

**Order of the
Inter-American Court of Human Rights
of July 5, 2004
Provisional Measures regarding Colombia

Matter of Pueblo Indígena de Kankuamo**

HAVING SEEN:

1. The July 2, 2004 brief of the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") where, pursuant to Article 63(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 25 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), it submitted to the Court a request seeking an order of provisional measures to Colombia (hereinafter "the State" or "Colombia"), to protect the lives and the physical and cultural identity of the members of the Kankuamo indigenous people (hereinafter "the Kankuamo indigenous people") and their special relationship with their ancestral territory, in connection with a petition filed with the Commission by the *Corporación Colectivo de Abogados "José Alvear Restrepo"* and the *Organización Nacional Indígena de Colombia* (ONIC) (hereinafter "the petitioners").
2. The Commission based its arguments on the following allegations of fact:
 - a) the Cogí, Arhuacos, Arsarios and Kankuamo indigenous peoples live in the Sierra Nevada de Santa Marta in the Caribbean region of Colombia; their territory spans portions of the departments of Magdalena, La Guajira and Cesar;
 - b) the Kankuamo indigenous people live on the southeastern slope of the Sierra Nevada de Santa Marta and number approximately six thousand;
 - c) the Kankuamo indigenous people, who once were considered extinct, have undergone a process of cultural rebuilding and of recovering their linguistic, religious and social roots;
 - d) Colombia legally recognized the territory of the Kankuamo in 2003, through resolution No. 012 of April 10, 2003, issued by the former Colombian Agrarian Reform Institute (INCORA); that resolution created the Kankuamo Indigenous Reserve, consisting of 40,000 hectares and composed of twelve communities: Atánquez, Chemesquemena, Guatapurí, Las Flores, Pontón, Mojado, Ramalito, Rancho de la Goya, Los Háticos, La Mina, Murillo and Rioseco;

- e) the Kankuamo indigenous people regard their territory as the foundation upon which they construct their political organization, grow their development and build their ethnic and cultural identity. For the Kankuamo, the Sierra Nevada de Santa Marta is sacred land;
- f) according to information supplied by the petitioners, the Kankuamo indigenous people's geographic location exposes its members to constant acts of violence and threats on the part of outlaw armed groups operating in the area. Governors and the leaders of indigenous village governments have been the victims of threats, assaults and assassinations. A number of families have had to move to protect their lives; food supplies are being cut off and indigenous youth run the risk of being impressed into the service of these armed groups;
- g) some 166 Kankuamo were killed by armed groups between 1993 and 2003, but by August 2003 the number killed in that year alone was at 44;
- h) Colombia's Ombudsman's Office issued Resolution No. 24 on September 18, 2002, where it set forth its views on the systematic human rights violations that armed elements were committing against indigenous peoples in the Sierra Nevada de Santa Marta, the oppressive control that these elements exercised over the indigenous peoples' territories and the forced displacements that indigenous peoples in the Sierra Nevada de Santa Marta were forced into by these armed groups, all of which was detrimental to the indigenous peoples' development and social fabric. The Ombudsman's Office also made reference to the extrajudicial executions and cruel treatment to which members of these peoples had fallen victim.
- i) on September 24, 2003, the Commission asked Colombia to adopt precautionary measures on behalf of the Kankuamo indigenous people; to adopt the measures necessary to provide emergency care to the victims of forced displacement; to arrange for collective measures of protection, including the presence of a community defender, worked out in consultation with the beneficiaries of the measures by way of their representative bodies; and to investigate the violence and threats made against the beneficiary indigenous people;
- j) in submissions dated October 27 and November 6, 2003, the petitioners informed the Commission that despite the precautionary measures it had ordered, new crimes had been committed against the members of the Kankuamo indigenous people. The petitioners reported the murder of María Isabel Minllola, alleged to have happened on October 15, 2003, and to have been the work of members of the *Autodefensas Unidas de Colombia*. The petitioners also reported the extrajudicial execution of the following members of the indigenous people: Dixon Alfredo Arias Arias (October 16, 2003); Cristóbal Montero, Pedro Arias and Néstor Montero (October 17, 2003); Carlos Arias Martínez (October 20, 2003); Freider Caballero Martínez (October 24, 2003), by unidentified perpetrators, and Hob Martínez Borbón (October 29, 2003). According to information supplied by the petitioners, these executions were alleged to have been the work of

members of the *Autodefensas Unidas de Colombia*. Finally, the petitioners also reported the presence of “paramilitary squads” in the towns of Badillo, Río Seco, Patillal, La Mesa, Los Corazones, Guacoche, Guacochito, Las Raíces, Alto de la Vuelta and in the capitol city of the department of Cesar, the city of Valledupar. According to the petitioners, these groups operate with the acquiescence or cooperation of members of the Colombian Army attached to Artillery Battalion No. 2 “La Popa” and the battalion detailed to the municipality of Patillal;

- k) on November 28, 2003, the petitioners reported to the Commission that Mr. Rafael Arias Maestre had been disappeared since November 23, 2003, and his whereabouts were still unknown. They added that the disappearance was the work of members of the *Autodefensas Unidas de Colombia*. On November 28, 2003, they also reported that Mr. William Pacheco Arias’ throat had been cut that very day, in an area under the control of the *Autodefensas Unidas de Colombia*;
- l) on December 3, 2003, the State submitted a report to the Commission concerning implementation of the precautionary measures where it pointed out that the situation had been reported to the Presidential Program of Human Rights and International Humanitarian Law, to the Office of the Attorney General, to the Ministry of the Interior and Justice, to the Office of the Prosecutor General, to the Government Security Department, to the Ministry of Defense and to the National Police, and that the petitioners had been asked to put together a proposal on the measures needed to address the situation. The State also reported that before precautionary measures were taken, other steps had been taken such as: “a list of Kankuamo victims had been sent to the Commission for Verification of Cessation of Hostilities; various State authorities held a meeting with the governors of the Wiwas, Yukpas and Kankuamo indigenous peoples, where a support group was agreed upon to assist the indigenous peoples of the Sierra Nevada de Santa Marta; finally, Colombia reported that a representative from the Ombudsman’s Office had been posted to the area;
- m) on December 15, 2003, the Commission informed the State of its concern over the aggression that continued to be perpetrated against the Kankuamo people despite the precautionary measures the Commission had ordered; it urged the State to make the necessary efforts to stop this aggression;
- n) on February 17, 2004, the petitioners provided information on the failure to implement the precautionary measures; it reported that on February 6, 2004, agents of Colombian Army Operational Command No. 7, accompanied by a person wearing a hood, had allegedly detained Mr. Juan Enenias Daza Carrillo, who was later discovered dead. The petitioners also pointed out that on February 7, 2004, the Commandant of the “La Popa” Army Battalion had said that the person in question had been killed in a clash with members of the armed group called the *Ejército de Liberación Nacional* (ELN);

- o) on March 2, 2004, during its 119th regular session, the Commission held a hearing to discuss issues relating to the requested precautionary measures. During that hearing, the petitioners and the State filed a joint report on the commitments undertaken for implementation of the measures. In that report, reference was made to two visits made to the Kankuamo Indigenous Reserve, at which agents of the State and representatives of the petitioners were present. The purpose of the visits was to get a process of consultations started within the Kankuamo people and to agree upon the measures to be adopted;
- p) on March 4, 2004, the petitioners reported threats made against the leaders of the Kankuamo indigenous people who had already been forcibly displaced to Bogotá; the threats were mainly in the form of acts of aggression committed by a group of six armed men who fired shots at the Bogotá residence of indigenous leader Gilberto Arlanth Arlza;
- q) the Commission learned of the March 8, 2004 execution of Mr. Ildomar Montero, which was portrayed as being the result of clashes being the *Autodefensas Unidas de Colombia* and the Colombian Army;
- r) the Commission also learned of the April 14, 2004 execution of Mr. Oscar Enrique Montero Arias;
- s) the Commission learned of the detention and subsequent execution of Mr. Néstor Oñate Arias, who had allegedly been unlawfully detained by troops with the Colombian Army's Operational Command No. 7 on April 16, 2004; his lifeless body was found the following day in the district of Antaquez; and
- t) The Commission learned of the June 26, 2004 execution of Mr. Romelio Antonio Pacheco.

3. The Commission's observations to the effect that when taken together, the facts alleged constitute a situation of extreme gravity and urgency that could result in irreparable harm to the members of the Kankuamo indigenous people. The Commission stated further that the State did not comply with the precautionary measures the Commission had ordered in this case.

In light of the foregoing, the Commission requested that the Court call upon Colombia to:

1. [p]rotect the life and the integrity of person of the members of the Kankuamo indigenous people in the Sierra Nevada de Santa Marta, and respect their cultural identity and their special relationship with their ancestral territory[;]
2. [i]nvestigate the facts that necessitated the request for provisional measures in order to identify and prosecute those responsible and punish them accordingly[;]
3. [e]nsure that the beneficiaries are able to continue to inhabit their ancestral territory free of any form of coercion or threat, and provide them with humanitarian aid whenever necessary.

4. [g]uarantee safe conditions enabling members of the Kankuamo indigenous people who have been forcibly displaced to return to their ancestral territory.

The Commission also asked that the Court “instruct the State that the provisional measures ordered are to be decided by mutual agreement of the State, the beneficiaries and their representatives and, given the gravity and delicacy of the situation, [are to be] implemented forthwith.”

CONSIDERING THAT:

1. The State ratified the American Convention on July 31, 1973 and, pursuant to Article 62 of the Convention, recognized the contentious jurisdiction of the Court on June 21, 1985.
2. Article 63(2) of the American Convention provides that “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.”
3. Article 25(1) of the Court’s Rules of Procedure provides that “[a]t any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.”
4. Article 1(1) of the Convention establishes the duty of States parties to respect the rights and freedoms recognized therein and to ensure their free and full exercise to all persons subject to their jurisdiction.
5. The purpose of provisional measures in domestic legal systems (domestic procedural law) in general, is to preserve the rights of the parties to a dispute, thereby ensuring that execution of the judgment on the merits is not obstructed or otherwise prejudiced by their actions *pendente lite*.
6. Under the International Law of Human Rights, urgent and provisional measures serve a further purpose, which is to protect fundamental human rights, thereby avoiding irreparable harm to persons.
7. The information presented by the Commission in this case reveals *prima facie*, a threat to the life and integrity of person of the members of the Kankuamo indigenous people. On a number of occasions, when protective measures were called for, this Court has ordered provisional measures applying the standard of *prima facie* assessment of a case and on the basis of presumptive evidence.¹

¹ Cf., *inter alia*, *Matter of Gómez-Paquiyaury Brothers*. Provisional Measures. Order of the Inter-American Court of Human Rights of May 7, 2004, ‘*Considering*’ sixteen; *Case of Bámaca-Velásquez*. Provisional Measures. Order of the Inter-American Court of Human Rights of November 20, 2003, ‘*Considering*’ twelve, and *Matter of Marta Colomina and Liliana Velásquez*. Provisional Measures. Order of the Inter-American Court of Human Rights of September 8, 2003, ‘*Considering*’ five.

8. The Inter-American Commission has adopted precautionary measures that have not had the required effects; to the contrary, recent events indicate that the members of the Kankuamo indigenous people are in gravel peril.

9. Heretofore, the Court has ordered protection for a group of persons who, although not previously named, are nonetheless identifiable and whose identity can be determined, and who are in grave peril by virtue of the fact that they belong to a given group.² In the instant case, as the Commission has indicated, the Kankuamo indigenous people, who number approximately 6,000, are organized into communities located in a specific geographic area comprising the villages of Atánquez, Chemesquemena, Guatapurí, Las Flores, Pontón, Mojado, Ramalito, Rancho de la Goya, Los Háticos, La Mina, Murillo and Rioseco, on the southeastern slope of the Sierra Nevada de Santa Marta. The territory of the Kankuamo indigenous people spans portions of the departments of Magdalena, Guajira and Cesar. Its members can be identified and named. Living in those Kankuamo villages, all are in the same danger of becoming the victims of acts of aggression against their lives and the integrity of their person and of being forcibly displaced from their territory.³ This Court therefore deems it necessary to order provisional measures of protection on behalf of all members of the villages belonging to the Kankuamo indigenous people.

10. The situation that the Kankuamo indigenous people are experiencing, as described by the Commission, has curtailed their freedom of movement and has forced them to move to other regions. The State must, therefore, ensure that the beneficiaries of these measures are able to continue living in their habitual place of residence; it must also provide those who have been displaced from their people's land with the means necessary to return to their homes.⁴

11. To effectively ensure the rights recognized in the American Convention, the State Party has an obligation, *erga omnes*, to protect all persons subject to its jurisdiction. As this Court has previously held, this means that this general obligation applies not only with respect to the power of the State but also with respect to actions by third parties, including groups of armed irregulars of any kind. The Court observes that given the characteristics of the instant case, provisional measures are needed to protect all members of the Kankuamo indigenous people, in

² Cf., *inter alia*, *Matter of The Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, 'Considering' nine; *Matter of the Peace Community of San José de Apartadó*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2002, 'Considering' eight; *Matter of the Peace Community of San José de Apartadó*. Provisional Measures. Order of the Inter-American Court of Human Rights of November 24, 2000, 'Considering' seven. See, also, *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, paragraphs 148, 149 and 153.

³ Cf. *Matter of The Communities of the Jiguamiandó and of the Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, 'Considering' nine.

⁴ Cf. *Matter of The Communities of the Jiguamiandó and of the Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, 'Considering' ten; *Matter of the Peace Community of San José de Apartadó*. Provisional Measures. Order of the Inter-American Court of Human Rights of November 24, 2000, 'Considering' eight; and *Matter of Giraldo-Cardona*. Provisional Measures. Order of the Inter-American Court of Human Rights of February 5, 1997, 'Considering' five.

accordance with the provisions of the American Convention, read in light of international humanitarian law.⁵

12. In this regard, the Court has held that:

[t]he right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.⁶

13. The case to which the Commission's request refers is not now pending with the Court for a decision on the merits; therefore, adoption of provisional measures does not imply a decision on the merits of the dispute between the petitioners and the State.⁷ In adopting provisional measures, the Court is merely ensuring that it is able to faithfully discharge its mandate under the Convention for cases of extreme gravity and urgency that require measures of protection to avoid irreparable harm to persons.

NOW, THEREFORE,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in exercise of its authorities under Article 63(2) of the American Convention on Human Rights and Article 25 of its own Rules of Procedure,

DECIDES:

1. To call upon the State to adopt, forthwith, the measures necessary to protect the life and the integrity of the person of all members of the communities that comprise the Kankuamo indigenous people.
2. To call upon the State to investigate the facts that necessitated the adoption of these provisional measures in order to identify those responsible and impose the appropriate punishments.
3. To call upon the State to ensure the security conditions necessary to ensure respect for the Kankuamo indigenous people's right to freedom of movement, and to

⁵ Cf. *Matter of The Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, 'Considering' eleven; and *Matter of the Peace Community of San José de Apartadó*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2002, 'Considering' eleven.

⁶ Cf. *Case of Myrna Mack-Chang*. Judgment of November 25, 2003. Series C No. 101, par. 152; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, par. 110; and *Case of the "Street Children" (Villagrán-Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, par. 144.

⁷ Cf., *inter alia*, *Matter of Lysias Fleury*. Provisional Measures. Order of the Inter-American Court of Human Rights of December 2, 2003, 'Considering' octavo; *Matter of Lysias Fleury*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 7, 2003, 'Considering' ten; and *Matter of The Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, 'Considering' twelve.

ensure that those who have been forcibly displaced to other regions are able to safely return to their homes, if they so desire.

4. To call upon the State to allow the beneficiaries of these measures to participate in their planning and implementation and, in general, to keep them informed of the progress made with execution of the measures ordered by the Inter-American Court of Human Rights.

5. To call upon the State to report to the Inter-American Court of Human Rights, within the ten-day period following notification of the present Order, on the provisional measures it has adopted in compliance therewith.

6. To call upon the representatives of the beneficiaries of these measures to submit their comments within the five-day period following notification of the State's report.

7. To call upon the Inter-American Commission on Human Rights to submit its comments within the seven-day period following notification of the State's report.

8. To call upon the State, subsequent to its first communication (*supra* operative paragraph 5), to continue reporting to the Inter-American Court of Human Rights every two months on the provisional measures adopted; to call upon the representatives of the beneficiaries of these measures to submit their observations on the State's reports within one month of receiving them; and to also call upon the Inter-American Commission on Human Rights to submit its observations on the State's reports within six weeks of receiving them.

Judges García Ramírez and Cançado Trindade informed the Court of their Concurring Opinions, which are affixed to the present Order.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCIA-RAMIREZ ON THE ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS FOR PROVISIONAL MEASURES IN THE MATTER OF PUEBLO INDÍGENA DE KANKUAMO, OF JULY 5, 2004

1. In recent years, the jurisprudence of the Inter-American Court of Human Rights, which carries on its own legacy and is enriched by it, has established precedent in a number of important areas and in so doing has broadened the scope of the protection of human rights in keeping with the values that the international law on the subject upholds and always within the framework that the American Convention provides. Provisional measures are one of the topics that the Court's jurisprudence has covered.

2. Provisional measures serve the general requirements of a fair trial and the objectives and needs characteristic of the system for the protection of human rights. Their purpose, therefore, is twofold: a) a generic purpose, common to any legal proceeding-and to the procedures in preparation for trial-, such as preserving the subject matter of an action, taking of evidence proceedings, the presence of the parties, and so forth; and b) a specific purpose posed by the particular needs of the system for the protection of human rights and provided for in Article 63(2) of the American Convention.

3. In serving that more specific purpose, provisional measures preserve legally protected interests from the threat of imminent danger. In cases of extreme gravity and urgency, provisional measures are used when necessary to avoid irreparable harm. On previous occasions, the Inter-American Court has examined the factors that trigger provisional measures: gravity, urgency, an imminent threat of irreparable harm. Apart from these determining factors, other questions relating to provisional measures need to be examined such as: the evidence required, the beneficiaries of these measures, the essence of these measures, the binding nature of the Court's orders for provisional measures, their duration, execution, oversight, etc. On a number of occasions I have analyzed these questions, already addressed in the case law of the Court.

4. Clearly, one salient aspect of provisional measures ordered by the Inter-American Court concerns the beneficiaries of those measures, an issue addressed in the Concurring Opinion I have affixed to several orders issued during this session. Traditionally, the Court held that beneficiaries were to be identified by name, so that the measure ordered could be carried out. However, the Court observed that there are situations of extreme gravity and urgency involving the possibility-or even probability- that the compromised rights might suffer irreparable harm, and in which the precise identity of the intended beneficiaries cannot be immediately established, precisely because of the urgency that justifies the order for provisional measures. Such cases involve a number of people exposed to the same grave threat.

5. To delay action until those exposed to that threat of grave and irreparable harm to legally protected interests -embodied in rights- can be individually identified would be to run the risk that the harm would materialize before the Court could intervene to prevent it, even though it had already established that the threat was not only possible but also probable and imminent. Thus, a surmountable technicality would prevent the Court from acting swiftly to fulfill its true mandate: to use the shield of its jurisdictional power to protect threatened rights. It would be hard to

make the case that that kind of judicial restraint was consistent with the Inter-American Court's essential mission of protecting human rights.

6. The Court established an important precedent with the order for provisional measures in the *Matter of the Peace Community of San José de Apartadó v. Colombia* of November 24, 2000. This order marked the first time the Court ordered provisional measures for a group of persons exposed to the same risk. They were not identified by name, but were identifiable by certain objective criteria. With that order, the jurisprudence of the Court took a major step forward in the real protection of human rights. Such protection is not provided by merely redressing harm already consummated; instead, true protection requires, above all else, prompt, appropriate and diligent action to prevent that harm being done.

7. In that case, my colleague Judge Alirio Abreu Burelli and I wrote a *Concurring Opinion* to explain the reasons for, the purposes of and the characteristics of the new subjective scope of provisional measures. This new scope in no way violates the provisions of the Convention; instead, it interprets the intent of the Convention and adjusts its orders accordingly. In that *Concurring Opinion*, we brought up the similarities that exist, *mutatis mutandi*, between legally protected diffuse interests and the rights of individuals who are members of a group, and the relative connection that might exist between an *actio popularis* to protect the rights of the members of a group and the urgent invocation of those rights through a petition seeking provisional measures.

8. The Court has applied the criterion it used in the *Matter of San José de Apartadó* to other cases. It has thus confirmed its pertinence and has enabled this mechanism of protection to more fully serve its intended purpose. The *Matter of San José de Apartadó* involved a peace community whose members—numbering in the hundreds—were linked by a common geography, which could change, and certain common decisions which were the source of the risks to individual and collective interests. In subsequent cases, other data have been produced for the analysis of the group whose members benefit from provisional measures: it might be—as in fact happened—an indigenous community, a group of adult prisoners or a group of juvenile offenders, a group of workers who work in a given place, and so on. All these are situations in which provisional measures might be called for, precisely because of the reasons explained in the decision of the Inter-American Court in the *Matter of San José de Apartadó*.

9. The Orders to which I affix this *Concurring Opinion* concern three cases in which the circumstances warrant provisional measures based on the very same criterion used in the *Matter of San José de Apartadó*. The Court found that in all three cases, the members of a given group faced a common grave threat and that provisional measures were therefore needed to avoid irreparable harm to members of the group. The members of these groups were not all identified by name, but were identifiable based on the data available to the Court and explained in the order: a commonality of situation which implies, in this case, a commonality of danger. Two cases involve ethnic groups; another involves a group of workers. The diversity of the type of beneficiaries—who nonetheless share certain elements in common—points up the importance of the road that the Court embarked upon four years ago in the *Matter of San José de Apartadó*.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I am voting in favor of these provisional measures through which the Inter-American Court of Human Rights is ordering that protection be extended to all members of the *Kankuamo Indigenous People* in Colombia. Still, I feel obliged to revisit the conceptual construct that I have been advocating within the Inter-American Court, which concerns the obligations *erga omnes* of protection under the American Convention. I have no intention of repeating, in detail, everything I have thus far said on the subject, particularly in my other Concurring Opinions on the Orders for Provisional Measures adopted by the Court in the *Matter of the Peace Community of San José de Apartadó* (of June 18, 2002) and *Matter of The Communities of Jiguamiandó and Curbaradó* (of March 6, 2003). Instead, I prefer to briefly highlight some of the central points I made on the subject, with a view to ensuring effective protection of human rights in a complex situation such as that of the *Kankuamo Indigenous People*.

2. Indeed, well before these cases were brought to this Court's attention, I had already underscored the pressing need to develop doctrine and jurisprudence on the legal regime of the obligations *erga omnes* of protection of the rights of the human being (for example, in my Concurring Opinions in *Blake vs. Guatemala*, Judgment on the Merits, January 24, 1998, par. 28, and Judgment on Reparations, January 22, 1999, par. 40). In my Concurring Opinion in the *Case of Las Palmeras v. Colombia*, Judgment on Preliminary Objections, February 4, 2000, I suggested that a proper understanding of the broad scope of the general obligation to ensure the rights recognized in the American Convention, provided for in Article 1(1) thereof, could be instrumental in developing the obligations *erga omnes* of protection (paragraphs 2 and 6-7).

3. The general obligation to ensure the exercise of rights to all persons subject to its jurisdiction is –I added in my Concurring Opinion in the *Case of Las Palmeras*– incumbent upon each State Party individually and on all of them collectively (obligation *erga omnes partes* - paras. 11-12). I wrote that

"there could hardly be better examples of mechanism for application of the obligations *erga omnes* of protection (...) than the methods of supervision foreseen in the human rights treaties themselves (...) for the exercise of the collective guarantee of the protected rights. (...) the mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently need is to develop their legal regime, with special attention to the *positive obligations* and the *juridical consequences* of the violations of such obligations. (par. 14).

4. The general obligation to ensure includes the application of provisional measures of protection under the American Convention. In my concurring opinion on the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Order of August 18, 2000), I took the liberty of pointing out the change that had occurred in both the *rationale* and purpose of provisional measures of protection (which historically moved from civil procedural law to public international law) as a result of the impact their application had within the framework of the International Law of Human Rights (paragraphs 17 and 23): with their introduction into the conceptual universe of the International Law of Human Rights, provisional measures underwent a transition: they went from safeguarding the efficacy of the functions of the courts to protecting the most fundamental rights of the human person. With the

transition from civil procedural law into the International Law of Human Rights, they moved out of the strictly *precautionary* realm and into the sphere of *protection*.

5. The jurisprudence of the Inter-American Court of Human Rights has made a decisive contribution to this subject, perhaps more than any other international tribunal to date. Its jurisprudence on the subject traces its roots to a convention and, for breadth of scope, is unparalleled⁸ in contemporary international jurisprudence. In recent years, and right up to the present, it has tapped all the potential for protection –through prevention- that can be drawn from the language of Article 63(2) of the American Convention.

6. In my Concurring Opinion in the *Matter of the Peace Community of San José de Apartadó* (Order of June 18, 2002), I underscored the fact that at the corresponding public hearing held by this Court on June 13, 2002, the Columbian State "correctly recognized its obligation to act also *vis-à-vis* private third parties" (para. 14), - whether those third parties be State security forces, paramilitary, guerrillas, unidentified persons, or any other simple private citizen. This is a genuine obligation *erga omnes* to protect all members of the threatened and harassed community who, although not named, are no less *identifiable*. In the instant case, the Court held that the members of the Kankuamo indigenous people meet this requirement, i.e., they are identifiable.

7. As I wrote in that Opinion (on the aforementioned Order of June 18, 2002) – and as I do so again in relation to this case- in the final analysis what we have here is the State's obligation *erga omnes* to protect all persons subject to its jurisdiction, an obligation that becomes all the more important in the midst of an armed conflict such as the one in Colombia and that

"(...) requires clearly the recognition of the effects of the American Convention *vis-à-vis* third parties (the *Drittwirkung*), without which the conventional obligations of protection would be reduced to little more than a dead letter.

The reasoning as from the thesis of the *objective* responsibility of the State is, in my view, ineluctable, particularly in a case of provisional measures of protection as the present. The intention here is to avoid irreparable harm to the members of a community and to the persons who render services to this latter, in a situation of extreme gravity and urgency, which encompasses actions, armed and otherwise, of paramilitary and clandestine groups, along with the actions of organs and agents of the public forces. (paras. 14-15).

8. Later, in my Concurring Opinion in the *Matter of The Communities of Jiguamiandó and Curbaradó* (Order of March 6, 2003), which also involved Colombia and had both individual and collective dimensions, I took the liberty of once again insisting that the response to acts of violence committed by armed irregulars of any kind must be recognition of the third-party effects of the American Convention "(the *Drittwirkung*)," –inherent in obligations *erga omnes*,-"without which the conventional obligations of protection would be reduced to little more than a dead letter." (paras. 2-3). I added that given the circumstances of that case—and of the present case as well-it is clear that

⁸. The provisional measures of protection adopted by the Inter-American Court in this one Order alone are protecting close to six thousand people: the communities of the Kankuamo people that are threatened with extinction and are struggling to rebuild their city, are now integrated, according to the request for provisional measures received from the Inter-American Commission on Human Rights (July 2, 2004, p. 2, n. 1), comprising a total of 5,929 individuals, spread among 1,207 families.

"the protection of human rights determined by the American Convention Americana, to be effective, comprises not only the relations between the individuals and the public power, but also their relations with third parties (clandestine groups, paramilitary, and other groups of individuals). This reveals the new dimensions of the international protection of human rights, as well as the great potential of the existing mechanisms of protection, - such as that of the American Convention, - set in motion in order to protect collectively the members of a whole community,⁹ even though the basis of action is the breach -or the probability or imminence of breach- of individual rights. (para. 4).

9. As I wrote in the two precedents to the *cas d'espèce*¹⁰ -and as I reassert here-when the sources (including those not identified) of human rights violations are so diverse, as illustrated here by the succession of members of the Kankuamo indigenous people alleged to have been victims in the present case, the juridical development of the obligations *erga omnes* of protection becomes all the more important, as do the convergences -at the normative, interpretational and operative levels- among the International Law of Human Rights, International Humanitarian Law and International Refugee Law.¹¹ Recognizing the importance of obligations *erga omnes* is essential to addressing the new requirements for protection of the human person, especially in situations of extreme gravity and urgency such as the one posed in the present *Matter of the Pueblo indígena de Kankuamo*.

10. As for the broad scope of the obligations *erga omnes* of protection, in my Concurring Opinion in the Inter-American Court's Advisory Opinion OC-18 on the *Juridical Condition and Rights of Undocumented Migrants* (of September 17, 2003), I noted that the *jus cogens* (from whence the obligations *erga omnes* emanate)¹² characterizes them as being objective of necessity. They thus apply to all the parties for whom the legal norms were intended (*omnes*), whether they be members of the public organs of the State or private persons (para. 76). I went on to write the following:

In my view, we can consider such obligations *erga omnes* from *two dimensions, one horizontal*¹³ *and the other vertical*, which complement each other. Thus, the obligations *erga omnes* of protection, in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole.¹⁴ In the framework of conventional international law, they bind all the States Parties to human rights treaties (obligations *erga omnes partes*), and, in the ambit of

². Suggesting an affinity with *class actions*.

¹⁰. Cf. my aforementioned Concurring Opinions in the *Matter of the Peace Community of San José de Apartadó* (2002, par. 19) and *Matter of The Communities of Jiguamiandó and Curbaradó* (2003, para. 5).

¹¹. A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, Chapter V, pp. 183-265.

¹². In this same Opinion I wrote the following: "By definition, all the norms of *jus cogens* generate necessarily obligations *erga omnes*. While *jus cogens* is a concept of material law, the obligations *erga omnes* refer to the structure of their performance on the part of all the entities and all the individuals bound by them. In turn, not all the obligations *erga omnes* necessarily refer to norms of *jus cogens*." (para. 80).

⁶. In that same opinion, I added that "the obligations *erga omnes partes*, in their horizontal dimension, find expression also in Article 45 of the American Convention, which foresees the mechanism (not yet utilized in the practice of the inter-American system of human rights), of inter-State complaints or petitions. (...) In any case, these dimensions, both horizontal and vertical, reveal the wide scope of the obligations *erga omnes* of protection." (para. 79)

¹⁴. IACtHR, *Case of Blake v. Guatemala* (Merits), Judgment of January 24, 1998, Separate Opinion of Judge A.A. Cançado Trindade, para. 26, and cf. paras. 27-30.

general international law, they bind all the States which compose the organized international community, whether or not they are Parties to those treaties (obligations *erga omnes lato sensu*). In a vertical dimension, the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).

The advent and the evolution of the International Law of Human Rights have made a decisive contribution toward the formation of this vertical dimension. But it is surprising that, until now, these horizontal and vertical dimensions of the obligations *erga omnes* of protection have gone entirely unnoticed by contemporary legal doctrine. Nevertheless, I see them clearly established in the legal regime of the American Convention on Human Rights. Thus, for example, in the case of the vertical dimension, the general obligation set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, generates effects *erga omnes*, encompassing the relations of the individual both with the public (State) power as well as with other individuals.¹⁵ (paras. 77-78).

11. Measures such as those that the Inter-American Court has just adopted in the present *Matter of Pueblo indígena de Kankuamo* are instrumental in creating, based on a provision of a human rights treaty like the American Convention, *continual monitoring* of a situation of extreme gravity and urgency. As I had already anticipated in my Concurring Opinion in the *Matter of The Communities of Jiguamiandó and Curbaradó* (paras. 6-8), such measures also contribute to the gradual establishment of a genuine *right to humanitarian assistance*. They illustrate that in situations of this kind, it is possible and viable to act *strictly within the framework of the Law*,¹⁶ thereby reaffirming the primacy of the law over the indiscriminate use of force. They testify to the current process of *humanization* of international law (moving toward a new *jus gentium*) in the area of provisional measures of protection as well. All this points up the fact that the human conscience (the ultimate source of all Law) has awakened to the need to protect the human person from violations of his rights by both the State and third parties.

12. At the *Institut de Droit International*, I have maintained that in the exercise of the emerging right to humanitarian assistance, the emphasis must be on the persons of the beneficiaries of the humanitarian assistance, and not on the potential activities of the agents materially trained to provide that humanitarian assistance. The ultimate basis for the exercise of that right lies in the inherent dignity of the human person: human beings are, in effect, the *titulaires* of the protected rights and of the right to humanitarian assistance. Their defenselessness and suffering—especially in situations of poverty, economic exploitation, social marginalization and armed conflict—merely underscore the need for obligations *erga omnes* to protect every human being's inherent rights.

13. Furthermore, the *titulaires* of the protected rights are the ones most qualified to identify their basic needs for humanitarian assistance, which is a response, based on the Law, to the new needs for protection of the human person. If the human person's international legal personality and standing ultimately materialize, then the right to humanitarian assistance may gradually become justiciable.¹⁷ As the present

¹⁵. Cf., in this regard, in general, the resolution adopted by the *Institut de Droit International* (I.D.I.) at the meeting in Santiago de Compostela in 1989 (Article 1), in: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 and 288-289.

¹⁶. Without having to resort to the unconvincing and unfounded rhetoric of so-called "humanitarian intervention."

¹⁷. Cf. A.A. Cançado Trindade, "Reply [- Assistance Humanitaire]", 70 *Annuaire de l'Institut de Droit International* – Bruges Meeting (2002-2003) n. 1, pp. 536-540.

Matter of Pueblo indígena de Kankuamo reveals, the current expansion of international juridical personality and standing is a response to a pressing need of the international community in our times. The development of the doctrine and jurisprudence on obligations *erga omnes* of protection of the human person, in any and all situations or circumstances, will certainly be a contribution toward the formation of a true international *ordre public* based on respect for and observance of human rights, capable of ensuring greater cohesiveness in the organized international community (the *civitas maxima gentium*), centered around the human person as subject of international law.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary