

**Order of the
Inter-American Court of Human Rights
of July 6, 2004
Provisional Measures regarding Ecuador
Matter of Pueblo Indígena Sarayaku**

HAVING SEEN:

1. The June 15, 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 the adoption of provisional measures on behalf of the members of the Kichwa indigenous community of Sarayaku (hereinafter "the community" or "the indigenous people") and its defenders, with respect to the Republic of Ecuador (hereinafter "the State" or "Ecuador"), to protect their lives, integrity of person, freedom of movement and the special relationship they have to their ancestral land, in connection with a petition that the *Asociación del Pueblo Kichwa de Sarayaku*, the Center for Justice and International Law and the Center for Economic and Social Rights (hereinafter "the petitioners") filed with the Inter-American Commission.

2. The Commission based its request on the following allegations of facts:

- a) in 1992, Ecuador legally recognized the Sarayaku community's ancestral territory by granting it the title to that territory. On July 26, 1996 the State concluded a participation contract with the Argentine business, *Compañía General de Combustible* (hereinafter the "CGC") granting a concession for oil exploration and drilling over an area of 200,000 hectares, called Block 23, in the province of Pastaza, Ecuador. Some 65% of this block is within the ancestral territory of the Kichwa indigenous community of Sarayaku. The contract was allegedly signed without consulting the Sarayaku people and without having obtained their informed consent;
- b) according to the information supplied by the petitioners, between 1996 and 2002, the CGC made several attempts to negotiate to enter Sarayaku territory and, using questionable means, tried to exact from the indigenous people their consent for the oil drilling;
- c) despite a court order in which the Pastaza Civil Law Judge of First Instance ordered precautionary measures for the Kichwa people of Sarayaku, and an order from the Ombudsman's Office protecting that community's rights, CGC employees and agents of the State have taken measures detrimental to that people's interests;

- d) on January 13, 2003, villagers from Jatún Molino, which neighbors Sarayaku territory, were shot at from the bank of the Bobonaza River as they were traveling in canoes. As trees were cut down, the river, which is the Sarayaku people's principal communication route, was eventually blocked, making it difficult for the Sarayaku to get from one place to another;
- e) on January 25, 2003, within the perimeter of Sarayaku territory, members of the Ecuadorian Army and CGC security personnel detained indigenous leaders Elvis Fernando Gualinga, Marcelo Gualinga, Reinaldo Gualinga and Fabián Grefa, after which they allegedly tortured them. It is alleged that the indigenous leaders' hands and feet were tied with rope and their eyes blindfolded. They were thrown on the ground and forced to remain in that position for an hour. Fabián Grefa was forced to kneel alongside a rifle, whereupon they took photographs of him, apparently with the idea of accusing him of illegal possession of weapons. Later, Army agents put the four indigenous leaders aboard a CGC helicopter, flew them to a CGC base and handed them over to CGC security personnel, who also tortured the indigenous leaders. The four were then taken to Police facilities until the Sarayaku leaders managed to negotiate their release;
- f) on January 26, 2003, members of Ecuador's armed forces, wielding firearms, allegedly attacked the Peace and Life Camp at Tiutihualli, which is within Sarayaku territory. They are also alleged to have attacked the Peace and Life Camp at Panduro. Approximately 60 indigenous people from the community were there at the time, among them women, children and elderly people who kept watch so that the CGC workers would not enter their territory. When this happened, the Sarayaku scattered into the rainforest, where they stayed for a week, too afraid to return, and living off of what they could gather from the rainforest. In that period, some members of the community were reportedly abducted by CGC personnel and reappeared in March 2003;
- g) on January 29, 2003, Marisela Yuri Gualinga-Santi and Tatiana Gualinga-Dacha, both 12 years of age, were stopped by an Ecuadorian Army patrol, along with workers from the CGC. They were questioned about why they were there and threatened by the CGC workers. The petitioners alleged that before the two girls were released, they were sexually molested;
- h) on May 5, 2003, the Commission asked Ecuador to adopt precautionary measures on behalf of the Kichwa indigenous community of Sarayaku. It also requested that Ecuador adopt all measures it deemed pertinent to protect the life and physical, mental and moral integrity of the members of the indigenous community of Sarayaku, especially Franco Viteri, José Gualinga, Francisco Santi, Cristina Gualinga, Reinaldo Alejandro Gualinga and the two girls whom Army personnel or civilians having no ties to the community might threaten or intimidate; investigate the events that occurred on January 26, 2003, at the Sarayaku Community's Peace and Life Camp at Tiutihualli and the aftermath of those events; prosecute and punish those responsible; take the necessary measures to protect the special

bond between the Sarayaku Community and its territory; and, in consultation with the community and its representatives vis-à-vis the inter-American system for the protection of human rights, agree upon precautionary measures;

- i) when it requested the precautionary measures on May 5, 2003, the Commission gave the State a 15-day period in which to report on the measures adopted. On June 17, 2003, Ecuador reported that it had sent a number of communications to the appropriate authorities with instructions to comply with the precautionary measures, and that the armed forces were investigating the events that occurred on January 26, 2003;
- j) on July 18, 2003, the petitioners reported that the State was not complying with the precautionary measures; the memorandums sent to various authorities were all that had been done. They also reported that no one had contacted the leaders of the community to determine what type of protection the persons named in the order for precautionary measures would receive. In that same submission, the petitioners also stated that navigation on the Bobonaza River had been stopped, which meant that the Sarayaku people were unable to get to their own territory or to have contact with other villages;
- k) on August 5, 2003, the State sent the Commission a copy of a memorandum signed by the Deputy Secretary of Defense, in which he reported that as the oil exploration and drilling work was getting underway in the zone, the Sarayaku people had threatened neighboring communities and that Amazonas' IV Command had allegedly launched a security operation to prevent "criminal activity" on the part of the indigenous peoples. The memorandum reported that on January 25, 2003, a patrol doing reconnaissance in the area "was taken by surprise by a band of 30 armed indigenous people." The military personnel were stripped of their weapons. The note added the following: "the complaint that they [the petitioners] have filed with the Inter-American Commission on Human Rights is not true; these things, like the military attack on the 'TIUTIHUALLI PEACE AND LIFE CAMP', which never happened, are "the *comuneros*' exaggerations";
- l) on September 27, 2003, the State submitted information on implementation of the measures and attached a memorandum from the Attorney General which read as follows:

[t]he report prepared by the police reveals that arrest warrants had been issued for certain members of the Sarayaku Community because of complaints filed by the CGC Oil Company alleging acts of vandalism committed by the *comuneros*. The Ecuadorian State, through the Office of the Attorney General, has had to do a thorough investigation of the information received –information the petitioners did not report– so that the protection afforded by the Inter-American Commission would not become a vehicle that the above-named persons could use to circumvent their appearance in domestic courts to answer the charges filed.

With its letter, the State enclosed a plan of operations for protection of the members of the Sarayaku community; however, that report did not indicate whether the security measures had actually been implemented;

- m) on October 16, 2003, during its 118th regular session, the Commission held a hearing to discuss issues related to the precautionary measures. At that hearing, the petitioners alleged that the State was not in full compliance with the precautionary measures; they stated further that rather than protect the Sarayaku community, the actions undertaken by the State had been prejudicial to it. They added that Ecuador had never contacted the Community's representatives to agree on the implementation of those measures, as the Commission had requested. At that hearing, the State contended that the increased military presence in the area in question had to do with the border situation with Colombia, and not with the Sarayaku community;
- n) on December 5, 2003, the petitioners informed the Commission that on December 4, 2003, approximately 120 people from the Sarayaku community –women and children included- who were traveling along the Bobonaza River en route to the city of Puyo to participate in a march protesting the government's oil policy, were attacked and assaulted by workers from the CGC. The indigenous people were hit with sticks, stones and machetes and their belongings were hacked to pieces. Many of the inhabitants of Sarayaku sustained very serious injuries; the assailants abducted four others, one of whom was a boy, and released them the following day;
- ñ) on December 17, 2003, the Commission extended the precautionary measures for another six months. It also gave the State 15 days in which to report to the Commission on the precautionary measures adopted. Ecuador requested an extension, but when the new deadline expired, it had still not provided the requested information;
- o) on April 8, 2004, the petitioners supplied the Commission with information on the failure to implement the precautionary measures and asked it to request the Inter-American Court to adopt provisional measures. In that request, the petitioners reported that on March 31, 2004, a military command allegedly launched a surprise incursion into the community's territory. That very same day, the Chief of the Joint Command of the Ecuadorian Armed Forces, General Octavio Romero, had flown aboard an Army helicopter into the populated center of Sarayaku, accompanied by two military police and ten Army officers, all heavily armed. The purpose of the General's visit was allegedly to tell the authorities of the Sarayaku community that if the community adopted a more extreme position and refused to allow the oil company to enter, "decisions will be made in Quito and the territory will be militarized";
- p) in that same communication of April 8, 2004, the petitioners reported on nine attacks against the lives and physical person of members of the indigenous community and its defenders:

- on February 1, 2004, unknown persons attempted to assassinate Leonidas Iza, President of the Confederation of Indigenous Nationalities of Ecuador (CONAIE) and his family; the attempt left one of his children gravely wounded. These events prompted the Commission to grant precautionary measures on February 26, 2004. Leonidas Iza has consistently expressed CONAIE's opposition to the militarization of the Sarayaku indigenous territory;
 - on March 1, 2004, as he was getting off public transportation in Quito, Marlon Santi, President of the Sarayaku, was attacked and physically assaulted as his assailants punched and kicked him. Mr. Santi was about to travel to Washington, D.C., to a working meeting convened by the Commission. His assailants called him an Indian and made specific references to Sarayaku, the oil business and the country's development, and warned him to abandon his opposition to the oil exploration and drilling. After hitting him, they threw him on the ground and opened his bag, stealing his passport and other identification papers;
 - some days after Marlon Santi was physically assaulted, police searched the Sarayaku offices in Puyo. The search was done "by order of the Ministry of Defense." The police questioned everyone there, but no record of the interrogation was prepared;
 - on April 6, 2004, the Pachamama Foundation and the Amazanga Institute received a telephone call warning them of a bomb in their facilities. These organizations have consistently supported the Sarayaku community; and
 - with regard to the obligation to investigate the attacks upon the Sarayaku people, the petitioners reported that the January 26, 2003 attack, the violence committed against villagers on December 4 and 5, 2003, and the other acts of violence and intimidation reported have not been investigated by any State authority;
- q) on April 28, 2004, the petitioners reported that on April 23, 2004, José Serrano Salgado, attorney and legal representative of the Sarayaku people, was attacked and physically assaulted by three armed and hooded men, while he was on his way to a meeting with the Sarayaku leaders in Puyo. Holding a pistol to his head, his assailants threatened him and warned him to abandon his work on behalf of the Sarayaku indigenous people;
- r) on April 30, 2004, the Commission forwarded to the State the additional information that the petitioners had supplied, with the request that the precautionary measures be extended to include the Sarayaku people's attorney, Mr. José Serrano-Delgado;
- s) on May 28, 2004, the State reported on the implementation of measures of protection in the case of the persons specifically named in

the May 5, 2003 request for precautionary measures: Messrs. Franco Viteri, José Gualinga, Elvis Fernando Gualinga-Malavar, Fabian Grefa and Marcelo Gualinga. The State indicated that the Pastaza police had interviewed leaders of the indigenous people to coordinate those measures. The only statement Ecuador made regarding the request that the necessary measures be taken to ensure the life and physical, mental and moral integrity of all members of the indigenous people was that the topography of the territory "makes it difficult to fully comply with the precautionary measures; compounding the difficulty is the fact that there is no police station for the police assigned to provide the needed protection and security." The State explained further that "all the complaints that representatives of the CGC oil company filed against members of the Community have been investigated," adding that "the Second Criminal Law Judge of Pastaza dismissed, once and for all, criminal case No. 52-2003 against the Sarayaku leaders";

- t) on June 9, 2004, the petitioners stated that it was untrue that the State was taking steps to comply with the precautionary measures requested by the Commission; they went on to say that quite the contrary, "the measures taken were for the purpose of keeping the Sarayaku leaders' activities under surveillance, intimidating them, and continuing the pressure on the Community to allow the oil people into their territory." The petitioners added that the State has not taken any steps to protect the lives and personal safety of the members and leaders of the Sarayaku community and their attorneys; and
- u) the explosives being detonated have destroyed forests, water sources, caves, underground rivers and sacred sites, and have driven animals away. The explosives planted in the traditional hunting areas have thus made it more difficult for the indigenous people to find food, thereby affecting their ability to secure the means to ensure the members' subsistence and altering their life cycle. All this has been detrimental to the Sarayaku indigenous people's right to use and enjoy their ancestral territory.

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 Kichwa indigenous community of Sarayaku and its defenders, which justifies the Court's ordering of provisional measures under Article 63(2) of the Convention. The Commission stated further that Ecuador had not complied with the precautionary measures that the Commission had ordered in this case.

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

[...] adopt without delay whatever measures are needed to:

1. [p]rotect the life and the integrity of the person of the members of the indigenous community of Sarayaku and their defenders[;]

2. [r]efrain from unlawfully restricting the right to freedom of movement of the members of the Sarayaku indigenous people[;]

3. [i]nvestigate the assaults committed on members of the Sarayaku Indigenous People[; and]

4. [p]rotect the special relationship that the Kichwa community of Sarayaku have with their ancestral territory; in particular, protect the use and enjoyment of their collective title to the property and its natural resources and take the measures necessary to avoid immediate and irreparable damage resulting from the activities of third parties who enter the Sarayaku people's territory or who exploit the existing natural resources within that territory, until such time as the organs of the inter-American system for the protection of human rights have adopted a final decision on the matter.

Further, these measures are to be planned by mutual agreement between the State and the representatives of the Kichwa indigenous people of Sarayaku and, given the very grave and delicate situation, implemented immediately.

4. The June 28, 2004 note from the Secretariat of the Court where, on instructions from the full Court, it requested that the State submit to the Court, by July 1, 2004 at the latest, its comments on the Commission's request for provisional measures and any information it might have on the situation of "extreme gravity and urgency" and the possibility that "irreparable harm" might be done to the members of the Sarayaku indigenous people and their defenders.

5. The July 2, 2004 communication where the State requested a 15-day extension to file its comments on the Commission's request seeking provisional measures.

6. The July 5, 2004 note from the Secretariat where, following instructions from the full Court, it informed the State that the extension had not been authorized "as this was a request seeking provisional measures, in which a situation of 'extreme gravity and urgency' is alleged, as is the possibility that 'irreparable harm' might be caused to the members of the Sarayaku indigenous people and their defenders."

CONSIDERING THAT:

1. The State ratified the American Convention on December 28, 1977 and, pursuant to Article 62 thereof, recognized the Court's binding jurisdiction on July 24, 1984.

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.¹

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 the persons of the members of the Kichwa indigenous community of Sarayaku and its defenders. On a number of occasions, when protective measures were called for, this Court has ordered provisional measures based on the standard of *prima facie* assessment of a case and on the basis of presumptive evidence.¹

8. The Inter-American Commission has adopted precautionary measures that have not produced the needed effects; to the contrary, recent events indicate that the members of the Sarayaku Kichwa indigenous community and their defenders are in grave peril.

9. Heretofore, the Court has ordered protection of a group of people not previously named, but who are identifiable and whose identity can be determined, and who are in grave peril by virtue of the fact that they belong to a given community.² In the instant case, as the Commission has indicated, the Kichwa indigenous community of Sarayaku, composed of approximately 1200 persons, is an organized community located in a specific geographic area comprising the villages of Shiguacoca, Chontayaku, Sarayakillo, Cali Cali, Teresa Mama, Llanchama and Sarayaku Centro, in the province of Pastaza. Its members are identifiable and can be named. Furthermore, as they are all members of that community, they are exposed to the same threat of aggression against the integrity of their person and lives. This Court therefore deems that provisional measures must be ordered to protect all members of the Kichwa indigenous community of Sarayaku.

10. 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 general obligation applies not

¹ Cf., *inter alia*, *Case of the Gómez-Paquiyaui 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 Lilliana Velásquez*. Provisional Measures. Order of the Inter-American Court of Human Rights of September 8, 2003, 'Considering' five.

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; and *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, para. 149.

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.³ The Court observes that given the characteristics of the instant case, provisional measures are needed to protect all members of the Kichwa indigenous community of Sarayaku, in accordance with the provisions of the American Convention.

11. 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.⁴

12. 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.⁵ In adopting provisional measures, the Court is merely guaranteeing 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.

13. As of the date of issuance of the present Order, July 6, 2004, the State has still not submitted its comments in response to the Secretariat's note of June 28, 2004 (*supra* 'Having Seen' 4, 5 and 6).

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 the Court's Rules of Procedure,

DECIDES:

³ Cf. *Matter of The Communities 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.

⁴ Cf. *Case of the "Street Children" (Villagrán-Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 144.

⁵ Cf., *inter alia*, *Case of Lysias Fleury*. Provisional Measures. Order of the Inter-American Court of Human Rights of December 2, 2003, 'Considering' eight; *Case of Lysias Fleury*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 7, 2003, 'Considering' ten; *Matter of The Communities Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 6, 2003, 'Considering' twelve; and *Matter of the Urso Branco Prison*. Provisional Measures. Order of the Inter-American Court of Human Rights of June 18, 2002, 'Considering' ten.

1. To call upon the State to adopt, forthwith, the measures necessary to protect the life and integrity of person of the members of the Kichwa indigenous community of Sarayaku and of those who represent and defend them in proceedings ordered before the authorities.
2. To call upon the State to guarantee the right to freedom of movement of the members of the Kichwa community of Sarayaku.
3. To call upon the State to investigate the facts that necessitated the adoption of these provisional measures so as to identify those responsible and impose the appropriate punishments.
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 Inter-American Commission on Human Rights to forward this Order to the beneficiaries of these measures and to inform them that they may 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, and 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; 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 Sergio García-Ramírez and Antônio A. Cançado-Trindade informed the Court of their Concurring Opinions, which are affixed to this 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 SARAYAKU, JULY 6, 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 the adoption of these provisional measures through which the Inter-American Court of Human Rights is ordering that protection be extended to all members of communities of the *Pueblo indígena de Sarayaku* in Ecuador. Still, I feel obliged to revisit the conceptual construct that I have been advocating within the Inter-American Court, which concerns 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), *The Communities of Jiguamiandó and Curbaradó* (of March 6, 2003) and *Pueblo indígena de Kankuamo* (of July 5, 2004). Instead, I prefer to summarize some of the central points I made on the subject, with a view to effective protection of human rights in a complex situation such as that of the communities of the *Pueblo indígena de Sarayaku*.

2. In the present Order on Provisional Measures of Protection, the Court has correctly emphasized the State's "obligation *erga omnes*" to protect all persons subject to its jurisdiction. 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. (...) given the characteristics of the instant case, provisional measures are needed to protect all members of the Kichwa indigenous people of Sarayaku, in accordance with the provisions of the American Convention. (par. 10)

3. Throughout my years with the Court, I have consistently insisted on the need to develop the doctrine and jurisprudence of the legal regime of obligations *erga omnes* to protect the rights of the human person,⁶ premised on the broad scope of the general obligation that States parties to the American Convention undertake in Article 1(1) thereof, which is to ensure the Convention-protected rights to all persons subject to their jurisdiction. That general obligation includes application of provisional measures of protection under the American Convention. Such measures do more than safeguard the efficacy of judicial procedure; they also protect the most fundamental rights of the human person, and thereby become truly *protective* measures, not simply *precautionary*.⁷

4. Thus, all the potential for protection –by way of prevention– under Article 63(2) of the American Convention is realized. The State's duty to protect also includes its actions *vis-à-vis* third parties. This is an authentic obligation *erga omnes* to protect all members of a threatened and harassed community and who, although not named, are no less *identifiable*. In the present case, the Court found that the members of the communities of the Sarayaku indigenous people meet this requirement, i.e., they are identifiable.

⁶. Cf., for example, my Opinions in the *Case of Blake v. 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 paras. 2 and 6-7;

⁷. As I pointed out in my Concurring Opinion in the *Case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Order of August 18, 2000, paras. 17 and 23).

5. In my Concurring Opinion in the *Matter of the Peace Community of San José de Apartadó* (Order of June 18, 2002) concerning Colombia, I took the liberty of suggesting that the State's obligation *erga omnes* to protect all persons subject to its jurisdiction

"(...) 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).

6. Similarly, in my Concurring Opinion in the *Matter of The Communities of Jiguamiandó and Curbaradó* (Order of February 6, 2003), which also involved Colombia, 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 the recent *Matter of Pueblo indígena de Kankuamo* (Order for Provisional Measures of Protection of July 5, 2004), which also concerned Colombia, it is clear that

... 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 community⁸, even though the basis of action is the breach - or the probability or imminence of breach - of individual rights. (para. 4).

7. As I have written on previous occasions⁹ when the sources (including those not identified) of the human rights violations are so diverse, as illustrated here by the succession of members of the Pueblo indígena de Sarayaku 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.¹⁰ Recognizing the importance of those obligations is essential to addressing the new needs 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 Sarayaku*.

². Suggesting an affinity with the *class actions*.

⁹. Cf. my aforementioned Concurring Opinions in the *Matter of the Peace Community of San José de Apartadó* (2002, para. 19) and the *Matter of The Communities of Jiguamiandó and Curbaradó* (2003, para. 5).

¹⁰. A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, Chap. V, pp. 183-265.

8. 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)¹¹ characterizes them as being objective of necessity. They thus encompass 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*¹² *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.¹³ 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 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.¹⁴ (paras. 77-78).

9. As I pointed out in my Concurring Opinion on the Order for Provisional Measures that this Court adopted yesterday in the *Matter of the Pueblo indígena de Kankuamo* (paras. 11-13), measures such as those that the Inter-American Court has just adopted in the present *Matter of the Pueblo indígena de Sarayaku* serve to establish a continual monitoring mechanism based on a provision of a human rights treaty like the American Convention, to keep track 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

¹¹. 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 their turn, not all the obligations *erga omnes* necessarily refer to norms of *jus cogens*." (parar. 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." (par. 79)

¹³. 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.

¹⁴. 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.

act *strictly within the framework of the Law*,¹⁵ 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.

10. 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 the rights that are inherent in the human person.

11. 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.¹⁶ As the present *Matter of the Pueblo indígena de Sarayaku* 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 of 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 the subject of international law.

Antônio Augusto Cançado-Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

¹⁵. Without having to resort to the unconvincing and unfounded rhetoric of so-called "humanitarian intervention."

¹⁶. 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.