

**CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE
JUDGMENT ON THE MERITS AND REPARATIONS IN THE
“MAYAGNA (SUMO) AWAS TINGNI COMMUNITY CASE”**

1. I have voted with the majority on the Court in the Judgment on the merits and reparations in the instant case, which finds that articles 21 and 25 of the American Convention on Human Rights were violated to the detriment of the Mayagna Awas Tingni Community. Before arriving at this decision, the Court carefully examined the arguments of the petitioners, who were represented before this Court by the Inter-American Commission on Human Rights. It also examined the position of the State, which explicitly acknowledged the rights of the Mayagna (Sumo) Awas Tingni Community and its members (par. 152 of the Judgment), the evidence offered at the hearing and other information in the case file. Building on this foundation, the Court has, in my view, correctly interpreted Article 21 of the American Convention on Human Rights.

2. When exercising its contentious jurisdiction, the Inter-American Court is duty-bound to observe the provisions of the American Convention, to interpret them in accordance with the rules that the Convention itself sets forth and those that can be applied under the legal regime governing international treaties, as set forth in the Vienna Convention on the Law of Treaties, of May 23, 1969. It must also heed the principle of interpretation that requires that the object and purpose of the treaties be considered (Article 31(1) of the Vienna Convention), referenced below, and the principle *pro homine* of the international law of human rights –frequently cited in this Court’s case-law- which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement.

3. Article 29 of the American Convention, which concerns the Convention’s interpretation, states that no provision of the Convention shall be interpreted as “restricting the exercise or enjoyment of any right or freedom recognized by virtue of the laws of any State Party (...).” In other words, even assuming, for the sake of argument, that the Convention contained provisions that restricted or limited pre-existing rights, which it does not, those persons protected under the legal regime that the Convention establishes would not forfeit the freedoms, prerogatives or authorities they have under the laws of the State to whose jurisdiction they are subject. The rights, prerogatives and authorities recognized under domestic laws are not supplanted by Convention-recognized rights; instead, they are adjusted to conform to the rights recognized under the Convention, or are added to an ever-growing body of human rights.

4. Article 31(1) of the Vienna Convention on the Law of Treaties provides as follows: “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.” In this regard, the object and purpose of the American Convention on Human Rights are to uphold human dignity and recognize the demands that the protection and fulfillment of the human person pose, to articulate attendant obligations, and to provide juridical instruments that preserve that human dignity and meet those demands. When examining the ordinary meaning of the terms of the treaty now being applied –namely, the American Convention-, one has

to consider the scope and meaning –or scopes and meanings- that the term “property” has in the countries of the Americas.

5. In its Advisory Opinion OC-16/99 (*The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process*) the Inter-American Court of Human Rights held 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” (par. 113). It cited the International Court of Justice, which found 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). This is precisely what the Inter-American Court has done in the judgment it delivered on the instant case.

6. Various international instruments on the life, culture and rights of indigenous peoples call for explicit recognition of their legal institutions, one of them being the concepts of property once and still prevalent among them. The review of these texts was informed by a wide array of beliefs, experiences and requirements. The finding was that the documents were legitimate and that the land tenure systems must be respected. It necessarily follows, then, that those systems must be recognized and protected. In the final analysis, the individual rights of indigenous persons and the collective rights of their peoples fit into the regime created by the more general instruments on human rights that apply to all persons, as illustrated by the texts of the more specific instruments for which there exists an ever broader and more robust consensus. This information is useful, if not indispensable, for an interpretation of those Convention provisions that the Court must apply.

7. Geneva Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries was adopted by the 76th General Conference of the International Labour Organisation (Geneva, 1989) out of a concern for the survival of indigenous and tribal peoples’ cultures and the institutions that their cultures have produced and protect. It provides that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” (Article 13(1)). The Convention also provides that “[T]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.” (Article 14(1)).

8. The Draft Declaration on Discrimination against Indigenous Peoples, prepared by the United Nations Economic and Social Council’s Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994) makes clear reference to these very same issues and sets the standards that the international juridical community is to observe in matters bearing upon indigenous peoples and the members of their communities. Article 4 stipulates the following: “Indigenous peoples have the right to maintain and strengthen (...) their legal systems (...)”. Article 25 provides that “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.” In Article 26, the Draft

Declaration recognizes indigenous peoples' right to "own, develop, control and use the lands and territories," and adds the following: "This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems (...) and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights."

9. The Proposed American Declaration on the Rights of Indigenous Peoples, which the Inter-American Commission on Human Rights approved on February 27, 1997, speaks to the existence, relevance and observance of the individual and collective rights of indigenous peoples. It provides the following: "Indigenous peoples have the right to the legal recognition of the varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and properties." (Article XVIII.1). It further states that indigenous peoples "have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood." (*Ibid.*, par. 2).

10. Various bodies of law within the Ibero-American world contain similar provisions, informed by the very same historical and cultural experience. A case in point is the Constitution of Nicaragua, the country to whose jurisdiction the Mayagna (Sumo) Awas Tingni Community is subject. That community is on Nicaragua's Atlantic Coast. Under the heading "Rights of the Atlantic Coastal Communities," that Constitution stipulates that: "The State recognizes the communal land-tenure systems of the Atlantic Coast communities. It also recognizes their right to enjoy, use and exploit the waters and forests on their communal lands." This recognition must be taken into account when interpreting and applying the American Convention, in keeping with the Convention's Article 29(a).

11. When examining this case, the Court considered the scope of Article 21 of the American Convention. Under the title "Right to Property," that article provides that "Everyone has the right to the use and enjoyment of his property." When the Court examined this question, it had before it the *travaux préparatoires* of the Convention. There one can trace the evolution of the language of Article 21 to its present-day wording. Originally, the article was to speak of the right to private property, specifically. Later, the proposed language changed until the authors finally settled on the wording we have today: "the right to the use and enjoyment of [one's] property." The language in which this right is framed was meant to accommodate all subjects protected by the Convention. Obviously, there is no single model for the use and enjoyment of property. Every people, according to its culture, interests, aspirations, customs, characteristics and beliefs, can institute its own distinctive formula for the use and enjoyment of property. In short, these traditional concepts have to be examined and understood from the same perspective.

12. A number of countries in the Americas are home to indigenous ethnic groups whose ancestors –this hemisphere's aborigines- built legal systems that predate the conquest and colonization and that are to some extent still in effect. These ethnic groups established special *de facto* and *de jure* relationships with the land that they possessed and from whence they obtained their livelihood. Since the conquest, their legal institutions –which reflect their framers' way of thinking and have the full force of law- have withstood countless attempts to undermine them and have managed to survive to this day. In a number of countries, these indigenous legal institutions have been adopted into the national legal systems and are backed by specific

international instruments that assert the lawful interests and traditional rights of the original inhabitants of the Americas and their descendents.

13. Such is the case with the indigenous property system, which does not preclude other forms of land ownership or tenure that are the product of differing historical and cultural processes. Indeed, it and the other forms of property and land tenure fit into the broad and pluralistic universe of rights that the inhabitants of various American countries enjoy. This set of rights has spread because of shared basic beliefs --the core idea of the use and exploitation of goods--, although there are significant differences as well --especially apropos the final disposition of those goods. But, taken together, these laws and rights are the property system that most of our countries have in common. To ignore the idiosyncratic versions of the right to use and enjoy property, recognized in Article 21 of the American Convention, and to pretend that there is only one way to use and enjoy property, is tantamount to denying protection of that right to millions of people, thereby withdrawing from them the recognition and protection of essential rights afforded to other people. Far from ensuring the equality of all persons, this would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights.

14. In its analysis of the matter subject to its jurisdiction, the Inter-American Court regarded the rights to use and enjoy property, protected under Convention Article 21, from a perfectly valid perspective, that of the members of the indigenous communities. In my opinion, the approach taken for purposes of the present judgment does not in any way imply a disregard or denial of other related rights that differ in nature, such as the collective rights so frequently referenced in the domestic and international instruments that I have cited in this opinion. It must be recalled that individual subjective rights flow from and are protected by these community rights, which are an essential part of the juridical culture of many indigenous peoples and, by extension, of their members. In short, there is an intimate and inextricable link between individual and collective rights, a linkage that is a condition *sine qua non* for genuine protection of persons belonging to indigenous ethnic groups.

15. During the hearing held to receive evidence on the merits of the case that the Court has now decided, opinions were proffered that alluded directly to this very point. In his verbal opinion, summarized in the Judgment, expert witness Rodolfo Stavenhagen Gruenbaum pointed out that "(i)n certain historical contexts, the rights of the human person can be fully guaranteed and exercised only by recognizing the rights of the collectivity and of the community to which that person has belonged since birth and of which he is part, a community that affords him the elements necessary to be able to feel self-fulfilled as a human being, which also means a social and cultural being."

16. In the history of the countries of modern-day Latin America, collective expressions of indigenous law have been attacked time and time again. These attacks have directly violated the individual rights of the members of the communities and the rights of the communities as a whole. Another expert heard by the Court, Roque de Jesús Roldán Ortega, spoke to this aspect of the issue. In the opinion he gave before the Court, he stated the following: "The experience in Latin America with the communal property issue is very telling. For almost 180 years, the policy of the Latin American States was to liquidate forms of communal ownership and the autonomous forms of government of the indigenous peoples, to annihilate them not just culturally but physically as well."

17. The judgment of the Inter-American Court of Human Rights in the Mayagna (Sumo) Awas Tingni Community Case contributes to the recognition of certain specific juridical relationships that together make up the body of law shared by a good portion of the inhabitants of the Americas, a body of law being increasingly accepted by and recognized in domestic laws and international instruments. The topic of this judgment, and by extension the judgment itself, is at that point where civil laws and economic, social and cultural laws converge. In other words, it stands at that junction where civil law and social law meet. The American Convention, applied in accordance with the interpretation that it authorizes and in accordance with the rules of the Law of Treaties, must be and is a system of rules that affords the indigenous people of our hemisphere the same, certain protection that it affords to all people of the American countries who come under the American Convention's umbrella.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary