

## CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In voting in favor of the adoption of this new Order of the Inter-American Court of Human Rights granting Provisional Measures of Protection in the *Matter of the Peace Community of San José de Apartadó*, regarding Colombia, I feel obliged to include in this Separate Opinion, albeit briefly, my personal reflections on the facts of the *cas d'espèce* and of other recent cases that have led the Court to order Provisional Measures of Protection. Currently, over 11,500 people (including members of entire communities), residing in Latin American countries and the Caribbean, are under the protection of provisional measures ordered by this Court.<sup>1</sup> The implementation of these measures has extended and they have assumed considerable importance in the last decade, thus becoming a true preventive judicial *guarantee*.<sup>2</sup> And the Inter-American Court, more than any other contemporary international court, has significantly contributed to their development in both International Human Rights Law and contemporary Public International Law.

2. Therefore, it is a matter of great concern to me to see that a remarkable legal remedy, which has saved many lives and prevented other irreparable damage to persons -holders of the rights protected by the American Convention on Human Rights-, begins to prove insufficient in certain extreme circumstances. I am deeply concerned that, in the last five years, as a direct result of the increasingly violent and dehumanized world in which we live, some individuals that were under the protection of provisional measures ordered by this Court have, however, been arbitrarily deprived of their lives.

3. This has taken place - paradoxically, *pari passu* with the extraordinary expansion of Provisional Measures of Protection under the American Convention - not only in this *Matter of the Peace Community of San José de Apartadó* regarding Colombia (2002-2006), but also in the *Matter of Eloisa Barríos et al* regarding Venezuela (2005), in the *Matter of Urso Branco Prison* regarding Brazil (2004-2006), in the *Matter of the Mendoza Prisons* regarding Argentina (2005-2006), in the *Matter of the Communities of Jiguamiandó and Curbaradó* regarding Colombia (2003-2006), in the *Matter of Children Deprived of Liberty in the "Complejo do Tatuapé" of FEBEM* regarding Brazil (2005-2006), and in the *Matter of James et al* regarding Trinidad y

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<sup>1</sup>. In the *Matter of Pueblo indígena de Kankuamo* regarding Colombia only there are approximately 6,000 beneficiaries of the measures; in the *Matter of the Peace Community of San José de Apartadó* regarding Colombia, the beneficiaries are over 1,200; in the *Matter of the Communities of Jiguamiandó and Curbaradó* regarding Colombia, the beneficiaries are over 2,000; in the *Matter of Urso Branco Prison* regarding Brazil, almost 900 inmates benefit from the measures; in the *Matter of Pueblo indígena de Sarayaku* regarding Ecuador, there are approximately 1,200 beneficiaries; among several others.

<sup>2</sup>. A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", in *Mesures conservatoires et droits fondamentaux* (publ. G. Cohen Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal* - Strasbourg/Kehl (2003), n. 5-8, pp. 162-168.

Tobago (2000-2002). This requires a reaction from Law in order to protect the vulnerable and defenseless.

4. In the matters cited above, there has been, therefore, a clear failure to comply with the Provisional Measures of Protection ordered by the Court, which are more than precautionary; they are truly protective. Notwithstanding the merits of the aforesaid cases (the alleged or reported original violations of the American Convention), there has been a violation of protective measures, essentially preventive in nature, which effectively safeguard fundamental rights, - almost always irrevocable rights, such as the right to life -, insofar as they seek to prevent irreparable damage to the human being as subject of International Human Rights Law and contemporary Public International Law.

5. This means - and this is the fundamental point that I would like to emphasize in this Concurring Opinion, as I have consistently done in past Opinions-, that, notwithstanding the merits of the respective cases, *the concept of victim also emerges in the new context of the Provisional Measures of Protection*. There is no escaping this point, which puzzles and concerns me. On the other hand, also in this context of prevention of irreparable damage to the human being, the central importance of the human person, though victimized, is affirmed.<sup>3</sup>

6. Provisional Measures of Protection impose obligations on the States, which are different from the obligations resulting from the Judgments rendered on the respective merits of the cases. There are actually obligations that result from Provisional Measures of Protection *per se*. They are completely different from the obligations that may be imposed by a Judgment on the merits (and reparations, if applicable) of the *cas d'espèce*. This means that Provisional Measures of Protection constitute an autonomous legal remedy; they actually have their own *legal framework*, which in turn, reveals the importance of the *preventive* dimension of the international protection of human rights.

7. So much so that, under the American Convention (Article 36(2)), the international liability of a State may arise from failure to comply with Provisional Measures of Protection ordered by the Court, even if the respective merits of the case are not pending before the Court (but rather before the Inter-American Commission on Human Rights). This confirms my thesis, which I set myself to advance in this Concurring Opinion, that Provisional Measures of Protection, in light of their autonomy, have their own legal framework, and failure to comply with them results in liability of the State. It has legal consequences, in addition to underscoring the central role of the victim (of such non-compliance), notwithstanding the consideration and decision of the specific case at issue upon its merits.

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<sup>3</sup>. Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos* (Direct Access of Individuals to International Human Rights Courts), Bilbao, Universidad de Deusto, 2001, pp. 9-104.

8. In addition to the conventional basis provided by Article 63(2) of the American Convention, Provisional Measures are further reinforced by the general obligation of the States Parties, under Article 1(1) thereof, to respect and to ensure respect for the protected rights, without discrimination, of all persons under their respective jurisdiction. The broad scope of this general obligation, which also encompasses the provisional measures of protection, is analyzed in my recent Separate Opinion (paras. 15-21) in the Judgment of the Court in the *Case of the girls Jean and Bosico v. República Dominicana* (September 8, 2005), Separate Opinion (paras. 2-7 and 17-29) in the Judgment of the Court in the *Case of the "Mapiripán Massacre" v. Colombia* (September 15, 2005), and Separate Opinion (paras. 2-13) in the *Case of the Pueblo Bello Massacre v. Colombia* (January 31, 2006). The aforesaid Article 1(1) also provides the conventional basis for the obligations *erga omnes partes* under the Convention.

9. I have the feeling that, despite everything this Court has done in favor of the evolution of the Provisional Measures of Protection - and, I insist, more than any other contemporary international court- there is still a long way to go. It is necessary to preserve the already considerable legacy of said measures under the American Convention. It is necessary to conceptually strengthen their legal framework, for the benefit of the protected persons and of the victims of non-compliance (notwithstanding the merits of the respective cases). This becomes even more imperative where - as is the case in the *Matter of the Peace Community of San José de Apartadó* regarding Colombia- there are repeated acts of harassment and aggression (and even death threats), which reveal a growing pattern of intimidation and violence, against persons that were already under the protection of provisional measures ordered by this Court. This is absolutely imperative in a world that has become dehumanized and devoid of values.

10. Provisional Measures of Protection, the development of which under the American Convention to date has been a true victory of Law, are, however, in my opinion, still very much in their infancy, at an early stage of their evolution, and they will grow and strengthen even more as the universal juridical conscience awakens towards their complete conceptual refinement. International Human Rights Law has transformed the *conception* itself of these measures<sup>4</sup> - from precautionary to protective-, thus revealing the current historical process of *humanization* of Public International Law<sup>5</sup> also in this particular field, however, this process is still in progress.

11. It is necessary to proceed resolutely in this direction. It is imperative, in these days, that the next step be the development of their legal framework, and, within such framework, of the legal consequences of non-compliance with or violation of Provisional Measures of Protection, provided with autonomy. In my view, the *victims* occupy, both

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<sup>4</sup>. A.A. Cançado Trindade, "Address by the President of the Inter-American Court of Human Rights", in *Compendium of Provisional Measures* (June 2001-July 2003), Volume No. 4, Series E, San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. V-XXII.

<sup>5</sup>. Cf. A.A. Cançado Trindade, "*La Humanización del Derecho Internacional y los Límites de la Razón de Estado*" (The Humanization of International Law and the Limits of the Reason of the State), 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte/Brazil* (2001) pp. 11-23.

in this context of prevention as well as in the decision on the merits (and possible reparations) of the cases, a truly central position, as subjects of International Human Rights Law and contemporary Public International Law with international legal standing.

Antônio Augusto Cançado Trindade  
Judge

Pablo Saavedra-Alessandri  
Secretary