PARTIALLY DISSENTING OPINION OF
JUDGE ALBERTO PÉREZ PÉREZ

CASE OF THE KALIÑA AND LOKONO PEOPLES*V.* SURINAME

JUDGMENT OF NOVEMBER 25, 2015
(Merits, Reparations and Costs)

1. I have dissented from operative paragraphs 1 to 3 because they unduly cite certain articles of the American Convention on Human Rights that have presumably been violatedas grounds for the judgment: respectively, Articles 3, 23 and 13. The Court's application of these articles in this case conflicts with the evidentmeaning of these provisions, and the reasoning that is given is totally insufficient and even, in one case, almost inexistent.

2. Furthermore, as will be seen, the rights that it is intended to protect by citing Articles 3, 13 and 23 are correctly founded on other provisions of the Convention, already contained in the text of the judgment.

I. Article 3 (Right to Recognition of Juridical Personality) was not violated

3. Article 3 establishes:

> *Article 3. Right to recognition of juridical personality*
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> *Every person has the right to recognition as a person before the law.*

Meanwhile, Article 1(2)stipulates:

> *2. For the purposes of this Convention, "person" means every human being.*

4. Significantly, neither of these provisions has been transcribed in the text of the judgment. Perhaps the reason for this unjustified omission is the fact that it is sufficient to read Article 3 and Article 1(2)to note that the right to recognition of juridical personalityis one of the "rights and guarantees that are inherent*in the human being*" (Article 29(c)), that cannot be suspended in states of emergency (Article 27(2)).

5. Consequently, Article 3 cannot serve as grounds for granting or recognizing *legal status[personeríajurídica]* to groups or collective entities, whether or not they are indigenous or tribal peoples or communities.

6. Recognition of juridical personality to the individual human beings who compose that people or community, as the Court did in the case of the *Sawhoyamaxa Indigenous Community,*is a different matter. In that case, it declared that Article 3 had been violated to the detriment of several individual members of this community who "*did not have records of their birth and death, or any other document provided by the State that could prove their existence and identity."* The Court stated:

> 188. The right to recognition of juridical personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such a person can enforce such rights. The breach of such recognition implies the

absolute denial of the possibility of being a holder of such rights and of assuming obligations, and renders the individual vulnerable to the non-observance of the same by the State or by individuals.

189. The State has a duty to provide the general legal conditions and resources, so that the right to recognition of juridical personality may be exercised by its holders. In particular, the State is bound to ensure to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditionsthat may secure for them the exercise of such right, pursuant to the principle of equality under the law.

190. In the instant case, the Court has considered proved that 18 of the 19 members of the Sawhoyamaxa Community who died as a result of the State's failure to comply with its preventive duty regarding their right to life (*supra* para. 178), did not have any birth or death records, or any other document provided by the State able to prove their existence and identity.(…)

194.*Based on the above considerations, and notwithstanding the fact that other members of the Community may be in the same situation, the Court finds that the State violated the right to recognition of juridical personality recognized in Article 3 of the American Convention, to the detriment of NN Galarza, Rosana López, Eduardo Cáceres, Eulalio Cáceres, Esteban GonzálezAponte, NN GonzálezAponte, NN Yegros, Jenny Toledo, Guido Ruiz-Díaz, NN González, Luis Torres-Chávez, Diego Andrés Ayala, Francisca Britez, Silvia Adela Chávez, Derlis Armando Torres, Juan Ramón González, Arnaldo Galarza and Fátima Galarza.*[1]

7. Article 3 has also been interpreted and applied correctly – that is, as a fundamental right of all human beings – in numerous cases. For example, in the*Case of the Yean and Bosico Girls v. Dominican Republic*the Court decided as follows:

178. A stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for recognition of juridical personality.

179. The Court considers that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.

180. In this specific case, the State maintained the Yean and Bosico children in a legal limbo in which, even though the children existed and were inserted into a particular social context, their existence was not recognized legally; in other words they did not have juridical personality.[2]

8. The Court has also declared, with full justification, the violation of Article 3 in cases of forced disappearance. In the case of*Anzualdo Castro v. Peru*, which was the first case in

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[1] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of March 29, 2006. Series C No. 146, paras. 188 to 190 and 194.

[2] *Case of the Yean and Bosico Girls v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 8, 2005. Series C No. 130, paras. 178 to 180, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2014. Series C No. 282, paras. 265 to 268.

which it adopted this position, the Court explained the content and basis of Article 3 and explained the reasons for its application to such cases:

> 87. As to the alleged violation of Article 3 of the Convention (*supra* paras. 56 and 57), the Court has noted that the content itself of the right to juridical personality is that every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights [which] implies the capacity to be the holder of rights (capacity and exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of [the] rights and obligations[the civil and basic].
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> 88. This right represents a parameter to determine whether a person is entitled to any given rights and whether that person can enforce such rights, therefore, the failure to recognize juridical personality places the person in a vulnerable position in relation to the State or third parties. Thus, the content of the right to juridical personality refers to the corresponding general obligation of the State to provide the means and general legal conditions necessary to guarantee each person the free and full enjoyment of the right to the recognition of his or her juridical personality.
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> 89. However, pursuant to the principle of effectiveness and the need for protection in cases of people and groups in a vulnerable situation, this Court has observed the broader legal content of this right, by considering that the State "is bound to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law." […]
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> 90. Certainly, case law has developed the legal content of [the right to recognition of physical personalityof every human being] in cases involving human rights violations other than forced disappearance of persons, because, in most cases of this type, the Court has found that it was not necessary to analyze the violation of Article 3 of the Convention, since there were no facts that warranted this. Nevertheless*, in view of the multiple and complex nature of this serious human rights violation, the Court reconsiders its previous position and deems it possible that, in this type of case, forced disappearance may entail a specific violation of the said right: in addition to the fact that the disappeared person can no longer exercise and enjoy other rights, and eventually all the rights to which he is entitled, his disappearance seeks not only one of the most serious forms of placing the person outside the protection of the law,but also denies that person's existence and leaves him in a kind of limbo or uncertain legal situation before society, the State, and even the international community*.
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> 91. Thus, the Court bears in mind that one of the characteristics of forced disappearance, contrary to extrajudicial execution, is that it entails the State's refusal to acknowledge that the victim is in its custody and to provide information in this regard, in order to create uncertainty as to his whereabouts, life or death,to intimidate and to eliminate rights (*supra* paras. 60 and 80).
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> […]
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> *101. Based on the foregoing, the Court finds that in cases of forced disappearance of persons, the victim is placed in a situation of legal uncertainty that prevents, impedes or eliminates the possibility of the individual being entitled to or effectively exercising his rights in general, in one of the most serious forms of non-compliance*

with the State's obligations to respect and ensure human rights. This has resulted in the violation of the right to juridical personality of Mr. Anzualdo Castro.[3]

9. Thus, the grounds for the recognition of the *legal status [personería jurídica]*[4]of the indigenous or tribal peoples or communities should be sought in relation to other provisions of the Convention. These grounds are not very hard to find, because they are the legal consequence of the recognition of the right to property (in this case collective property) established in Article 21. No one can be the holder of a right without the corresponding existence of the consequent legal status [*personería jurídica*]. And the Court explained this in its judgment in the case of the *Saramaka People,* in which it set out the correct reasoning with absolute clarity:

> 171. The recognition of their juridical personality is a way, albeit not the only one, to ensure that the community, as a whole, will be able to enjoy and exercise fully their right to property, in accordance with their communal property system, and the right of equal access to judicial protection against violations of that right.
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> 172. The Court considers that the right to have their juridical personality recognized by the State is one of the special measures that should be provided to indigenous and tribal groups in order to ensure that they are able to enjoy their territory in accordance with their own traditions. This is a *natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner*.[5]

10. The same reasoning must be applied in the instant case; thus, the reference to Article 3 and, in particular, the supposed violation of this article, is not only unjustified, but also unnecessary.[6]

II. Article 13 (Freedom of Thought and Expression) was not violated

11. Article 13(1)ofthe American Conventionestablishes the following:

> *Article 13. Freedom of Thought and Expression*
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> *1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*

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[3] *Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 22, 2009. Series C No. 202, paras. 87 to 91 and 101.

[4] I find it preferable to reserve the use of the expression*"juridical personality" [personalidad jurídica]* to situations covered by Article 3 of the Convention (the right of every human being to recognition as a person before the law) and, instead, speak of *"legal status"[personería jurídica]* for cases in which the condition of subject of rights and obligations is attributed to a group, community or people.

[5] *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C No. 172, paras. 171 and 172.

[6] In the case of the Saramaka People, incongruously, the Court ended by declaring "the violation of the right of the members of the Saramaka People to recognition of their juridical personality pursuant to Article 3 of the Convention in relation to their right to property under Article 21 thereof, and the right to judicial protection under Article 5 of this same instrument, as well as with regard to the general obligation of the State to adopt the legislative or other measures required to make those rights effective and to respect and ensure their free and full exercise without discrimination, in accordance with Articles 2 and 1(1) of the Convention, respectively." This was an evident inconsistency which the Court should not repeat.

12. Once again it is necessary to point out that this provision has not been transcribed in the text of the judgment. Perhaps the reason for this unjustified omission is the fact that it is sufficient to read Article 13 to understand that the refusal to hand over certain information considered necessary in order to exercise the rights to participation and to consultation of an indigenous or tribal people are unrelated to "freedom of thought and expression" and, in particular, with the "freedom to seek, receive, and impart information and ideas of all kinds."

13. As the Court rightly indicated in the judgment in the *Sarayaku* case:

> [R]egarding the alleged violation of Articles 13, 23 and 26 of the Convention, the Court agrees with the Commission that, in cases such as this one, access to information is vital for effective democratic monitoring of the State's management of the exploration and exploitation of natural resources on the territory of indigenous communities, a matter of evident public interest. Nevertheless, *the Court considers that, in this case, the facts have been sufficiently analyzed and the violations conceptualized under the rights to communal property, consultation and cultural identity of the Sarayaku People, in the terms of Article 21 of the Convention, in relation to Articles 1(1) and 2 thereof; accordingly, it will not rule on the alleged violation of those provisions*.[7]

14. In the instant case, the Court considered the possible violation of Article 13 *ex officio*, because it had not been alleged by either the Commission or the presumed victims.[8] It immediately began to examine the possible violation of Article 13 consisting in the "the State's failure to answer the request for information on the property titles, which the victims have alleged."[9] More precisely, this was a request "to clarify and produce the relevant documents that prove whether the persons identified above [H.J. De Vries and Harrold Sijlbing] possess valid land titles in the village of Pierrekondre; and if so, [to explain] the nature of those titles and whether the said persons had permission to build houses and/or stores under them. [They] asked that this information be provided in writing and discussed with [them] as soon as it was available."[10] It is clear that this request for information is unrelated to "a matter of evident public interest," rather it refers to a matter of interest to the Kaliña and Lokono indigenous peoples in order to exercise their right to judicial protection (Article 25) in relation to their rights to collective property, participation and consultation.

15. To the contrary, the freedom of information recognized in Article 13 ofthe Convention refers (in the terms transcribed above from the judgment in the Sarayaku case) to "information [that] is vital for effective democratic monitoring of the State's management of the exploration and exploitation of natural resources on the territory of indigenous communities." The instant case does not relate to the "democratic control of the State's management," but to the exercise of the specific rights mentioned at the end of the preceding paragraph. As the judgment indicates, "the information requested was important documentation to provide the Kaliña and Lokono peopleswith precise facts on how many

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[7] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations.* Judgment of June 27, 2012. Series C No. 245, para. 230.

[8] *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs.* Judgment of November 25, 2015, para. 259.

[9] *Case of the Kaliña and Lokono Peoplesv. Suriname, supra*, para. 260.

[10] *Case of the Kaliña and Lokono Peoplesv. Suriname, supra*, para. 263.

individuals from outside their communities were in the area, and the legal situation of the land ownership. Thus, the information could have provided them with additional evidence when filing their claims in the domestic jurisdiction."[11]

16. Therefore, it was not in order to declare a violation of Article 13 ofthe Convention; rather it was sufficient to declare the violation of Article 25 (Right to Judicial Protection).

III. Article 23 (Right to Participate in Government) was not violated

17. Article 23 ofthe American Conventionestablishes the following:

> *Article 23. Right to Participate in Government*
>
> *1. Every citizen shall enjoy the following rights and opportunities:*
> *a. to take part in the conduct of public affairs, directly or through freely chosen representatives;*
> *b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and*
> *c. to have access, under general conditions of equality, to the public service of his country.*
>
> *2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.*

18. In this case, Article 23 was transcribed in the text of the judgment. But the transcription is partial and biased. It only goes as far as the words "public affairs," and omits the passage that states "directly or through freely chosen representatives" as well as subparagraphs (b) and (c) regarding the "rights and opportunities" "to vote and to be elected" and to have equal access "to the public service." Both the elements omitted and the reference to "public affairs" and the name of the rights in question ("Right to Participate in Government") would be sufficient to exclude the application of the norm allegedly violated to a matter concerning private property (Article 21) and not "a matter of evident public interest" (as seen in paras. 13 and 14), but rather a private matter.

19. According to the second operative paragraph of the judgment, the violation of Article 23 was allegedly proved "pursuant to paragraphs 122 to 230." But, an analysis of those paragraphs reveals that, although they are inserted in Chapter VI.2, entitled "Right to collective property (Article 21) and political rights (Article 23) in relation to Articles 1(1) and 2 of the American Convention," none of its sections deals with the political rights that were presumably violated. The "Considerations of the Court" are comprised of the following four sections, and they do not mention such rights either: "*B.1 Interpretation of the right to collective property of the indigenous peoples in this case"; B.2 The failure to recognize the right to collective property of the Kaliña and Lokono indigenous peoples"; B.3 Nature reserves in the traditional territory", and "B.4 The right to collective property in relation to the mining concession within the Wane Kreek Nature Reserve."*

[11] *Case of the Kaliña and Lokono Peoplesv. Suriname, supra*, para. 267.

20. Also, the four main disputes described in paragraph 127 do not mention political rights or Article 23,[12] and the 109 paragraphs of these sections do not include any terms that would attempt to provide grounds for the alleged violation of Article 23:

a) Paragraph 126: "[…]the Court considers it important to emphasize that, although the parties have not argued the violation of Article 23 of the Convention during the proceedings before this Court, it finds it pertinent to apply the *iura novit curia* principle." In other words, it records the decision to consider a violation that has not been alleged by the parties, but does not explain how this violation has been committed.

b) Paragraph 196: "In this regard, the Court recalls that Article 23 of the American Convention establishes that everyone must enjoy the rights and opportunities "to take part in the conduct of public affairs […]." In this sense, the participation of the indigenous communities in the conservation of the environment is not only a matter of public interest, but also part of the exercise of their right as indigenous peoples "to participate in decision-making in matters which would affect their rights, […] in accordance with their own procedures and […] institutions" (*supra* paras. 178 and 180)." Thus, there is an attempt to identify the "right to take part in the conduct of public affairs" with the right of the indigenous peoples to take part in the adoption of decisions on matters that affect their rights, without providing even the most basic grounds for this. It is evident that these are two different matters.

c) Paragraph 197: "the absence of explicit mechanisms that guarantee the access, use and effective participation of the Kaliña and Lokono indigenous peoples in the conservation of the said nature reserves and the benefits these reserves yield constitutes a violation of the obligation to adopt the necessary provisions to make such measures effective in order to ensure the rights to collective property, to cultural identity, and to political rights, to the detriment of the Kaliña and Lokono peoples." The failure to provide the grounds for the supposed equivalence to political rights continues.

d) In paragraph 198 (the sole paragraph in the section entitled "Conclusion on the restrictions in the nature reserves"), political rights are once again included without any grounds: "In sum, the Court finds that the State has violated the victims' rights to collective property, cultural identity and participation in public matters, mainly by preventing their effective participation, and the access to part of their traditional territory and natural resources, in the Galibi and Wane Kreek nature reserves, as well as by failing to guarantee, effectively, the traditional territory of the communities that has been affected by the environmental degradation within the Wane Kreek Nature Reserve, which constitutes a violation of Articles 21, 2 and 23 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kaliña and Lokono peoples and their members."

e) Paragraph 202: "Furthermore, the Court reiterates that Article 23 of the American Convention establishes that: "[e]very citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs […]." Similarly, Article 18 of the

[12] "Based on the above, in light of the arguments of the parties, the Court finds that the violations that have been alleged relate to four main disputes: (a) the failure to recognize the right to collective property and the absence of delimitation, demarcation and land-titling of the ancestral lands of the Kaliña and Lokono indigenous peoples; (b) the granting of land titles and leases to non-indigenous persons within the territory claimed by the Kaliña and Lokono peoples; (c) the adverse effects on use and enjoyment of the parts of the nature reserves that fall within the alleged traditional territories, and (d) the absence of effective participation, by means of a consultation process, with regard to the mining concessions within one of the nature reserves in the ancestral territory." *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 127.

United Nations Declaration on the Rights of Indigenous Peoples establishes that "[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives […]," and the pertinent part of Article 32 stipulates that "States shall consult and cooperate in good faith […] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the […] utilization or exploitation of mineral […] resources." In this case, there is evident confusion between "to take part *in the conduct of public affairs*" and Articles 18 and 32 of the Declaration on the Rights of Indigenous Peoples relating to participation *in matters which would affect their rights and the obligation of States to "consult […] prior to the approval of any project affecting their lands*."

f) Paragraph 203: The following paragraph enunciates, but without providing any grounds, the presumed equivalence between the right to participation and consultation derived from the right to property, and the right to participate in the conduct of public affairs. Thus, it indicates: "Consequently, in order to ensure the use and enjoyment of the right to indigenous collective property recognized in Articles 1(1) and 21 of the Convention, in relation to the utilization or exploitation of natural resources in their traditional territory, the State must, for the effects of this case, put in place mechanisms for the effective participation of the indigenous peoples using procedures that are culturally adapted to the decision-making of such peoples. This is not only *a matter of public interest*, but also forms part of the exercise of *their right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions, in relation to Article 23 of the American Convention* (*supra* para. 196)." No explanation is given as to why "*the conduct of public affairs*" would be equivalent to participation in decisions relating to *private* property of a collective nature. Nor is it explained why matters relating to *private* property or to any of its implications would be a "*matter of public interest*."

g) The paragraph containing the final conclusion in this regard (para. 230) mentions the presumed violation of Article 23, but the only grounds included refer to Article 21 concerning private property, and not to the right to take part in the conduct of public affairs recognized in Article 23, which has a very different meaning and content.

21. The remaining mentions of Article 23 are contained in the chapter on reparations (VII) and evidently refer to the considerations in the chapter on merits (VI) without adding any reasoning in this regard (paras. 278, 295 and 304). To the contrary, when the grounds for the alleged violations are described, there is merely a reference to "the lack of effective participation in relation to the exploitation project within one reserve" (para. 278-c) or to "the lack of mechanisms that ensure effective participation, by a consultation process" (para. 304-d).

22. The foregoing reveals that, on this aspect also, the conclusion reached in the Sarayaku case and transcribed above (*supra,* para. 13) with regard to the presumed violation of Articles 13 and 23 is also applicable: "*the Court considers that, in this case, the facts have been sufficiently analyzed and the violations conceptualized under the rights to communal property, consultation and cultural identity of the Sarayaku People, in the terms of Article 21 of the Convention, in relation to Articles 1(1) and 2 thereof; accordingly, it will not rule on the alleged violation of those provisions*."

23. Consequently, it is not in order to declare a violation of Article 23 ofthe Convention, but rather sufficient to declare the violation of Article 21 (Right to Property).

IV. Conclusions

24. In conclusion:

a) It is not in order to declare that Articles 3, 13 and 23 ofthe American Convention have been violated;

b) It is sufficient to declare the violation of Article 21 (Right to communal property), and the consequent rights to recognition of legal status*[personería jurídica]*and to consultation and cultural identity, and Article25 (Right to Judicial Protection) ofthe American Convention.

25.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary