes that:

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.

¹⁶ Reply to the Application, para. 152.

¹⁷ Application by the Inter-American Commission. Main brief regarding the petition. Summary Doc., para. 2.

26. The application states that the H. Inter-American Court has established that the right to life is a basic human right, crucial for exercise of the other human rights, and that it encompasses not only the right of every human being not to be arbitrarily deprived of his or her life, but also the right of access to conditions that ensure a decent existence. Regarding this right, the Court has in fact stated:

“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 dignified 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.”¹⁸

27. Interpretation of the right to life in a way that encompasses positive measures of protection for the indigenous peoples to enjoy the right to a decent life is based on international jurisprudence and doctrine, and it entails new steps forward in International Human Rights Law.

The Inter-American Court has pointed out that the duty of the State to take positive steps must be a high priority precisely in connection with protection of the life of the more vulnerable persons, such as members of indigenous communities. This concept of the right to life, with regard to indigenous communities in a destitute situation, which can be reflected in death rates that could be avoided, asserts the obligation to provide social protection and to put an end to extreme poverty. Since they suffer severe deprivation, these indigenous communities lack strategies to adequately address the risks they face, to take advantage of opportunities to improve their living conditions and to attain minimum conditions regarding their quality of life.¹⁹ In my opinion, the international responsibility of the Paraguayan State in the case of the deaths of members of the Yakye Axa community that could have been avoided, and which as I will show must be shared with others involved, stems from extreme poverty, worsened by precarious settlement of the community along the route, a fact that is not attributable to the State.

28. The right to life is embodied in various instruments, and pursuant to them, existence of extreme poverty, which tends to grow in the country, entails denial of economic, social, and cultural rights, including the rights to adequate nutrition, to health, to food, and to work.²⁰ The United Nations Human Rights Commission recognized that extreme poverty is contrary to the basic right to life, and it established the human rights that are essential to protect the right to life (food, drinking water, health).²¹ The World Conference on Human Rights, held in Vienna in 1993, in turn, deemed that extreme poverty is contrary to human dignity. In the case of the indigenous communities, especially those suffering harsh poverty, the

¹⁸ I-A Court of HR. Villagrán Morales et al. Case (“Street Children” Case), Judgment of November 19, 1999, para. 144.

¹⁹ Inter-American Court of Human Rights. Joint concurring opinion of judges Antonio Augusto Cançado Trindade and Alirio Abreu Burelli, Villagrán Morales et al. Case (“Street Children” Case), para. 4.

²⁰ Additional Protocol to the American Convention on Human Rights regarding Economic, Social, and Cultural Rights. “San Salvador Protocol”. The United Nations Human Rights Commission asserted that situations of extreme poverty affect all human rights, civil, cultural, economic, and political, as well as the right to development, for which the human person is crucial. E/CN.4/1995/101 para. 83.

²¹ E/CN.4/ Sub 2/200425.

situation of extreme poverty entails a systematic denial of the possibility of enjoying the inherent rights of the human person.²² The Yakye Axa Community certainly suffers extreme poverty, as the testimony of witnesses and expert witnesses shows.²³

29. Interventions by the State must prevent, attenuate, and overcome risks such as malnutrition, prevalence of anemia, morbidity and mortality, creating basic conditions in terms of health care, adequate nutrition, education, occupational training, and income generation. Protective factors that must be guaranteed by the State, including medical services, conditions for self-production of food, and integration into community networks that ensure essential self-sufficiency, require basic conditions regarding settlement of the indigenous community members that are the target group of the services; the size of the group must enable social/communal self-sufficiency, and quality of the land must be adequate to prevent, attenuate, and overcome the risks.

30. Said interventions must take into account that, pursuant to the Vienna Declaration and Programme of Action (1993), at the World Conference on Human Rights, all human rights are universal, indivisible, and interdependent, and interrelated.²⁴ I believe that, in light of these principles, it is not a matter of protecting one of the human rights embodied in the Inter-American System to the detriment of another or other such rights, or of protecting some complainants in a way that leads to violation of these rights of others also protected by the Convention. In this framework, we must deem it axiomatic that no assistance provided to small groups that are dispersed and/or settled on precarious lands can create conditions that ensure a decent existence.²⁵

31. Insisting on supplying food to the members of indigenous communities, with no ending date and without meeting the conditions stated in the previous paragraph, can lead to an unwanted end by creating dependency and weakening their own social protection mechanisms. It is also necessary to take into account that access to appropriate land is a necessary condition, but not sufficient, to create conditions that ensure a decent life.²⁶ In this regard, it is necessary to avoid using most of the existing financial resources to purchase land or pay compensation for land expropriation.

32. The State's duty to adopt positive measures to protect the right to life, even if this involves aid to the vulnerable population groups in a situation of extreme

²² E/CN.4/ Sub 2/2004/44.

²³ Case of the Yakye Axa Indigenous Community, Public Hearing held on March 3 and 4, 2005 at the Seat of the Court.

²⁴ The principle of indivisibility establishes that improvements regarding one human right cannot be obtained in a manner that is detrimental to another, while the principle of interdependence asserts that improvements in realization of any human right depend on realization of all, or at least of several. E/CN.4/ Sub 2/2004/25.

²⁵ Law 904/81 establishes that indigenous groups that have separated from their communities and regroup must have at least 20 families.

²⁶ It is necessary to take into account that in fact there are already indigenous communities that despite access to land that is adequate in terms of quality and size are in a situation of extreme poverty due to lack of adequate intervention.

poverty, cannot be limited to them, as said assistance does not attack those factors that generate poverty in general, and especially extreme poverty, and therefore it cannot create said conditions for a decent life. In this regard, it is necessary to take into account what the Inter-American Court has asserted regarding the need for interpretation of an international protection instrument to “go hand in hand with the changing times and current living conditions.” The Court has also pointed out that said evolutionary interpretation, pursuant to the general rules of treaty interpretation, has significantly contributed to furthering International Human Rights Law.²⁷

33. In my opinion, the evolutionary interpretation of the right to life embodied in the American Convention must take into account the socio-economic situation of Paraguay and of most Latin American countries, where extreme poverty has increased in absolute and relative terms despite implementation of social protection policies. Interpretation of the right to life involves not only compliance, by the State, with social protection measures that temporarily ensure minimum living conditions, but also addressing the causes generate poverty, reproduce its conditions, and create additional poor population, as discussed in the framework of the United Nations.²⁸ This poses the need to link measures for eradication of poverty with the set of phenomena that give rise to it, bearing in mind the impact of decisions by the States, international and multi-lateral bodies;²⁹ reproduction of conditions of poverty entails responsibilities of the international and national actors and institutions involved.

34. In this context, the ability of the States to intervene, in developing countries such as Paraguay, and application of international provisions regarding extreme poverty are not a juridical matter that involves only the State, which is often subject both to its limited financial resources and to structural factors linked to the “adjustment process,” which the Paraguayan State does not control in an isolated manner, as set forth in the Reply to the Application (para. 185).³⁰ International responsibility is not limited to the right to international assistance when the State Party cannot attain, on its own, the model set forth in the Covenant, embodied in the International Covenant on Economic, Social and Cultural Rights.³¹

²⁷ Inter-American Court of Human Rights. Case of the “Street Children” (Villagrán Morales et al.) Judgment of November 19, 1999, para. 193, and Inter-American Court of Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law - Advisory opinion OC – 16/99, para. 114.

²⁸ UNESCO, *Poverty as a violation of Human Rights. 2004*, by José Bengoa, Member of the United Nations Sub-Commission for the protection and promotion of human rights, Chairman of the United Nations working group on extreme poverty.

²⁹ E/CN.4/ Sub 2/2004/44 para. 11, 17 and 19.

³⁰ Inter-American Court of Human Rights. Joint concurring opinion of judges Antônio Augusto Cançado Trindade and Alirio Abreu Burelli, Case of the “Street Children” (Villagrán Morales et al.), para. 6. Bearing in mind that conduct of the States, and especially of small ones, vis-à-vis multinational corporations that control markets exhibits weakness, the international community as a whole must effectively acknowledge that the responsibility is shared by the actors involved. E/CN.4/Sub 2/2004/44, para. 19 and 20.

³¹ Articles 2 and 11 of the Covenant are pertinent. The text of the article refers to “international assistance and co-operation”, while Article 11 establish that “The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed (...) Taking

35. In this view, growing poverty is the result of primarily economic and financial decisions taken by private actors in agreement with public actors, with far greater power than the States of developing countries. Responsibilities of multi-national firms and of multilateral bodies regarding abridgments of economic, social and cultural rights are addressed in this framework; thus, when the Human Rights Commission asserted that poverty abridges the fundamental right to life, it requested an analysis of the policies of the World Bank, of the World Trade Organization, of the International Monetary Fund, and of other international bodies.³²

36. Progress of International Human Rights Law requires that the international community acknowledge that poverty, and especially extreme poverty, is a form of abridgment of all human rights, civil, political, economic, and cultural, and that it act accordingly so as to facilitate identification of the internationally liable perpetrators. The economic growth system linked to a type of globalization that impoverishes growing sectors constitutes a “massive, flagrant, and systematic violation of human rights”,³³ in an increasingly interdependent world. This interpretation of the right to life, attuned to evolving times and current living conditions, must pay attention to the causes of extreme poverty and to their perpetrators. From this standpoint, the international responsibility of the State of Paraguay and of other Signatory States of the American Convention does not cease, but it is shared with the International Community that requires new instruments.

37. It is also necessary to take into account, in addition to what was stated in previous paragraphs, that Article 46(1)a of the Convention asserts that for a petition or communication filed before the Inter-American Commission pursuant to Articles 44 or 45 of the Convention to be admissible, it is necessary to have filed and exhausted domestic remedies, which did not happen in the instant case.

With regard to the deceased members of the indigenous community, it is necessary to assert that if complaints had been filed in a timely manner under domestic venue regarding possible negligence that could lead to avoidable deaths, it would have been possible to correct, or at least to attenuate, said health problems; this path would have enabled an investigation of abridgments of the right to life, punishment

into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.” E/CN.4/1995/101. para. 64.

³² E/CN.4/Sub 2/2004/25. Likewise, the United Nations Committee on Economic, Social and Cultural Rights has asserted in international fora that Intellectual Property rights as reflected in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization are contrary to human rights treaties, conventions and agreements. E/CN.4/Sub 2/204/44 para. 11, 17, and 19. The Social Forum held in the framework of the United Nations Human Rights Commission, in 2004, highlighted the growing need to include a human rights dimension in international economic decisions, such as those pertaining to debt payment, trade, and free trade agreements, as a way to avoid generating poverty.

³³ International Conference on Poverty and Social Exclusion, held in San Jose, Costa Rica, in January 1997; *General Assembly Resolution (A/RES/55/106) of 14 March 2001*, Resolutions of the Commission on Human Rights and the General Assembly of the United Nations state that both poverty and social exclusion are a “violation of human dignity”. Paragraph 1; E/CN.4/Sub.2/1996/13, *Final report on human rights and extreme poverty, submitted by the Special Rapporteur, Mr. Leandro Despouy*; UNDP, *Poverty reduction and human rights, a practice note* (March 2003).; J. Bengoa, *Implementation of existing human rights norms and standards in the context of the fight against extreme poverty* (E/CN.4/Sub.2/2003/17).

of those responsible, and reparations for the next of kin of the victims. Lack of reparation, in proven cases of negligence by agents of the State, could have given rise to domestic responsibility of the State of Paraguay.

38. With regard to the alleged violation of Articles 8 and 25 of the American Convention (Right to Fair Trial and Judicial Protection) and more specifically regarding the proceeding against the members of the Community, I believe that the unfair treatment against the Community in connection with violation of the right to fair trial, which originated in the early procedural steps, in the trial court, could have been readressed in other stages of the same proceeding, under domestic venue.

Ramón Fogel Pedroso
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary