PARTIALLY DISSENTING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN REGARD TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF SALVADOR CHIRIBOGA V. ECUADOR, OF MARCH 3, 2011

1. I have concurred with the majority of the members of the Court in the adoption of all the points covered in the Judgment of preliminary objections and the merits in the *Case of Salvador Chiriboga*, of May 6, 2008. Now, I agree with several points of this judgment on reparations, approved March 3, 2011, yet I disagree in some. Other colleagues who participated in this order have also agreed in this same sense.

2. I want to emphasize, as I have done in other cases, that my reservations or disagreements do not imply neglect or rejection of the valid reasons provided by those who hold different views. I leave unmentioned - as I've always done, over many years - the majority decision of the Court and the insights of its members, which I have always valued and respected.

3. I have no doubt (as evinced by my participation in the judgment on preliminary objections and the merits) about the violation to the right to property, enshrined in Article 21 of the Convention, to the detriment of the victim in this case. A violation occurred. This is evident. It is reprehensible. It was therefore brought before this Court and should be grounds for conviction in the judgment on reparations.

4. I also have no doubt about the legitimacy of repairing the violation through a just compensation - among other measures - as is clear from Article 21(2), in relation to Articles 63(1) and 1(1) of the Convention, and as was ordered by the Court in the aforementioned decision of May 6, 2008.

5. A patrimonial reparation, in the form of a just compensation for the victim, without enriching or impoverishing her - as has been established by the jurisprudence of the Inter-American Court -, is the natural and customary manner for responding to the violation the right to private property, regarding the use and enjoyment of assets, which in this case include tangible property, real estate, affected by measures of expropriation for social interest.

6. The amount of compensation for damages comes from an assessment that is usually based on the value of the asset in question, established with support on objective factors that provide reasonable certainty. To this amount, it is necessary to add other charges such as those relating to interest incurred through the passage of time without satisfying the affected right. In this sense, the appreciation of the value of an asset often presents problems of a lesser degree than those inherent to the assessment for indemnification of assets of another nature, such as life, integrity, and freedom.

7. It is highly desirable that a dispute of this nature leads to an agreed solution, in good faith and with equity, between the victim and the State being accused of a violation and has actually committed it. It entails a regular space for a joint solution, both in what regards the very recognition of a violation as well as in regard to the compensation due. In other cases the agreement between the parties is irrelevant. In these, however, it is the desirable and reasonable option.

8. In the hypothesis of reference, the agreement should have specified the amount of compensation due by the State - who is undoubtedly obligated to provide it - and in favor of the victim - who is unquestionably the creditor of this benefit.

9. The Inter-American Court sought to encourage such an agreement, as seen in operative paragraphs 4 and 5 of the Judgment of May 6, 2008. In this sense, it brought about the valuation of the property by a competent third party designated for this purpose, who deserved that the parties be in conformity and who would take into account the extremes that needed to be considered for this purpose, established in the judgment on the merits of the Court. The search for a joint solution has taken longer than was initially expected.

10. The valuations performed before the proceeding began before the Inter-American Court - including those presented to national authorities - and in the course of this process, show

profound differences. These concern both the characterization of the nature and use of the property (which affects its value for purposes of compensation) and the numbers drawn from the examination carried out by the various experts who participated. In this regard, paragraph 63referred judgment is particularly illustrative in regard to this vote.

11. Accordingly, the Court has not been provided with clear, sufficient, or accepted elements of analysis by the litigants. Moreover, the final determination concerns the responsibility and mission of the Tribunal, "the expert of experts," and is not overruled by the opinion of the experts or in the more or less automatic adoption of a sort of "average" between numbers that are distant one from another, with respect to the basis and its amount.

12. The Court, which has already expressed that it has the "power to verify whether (the) agreement (which eventually was reached by the State and the representatives of the victim) is consistent with the American Convention on Human Rights," was finally disagreed upon, requiring it to provide full reparation and to adopt a decision without the support that would have existed with the decision of the parties and the agreement (if it were relevant) of the opinion of experts.

13. As such, the need arose to resolve in equity, pursuant to that mentioned in paragraph 84 of the Judgment of March 3, 2011. However, the consequences of the implementation of equity to a problem that ideally should have been resolved in another manner, qualitatively and quantitatively - which could not be reached, as has already stated - divided the opinion of the judges and now explains the reason for separate considerations and opinions.

14. In my opinion, equity - justice in the case, is threatened by the nature of the case - in the case *sub judice*, there is a sharper consideration of the set of standards that explicitly or implicitly are enshrined in the Articles 21(1), 21(2), 32(2), and 63(1) of the Convention, as there is - always protecting fairness - the need to move between the wide space that exists between numbers that are very different and very distant from each other. It is necessary to find, in this wide space, a number that is reasonable for the scope of the objective sought by the Court at this time.

15. I must emphasize, to synthesize the reading of this particular opinion, to which I am not discussing, in any way, the terms of the judgment on the merits, or reviewing or rereading its terms. This judgment said what it needed to say about the formal legality of the expropriation, the formal legality of the process, the existence of a cause of action based on public or social interest, and other extremes of its incumbency. What I seek - to my knowledge and belief - is to infer from the Convention and the Judgment on the merits the basis for the identification of a reasonable amount as compensation.

16. The Court has decided, by a majority vote, what that number is. I shall not pose another, but I shall state that in my opinion the amount specified in the judgment of March 3 could have been more reasonable and thus provide a more equitable solution to the obvious problem that arises regarding the tension between the right to a person's private property and the social expectation of the community for whose benefit the expropriation was made. Both objectives are plausible. It is possible to head to them, especially when it entails operating with equity in the absence of conclusive evidence of another nature.

17. I think that the Court itself has considered some implications of the decision, which must be fulfilled by the Ecuadorian State, and perhaps more specifically - in practical terms - by the community of Quito, which now faces two overriding purposes: to carry out the ecological project that will benefit the health of the community and to provide the compensation that is due - with full justification, because it stems from the infringement of an individual right - that of the victim in this case.

18. I say that the Court has considered in some way - by implication - the circumstances in which it operates and the consequences that should be brought about by its judgment, in that it allowed the State to pay the compensation within five years, without accruing new interest charges due to this modality of payment. I do not believe that it would have been resolved in this way had the Court not considered the existing tension between the rights sought to be respected and the difficulty of making a single payment, or covering the payment in a shorter period or with interest accrued over time, of such a large amount (given the circumstances presented here), which perhaps would weigh very heavily on the

finances of the community of Quito and in this sense probably weighs on the extent of the objective behind the social interest.

19. I shall not omit to mention -using my memory as opposed to specific information regarding the jurisprudence of the Court- that this declaration of a violation of the right to private property is the highest it has been over a period of thirty years. Never before has a violation been declared that comes close to that amount even in cases of extrajudicial killings (of one or many persons, or massacres which destroy the lives of tens or hundreds of human beings), nor in cases of torture and enforced disappearances.

20. Of course, the consideration mentioned in the previous paragraph - which inspired some of my concerns upon studying the case and meditating over the judgment - does not in any way intend to question the existence or apparent violation of a right no less respectable and protected than any other in the Convention or to put aside objective facts to assess the damage caused (those of which were not enough in this case, as there are none- nor could there be- at the time of review for purposes of compensation, regarding the loss of life, injury to integrity, the unjust suppression of freedom), nor reconsidering the text of Article 21 and the decision held in the judgment on the merits, which I subscribed.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary