

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF NOVEMBER 21, 2011**

**PROVISIONAL MEASURES
REGARDING THE REPUBLIC OF COLOMBIA**

MATTER OF THE INDIGENOUS COMMUNITY OF KANKUAMO

HAVING SEEN:

1. The Orders of the Inter-American Court of Human Rights (hereinafter, the "Court", "the Inter-American Court" or the "Tribunal") of July 5, 2004; January 30, 2007 and April 3, 2009, issued in relation to this matter. By means of the last order, the Tribunal ordered the Republic of Colombia (hereinafter, the "State" or "Colombia"):

1. to maintain and adopt the measures necessary to continue protecting the life, personal integrity and liberty of all the members of the communities that form part of the Indigenous Community of Kankuamo [;]
2. to continue informing the Inter-American Court of Human Rights on the investigation into the facts that gave rise to these provisional measures[;]
3. to continue guaranteeing the conditions of security necessary to respect the right to freedom of movement of the people of the Kankuamo community, as well as of those who have been forced to displace to other regions in order to return to their homes, if they wish so[;]
4. to continue allowing the participation of the beneficiaries in the planning and implementation of the protective measures and to, in general, keep them informed on the progress of the measures ordered by the Inter-American Court[;]

[...]

2. The briefs of August 3, 2009; January 8 and 12 and October 6, 2010; January 17, April 7, May 2 and October 19, 2011, by which the Republic of Colombia (hereinafter, the "State") presented information on the compliance with the provisional measures ordered in this matter. In addition, the brief of July 18, 2011, by means of which the State presented the information requested by the Court at the public hearing held in this matter (*infra* Having Seen clause 5).

3. The briefs of November 7, 2009; April 28, 2010 and July 25, 2011¹, by means of which the representatives of the beneficiaries of the provisional measures (hereinafter, the

¹ By means of this brief, the representatives presented also the information requested by the Tribunal at the public hearing held in this matter (*infra* Having Seen clause 5). However, said information was presented after the non-renewable term granted by the Court to the parties, that is, after July 15, 2011, and once the representatives received the briefs of the State of Colombia and the Inter-American Commission on Human

“representatives”) filed the observations to the reports of the State of August 3, 2009; January 8 and 12, 2010; October 6, 2010 and April 7, 2011 (*supra* Having Seen clause 2), as well as the slides presented by the representatives at the public hearing held in this matter (*infra* Having Seen clause 5). The representatives did not present observations to the State’s report of October 19, 2011 (*supra* Having Seen clause 2).

4. The briefs of December 3, 2009; May 13, 2010; April 13 and November 18, 2011, whereby the Inter-American Commission on Human Rights (hereinafter, the “Inter-American Commission” or the “Commission”) submitted its observations to the reports of the State (*supra* Having Seen clause 2) and the briefs presented by the representatives (*supra* Having Seen clause 3). Moreover, the brief of July 15, 2011, by means of which the Inter-American Commission presented the information requested by the Court at the public hearing held in this matter (*infra* Having Seen clause 5).

5. The private hearing held at the Court’s seat in San José, Costa Rica, on June 27, 2011².

CONSIDERING THAT:

1. Colombia has been a State Party to the American Convention on Human Rights (hereinafter, the “American Convention”) since July 31, 1973, and it accepted the binding 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 may, with respect to a case not yet

Rights in which they presented their opinions regarding the information required by the Court. Therefore, the information presented by the representatives was not considered by the Tribunal in this Order.

² To this hearing, there appeared: a) on behalf of the Inter-American Commission: Advisors Karla Quintana Osuna and Silvia Serrano Guzmán; b) on behalf of the beneficiaries’ representatives: Luis Fernando Arias Arias, OIK, and Rafael Barrios Mendivil y Jomary Ortegón Osorio, of *Colectivo de Abogados José Alvear Restrepo*, and c) on behalf of the State of Colombia: Hernando Herrera Vergara, Ambassador of Colombia to Costa Rica; Hernán Ulloa Venegas, Director of the Presidential Program on Human Rights; Juan Carlos Forero, Deputy Attorney General; Néstor Armando Novoa, National Director of Public Prosecutors’ Offices, Solicitor General; Marlene Barbosa Sedano, Human Rights Coordinator of the Solicitor General’s Office; Francisco Javier Echeverri Lara, Human Rights Director of the Office of Foreign Affairs; María Paulina Riveros Dueñas, Human Rights Director of the Ministry of Interior and Justice; Pedro Santiago Posada Arango, Aboriginal Affairs Director of the Ministry of Interior and Justice; Elena Ambrosi Turbay, Human Rights Director of the Ministry of National Defense; Lieutenant Colonel John Henry Arango Alzate, Head of the Human Rights Department of the National Police; Tomás Concha, Coordinator of the Presidential Program on Human Rights; Diana Patricia Ávila Rubiano, Coordinator of the Group of Protection and Information on Human Rights of the Ministry of Foreign Affairs; Luz Stella Bejarano, Defense Coordinator before International Fora of the Ministry of National Defense; César Augusto Vergara, Coordinator of the Human Rights Group of *Agencia Presidencial para la Acción Social y la Cooperación Internacional*; Juan Manuel Bravo Coral, Leader of Public Policy on Human Rights of the Ministry of Interior and Justice; Diana Izquierdo, Advisor to the Human Rights Department of the Ministry of Interior and Justice; Alejandra Poveda Torres, Advisor to the Human Rights Department of the Ministry of Foreign Affairs and María Paula Ordóñez and Jennifer Mojica, Advisors to the Ministry of Agriculture and Rural Development.

submitted to the Court, adopt such provisional measures as it deems pertinent. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

3. In this regard, article 27 of the Rules of Procedure of the Court (hereinafter, the “Rules of Procedure”)³ establishes, in its relevant part, that:

1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63(2) of the Convention.

2. With respect to a matter not yet submitted to the Court, it may act at the request of the Commission.

[...]

7. The monitoring of provisional or urgent measures ordered shall be carried out by means of the submission of State’s reports and the filing of the corresponding observations to those reports by the beneficiaries of such measures or their representatives. The Commission shall present observations to the State’s report and to the observations of the beneficiaries of the measures or their representatives.

[...]

4. According to the International Human Rights Law, the provisional measures are not only precautionary in the sense that they preserve a legal situation, but they are also mainly protective since they protect human rights, insofar as they avoid irreparable damage to people. Provisional measures are adopted provided the basic requirements of extreme gravity and urgency and the prevention of irreparable damage to persons are met. In this sense, provisional measures become a real jurisdictional guarantee of a preventive nature⁴.

5. By reason of its competence, within the framework of provisional measures, it falls upon the Court to consider only those arguments which relate strictly to the extreme gravity and urgency and the necessity to avoid irreparable damage to persons. Such other fact or argument can only be analyzed and decided during the consideration of the merits of a contentious case⁵.

³ Rules of Procedure of the Court approved during its LXXXV Period of Ordinary Sessions, held from November 16 to 28, 2009.

⁴ See *Case of “La Nación” Newspaper*. Provisional Measures regarding Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001; Considering Clause four; and *Matter of Alvarado Reyes et al.* Provisional Measures regarding Mexico. Order of the Inter-American Court of Human Rights of May 15, 2011, Considering Clause five.

⁵ See *Matter of James et al.* Provisional Measures regarding Trinidad and Tobago. Order of the Inter-American Court of Human Rights of August 20, 1998; considering clause six; *Matter of Urso Blanco Prison*. Provisional Measures regarding Brazil. Order of the Inter-American Court of Human Rights of August 25, 2011, Considering Clause four.

6. At the public hearing held in this matter (*supra* Having Seen clause 5), the Tribunal requested the representatives of the beneficiaries and the Inter-American Commission to put it in writing in what specific way the State did not comply with the duty to prevent and it also requested the State to indicate whether it considered that it had complied with such a duty. Moreover, the Tribunal also requested the parties to indicate whether there is a remedy available to file with the Constitutional Court in order to allege the presumed non-compliance with Court Order 004 issued by such court as mentioned by the representatives at the public hearing (*supra* Having Seen clause 5). In addition, the President of the Tribunal indicated to the parties that the Court needed “clarifications as to dates, figures, circumstances and the [...] assessment from both sides, from the representatives and the State and, of course, from the [Inter-American] Commission” of these provisional measures. In this respect, the President mentioned that the information that the Tribunal might receive within the time limit granted to the parties, it would be “submitted to the attention of the interested parties [of this matter] so that the Court [might] gather all the facts with which to decide whether [these] provisional measures continu[e] in force”. Based on the above, the Tribunal shall take into account the information presented by the parties in order to assess the enforcement of these provisional measures.

A. Maintain and adopt the measures necessary to continue protecting the life, personal integrity and liberty of all the members of the communities that form part of the Indigenous Community of Kankuamo (operative paragraph one of the Order of April 3, 2009)

7. The State presented, not only in its reports but also at the public hearing, extensive information on the measures adopted tending to comply with this operative paragraph. Next, the Tribunal shall refer to the main aspects of said information. In general terms, the State pointed out that the provisional measures are being implemented within the framework of the Human Rights Protection Program of the Ministry of Interior and Justice, especially, through the Regulation and Risk Evaluation Committee [*Comité de Reglamentación y Evaluación de Riesgos*] (hereinafter, "CRER" for its acronym in Spanish). This body is requested to recommend the most convenient measures to protect people, in this case, the members of the Kankuamo Indigenous Community. The State broadly referred to the different measures it had adopted. On the one hand, it indicated that in order to guarantee the life and personal integrity of the beneficiaries, the Tenth Engineer Battalion [*Batallón de Ingenieros de Movilidad y Contra Movilidad N° 10*] is carrying out tactical missions to ensure security in the area, not only in the indigenous territory but also in access roads and roads that connect different *corregimientos*. Also, the State made reference to the adoption of different protective material measures of an individual and a collective nature⁶. In this respect, it indicated that, in a meeting conducted on February 22, 2011, the CRER recommended that the requests for “protective material measures made by the indigenous peoples” be assessed “taking into account the differential approaches in accordance with the proposal to be presented by the representatives of [such] people”. Given that, according to the Colombian legislation, protective material measures are provisional in nature, on that same month,

⁶ These measures consist, basically, in ground transportation services; mobile, “avantel” and satellite communication services; airline tickets and armored vehicles with escort agents.

through the CRER, the State requested “the representative of the community to update the information regarding the leaders of the community, the occurrence of new facts, if any, and the resolution thereof, in order to conduct new and up-to-date Technical Studies on the Level of Risk”.

8. On the other hand, the State pointed out that, since 2009, it has convened “security councils with the local authorities”. These councils are part of a “mechanism [...] of the Colombian government designed to address the concerns related to security of the local authorities and the community”. “Members of the police and the national army permanently attend” this security council. In addition, it indicated that, in a follow-up meeting of these provisional measures held on June 9, 2011⁷ it made some commitments with Kankuamo Indigenous Community, including the organization of periodic meetings with the police, the army and the “community” in order to make a “permanent assessment of Kankuamo Indigenous Community”; the appointment of an indigenous liaison officer and the designation of a direct liaison by means of a non-commissioned officer of the intelligence department of the battalion with jurisdiction over the area, in order to communicate any “alleged presence of illegal armed people in the indigenous territory”. The State provided detailed information regarding the “current liaison officers”. It also indicated that the members of the army and the police receive permanent training on the respect for the autonomy and jurisdiction of the communities. In this respect, the State indicated that it requested the Indigenous Governor of the Kankuamo Indigenous Organization its good practices so that a member of such community support, in these trainings, the military groups “in order to teach them their customs and traditions” and, thereby, “improve the relations”. Moreover, it indicated that the Ministry of Defense has given “clear instructions” in the sense that “all units with jurisdiction over the area, when entering the [Kankuamo] indigenous territory to carry out a military operation, must contact the indigenous authority in order to inform the reason of [...] their presence”, unless it is an “strictly secret operation” that may jeopardize the military groups. In this respect, the State and the community agreed that every time there is a change in the command of the military authorities, it would be duly communicated to the indigenous authorities. Regarding the complaints filed according to which the national army was conducting surveys and taking photographs of the members of the Kankuamo Indigenous Community, the State pointed out that the Ministry of Defense has reiterated the prohibition by which the military officers are not allowed to conduct surveys and, on the contrary, that “it must be the community itself who must identify when strange persons enter the territory and communicate it to the authorities in order to do the corresponding verifications of the case”.

9. The State made also reference to and explained in full some measures adopted in compliance with Court Order 004 issued in 2009 by the Constitutional Court of Colombia, especially in relation to the program ensuring the rights of the indigenous peoples and the design and implementation of ethnic safeguard plans, among others, in favor of Kankuamo Indigenous Community. This community participates in such actions taken. In this respect, the State pointed out that the orders given by the Colombian Constitutional Court “respond to the compliance with the general obligations of the State [...] in the field of the respect for and guarantee of the rights, [but they are also] identical to the orders given by the [Inter-American Court] by means of provisional measures”. Such actions “are independent from but identical

⁷ In the brief presented by the State of July 18, 2011, it was indicated that said meeting was held on June 10, 2011.

to the [provisional] measures ordered by [the Tribunal]”. In this regard, the State “recall[ed] the principle of complementarity and assistance contained in the preamble of the American Convention on Human Rights [...]”. Regarding the facts referred to by the representatives at the public hearing according to which two members of Kankuamo Indigenous Community died (*infra* Considering clause 12), the State explained that it was conducting the corresponding investigations but that, according to the information available at that time, none of such deaths were related to these provisional measures. It indicated that Mrs. Hilda Solís, it seems, was killed by, possibly, a person who lived at her residence. Moreover, it indicated that the death of the minor, as mentioned by the representatives, was the result of an attack addressed at a soldier while the minor was serving a beverage. In said act, the soldier and the minor died and another soldier got injured.

10. Finally, the State pointed out that the situation of the members of the Kankuamo Indigenous Community "differs from [...] the situation that gave rise to the provisional measures in the year 2003", since it has “substantially improved”. In addition, the State emphasized that “at the moment there are no threats in the Kankuamo indigenous territory representing a situation of extreme gravity and urgency”; the Ministry of Interior and Justice “has not received requests for protection” from the beneficiaries and that, according to information of the National Police and the Ministry of Defense, during the last two years “no special facts have occurred in the Kankuamo community”. Likewise, it mentioned that the “displacements, disappearances, [and] abductions that once occurred in there, are no longer happening now” and that “as from 2009, the presence of [illegal armed groups] has [stopped] and that there was a not so important presence of members of criminal gangs [BACRIM] “though such gangs are not in Kankuamo territory”. However, the “presence of law enforcement officers shall continue in the same proportion given that, within the framework of [the] consolidation policy, it is precisely when territories are consolidated that [best efforts] need to be done in order to guarantee the irreversibility of the results”.

11. In the Order by means of which the public hearing held in this matter was convened (*supra* Having Seen clause 5)⁸, it was emphasized that that last piece of information that the Court received from the representatives was dated April 28, 2010. Said information referred to four items: a) threats against life and personal integrity of some leaders; b) violations of the rights of women, c) violations of the international humanitarian law and other irregular acts committed by the National Army and d) presence of other armed groups in the Kankuamo territory⁹. At the public hearing, the representatives pointed out that “even though it is true

⁸ Matter of the Indigenous Community of Kankuamo. Provisional Measures regarding Colombia. Order of the President of the Inter-American Court of Human Rights of June 7, 2011.

⁹ Regarding item a), they mentioned that in December 2009, a “pamphlet” was distributed by the paramilitary group called “Aguilas Negras” [Black Eagles], at the premises of the Kankuamo Indigenous Organization, containing death threats against several leaders. Among the threatened indigenous persons, there were indigenous governors of the community of Mojao, of la Goya and the indigenous Governor of Kankuamo community, Jaime Arias. Moreover, they mentioned that on April 8, 2010, through a text message, Oscar Segundo Carrillo Daza, a Kankuamo indigenous person, who is the Dean of San Isidro Labrador school of Atanquéz indigenous *resguardo*, received threats. In relation to item b) they pointed out that “the presence of Colombian law enforcement officers in Sierra Nevada of Santa Marta [...] is still a problem that directly affects young women living in the four towns”, such as “multiple pregnancies of indigenous women by members of the national army and the subsequent disregard of their parental responsibilities”. Regarding item c), the representatives pointed out that on July 7, 2009, Mrs. Celia del Carmen Maestre, a Kankuamo indigenous member, received threats against her life and personal integrity by an active member of the 6th High Mountain Group ascribed to the Malambo Battalion, Atlantic Department. Moreover, they indicated that military

that, thanks to the measures adopted by the Inter-American Court, the situations have improved, [...] the threatening conditions that gave rise to the request for provisional measures [...] still continue". Moreover, they mentioned that "the context of violence surrounding the area is a context of systematic and widespread violence, [...] the same motives, the presence of armed groups in the ancestral territory, today represented by *guerrilla* and paramilitary groups [...] are reactivating and rearming in the Department of Cesar". In this respect, they mentioned that in the city of Valledupar, "very near the Kankuamo Indigenous Community", there exist a "profound" violent situation and "there have already been cases of murders and human rights violations in the indigenous territory", like, for instance, in the ancestral territory, near the community of Rio Seco. They pointed out that in the "month of July, four bodies were found, three bodies were in a communal grave and one of them had the feet and hands tied up, murdered by paramilitary groups, [...] buried [in] that area". Furthermore, they mentioned "the presence of farmers around the territory of Kankuamo *resguardo*[; that] there have been selective murders[, like the murder of the *corregidor* of Raices Community;] there have been raids and threats in the territory [of] some communities, [like in the community of Mina and Rio Seco], in which pamphlets were distributed in the houses containing threats against the members of the communities, indigenous leaders of the Kankuamo organization, residents of Valledupar, which basically represent the displaced families".

12. Especially, the representatives referred to the alleged murder of a minor in the city of Valledupar, on June 18, 2011. The minor was displaced from the Chemisquemina Community. Moreover, they mentioned the murder of Mrs. Hilda Solís in the community of Guatapurí, approximately on June 24, 2011.¹⁰ They emphasized that there was presence of the army in that community, for which they were concerned about the fact that, even in this way, a person was killed. At the public hearing, the representatives also referred to information previously presented. However, they expressed that the protective measures granted by the State "were dismantled in a systematic and gradual way" and that, today, these measures consist only of a mobile phone and the security scheme of the indigenous governor. Afterwards, the representatives also indicated that "the security situation in the urban area of

enrolment documents have been issued to the Kankuamo indigenous people, and that other civilian-military activities were carried out in the area. In addition, there is still presence of law enforcement officers in the Kankuamo indigenous *resguardo*, which has not been communicated. Moreover, they pointed out that there have been cases in which Kankuamo indigenous people were recruited. They mentioned the example of young Edilberto de Jesus Gutierrez and other six members of the community of Atánquez. Moreover, they informed that there are police stations and ditches in the very center of the *corregimiento* of Atánquez, a situation that jeopardizes the population before a possible attack of the *guerrilla*. Moreover, according to the representatives, the soldiers are still occupying schools, residences, vehicles and there is even presence of military personnel and "armaments" near the health centers. Likewise, they mentioned that the indigenous communities of Sierra Nevada have reported the presence of military personnel in sacred places and, in some cases, they have desecrated "graves" and stolen sacred objects on which the protection of the territory depend. Finally, regarding item d), the representatives pointed out that the Wiwa Yugamain Bunuankurrua Tayrona Organization (OWBYT) reported the presence of unknown persons, dressed as civilians and with short and long-range arms, in two motorcycles, near the Indigenous House of Valledupar, where the offices of the indigenous organizations of Sierra Nevada are located, on September 13, 2009. Moreover, they indicated that the Kankuamo indigenous people was concerned about the presence of unknown people in the Community of Rio Seco and the Community of Makugueka. The representatives indicated that these people were riding motorcycles, dressed in black, "at night", since this has been the *modus operandi* of members of illegal armed groups like the "Autodefensas", to whom the murder of "approximately 150 Kankuamo indigenous persons" is attributed.

¹⁰ Afterwards, the representatives pointed out that said act took place in "the week of June 23".

the municipality is of high complexity" and that "it is concerning that the eruption of violence is close to the [Kankuamo Indigenous] Community". Apart from the alleged murders mentioned at the public hearing, the representatives also indicated that: a) on April 9, 2011, "an armed group entered a place known as Cesar creek" of the community of Mina, "they were wearing camouflage clothing and bracelet of FARC" and they took Dimas Jose Rodriguez away. They indicated that "it seems that this group was, actually, a paramilitary group"; b) on May 13, 2011, "a man in a motorcycle, with no plate" arrived at the residence of Freddy Martinez, the "coordinator of the Kankuamo community" and [...asked] him whether he was Freddy Martinez"; after having received an affirmative response, such person said to him that "if he was the person in charge of informing the 'justice and peace' process, he should say that nothing must happen to 'paisa', that nobody should know the truth"; c) on May 16, 2011, Adriana Arias, "a displaced leader and resident of Valledupar, was taking her two-year old son to *caí* [sic] when she was chased by a man in a motorcycle who told her to hand in her child [...] and d) on July 5, 2011, "in the community of Rio Seco, seven men with short-range arms and guns, wearing strange clothes and balaclava, between 4 and 5 p.m., appeared at the farm of Mr. Dimas Olivella [...] asked for the owner of the farm, stayed there for a couple of hours [and] ate". The representatives did not present observations to the last report presented by the State on October 19, 2011 (*supra* Having Seen clause 2), once the public hearing was held.

13. Previously, the Commission took note of the information furnished by the State and the coordination efforts between the State and the representatives. However, it expressed that, in light of the observations of the representatives, it did not have sufficient information regarding specific actions related to "the facts of December 2009 and April 2010", as well as "regarding other risk elements that would place the people in a situation of extreme gravity and urgency", which was acknowledged by the Colombian Constitutional Court. Likewise, in the brief presented before the public hearing was held (*supra* Having Seen clauses 4 and 5), it mentioned that "it [did] not have the observations of the representatives and that it [was] waiting for such observations in order to issue more conclusive observations"[.]

14. At the public hearing, the Commission indicated that "in the year 2004, [when the provisional measures were ordered] [...] the Court heard about the situation of extreme gravity and urgency in which hundreds of Kankuamo indigenous persons were murdered within their community". In this respect, it mentioned that "in fact, the Commission considered that, after 7 years [of the granting] of the provisional measures, the shocking number, of hundreds of dead people in 2004, had decreased but it had not disappeared". It expressed that "three days ago, unfortunately, within the Kankuamo *resguardo*, the daughter of a traditional leader of the Kankuamo Indigenous People [...] and, therefore, a beneficiary of these provisional measures, was killed in her house". In general terms, the Commission pointed out that "from the information received throughout the enforcement of these provisional measures, [...] within the area of Sierra de Santa Marta, there is still presence of armed groups that places the Kankuamo Indigenous People in a situation of extreme gravity and urgency. It does not necessarily represent hundreds of deaths, like in 2004, but it is translated into several deaths over the last years and multiple threats [...]". The Commission also referred to the death of the minor in the city of Valledupar (*supra* Considering clause 12). In general terms, the Commission indicated that "the risk factors that gave rise to these provisional measures still persist"; that even though the number of deaths had decreased, they "have not ceased" and that the lack of "widespread threats towards most of the beneficiaries" must not imply that the situation of risk has disappeared. Finally, it expressed that the State

has not “effectively implemented the mechanisms to allow, as ordered by the Inter-American Court and the Colombian Constitutional Court, the return of the displaced members” and therefore, the foregoing, “coupled with the lack of an investigation and the fact that the Kankuamo People is at risk of disappearance as a community due to the continuing violence against it, keeps the members of said People in a situation of extreme gravity and urgency”.

15. The Court notes that these provisional measures were ordered at the request of the Inter-American Commission by means of an Order of July 5, 2004 (*supra* Having Seen clause 1), that is, seven years ago. Throughout this period, the Tribunal has been informed, on different occasions, of the occurrence of facts against the life and personal integrity of the members of the Kankuamo Indigenous Community, especially, threats and murders, as it spring from the Orders of the Tribunal of January 30, 2007 and April 3, 2009 (*supra* Having Seen clause 1). However, during approximately the last two years, the information brought to the Court’s attention by the Inter-American Commission and the representatives has not been enough. From the information provided to the Tribunal, it spring that, according to most recent statements, the Inter-American Commission as well as the representatives acknowledged that, even though the “violent” situation against members of the Kankuamo Indigenous Community continues, said situation has improved and the number of murders has decreased. In this respect, mainly the representatives, after almost 14 months without reporting to the Tribunal, made reference to some facts that took place between April and July 2011, allegedly against members of the Kankuamo Indigenous Community. However, they did not explain the way in which said facts are directly related to the purpose of these provisional measures. Moreover, in very general terms, the Commission as well as the representatives had sustained that the threats and acts of harassment continue, without providing further information as to the manner, time and place in order to allow the Court to adequately assess the situation. In particular, the main argument put forward by the Commission and the representatives to sustain the continuance of the provisional measures is based on that the risk factors that gave rise to such measures still exist. Moreover, the Tribunal notes that the State has broadly referred to different measures adopted by different State’s instances. These measures consist in actions in which the Ministry of Interior and Justice, the army and national police, as well as the municipal authorities and even the authorities of the Kankuamo Indigenous Community, among others, participate.

16. Furthermore, even though it seems that there are still some acts taking place against different members of the Kankuamo Indigenous Community, said situation is not equivalent to the situation described in the year 2004 by the Inter-American Commission upon requesting these provisional measures. According to the Tribunal, the complete eradication of the alleged violence against the Kankuamo Indigenous Community, though desirable, exceeds the object of the purpose of a provisional measure. In addition, the Court considers that the mere existence of “risk factors”, by itself, does not necessary amount to a situation of “extreme gravity and urgency” and the probability of irreparable damage required by Article 63.2 of the American Convention ¹¹,.

¹¹ See Case of the Constitutional Court. Provisional Measures regarding Peru. Order of the Inter-American Court of Human Rights of March 14, 2001; Considering Clause four; Matter of *Carlos Nieto Palma et al.* Provisional Measures regarding the Bolivarian Republic of Venezuela. Order of the Inter-American Court of Human Rights, of January 26, 2009; Considering clause fifteen. Matter of *Liliana Ortega et al.* Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of July 9, 2009, Considering Clause thirty-five.

B. Continue informing on the investigation into the facts that gave rise to these provisional measures (operative paragraph two of the Order of April 3, 2009).

17. In its briefs as well as at the public hearing, the Inter-American Commission, the representatives and the State referred to the situation of the investigation into several facts related to these provisional measures.

18. In this respect, the Court considers pertinent to clarify that, previously, during the processing of these provisional measures, it has adopted the criterion according to which the State was required to investigate into the facts that gave rise to these provisional measures, as well as to inform the Tribunal on that regard. However, taking into account the characteristics of this matter and the fact that these provisional measures have been subjected to a process for approximately seven years, the Court considers that, in this matter, the issue of the investigation implies for the Tribunal to make an analysis of the merits that go beyond the scope of the provisional measures. Taking the aforementioned into account, in the framework of the present provisional measures and as it has done in other matters¹², the Court shall not refer to the investigations carried out by the State and the observations made by the Commission and the representatives in that respect. To this end, the Tribunal shall not request the parties to forward information on this aspect anymore. However, this does not exonerate the State from its duty to investigate the facts denounced in the context of these measures, under the terms of article 1.1. of the American Convention.

C. Continue guaranteeing the conditions of security necessary to respect the right to freedom of movement of the people of the Kankuamo community, as well as of those who have been forced to displace to other regions in order to return to their homes, if they wish so (operative paragraph three of the Order of April 3, 2009).

19. The State informed that the Tenth Engineer Battalion [*Batallón de Ingenieros de Movilidad y Contra Movilidad N° 10*] has carried out different tactical missions in order to counteract the actions of any outlawed armed group, thereby guaranteeing the protection of the members of the Kankuamo Indigenous Community. Moreover, it indicated that while formulating the policy on assistance and support of the return processes of the population in situation of displacement, it was designed and defined the "protocol to support the return or relocation of the displaced population". In this context, the State indicated that "it has allowed the return of fifty (50) families of the *corregimiento* (departamental division) of Rio Seco and thirty-five (35) families of Murillo" and it referred to the actions adopted within the framework of the Departamental Return Meeting [*Mesa Departamental de Retorno*] in favor of the Kankuamo people who returned to said municipalities. Moreover, the State emphasized certain actions taken to comply with the Protection Judgment 2595 [*Sentencia de Tutela N° 2597*] of November 2, 2005, issued by the Superior Council of the Judicature in

¹² See Matter of The Communities of Jiguamiandó and Curbaradó. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of August 30, 2010, Considering Clause thirty-eight and thirty-nine. Matter of the Peace Community of San Jose de Apartadó. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of August 30, 2010, Considering Clause twenty-nine and thirty.

favor of 17 families of the Kankuamo Indigenous Community, who, up to date, are in a situation of forced displacement in the city of Bogota". In addition, it mentioned that by reason of the orders issued by the Constitutional Court, especially "the judgment T-025 of 2004 and Court Order 004 of 2009[,], it was requested to some entities of the National Government [,] among other things, the design of a Program to ensure the rights of the indigenous peoples who are affected by the displacement". By reason of "the order issued by the Constitutional Court, there is a specific space, like the "Meeting for Dialogue and Consensus". Moreover, it mentioned that the Ministry of Interior and Justice, through its Regional Coordination Group in the field of forced displacement, "has adopted different actions addressed at devising schemes to coordinate the policies formulated by the national entities and the actions taken by the regional entities in order to make a profound impact on the implementation of the policy on prevention and assistance of forced displacement". Furthermore, the State mentioned that "the issues related to the return to Rio Seco and Murillo shall be taken up according to the new guidelines of the return policy by means of the protocol that regulates these issues. The pending commitments related to these issues shall be included in the new scheme of the return protocol with 17 components agreed upon at the Constitutional Court [...]". Finally, the State informed that "in order to avoid any inconveniences in the transportation of the Kankuamo community, the National Army gave instructions so that the troop [,] by means of authorized channels [,] learns about and protects the community [...] when it migrates, in light of its indigenous culture". In addition, in order to maintain and increase the control over the roads "and the sense of security in the area, control posts were established in [several *corregimientos*]".

20. As to the right to freedom of movement of the members of the Kankuamo Indigenous Community, the representatives previously informed that on July 15, 2009, in the community of Guatapurí, Mr. Luis Manuel Montero Arias and Jose Enrique Cáceres Arias were arbitrarily detained by members of the State's security department (DAS). Moreover, they emphasized that the indigenous members who decided to voluntarily return to their territories were not afforded the guarantees of security, protection and dignity necessary at the moment of carrying out this type of procedure. At the public hearing as well as in a subsequent brief, they specified that some people had returned to the communities of Murillo and Rio Seco, but that they were not afforded "full guarantees". They also referred to the fact that there were "individual" returns without State's escort. They expressed their concern about the current non-existence of mechanisms to prevent new forced displacements and they emphasized that it is still pending the implementation and availability of viable projects according to the indigenous traditions and customs guaranteeing collective self-sustaining processes within the framework of the returns. In addition, the representatives informed that, by means of the filing of an *amparo*, it was requested the protection of the rights of the indigenous people living in a situation of forced displacement in the city of Bogota and the allocation of a piece of land located in the municipality of Nilo, Department of Cundinamarca. They emphasized the importance of making an appraisal of the proposals taking into account the custom and usage of the beneficiaries. Finally, the representatives also made reference to some aspects related to the "socio-economic stabilization", "humanitarian aid", "the situation of displacement of the city of Bogota" of some members of the Kankuamo Indigenous Community and the need to "include in the population registry – SUR- a variable in order to identify the Kankuamo Indigenous People".

21. Previously, the Commission noted that the State and the representatives made reference to the provisional allocation of a piece of land to the members of the Kankuamo

Indigenous Community who are displaced in Bogota, as well as the lack of an agreement regarding the development of a viable project in said land. In addition, it emphasized the inconsistencies in the observance of the Protocol related to the guidance of the return or relocation processes of the displaced population. The Commission also mentioned that the information presented by the State regarding the measures adopted in favor of the “Kankuamo population” to return to the municipalities of Rio Seco and Murillo, was incomplete. In the brief presented before the public hearing was held (*supra* Having Seen clause **), it mentioned that it reiterated “the need to have detailed information on the measures adopted in order to implement the security conditions necessary for the freedom of movement of the People, to alleviate the situation and make its return safe, avoiding new displacements. At the public hearing, the Commission expressed that “the cause of the displacement of the Kankuamo Indigenous Community [was] the same that [it had] informed in 2004” and that, at [that] moment, there was information about the fact that 400 families of the Kankuamo Indigenous People remain displaced in several cities of Colombia”. Therefore, it mentioned that “the progress has not been enough”.

22. The Court recalls that it ordered the State “to continue guaranteeing the conditions of security necessary to respect the right to freedom of movement of the people of the Kankuamo community, as well as of those who have been forced to displace to other regions in order to return to their homes, if they wish so”. In this respect, the Court notes that, mainly, the representatives indicated that some members of the Kankuamo Indigenous Community have returned to the communities of Murillo and Rio Seco, and that there have been other individual returns, but that the latter was achieved without the “State’s escort” and the due guarantees. However, the representatives did not provide further evidence regarding the way in which such returns took place and, on the contrary, the State informed on such returns as part of the actions it has taken in view of the measures adopted. Moreover, the parties have referred to the alleged situation of members of the Kankuamo Indigenous Community who are displaced in the city of Bogota and the alleged actions adopted to address this situation. However, the Tribunal emphasizes that it does not form part of the object of these provisional measures, since the order issued by the Court refers only to guaranteeing the conditions so that the displaced people may return to their ancestral territory. The representatives also referred to other type of measures that they consider the State should adopt, such as “socio-economic stability”, “humanitarian aid” and “population registry” (SUR). Nevertheless, the Court considers that the foregoing goes beyond the purpose of the provisional measures.

23. From the information furnished by the parties, the Court also notes that the situation reported in the year 2004 that affected the freedom of movement of the members of the Kankuamo Indigenous Communities does not exist in the same proportion. In addition, though the Tribunal verifies that there is still a situation of displacement of several members of the Kankuamo Indigenous Community, said situation could not be totally remedied by the mechanism of provisional measures, as it was intended by the Commission and the representatives. **In this respect, the Court notes that the State has made important efforts to address this problem and that it has adopted different material measures or of other nature to that effect.**

D. Continue allowing the participation of the beneficiaries in the planning and implementation of the protective measures and to, in general, keep them informed on the

progress of the measures ordered by the Inter-American Court (operative paragraph four of the Order of April 3, 2009).

24. The State informed that it convened different entities, which are part of the working group of the provisional measures, to a follow-up meeting, which was organized to be held on May 19, 2009. However, it indicated that the indigenous Governor expressed the concern of the Kankuamo Indigenous People about the absence of the Mayor of Valledupar and the Governor of Cesar; therefore, it requested to set a new date for the meeting if the officers with decision-making power were not present. The State reiterated its will to follow-up the compliance with the provisional measures and it requested the indigenous town council to assess the assistance of different delegates of the entities. However, the State sustained that the indigenous town council maintained his position. Moreover, it mentioned that, since the month of June 2010, it has maintained contact with the representatives of the beneficiaries in order to agree on a date to hold the follow-up meeting of these provisional measures. Nevertheless, due to commitments previously established by the beneficiaries, their representatives and the officers of the different State's entities, there was no agreement as to the date for the meeting. The State also mentioned that it has taken actions to hold the meeting on December 21, 2010. However, "for reasons beyond the control of the State", this meeting was never held. The State mentioned that it was taking steps in order to organize the meeting for February 2011. At the public hearing, it informed on a follow-up meeting of the provisional measures that was held on June 10, 2011, in which "a series of complaints were filed by the community". In this respect, it indicated that what the community has stated was that "on occasions, it has noted the presence of alleged members of criminal groups in its territory", but that what it was verified was that the complaints filed with the army were timely addressed. In said meeting, the State made several commitments with the beneficiaries. Moreover, it indicated that on June 22, 2011, at the premises of the indigenous house of Valledupar, a meeting was held with the National Police and the Indigenous Governor of the Kankuamo Indigenous Community, "in order to follow-up and honor the commitments made at the meeting" of June 10, 2011. Afterwards, the State indicated that on July 12, 2011, another meeting with the beneficiaries was scheduled. In this respect, said date was proposed to the Indigenous Governor of the Kankuamo Indigenous Community. However, said person proposed, as new date for the meeting, July 14, 2011, and then he rescheduled it "until next date". On July 18, 2011, the Indigenous Governor would send a new proposal.

25. The representatives indicated that all the authorities of the Kankuamo Indigenous Community and the representatives attended the meeting scheduled for May 19, 2009. However, they emphasized that the authorities with decision-making power did not attend the meeting, such as the Mayor of the Municipality of Valledupar, the Governor of the Department of Cesar and the Director of the Presidential Program on Human Rights of the Vice-Presidency of the Republic, among others. They expressed their concern about the attitude adopted by the Human Rights Director of the Ministry of Foreign Affairs, "who indicated that her entity was unable to convene a new meeting of the working group to follow-up the provisional measures of the Kankuamo People, alleging problems with the agenda". Moreover, they expressed their concern about the fact that from the State's entities, it does not spring the intention to resume the commitments made at the meetings for dialogue and consensus. Consequently, they indicated that the Kankuamo Indigenous Community has convened, once again, the State to give compliance with the agenda scheduled. However, they indicated that they have not received an answer from the authorities. According to the last piece of information received, the representatives sustain that, in the last three years, only on

two occasions, they had held meetings with the State's authorities to give compliance with the implementation of these measures and the commitments made by the State.

26. Initially, the Commission noted that it did not have information related to the possible reactivation of the Meeting for Dialogue and Consensus. In addition, it mentioned that it considered "it was essential to establish fluid communication with the parties to better implement the measures that are effective to ensure the rights of the Kankuamo Indigenous Community, as well as to implement the commitments previously made by the State's authorities". Afterwards, the Commission indicated that "[it was] informed that, since the last public hearing [...] the State and the representatives of the beneficiaries only met once" and it expressed its "concern about the fact that the State has not given adequate participation to the beneficiaries in the implementation of the measures".

27. In this regard, the Court notes that there is inconsistent information from the representatives and the State regarding different attempts made by both sides to meet and verify the situation of the implementation of these provisional measures. Nonetheless, according to information provided by both sides, the number of meetings held since the last Order issued by the Tribunal in this matter (*supra* Having Seen clause 1) has been minimal. The Court urges the representatives and the State to continue making efforts to address the situation and the needs of the members of the Kankuamo Indigenous Community, regardless of the existence of provisional measures.

E. Enforcement of provisional measures

28. The Court recalls that the principle of *prima facie* assessment of a case and the application of assumptions in cases when protection is required has led the Court to order provisional measures on many occasions. Notwithstanding the foregoing, the need to maintain the protective measures calls for a more strict evaluation by the Court of the existence of the situation that gave rise to those measures¹³. If a State requests the rescission or modification of the provisional measures so ordered, the State must present sufficient evidence and argument that would allow the Tribunal assessing that the risk or threat is no longer of extreme gravity and urgency to avoid irreparable damage. In turn, the burden of proof and argument of the beneficiaries and of the Commission will be greater as the time goes by and there are no new facts committed by the entity that gave rise to the provisional measures.

29. In addition, the Court must take into account that, according to the Preamble of the American Convention, the international protection in the form of a convention "reinforces or complements the protection provided by the domestic law of the American States". Therefore, should there be evidence that the State in question has developed effective mechanisms or acts of protection for the beneficiaries of the provisional measures, the Tribunal would be able to decide whether to rescind the provisional measures, delegating the obligation to protect the

¹³ *Matter of Mendoza Prisons* Provisional Measures Regarding Argentina. Order of the Inter-American Court of Human Rights of November 26, 2010, Considering Clause thirty-nine. Case of the Mapiripán Massacre. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights, of March 1, 2011; Considering clause twenty-two.

primary responsible, that is, the State¹⁴. Should the provisional measures be rescinded by the Court for this reason, the State would have the obligation, according to the duty to guarantee human rights, to maintain the protective measures it has adopted, which were considered by the Tribunal to be effective, as long as the circumstances call for them.

30. The Tribunal emphasizes that it has issued three orders in this matter (*supra* Having Seen clause 1) and that it has held, on three occasions, public hearings to verify the implementation of these provisional measures. Approximately seven years have passed since provisional measures have been adopted. These measures have undoubtedly had a positive effect toward overcoming the grave situation that has principally characterized the members of the Kankuamo Indigenous Community. These effects have been recognized by both the Commission and the representatives. In this respect, the measures adopted by the State to address and counteract said situation have already been indicated. It is also important to note that the State has complied with its duty to report to the Tribunal periodically on the steps taken to implement these measures.

31. In view of the principle of complementary and subsidiary nature that guides the Inter-American Human Rights System, an order to adopt or maintain original measures is justified in situations contemplated under Article 63(2) of the American Convention, with regard to which the ordinary guarantees existing in the State are insufficient or ineffective or when the domestic authorities cannot or do not wish to make them prevail¹⁵. From the court file of the Tribunal, it springs that the domestic authorities have been aware of the situation of the Kankuamo Indigenous Community since the measures were ordered by this Court. This allows for the reasonable assumption that they will continue adequately exercising all due Convention related oversight¹⁶, likewise with regard to the protective measures to be required going forward, if applicable.

32. For all these reasons, the Court views positively the efforts made by the State and the active participation of the representatives of the beneficiaries and finds that the factual situation that, in 2004, led to the adoption and maintenance of these measures to the benefit of the members of the Kankuamo Indigenous Community, does not persist. The situation of risk facing these individuals has evidently not been eliminated, but the information presented by the State, the Commission, and the representatives does not allow for the conclusion that the situation of the community or the specific factors of risk that they could be facing, meet the standard of gravity verified previously. In any case, the urgency and imminence of the situation no longer coincide.

33. This Tribunal is aware that the alleviation and correction of the situation present in this matter is a short, medium, and long term process requiring a collection of actions on the part of the different State's authorities in the administrative, judicial, and legislative areas. Moreover, the Tribunal emphasizes that, according to information on record in this matter, the Colombian Constitutional Court has issued a series of decisions addressing the situation of

¹⁴ Matter of the Mendoza Prisons, *supra* note 13; considering clause forty.

¹⁵ Matter of the Mendoza Prisons, *supra* note 13, considering clause forty-five.

¹⁶ Matter of the Mendoza Prisons, *supra* note 13, considering clause forty-five.

displacement in broad terms¹⁷, as well as others deriving from them and that also address the problem of the members of the Kankuamo Indigenous Community, among others¹⁸. The Court also notes that the State count on a Human Rights Protection Program, which depends on the Ministry of Interior and Justice and which, through the Regulation and Risk Evaluation Committee (“CRER”) conduct risk studies and recommend the most convenient measures to protect the population, in this case, the members of the Kankuamo Indigenous Community. However, many aspects of said State’s actions do not fall under the supervision of the implementation of provisional measures. Because of this and for the aforementioned reasons, the Court deems it is appropriate to rescind such measures. The foregoing does not prevent the Tribunal from ordering provisional measures if, in the future, the three conditions established in article 63(2) of the American Convention are met again.

34. Without prejudice to what was decided by this Tribunal, the Court recalls that Article 1.1 of the Convention embodies the general duty of States Parties to respect the rights and liberties recognized in said treaty and to ensure to all persons subject to its jurisdiction the free and full exercise of those rights and freedoms, under any circumstance. Therefore, independently of the existence of specific provisional measures¹⁹, the State is specially obligated to ensure the rights of the members of the Kankuamo Indigenous Community.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

by virtue of the authority granted by Article 63(2) of the American Convention on Human Rights and Article 27 of its Rules of Procedure,

DECIDES:

1. To rescind the provisional measures ordered by the Inter-American Court of Human Rights on July 5, 2004, which were subsequently ratified, in the case of the members of the Kankuamo Indigenous Community.
2. To clarify that, under the terms of article 1.1, of the American Convention, the rescission of the provisional measures does not imply that the State is relieved of its treaty obligations to protect.
3. To request the Secretariat of the Inter-American Court of Human Rights to notify this Order to the Inter-American Commission on Human Rights, the representatives of the beneficiaries of the provisional measures and the Republic of Colombia.
4. To file the proceeding of the instant case.

¹⁷ For example, Judgment T-025/04 of the Colombian Constitutional Court on the unconstitutional situation of the displaced population.

¹⁸ In this respect, Court Order 004/09 of the Colombian Constitutional Court on the displacement of different indigenous peoples in Colombia.

¹⁹ Matter of the Mendoza Prisons, supra note 13; considering clause fifty-two.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

