

Inter-American Court of Human Rights

Case of the Indigenous Community Yakye Axa v. Paraguay

Judgment of February 6, 2006

(Interpretation of the Judgment of Merits, Reparations and Costs)

In the case of the *Indigenous Community Yakye Axa*,

the Inter-American Court of Human Rights (hereinafter, "the Court", or "the Inter-American Court" or "the Tribunal"), composed of the following judges¹:

Sergio García-Ramírez, President;
Alirio Abreu-Burelli, Vice-President;
Oliver Jackman, Judge;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina-Quiroga, Judge;
Manuel E. Ventura-Robles, Judge, and
Diego García-Sayán, Judge,

also present,

Pablo Saavedra-Alessandri, Secretary, and
Emilia Segares-Rodríguez, Deputy Secretary;

pursuant to Article 67 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 59 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the following judgment on the request for interpretation of the Judgment on the merits, reparations and legal costs issued by the Court on June 17, 2005 in the case of Yakye Axa Indigenous Community (hereinafter "the request for interpretation") filed by the victims' representatives (hereinafter "the representatives") on October 14, 2005.

I

JUDGMENT ON THE MERITS, REPARATIONS AND COSTS

1. On June 17, 2005, the Court delivered the Judgment on the merits, reparations and costs in the instant case (hereinafter the "Judgment on the merits"), whereby the Court

HELD:

By seven votes to one,

1. the State violated the rights to fair trial and the right to judicial protection enshrined in Articles 8 and 25, respectively, of the American Convention on Human Rights, in relation with Articles 1(1) and 2 thereof, to the detriment of the members of

¹ Judge Diego García-Sayán informed the Court that, for reasons beyond his control, he would not be able to attend the deliberation and signing of this Judgment.

the Yakye Axa indigenous community, as held in paragraphs 55–119 of the [...] Judgment.

Judge Ramón Fogel-Pedroso issued a partially dissenting separate opinion.

By seven votes to one,

2. the State violated the right to property established in Article 21 of the American Convention on Human Rights, in relation with Article 1(1) and 2 thereof, to the detriment of the members of the Yakye Axa indigenous community, pursuant to paragraphs 123–156 of the [...] Judgment.

Judge Ramón Fogel-Pedroso delivered a separate dissenting opinion.

Unanimously,

3. the State violated the right to life established in Article 4(1) of the American Convention on Human Rights, in relation with Article 1(1) thereof, to the detriment of the members of the Yakye Axa indigenous community, pursuant to paragraphs 160–176 of the [...] Judgment.

By five votes to three,

4. there is no sufficient evidence to prove the violation of the right to life established in Article 4(1) of the American Convention on Human Rights to the detriment of sixteen members of the Yakye Axa indigenous community, pursuant to paragraphs 177–178 of the [...] Judgment.

Judges Alirio Abreu-Burelli, Antônio A. Cançado Trindade and Manuel E. Ventura-Robles issued separate dissenting opinions.

Unanimously,

5. [the] Judgment constitutes in and of itself a form of reparation in accordance with paragraph 200 [thereof].

AND, UNANIMOUSLY, THE COURT HELD:

6. the State must identify the traditional territory of the members of the Yakye Axa indigenous community and transfer it to them for no compensation within three years from notification of the [...] Judgment, pursuant to paragraphs 211–217 of the [...] Judgment.

7. as long as the members of the Yakye Axa indigenous community have no territory of their own, the State must provide them with the essential goods and services needed to subsist, pursuant to paragraph 221 of the [...] Judgment.

8. the State must establish a fund to be used exclusively to purchase the lands to be transferred to the members of the Yakye Axa indigenous community within one year from the notification of the [...] Judgment, pursuant to paragraph 218 thereof.

9. the State must establish a program and a community development fund pursuant to paragraphs 205 and 206 of the [...] Judgment.

10. within a reasonable time, the State must incorporate into its domestic law the legal, administrative and other necessary measures to guarantee the effective enjoyment of the right to property of indigenous people, pursuant to paragraph 225 of the [...] Judgment.

11. the State must publicly acknowledge its liability within one year from notification of the [...] Judgment, pursuant to paragraph 226 thereof.

12. the State must publish in the Official Gazette and another nationwide newspaper at least once within one year from notification of the [...] Judgment, both the section entitled “Proven Facts” and the operative paragraphs 1 to 14 thereof. In

addition, the State must finance the radio airing of [the] Judgment, pursuant to paragraph 227 thereof.

13. the State must make payments to compensate for pecuniary damages, costs and expenses within one year from notification of the [...] judgment, pursuant to paragraphs 195 and 232 of [the] Judgment.

14. the Court will monitor compliance with [the] Judgment and it will conclude this case once the State has fully complied with the provisions therein. Within one year from notification of [the] Judgment, the State must render a report account to the Court concerning the measures adopted to fulfill the Judgment, pursuant to paragraph 241 thereof.

2. The Judgment on the merits was notified to the parties on July 14, 2005.

II

JURISDICTION AND COMPOSITION OF THE COURT

3. Article 67 of the Convention, states that:

[t]he judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

4. Pursuant to the above-mentioned article, the Court has jurisdiction to interpret its judgments and, when considering the request for interpretation, it must, whenever possible, be composed of the same judges who delivered the judgment of which the interpretation is being sought (see Article 59(3) of the Rules of Procedure). In this case, the Court is composed of the same judges who delivered the Judgment on the merits of which the representatives have requested an interpretation².

III

INTRODUCTION OF THE REQUEST FOR INTERPRETATION AND ITS PURPOSE

5. On October 14, 2005, the representatives submitted a request for interpretation of the Judgment on the merits, in accordance with Article 67 of the Convention and Article 59 of the Rules of Procedure.

6. The representatives' request for interpretation made reference to two aspects: (a) the provisions in the sixth operative paragraph of the Judgment on the merits, which, according to them, "orders the State to return the territory historically owned by the members of the [C]ommunity, whilst at the same time it seems to direct that the area in issue has to be 'identified'; and (b) the manner in which the State should fulfill its obligation under the eighth operative paragraph of the Judgment on the merits, to establish a fund for the sole purpose of acquiring the territories to be conveyed to the members of the Yakye Axa Community, "since the

² Even though *ad hoc* Judge Ramón Fogel-Pedroso did not participate in the discussions leading to this Judgment at the Court's headquarters in San José, Costa Rica, he had been consulted prior to deliberation and voting, and agreed with the contents of this interpretation judgment.

term within which to accomplish this is shorter than that given to identify, delimit, demarcate, title, and transfer for no consideration the lands[,] the price of which must be previously assessed."

IV PROCEEDINGS BEFORE THE COURT

7. On October 19, 2005, pursuant to Article 59(2) of the Rules of Procedure, and following instructions from the President of the Court, the Secretariat of the Court forwarded a copy of the request for interpretation to the Inter-American Commission of Human Rights (hereinafter "the Commission" or "the Inter-American Commission") and to the Government of Paraguay (hereinafter "the State" or "Paraguay"), inviting them to submit the written arguments they deemed appropriate no later than November 21, 2005. In addition, the State was reminded that, under Article 59(4) of the Rules of Procedure, "[the] request for interpretation shall not suspend the effect of the judgment."

8. On November 18, 2005, the State submitted its written arguments on the request for interpretation, stating, *inter alia*, that "it is not appropriate to alter the clear and express language of the [Judgment on the merits] through a request [...] that merely seeks an interpretation."

9. On November 22, 2005, the Inter-American Commission submitted its written arguments on the request for interpretation, arguing, *inter alia*, that the first issue addressed by the representatives "constitutes, strictly speaking, a claim for enforcement," whereas the second issue "addresses a valid doubt about how two parts of the judgment are supposed to be interpreted together with respect to its enforceability in the future."

V ADMISSIBILITY

10. The Court must now verify whether the terms of the request for interpretation comply with the applicable rules.

11. Article 67 of the Convention, states that:

[t]he judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

12. The relevant provisions of Article 59 of the Rules of Procedure establish as follows:

1. The request for interpretation, referred to in Article 67 of the Convention, may be made in connection with judgments on the merits or on reparations and shall be filed with the Secretariat. It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested.

[...]

4. A request for interpretation shall not suspend the effect of the judgment.

5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.

13. Under Article 29(3) of the Rules of Procedure, "Judgments and orders of the Court may not be contested in any way."

14. The Court is satisfied with the representatives filing the request for interpretation on October 14, 2005 within the term set forth in Article 67 of the Convention (*supra* para. 11), since the Judgment on the merits was notified to the representatives on July 14, 2005.

15. In addition, as previously decided by this Court, a request for interpretation must not be used as a means for challenging a judgment, but it may only seek to clarify the meaning of a judgment when one of the parties argues that the language of its operative paragraphs or its considerations lacks clarity or precision, provided that such considerations have a bearing on the operative paragraphs; hence, no party may seek to alter or annul the judgment through a request for interpretation.³

16. In addition, the Court has held that the request for interpretation of a judgment may not involve raising issues of fact or of law already asserted at the appropriate stage of the proceedings and on which the Court has entered a decision.⁴

17. In analyzing whether the representatives' request for interpretation is admissible and, if appropriate, in order to clarify the meaning or scope of the Judgment on the merits issued on June 17, 2005, the Inter-American Court will now consider the two issues raised by the representatives separately (*supra* para. 6).

VI
ON THE TERRITORIES TO IDENTIFY
(SIXTH OPERATIVE PARAGRAPH OF THE JUDGMENT ON THE MERITS,
REPARATIONS AND COSTS)

Arguments of the victims' representatives

18. The representatives argued that "throughout the proceedings held before the international courts, both the Inter-American Commission [and] the victims' representatives have asserted [...] that the lands claimed by the Yakye Axa

³ Cf. *Case of the Serrano-Cruz Sisters. Request for Interpretation of the Judgments on the Merits, Reparations and Costs* (Art. 67 of the American Convention on Human Rights). Judgment of September 9, 2005. Series C No. 131, para. 14; *Case of Lori Berenson-Mejía. Request for Interpretation of the Judgment on the Merits, Reparations and Costs* (Art. 67 of the American Convention on Human Rights). Judgment of June 23, 2005. Series C No. 128, para. 12, and *Case of Juan Humberto Sánchez. Request for Interpretation of the Judgment on Preliminary Objections, Merits and Reparations*. (Art. 67 of the American Convention on Human Rights). Judgment of November 26, 2003. Series C No. 102, para. 14.

⁴ Cf. *Case of the Serrano-Cruz Sisters. Request for Interpretation of the Judgment on the Merits, Reparations and Legal Costs*, *supra* note 1, para. 15; *Case of Lori Berenson-Mejía. Request for Interpretation of the Judgment on the Merits, Reparations and Costs*, *supra* note 1, para. 11, and *Case of Juan Humberto Sánchez. Request for Interpretation of the Judgment on Preliminary Objections, Merits and Reparations*, *supra* note 1, para. 40.

Community is the Estancia Loma Verde estate, which assertion was not challenged by the State and was even admitted by the [...] Court in the 'Proven Facts' section of the Judgment [on the merits]. However, operative paragraph [six] orders the State to return the traditional habitat of the members of the [C]ommunity, while at the same time it seems to require that the territory at issue be 'identified'."

Arguments of the Inter-American Commission

19. The Commission argued that:

a) the first question of the representatives "does not raise doubts concerning the scope of the [J]udgment [on the merits], about which the Court has been clear in holding that it had no power to identify the territory to be transferred;"

b) the representatives' question concerns a matter of "purpose", as they consider that the State, in fulfilling its duty to identify the territory to be transferred to the members of the Yakye Axa Community, must base itself on "the territory currently known as Estancia Loma Verde." Thus, according to the Commission, the position asserted "involves, strictly speaking, a claim for fulfilment," and

c) the answer to the question "is not" *a priori* "essential", since "from the Inter-American court findings and the assertions by the parties to the proceedings it follows that, in order to faithfully fulfill its duty to transfer the lands, the State must primarily consider the lands that correspond, among others, to Estancia Loma Verde." However, if the Court finds that there is a controversy as to the manner in which the Judgment on the merits is to be complied with, the Commission considers "that it would be particularly useful for the Court to clear up the issue." In such a case, "the Court's addressing the issue raised by the aggrieved party can only be beneficial for the efficacy of its judgment."

Arguments of the State

20. The State argued that:

a) "[i]t is not appropriate to alter the clear and express language of the [Judgment on the merits] by means of a request [...] that only seeks an interpretation. In view of the clarity of the [J]udgment [on the merits], it cannot be interpreted other way than as the [...] Court has;"

b) "[i]t is not true that the State has agreed to seize the Estancia [Loma Verde];"

c) "it has agreed to identify the territory of the [Yakye Axa Community], which is part of the E[nxet] ethnic group spread all over the Central Chaco[,] and to transfer for no consideration the tract of land necessary to house the

Community according to the number of members it consists of, pursuant to the Paraguayan Constitution," and

d) "we are taking steps towards obtaining [...] the indigenous community's acquiescence in the purchase of an estate within the same territory."

Considerations of the Court

21. The Court considers that the scope of the ruling in the Judgment on the merits is clear as to the transfer of ancestral lands to the Yakye Axa Community. However, in order to clear the representatives' doubts about this issue, the Court deems it convenient to establish the meaning of the sixth operative paragraph of the Judgment on the merits, whereunder the State must identify the ancestral territory of the members of said Community and convey such lands to them for no consideration.

22. The provisions in the sixth operative paragraph of the Judgment on the merits must be construed in the light of the Court's considerations included in other sections of the judgment, such as paragraphs 50(4) to 50(6), 137 to 154, and 211 to 217. In particular, paragraph 215 of the Judgment states that

it is not competent to determine the ancestral territory of the Yakye Axa Community, but it is within its powers to establish whether the State has respected and protected the right to the community property of its members, as it has done in the [...] Judgment [...]. For this reason, it is the State's duty to delimit, demarcate, title and transfer the lands pursuant to paragraphs 137 to 154 of the [...] Judgment.

23. Thus, the Inter-American Court has clearly established that it is the State's duty to identify the Community's territory and subsequently delimit, demarcate, title and transfer the lands, inasmuch as it is the State who has the technical and scientific means to carry out these tasks. However, as follows from the "Proven Facts" section of the Judgment on the merits, certain procedural steps have already been taken before the competent governmental entities to that end, which certainly must be taken into account by the State in identifying and measuring the lands to be transferred to the Yakye Axa Community. Likewise, the Court has recognized in paragraph 216 of the Judgment on the merits, that "possession [of] the ancestral territory is engraved in [the] historical memory [of the members of the Yakye Axa Community]," and throughout its process of sedentarization, the Community "adopted a particular identity, associated with a physically and culturally determined geographical area." Such historical memory and particular identity must be especially considered in identifying the land to be transferred to them.

24. In addition, as follows from the Judgment on the merits issued in the instant case, the Court has allowed for the possibility that, after carrying out the necessary steps, the competent governmental authorities establish that the Yakye Axa Community's ancestral lands correspond to all or part of one or more private properties. In effect, in such a case, paragraph 217 of the Judgment on the merits sets forth that the State "must assess the legitimacy, necessity and proportionality of the condemnation of the territories with the aim of achieving a legitimate goal in a democratic society," and to that end "it must take into account the Yakye Axa indigenous community's individual characteristics, values, customs and customary law."

25. The Court likewise anticipated that “[i]f, for objective and justified reasons, it is not possible to recover the ancestral territories of the members of the Yakye Axa Community, the State must convey them an alternative territories, to be selected in consultation with the Community, in accordance to their own rules for consulting and deciding, values and customs.”⁵ In this regard, it must be noted that, pursuant to paragraphs 144–149 of the Judgment on the merits, the fact that the Community’s ancestral territories are currently in private hands, is not in and of itself an “objective and justified” reason to impede the recovery of lands.

26. Thus, the Court clearly establishes that the task of identifying the Yakye Axa Community’s ancestral lands is the responsibility of Paraguay. However, in carrying out such task, Paraguay must comply with the provisions in the Court’s judgment, giving careful consideration to the values, uses, customs and customary laws of the members of the Community, which bind them to an specific territory. In addition, as regards to the transfer of such territories, in the event that after identifying them it transpires that they are in private hands, the State must evaluate the convenience of condemning them, taking into account how particularly important they are for the Community. Finally, provided there are objective and justified reasons that prevent the State from claiming the territories identified as traditionally belonging to the Community, it must convey them alternative lands, which will be selected in consultation with the Community. In either case, according to paragraph 217 of the Judgment on the merits, “the extension of the lands must be large enough to support and develop the Community’s way of life.”

27. Pursuant to the foregoing, the Court has established the meaning and scope of the sixth operating paragraph of the Judgment on the merits.

VII

TIME PERIODS FOR THE IDENTIFICATION OF THE TERRITORY AND FOR THE CREATION OF A FUND TO PROVIDE THE FUNDS FOR THE ACQUISITION THEREOF (EIGHTH OPERATIVE PARAGRAPH OF THE JUDGMENT ON THE MERITS, REPARATIONS AND COSTS)

Arguments of the representatives

28. Concerning the eighth operative paragraph of the Judgment on the merits, the representatives requested that the Court make clarifications regarding:

- a) “the basis to be considered for the budgetary estimate of the allocation of funds to the acquisition of or eventual compensation for the lands to be returned to the Yakye Axa [C]ommunity, since the time period to fulfill the

⁵ *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 217.

foregoing is shorter than the period established for the identification, delimitation, demarcation, titling and free transfer of the lands whose price should be previously budgeted," and

b) "how this obligation would be fulfilled considering the maximum time period of three years which was also set by the Court and within which the State should comply with [the transfer of the territory to the Community]."

Arguments of the Inter-American Commission

29. The Commission considered that the second question raised by the representatives "addresses a valid doubt about how two parts of the judgment are supposed to be interpreted together with respect to its enforceability in the future," and stated that:

a) "nothing prevents [...] the process of identification of the lands [, ...] which will facilitate the accurate estimate of the necessary monies for the Fund, [...] from being completed by the State within a year as from the date of notification of the [J]udgment [on the merits]. The other (two years) of the maximum time period allowed by the Court might be used, based on standards of necessity and usefulness, to fulfill the process of transfer of the territories to the injured party through their delimitation, demarcation, titling and material transfer," and

b) if the identification of the territory to be given to the Community was not made, the Commission considered that "it would be the State's responsibility to create the Fund in any case, with enough funds to ensure that, in due course, it will be able to [...]acquire the misappropriated territories and 'sufficient to guarantee that the Community may develop and keep its own life style.'"

Arguments of the State

30. For its part, the State considered that the representatives "have reques[ted] the [...] Court to replace the State as to the budgetary provisions it should make to determine the sum to be allocated" either to the acquisition of the lands from private owners or to the payment of a fair compensation to the injured parties in case of condemnation as the case may be. Furthermore, the State argued that, though it is within the jurisdiction of the Court "to hear and determine the interpretation of the American Convention as to whether a violation thereof was committed [...], and if such were the case, to impose sanctions, as it did in [the] Judgment [on the merits], it has no jurisdiction to determine 'how' the State which has been sanctioned [...] should comply wit[h] the provisions of such Judgment [on the merits]."

Considerations of the Court

31. The Court has verified that the second matter raised by the representatives in their request for interpretation poses a valid doubt, and therefore, it is admissible, and the Court now proceeds to examine it.

32. Paragraphs 215-217 of the Judgment on the merits rendered by the Court in the instant case provide that the State must identify the traditional territory of the Yakye Axa Community, delimit it, demarcate it, title and transfer said territory for

free to the Community within a maximum period of three years as from the date of notification of the Judgment on the merits.

33. In turn, paragraph 218 of the Judgment on the merits provides that, in order to comply with the foregoing,

The State, if necessary, should create a fund to be exclusively allocated to the acquisition of the lands to be given to the Yakye Axa Community, within a maximum period of one year as from the date of notification of the [...] Judgment, and which will be used either for the acquisition of the land from private owners or for the payment of a fair compensation to the injured parties in case of condemnation, as the case may be.

34. From the foregoing it is therefore inferred that the State has a number of obligations which conclude with the definite transfer of the traditional lands to the Yakye Axa Community. These State obligations, due to the very nature of the internal processing, are fulfilled sequentially: first, the territory of the Community should be identified, which, in turn, implies establishing borders and boundaries, as well as its size. Once the identification of the territory and the borders thereof has been completed, if such territory belongs to a private owner, the State should start the acquisition process or consider the convenience of condemning it, in accordance with paras. 217 and 218 of the Judgment on the merits. Should there be objective and well-founded reasons that prevent the State from returning back the territory identified as one the traditional territory of the Community, it should give the Community an alternative territories, which will be chosen upon the basis of a mutual agreement. Finally, whether the lands are condemned or chosen upon the basis of a mutual agreement, the State should issue the title deeds and transfer them to the Community both materially and formally. All these steps should be taken within a maximum period of three years.

35. In turn, if the territories belong to a private owner, the period of one year allowed for the creation of a fund to be allocated to the acquisition or condemnation thereof aims at securing the availability of sufficient funds by the State to acquire such lands, and thus, comply with the other obligations referred to in the foregoing paragraph.

36. It is to be desired that the State should identify the traditional territory of the Community before the creation of the Fund, so that the allocation of the money necessary for acquisition or eventual condemnation thereof be budgeted. Notwithstanding, if this were not possible, the State, pursuant to the Judgment on the merits, should create the Fund which will provide the money in any case, and set a sum which allows ensuring that the acquisition or condemnation process is not affected by the insufficiency of funds.

37. Pursuant to the foregoing, the Court has determined the meaning and scope of what has been set forth in the eighth operative paragraph of the Judgment on the merits.

VIII OPERATIVE PARAGRAPHS

38. Therefore,

THE INTER-AMERICAN COURT ON HUMAN RIGHTS

pursuant to Article 67 of the American Convention on Human Rights and Articles 29(3) and 59 of the Rules of Procedure

DECIDES:

Unanimously,

1. To determine the meaning and scope of what has been set forth in the sixth operative paragraph of the Judgment on the merits, reparations and costs, pursuant to para. 21-27 of this interpretation Judgment.
2. To determine the meaning and scope of what has been set forth in the eighth operative paragraph of the Judgment on the merits, reparations and costs, pursuant to para. 31-37 of this interpretation Judgment.

Judge Antônio A. Cançado Trindade informed the Court of the contents of his concurring opinion, which will be attached to this Judgment

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with the adoption of this Judgment which has been recently rendered by the Inter-American Court of Human Rights in the *Case of the Indigenous Community Yakye Axa v. Paraguay*, wherein the Court asserts the obligations of the respondent State with the Yakye Axa Community regarding "the definite transfer of the traditional territories to the Yakye Axa Community" (para. 34). I basically agree with the decision adopted by the Court and I highlight its consideration in that the possession of their traditional territories is "permanently" marked in the "ancestral memory" of the members of said Community, who have adopted "an identity of their own related" to their traditional territories; furthermore, "such ancestral memory and identity of their own should be particularly considered when identifying the territory to be given " (para. 23). Regarding such consideration, in this Opinion I feel obliged to express my personal line of reasoning as the basis of my position.

2. Firstly, I must stress the relevance which, in circumstances such as those of the *Case of the Yakye Axa Community*, I ascribe to the definite transfer of the lands to the members of such Community. The Court has determined in the exercise of a power which is inherent thereto and pursuant to the provisions of Article 63(1) of the American Convention on Human Rights. With said transfer in circumstances such as those of the *cas d'espèce*, the principle of the effectiveness of norms (*effet utile*) is met under the terms of Articles 21 and 22 of the American Convention.

3. It may be recalled that, as a matter of fact, in the leading case of the Community *Mayagna Awas Tingni v. Nicaragua* (Judgment of August 31, 2001), in the application filed before the Court, the Inter-American Commission of Human Rights (IACHR) claimed for the first time in the history of the Court, the lack of demarcation of the lands possessed by such Community, as well as the lack of an effective procedure in Nicaragua for the demarcation of such lands. The Court ordered in its Judgment the creation of "an effective mechanism for the delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, uses and customs" (operative paragraph No. 3). That judgment forms part of the specialized juridical bibliography and constitutes a landmark in the Court's jurisprudence regarding the question at issue..

4. Immediately afterwards, in the Case of *Moiwana Community v. Suriname* (Judgment of June 15, 2005), the victims' representatives argued that the violations of the right to property (Article 21 of the Convention) by the State are "continued", to the detriment of the "indigenous and tribal communities that have been forcibly displaced from their traditional lands," and that the State has not established the legal mechanisms for the victims to "assert and secure their rights of tenure" (para. 122). In turn, the Court, after establishing its jurisdiction to render judgment regarding "the continued displacement of the community from its traditional territories" (para. 126), stated that the failure to "carry out an effective investigation" of the events occurred in the *cas d'espèce* "has prevented the members of the Community from living once again in safety and peace in their ancestral lands" (para. 128).

5. In the same case, the Court stated its understanding that in the case of the members of indigenous communities "the mere possession of the land should suffice

to obtain official recognition of their communal ownership and the subsequent registration thereof" (para. 131). It further stated that the members of the Moiwana Community should be deemed "legitimate owners" of their "traditional lands," of which they have been deprived of this right to the present date as a consequence of the 1986 massacre and of the subsequent failure by the State to investigate those occurrences adequately (para. 134). The Court finally ordered that

"the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana Community in relation to their traditional territories, from which they were expelled, and provide for the members' use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation, and titling of said traditional territories, in the terms of paragraphs 209-211 of this Judgment" (operative paragraph No. 3).

6. Shortly afterwards, in the instant case of the *Indigenous Community Yakye Axa v. Paraguay* (Judgment of June 17, 2005), the victims' representatives claimed that "the right of the indigenous communities to the communal property ownership of their lands is made effective," *inter alia*, "through the State's obligation to delimit, demarcate and title the territory of the respective villages" (para. 121(d)). The Court, in turn, acknowledged the link of the "right to communal property of the indigenous communities over their traditional territories and the natural resources tied to their culture" with the term "goods" as stated in Article 21 of the Convention and gave value to the guarantee traditional expressions, customary law, the philosophy and the values of such communities (paras. 137 and 154), and ordered the State to "identify the traditional territory of the members of the *Indigenous Yakye Axa Community* and provide it free of charge" (operative paragraph No. 6).

7. I understand that the definite transfer of the lands to the members of the *Indigenous Yakye Axa Community* is a legitimate and necessary form of non-pecuniary reparation in the circumstances of the *cas d'espèce*, which the Inter-American Court has full authority to order in the light of the provisions of Article 63(2) of the American Convention. It is not just a matter of a mere *restitutio*, turning back to the vulnerable *statu quo ante* of the victimized Community, but also ensuring the *guarantee of non-repetition* of the particularly serious harmful events that led to the victims' displacement (and to the death of some of them).

8. The definite transfer of the communal lands has in the instant case consequences which are quite more far-reaching than one can *prima facie* anticipate, since, in the last resort, it is a question of survival of the cultural identity of the members of such Community. Only through such measure will their fundamental right to life *lato sensu*, including their cultural identity, be properly protected.

9. The *universal juridical conscience*, which, in my opinion, is the material source of all Law, has evolved in such a way as to recognize this urgent need. This is evidenced by the significant triad of the UNESCO Conventions, namely, the 1972 Convention on the Protection of the World Cultural and Natural Heritage; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; and, more recently, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

10. The 1972 UNESCO Convention in its Preamble warns that the deterioration or disappearance of any item of the cultural or natural heritage regrettably weakens the heritage of "all the nations of the world", since parts of the cultural or natural

heritage are of outstanding interest and therefore need to be preserved as “part of the world heritage of mankind as a whole”; hence the need to establish an “effective system of collective protection of the cultural and natural heritage of outstanding universal values.”

¹ The 2003 UNESCO Convention seeks to safeguard the *intangible cultural heritage* (to this end, it invokes the international instruments on human rights), defined as “the practices, representations, expressions, knowledge, skills (...) that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”²

11. The recent 2005 UNESCO Convention was preceded by its 2001 Universal Declaration on Cultural Diversity, which defines cultural diversity as the *common heritage of humanity*, and states its aspiration to greater solidarity on the basis of recognition of cultural diversity, of “awareness of the unity of humankind.”³ Following the 2001 Declaration, the 2005 Convention, adopted (on October 20, 2005) after extensive debates,⁴ reaffirmed the definition of cultural diversity as the *common heritage of humanity*, explaining that “culture takes diverse forms across time and space” and this diversity is embodied “in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity.”⁵ The Convention added that cultural diversity can only be protected and promoted through the safeguard of human rights.⁶

12. In my opinion, the universal juridical conscience has evolved towards a clear recognition of the relevance of cultural diversity for the universality of human rights and vice-versa. It has further developed toward the *humanization* of International Law and the creation, at the beginning of the XXI century, of a new *jus gentium*, a new International Law for humankind, and the aforementioned triad of UNESCO Conventions (of 1972, 2003 and 2005) are, in my opinion, one of the many contemporary manifestations of human conscience in this respect.⁷

13. One cannot live in constant exile and displacement. Human beings share a spiritual need for roots. The members of traditional communities attribute particular

¹ *Consideranda* 1 and 5.

² Preamble and Article 2(1).

³ Preamble and Article 1 of the 2001 Declaration.

⁴ Cf., e.g., UNESCO/General Conference, document 33-C/23 of August 4, 2005, pp. 1-16, and Attachments; and cf. G. Gagné (ed.), *La diversité culturelle: vers une Convention internationale effective?*, Montréal/Québec, Éd. Fides, 2005, pp. 7-164.

⁵ Preamble, *consideranda* 1, 2 and 7 of the 2005 Convention.

⁶ Article 2(1) of the 2005 Convention. Cf., regarding, in general, v.g., A.Ch. Kiss and A.A. Cançado-Trindade, “Two Major Challenges of Our Time: Human Rights and the Environment”, in *Human Rights, Sustainable Development and Environment* (Brasilia Seminar of 1992, ed. A.A. Cançado-Trindade), 2nd ed., Brasilia/San José de Costa Rica, IIDH/BID, 1995, pp. 289-290; A.A. Cançado-Trindade, *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brasil, S.A. Fabris Ed., 1993, pp. 282-283.

⁷ Cf. A.A. Cançado Trindade, “General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*”, *Recueil des Cours de l’Académie de Droit International de la Haye* (2005), chapter XIII (in print).

value to their land, which they consider belongs to them, and alternatively, they “belong” to their land. In the instant case, the definite transfer of the lands to the members of the *Yakye Axa Community* is a necessary measure of reparation, which further protects and preserves their own cultural identity and, in the last resort, their fundamental right to life *lato sensu*.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary