ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF AUGUST 18, 2000

PROVISIONAL MEASURES REQUESTED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
IN THE MATTER OF THE DOMINICAN REPUBLIC [1]

CASE OF HAITIAN AND HAITIAN-ORIGIN
DOMINICAN PERSONS
IN THE DOMINICAN REPUBLIC

HAVING SEEN:

1. The brief of the Inter-American Commission on Human Rights (hereinafter the "Commission" or the "Inter-American Commission") of May 30, 2000, and its Annexes, whereby it submitted to the Inter-American Court of Human Rights (hereinafter the "Court" or the "Inter-American Court"), pursuant to Articles 63(2) of the American Convention on Human Rights (hereinafter the "Convention" or the "Inter-American Convention"), and 25 of the Rules of Procedure of the Court, a request for provisional measures on behalf of Haitian and Haitian-origin Dominican persons subject to the jurisdiction of the Dominican Republic (hereinafter the "State" or the "Dominican Republic") at risk of being "expelled" or "deported" collectively (hereinafter the "alleged victims"), in relationship to case N° 12.271, currently before the Commission.

2. That in said brief the Commission indicated as facts the events that are summarized below:

a) on November 12, 1999, the Commission received a complaint about "massive expulsions" of the alleged victims, that the State was implementing during that month. Ten days later, on November 22, 1999, the Commission issued a request for the adoption of a precautionary measure and requested that the Dominican Republic stop the "massive expulsions" and that, in the event that they would continue to be made, this be done satisfying the requirements of the due process;

b) on December 7, 1999, the State rejected the precautionary measure, pointed out the legal procedures applicable to the "repatriations" implemented by the General Immigration Directorate, and informed on the preparation of a new

[1] Judges Oliver Jackman and Sergio García-Ramírez informed the Court that, due to *force majeure*, they were unable to be present at the public hearing of August 8, 2000, for which reason they did not take part in the deliberation and signing of this Order.

draft Immigration Law, and on talks held with the Government of Haiti. Lastly, it affirmed that "collective repatriations" were not being made in the Dominican Republic;

c) the pace of the "deportations" became slower after November 1999; however, on March 10 and May 5, 2000, the petitioners reiterated their complaint before the Commission, and affirmed that an average of 2,000 "deportations" were being made per month since November 1999, and that in April 2000 it was noticed that the pace of such "deportations" had quickened;

d) the "expulsions" are made through collective raids not subject to a legal procedure for identifying adequately the nationality of those "expelled," their immigration status, or their family ties; they are simply drawn away from their homes without warning and without the possibility to carry their belongings with them. The immigration authorities select the persons to be deported by the color of their skin;

e) the petitioners have calculated that more than 20,000 individuals were "expelled or deported" during November 1999. The Dominican authorities use excessive force to ensure that the alleged victims obey their orders, which includes the women's submitting to sexual abuse; the children suffer psychological damage, and fear keeps them from leaving their homes; the women of those who are "deported" have to survive without means;

f) on December 3, 1999, the Governments of Haiti and the Dominican Republic entered into an agreement, whereby the latter committed to notify the Haitian authorities on any deportation of Haitian nationals; according to the petitioners, this agreement has not been honored by the State; and

g) the practice of "deportations" and "expulsions" affects two groups: legal and non-documented Haitian workers, and legal and non-documented Haitian-origin Dominicans who live in the Dominican territory;

and on the basis of the preceding it requested that the Court

> […] adopt the provisional measures in order that the State… suspend the massive expulsions-deportations that the Dominican authorities are implementing, and of which Haitians and Haitian-origin Dominicans are being the victims, since they place the life and physical integrity of those deported and of family members who are separated, especially children under age who are left abandoned, at risk[;]
>
> […] adopt the provisional measures in order that the State establish procedures through which it may be possible to distinguish cases where deportation is not applicable, from cases where it is applicable. In the event that persons who are in the Dominican territory are expelled or deported, the requirements of the due process must be strictly observed, including a minimum term for notification, access to family members, adequate hearings, and decisions adopted lawfully by the competent authorities. In all the cases the deportations must be made individually, not massively.

3. The brief of the Commission of June 13, 2000, whereby it submitted an *Addendum* to its request for provisional measures (*supra* 1) and informed that it had acquired

knowledge of the identity of some of the alleged victims, who had given their approval to being named in the context of the request. Thus, the Commission described some of the specific circumstances of Benito Tide-Méndez, Rafaelito Pérez-Charles, Antonio Sensión, Janty Fils-Aime, Berson Gelim, William Medina-Ferreras[2] and Ms. Andrea Alezy, as well as those of some relatives, and urged the Court to adopt the measures necessary to

> [p]ermit the immediate return of the above-mentioned persons, who are currently in Haiti;[3]
>
> [p]rotect the abovementioned persons who are in the Dominican Republic from any detention or deportation action based on racial or national origin, or on the suspicion that they are not full-fledged citizens;[4]
>
> [a]llow all those who were mentioned [*supra*] to establish contact with their families, especially their children under age, to normalize their support, health and schooling situation as soon as possible[;]
>
> […] urge the Dominican Government to establish adequate procedures for the detention and determination of measures for the deportation of deportable aliens, including the holding of hearings to prove the right that the persons may have to remain on Dominican soil or, in its defect, to communicate with their families and employers, in order to normalize the collection of salaries and the protection of their property and personal effects.

4. The Order of the President of the Court of June 16, 2000, whereby it summoned the State and the Commission to appear at a public hearing to be held at the seat of the Inter-American Court on August 8, 2000, as of 10:00 hours, in order for the Court to hear their points of view concerning the facts and circumstances that led to the request for provisional measures.

5. The brief of the Commission of July 21, 2000, whereby it accredited the persons that would represent it at the public hearing (*supra* 4), proposed Ms. Solange Pierre and Rev. Pedro Ruquoy as "experts" to submit reports at the hearing, and requested the approval of the Court to show, during said hearing, a video with testimonies of the alleged victims.

6. The brief of t he Inter-American Commission of July 25, 2000 whereby it presented its position with respect to its offer of "expert witnesses," and pointed out to the Court the need to have both of them present.

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[2] His actual name is Wilner Yan, according to the brief of the State of August 8, 2000, accompanied by the July 19, 2000, Annex of the Director General of Immigration of the Dominican Republic, submitted at the end of the public hearing held before the Inter-American Court on August 8, 2000.

[3] According to the brief of the Commission, Ms. Andrea Alezy and Messrs. Janty Fils-Aime, Berson Gelim, and William Medina-Ferreras were "expelled" of "deported" from the Dominican Republic and are currently in Haity.

[4] According to the brief of the Commission, Messrs. Rafaelito Pérez Charles and Antonio Sension are currently in the Dominican Republic under constant risk of being "deported" or "expelled." Mr. Benito Tide-Méndez [has] returned or is becoming ready for his return" to the Dominican Republic, after having been "expelled" at the end of 1999. However, during the public hearing of August 8, 2000, the Commission confirmed that Mr. Benito Tide-Méndez is in the Dominican Republic.

7. The communication from the State of August 1, 2000, whereby it accredited the persons that would represent it at the public hearing, and objected to the offer of "expert witnesses" made by the Commission.

8. The brief of the Inter-American Commission of August 4, 2000, in which it responded to the objection submitted by the State and reiterated the need to have the two "expert witnesses" it had offered for the public hearing.

9. The Order of the Court of August 7, 2000, where it considered

> 1. [t]hat the Commission has indicated to this Tribunal that Father Pedro Ruquoy and Ms. Solange Pie would render statements concerning the situation of the alleged victims and the alleged practice of "expulsion" and the consequences thereof, in order to illustrate the context within which this request has been submitted[;]
>
> 2. [t]hat the purpose of the depositions of Father Pedro Ruquoy and Ms. Solange Pie bears no relationship to technical or specialized items with respect to which this Tribunal would request the opinion of experts[;]
>
> 3. [t]hat Article 44(1) of the Rules of Procedure of the Court establishes, however, that the Court may "Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant[;]"
>
> 4. [t]hat, in accordance with the reasons expressed by the State and the Commission, both, Father Pedro Ruquoy, and Ms. Solange Pie have worked with the alleged victims, and have directly perceived the circumstances and conditions in which they live, whereby this Tribunal orders the appearance of both to hear their statements in their capacity as witnesses[;]
>
> 5. [t]hat the fact that a person has a direct interest in the outcome of a proceeding or may have taken part as a petitioner in a case before the Commission, is not a cause for hindrance to deposing before this Court which, in its practice, has even admitted statements from the victim and her or his relatives *(I-A.CourtH.R., Loayza-Tamayo Case. Judgment of September 17, 1997. Series C N° 33; I-A.CourtH.R., Castillo-Páez Case. Judgment of November 3, 1997. Series C N° 34; I-A.CourtH.R., Suárez-Rosero Case. Judgment of November 12, 1997. Series C N° 35; I-A.CourtH.R. Blake Case. Judgment of January 24, 1998. Series C N° 36; I-A.CourtH.R. Paniagua-Morales et al. Judgment of March 8, 1998. Serie C N° 37; I-A.CourtH.R. Villagrán-Morales at al. Judgment of November 19, 1999. Series C N° 63)* [;][5]

and decided

> 1. [t]o summon Father Pedro Ruquoy in order that, as of 10:00 hours of the 8th day of August, 2000, he appear before the Inter-American Court of Human Rights to render a testimonial statement concerning the alleged practice of "expulsion and deportation" of Haitian and Haitian-origin Dominican nationals in the Dominican Republic[;]
>
> 2. [t]o summon Ms. Solange Pie, in order that, as of 10:00 hours of the 8th day of August, 2000, she appear before the Inter-American Court of Human Rights to render a testimonial statement concerning the alleged practice of "expulsion and deportation" of Haitian and Haitian-origin Dominican nationals in the Dominican Republic[;]

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[5] This Court has observed the same practice in the stage of reparations (*I-A.CourtH.R., Loayza-Tamayo Case. Reparations (Art. 63.1 American Convention on Human Rights). Judgment of November 27, 1998. Series C N° 42; I-A.CourtH.R. Suárez-Rosero Case. Reparations (Art. 63.1 American Convention on Human Rights). Judgment of January 20, 1999, Series C N° 44.*

3. [t]o request the State of the Dominican Republic to facilitate the exit from and entry into its territory of Father Pedro Ruquoy and Ms. Solange Pie, who have been summoned by the Inter-American Court of Human Rights to render a testimonial statement in relationship to the request for provisional measures[; and]

4. [t]o establish that this summons shall be governed by the provisions of Article 45 of the Rules of Procedure of the Inter-American Court of Human Rights, according to which "the party requesting the production of evidence shall defray the cost thereof[;]"

10. The public hearing on this request held at the Inter-American Court on August 8, 2000, there having appeared

for the Dominican Republic:

Servio Tulio Castaños, agent;
Danilo Díaz, deputy agent;
Flavio Darío Espinal, assistant;
Rhadys Abreu-de-Polanco, assistant;
Wenceslao Guerrero-Pou, assistant;
Teresita Torres-García, assistant;
Claudia Blonda, assistant; and
Oscar Iván Peña, assistant.

For the Inter-American Commission on Human Rights:

Juan Méndez, delegate;
Berta Santoscoy, attorney;
Roxanna Altholz, adviser;
Katie Fleet, adviser;
Cathie Powell, adviser;
Arturo Carrillo, adviser; and
Luguely Cunillera, adviser.

Witnesses presented by the Inter-American Commission:

Father Pedro Ruquoy and
Solange Pierre

11. The arguments of the Commission presented at the above-referenced public hearing, which are summarized below:

a) The Commission recognizes that the immigration policy of each State is its own sovereign decision; however, this has limitations. Thus, in conformity with the American Convention, this policy cannot affect the right of nationals to leave and enter the country, and to select any location therein as a place of residence; this policy must recognize the right of legal aliens not to be deported, except by a decision based on the law, and must prohibit the collective expulsion of aliens whether legally or not in the country. In like manner, the immigration policy must ensure, for each case, an individual decision with the guarantees of the due process;

it must respect the right to life, to physical and psychological integrity and to the family, and the right of children to obtain special protection measures. Lastly, the implementation of such policy cannot be allowed to result in cruel, inhuman or degrading treatment, nor in discrimination for reasons of race, color, religion or sex;

b) the Commission required the adoption of precautionary measures on November 21, 1999, and, to date, there has been no change in the practice of the Dominican authorities of deporting and expelling Haitians and Haitian-origin Dominicans. This practice, which is carried out arbitrarily, in summary fashion, and without guarantees, continues to be aimed against individuals whose skin color is "black." Because of the fact that they are black, they are suspected to be Haitian; it is then presumed that if they are Haitian they are illegally in the country and are therefore expelled. The practice described causes great damage and harm to Haitians and Haitian-origin Dominicans, who live with the constant fear of being deported or expelled.

c) this request is being made on behalf of a given but nameless group, since the State's practice makes it impossible to distinguish between individual group members; the members do not come forth as individual members of the group because of fear; and the inter-American human rights system would not be equipped to process individual complaints from each member;

d) neither the text nor the spirit of Article 63(2) of the American Convention establish an impossibility or restriction as to whether the irreparable damage should be against life, integrity or any other right. There is, therefore, the need to recognize that other rights protected by the Convention should be subject to a protection similar to the protection thus far afforded life and personal integrity;

e) the witnesses who appeared at the public hearing before the Court are justifiably fearful, and the interrogation by the State at said hearing did not help dissipate their fear; and

f) the Commission continues to be ready to dialogue constructively with the Dominican authorities to arrive at permanent solutions.

12. The arguments of the State presented at the same public hearing, which are summarized below:

a) There is, in the Dominican Republic, a deportation procedure that ensures the due process and the personalized treatment of deportation cases. The State has taken very seriously the repatriation of Haitian citizens who are illegally within its territory, whereby it has made a sustained effort, in collaboration with the Haitian government, to improve at every step the repatriation mechanisms, in a spirit of protection of people's rights. In like manner, the State recognizes that all mechanisms or procedures can always be improved;

b) the immigration authorities have publicly and repeatedly invited the non-governmental organizations of the Dominican Republic to observe the different phases of the deportation process, but this invitation has not been welcomed by said organizations;

c) the Dominican Republic is obliged to maintain a permanent return and expulsion policy, but it is necessary to point out that the number of persons repatriated does not compensate even remotely for the number of persons who come into the country illegally. The acceptance of this request would be like tying the hands of a State that has been trying for four years to make headway in the field of human rights and concerning its immigration problem;

d) the problem of Haiti is a problem of the international community and, above all, of the richest countries; the Dominican Republic has great economic limitations, great levels of poverty, and it is unable to bear on its shoulders, by itself, the circumstances of the economic, social, environmental, political, institutional and security reality of the Haitian people; and

e) it is necessary to identify the persons on whose behalf provisional measures are being requested; however, the Dominican Republic is in the best disposition to study any individual case where the violation of rights is alleged, in order to correct any abuse which may have been committed, and to take measures in the same context where it advances towards an improvement of the repatriation mechanisms.

13. The statements delivered by the witnesses during the cited public hearing, which are summarized below:

a) Testimony of Father Pedro Ruquoy, a Catholic priest and a member of a missionary religious organization in the Dominican Republic.

He deposed on the process of forced repatriations in the Dominican Republic. Said process is very quickly implemented. In most cases the persons are conducted to the border on buses without being able to communicate with their relatives, without warning, without being able to carry their belongings, and without the possibility to appear before some competent authority to prove their immigration status. The criteria used to select the persons who will be expelled are skin color and the way they talk. Furthermore, some of the persons expelled are Dominicans who have their national identification cards, but who are told that said identification cards are false. The alleged victims live in constant fear; sometimes the repatriations are carried out at night and the persons are subject to abuse, including the women. On one occasion he reported on this to the President of the Republic, but received no reply. He indicated that, since he lives in the border area, he is visited every day by an average of 12 expelled persons who wish to return to their homes. Lastly, he said that he understood and supported each country's right to repatriate persons who are illegally in its territory, but that he did not agree to the manner in which the Dominican Republic treated these persons at the time of repatriation.

b) Testimony of Ms. Solange Pierre, a social worker and Director of the Dominican-Haitian Women's Movement

She deposed on the process of forced repatriations in the Dominican Republic. Armed military personnel enter violently into the homes of persons and take them directly to Haiti. Said expulsions separate the families, cause trauma and grave consequences among the population in general, especially the women and children. Furthermore, many of the expelled persons have been in the Dominican Republic for 20-30 years, and have broken their ties with Haiti; many do not speak the language, do not have Haitian customs, and when they arrive in Haiti they find themselves in a totally unknown place. There are cases of rape in the context of the expulsions. She works with approximately seven small communities or "bateyes" without utilities or basic services. She expressed that the expulsions are carried out without warning. She indicated that there are legislators and Government representatives who asked, through the media, that she be arrested, investigated and expelled; her children and family have been similarly terrorized. Lastly, she added that the practice of expulsions has continued to date.

14. The brief submitted by the Dominican Republic upon the closing of the public hearing before the Court, and its appendices, whereby it alleged that

a) the Commission acted hastily in its request for provisional measures, since it did not wait for the reply from the State, nor did it use the means and mechanisms at its disposal to ascertain the complaint filed by the petitioners;

b) the deportation of foreigners who stay illegally within the Dominican territory is a "right of the Dominican State that can be neither waved nor negotiated, as it is one of the basic attributes of its sovereignty;" it is established in its legislation, and it does not violate any treaty or convention that the State may have signed or ratified;

c) there is, in the Dominican Republic, a deportation procedure that ensures the due process and the personalized treatment of deportation cases. This procedure consists of three stages, to wit: detention and identification, investigation and depuration, and, finally, verification and confirmation;

d) before deporting someone, the competent authorities establish with precision her or his identity and legal status in the State, to distinguish persons susceptible of deportation from those who are not. Persons to be deported are subject to final verification, with the participation of Haitian consuls, before being handed over to Haitian authorities.

e) The Dominican Republic has made sustained efforts to establish mechanisms for the repatriation of Haitians with due protection of their rights; this commitment has become evident over the past few years, through intensified relations of collaboration between the Dominican and the Haitian Governments; this has been done through the signing of several cooperation agreements on this subject;

f) it is not true that "the lives and physical integrity of a large number of persons" are in danger in the Dominican Republic;

g) the number of repatriated persons every month must be analyzed in the context of the massive immigration of Haitian citizens into Dominican territory; even so, the statistics of the General Immigration Directorate indicate that the number of repatriated persons has never reached 1,000 in any one month;

h) the Dominican Republic has serious difficulties to absorb an indefinite and constant number of refugees because of its own limitations, since this is a problem that must be solved within a global context;

i) the identity of those persons who are in danger of suffering irreparable damage must be revealed for the adoption of provisional measures; measures adopted in relationship to nameless persons would only hinder the Dominican State's right to protect its border and control the legal status of the persons who enter into its territory or live in it; and

j) concerning the persons mentioned in the Commission's *Addendum* of June 13, 2000 (*supra* 3), two of them, Rafaelito Pérez-Charles does not live, nor has he lived for the past 51 years, in the community indicated by the Commission,[6] and Berson Gelim is not registered among those deported from the Dominican Republic.

Lastly, the State referred to the particular circumstances of the rest of the persons indicated in the cited *Addendum* of the Commission, requested the Court to reject the current request, and expressed "its willingness to rectify and bring under the law those responsible in connection with any case where it can be ascertained that there was any abuse or ignorance of rights to the detriment of foreigners."

15. The communication of the Commission of August 11, 2000, whereby it

a) objected to the writing submitted by the State upon the closing of the public hearing (*supra* 14);

b) indicated, in response to a matter posed by the President of the Court during the public hearing, that its request for provisional measures was a *popular action* (*actio popularis*); and

c) requested provisional measures also on behalf of the two witnesses who deposed a the cited public hearing.

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6 The Commission referred to the Neyba, Batey 7, community.

CONSIDERING:

1. That the Dominican Republic is a State Party to the American Convention since April 19, 1978, and recognized the jurisdiction of the Court, pursuant to Article 62 of the Convention on March 25, 1999.

2. That 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, in matters not yet submitted to its knowledge, at the request of the Commission, adopt such provisional measures as it deems pertinent.

3. That, under the terms of Article 25(1) of the Rules of Procedure of the Court,

> [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. That it is an attribute of the Dominican Republic to adopt sovereign decisions concerning its immigration policy, which must be compatible with the human rights protection rules established in the American Convention.

5. That it has not been proven, either at the public hearing of August 8, 2000, or in the writings submitted to the Court, that the Dominican Republic maintains a State policy of deportations and massive expulsions in violation of the specific rules of the Convention; however, the testimonies presented at the cited public hearing enable the Court to establish a *prima facie* assumption of the occurrence of cases where individuals are subject to abuse.

6. That information was provided at the cited public hearing, on bordering communities or "bateyes" whose inhabitants are subject to forced repatriations, deportations or expulsions, for which reason the Court deems it necessary to obtain additional information on the situation of the members of such communities or "bateyes."

7. That, in a positive manner and at the same public hearing, the State has expressed its willingness to improve the repatriation mechanisms and the deportation and expulsion procedures; correct certain practices, and bring under the law those responsible for abuse or ignorance with respect to rights in connection with such repatriations.

8. That this Court deems it indispensable to identify individually the persons in danger of suffering irreparable damage, for which reason it is not feasible to order provisional measures without specific names, for protecting generically those in a given situation or those who are affected by certain measures; however, it is possible to protect the individualized members of a community.[7]

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[7] *Cfr. Inter alia, Álvarez et al. Case,* Provisional Measures. Order of January 21, 1998. Series E N° 2; *Clemente Teherán et al. Case*, Provisional Measures. Order of June 19, 1998. Series E N° 2; *Digna Ochoa and Plácido et al. Case.* Provisional Measures. Order of November 17, 1999. Series E N° 2.

9. That the events presented by the Commission in its request show *prima facie* a situation of extreme gravity and urgency as to the rights to life, personal integrity, special protection for children in the family, and to residence and movement, of the persons identified in the June 13, 2000, *Addendum* of the Commission (*supra*, Having Seen N° 3), and specified in the operative part of this Order of the Court (*infra* operative paragraphs 1, 3, 4, 5, 6, and 7).

10. That Article 1(1) of the Convention establishes the obligation that the States Parties have to respect the rights and freedoms recognized in that covenant and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.

11. That it is the responsibility of the Dominican Republic to adopt security measures to protect all persons subject to its jurisdiction; this responsibility becomes still more evident in relationship to those who may be bound by proceedings before the supervising organs of the American Convention.

12. That, on the basis of what has been affirmed by the witnesses during the August 8, 2000, public hearing, and the submissions of the Commission, Father Pedro Ruquoy and Ms. Solange Pierre may be the victims of reprisals in the Dominican Republic as a consequence of their depositions before this Court, for which the adoption of provisional measures is required to keep them from suffering irreparable damage.

13. That the practice of this Tribunal has been to protect, through the adoption of provisional measures, witnesses who have deposed before the Court.[8]

NOW, THEREFORE,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

In exercise of the powers conferred upon it by Article 63(2) of the American Convention, and Article 25 of its Rules of Procedure,

DECIDES:

1. To require that the State of the Dominican Republic adopt, forthwith, whatever measures are necessary to protect the lives and personal integrity of Benito Tide-Méndez, Antonio Sension, Andrea Alezy, Janty Fils-Aime, and William Medina-Ferreras.

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8 *Cfr., Velásquez-Rodríguez, Fairén-Garbi and Solís-Corrales, and Godínez-Cruz Cases*, Provisional Measures. Order of January 15, 1988. Series E N° 1; *Caballero-Delgado and Santana Case*, Provisional Measures. Order of December 7, 1994. Series E N° 1; *Blake Case*, Provisional Measures. Orders of September 22, 1995 and April 18, 1997. Series E N° 1 and 2; *Bámaca-Velásquez Case*, Provisional Measures. Orders of June 30, 1998 and August 29, 1998. Series E N° 2; *Paniagua-Morales et al. and Vásquez et al. Cases*, Provisional Measures. Orders of February 10, 1998 and June 19, 1998. Series E N° 2.

2. To require that the Inter-American Commission on Human Rights urgently report in detail to the Inter-American Court of Human Rights, no later than August 31, 2000, about the current situation of Rafaelito Pérez-Charles and Berson Gelim, in relationship to diverging affirmations of the parties on these two persons.

3. To require that the State of the Dominican Republic abstain from deporting or expelling Benito Tide-Méndez and Antonio Sension from its territory.

4. To require that the State of the Dominican Republic permit the immediate return to its territory of Janty Fils-Aime and William Medina-Ferreras.

5. To require that the State of the Dominican Republic permit, within the shortest possible time, the family reunification of Antonio Sension and Andrea Alezy with their minor children in the Dominican Republic.

6. To require that the State of the Dominican Republic collaborate with Antonio Sension to obtain information on the whereabouts of his next of kin either in Haiti or in the Dominican Republic.

7. To require that the State of the Dominican Republic, within the framework of the pertinent cooperation agreements between the Dominican Republic and Haiti, investigate the situation of Janty Fils-Aime and William Medina-Ferreras, under the supervision of the Inter-American Commission on Human Rights, to expedite the results of such investigations.

8. To require that the State of the Dominican Republic continue to follow up the investigations that its competent authorities have already initiated concerning Benito Tide-Méndez, Rafaelito Pérez-Charles, Antonio Sension, Andrea Alezy, and Berson Gelim.

9. To require that the State of the Dominican Republic adopt, forthwith, whatever measures are necessary to protect the lives and personal integrity of Father Pedro Ruquoy and Ms. Solange Pierre, witnesses at the August 8, 2000, public hearing.

10. To require that the State of the Dominican Republic and the Inter-American Commission on Human Rights provide to the Inter-American Court of Human Rights detailed information on the situation of members of the border communities or “bateyes” who could be subject to forced repatriations, deportations or expulsions.

11. To require that the State of the Dominican Republic inform the Inter-American Court of Human Rights every two months as of the notification of this Order, about the provisional measures that it will have adopted in compliance therewith.

12. To require that the Inter-American Commission on Human Rights submit its observations on the reports of the State of the Dominican Republic within six weeks of receiving them.

Judge Cançado Trindade informed the Court of his Concurrent Opinion, which shall be attached to this Order.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez Hernán Salgado-Pesantes

Alirio Abreu-Burelli Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In the memorable public hearing of 08 August 2000 before the Inter-American Court of Human Rights, the Delegations of both the Inter-American Commission on Human Rights and the Dominican Republic sought to identify the context of the present case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, and pointed out - amidst signs of an appreciated procedural cooperation - its considerable complexity and its character of a true human tragedy. This being so, besides voting in favour of the adoption by the Court of the present Resolution on Provisional Measures of Protection, I feel obliged to leave on the records, in this Concurring Opinion, my thoughts on the matter, given the dimension and proportions which the problem dealt with herein has acquired, constituting one of the great challenges of the International Law of Human Rights at the beginning of the XXIst century.

I. Uprootedness and Human Rights: The Global Dimension.

2. In the aforementioned public hearing, the Dominican Delegation pointed out that the present case reflects a problem which concerns also the international community and that the search for a solution to it should not be incumbent entirely upon the shoulders of the Dominican Republic. In my understanding the Dominican Delegation is right in pointing out this aspect of the problem: we cannot, in fact, make abstraction of its *causes*. The contemporary phenomenon of the *uprootedness*, which is manifested in different regions of the world, discloses a truly global dimension, which presents a great challenge to legal science, and, in particular, the International Law of Human Rights.

3. In fact, in a "globalized" world - the new euphemism *en vogue*, - the frontiers are opened to capitals, investments, goods and services, but not necessarily to the human beings. The wealth is increasingly concentrated in the hands of a few ones, at the same time that those marginalized and excluded regrettably increase, in a growing (and statistically proven) way. The lessons of the past seem to have been forgotten, the sufferings of previous generations appear to have been in vain. The current "globalizing" frenzy, shown as something inevitable and irreversible, - constituting in reality the most recent expression of a perverse social neodarwinism, - appears entirely devoid of all historical sense.

4. This framework reveals the dimension that the human being (of the era of the computers and the *Internet*) has given to his fellow-man, on this eve of the XXIst century: the human being has been placed by himself in a scale of priority inferior to that attributed to the capitals and goods, - in spite of all the struggles of the past, and of all the sacrifices

of the previous generations. To the primacy of the capital over work[9] corresponds that of egoism over solidarity. As a consequence of this contemporary tragedy - caused essentially by man himself, - perfectly avoidable if human solidarity prevailed over egoism, there emerges the new phenomenon of the uprootedness, mainly of those who seek to escape from hunger, from illnesses and from misery, - with grave consequences and implications for the international norms themselves of protection of the human being.

5. Already in 1948, in a luminous essay, the historian Arnold Toynbee, questioning the very bases of what is understood by *civilization*, - that is, quite modest advances at the social and moral levels, - regretted that the command achieved by man over the non-human nature unfortunately did not extend itself to the spiritual level[10]. In fact, the need for roots is to the human spirit itself, as pointed out with such a rare lucidity by Simone Weil in a book published in 1949: every human colectivity has its roots in the past, which constitutes the only means of preserving the spiritual legacy of those who have already departed, and the only means whereby the dead can communicate with the living[11].

6. With the uprootedness, one loses, for example, the familiarity with the day-to-day life, the mother-tongue as a spontaneous form of the expression of the ideas and sentiments, and the work which gives to each person the meaning of life and sense of usefulness to the others, in the community wherein one lives[12]. One loses the genuine means of communication with the outside world, as well as the possibility to develop a *project of life*. It is, thus, a problem which concerns the whole human kind, which encompasses the totality of human rights, and, above all, which has a spiritual dimension which cannot be forgotten, with all more reason in the dehumanized world of our days.

7. The problem of uprootedness ought to be considered in a framework of action oriented towards the erradication of social exclusion and extreme poverty, - if one indeed wishes to reach its causes and not only to fight its symptoms. One ought to develop responses to the new needs of protection, even if they are not literally contemplated in the international instruments in force of protection of the human being[13]. The problem can only be adequately confronted bearing in mind the indivisibility of all human rights (civil, political, economic, social and cultural).

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9. This latter being understood not as a simple occupation, or a means of production, or source of income, but rather as a way to give meaning to life, to serve the fellow-men, and to attempt to improve the human condition.

10. A.J. Toynbee, *Civilization on Trial*, Oxford, University Press, 1948, pp. 262 and 64.

11. The point is developed by the author, one of the great thinkers of the XXth century, who died prematurely, in her posthumous book *L'Enracinement* (of 1949, subsequently edited in English under the title *The Need for Roots*, 1952).

12. Such as perspicaciously pointed out by another great thinker of our times, Hannah Arendt (in *La Tradition cachée*, 1987).

13. It may be observed that the principle of *non-refoulement*, a cornerstone of the protection of refugees (as a principle of customary law and even of *jus cogens*), may be invoked even in distinct contexts, such as that of the collective expulsion of illegal migrants or of other groups. Such principle has been acknowledged also by human rights treaties, as illustrated by Article 22(8) of the American Convention on Human Rights.

II. Uprootedness and Human Rights: The State Responsibility.

8. But there is another aspect which ought to be considered. Part of the difficulties of protection, in the present context of uprootedness, lies in the gaps of the existing norms of protection. No-one questions, for example, the existence of a right to *emigrate*, as a corolary of the right to freedom of movement. But the States have not yet accepted a right to *immigrate* and to *remain* wherever one happens to be. Instead of population policies, the States, in their great majority, pursue rather the police function of protecting their frontiers and controlling migratory fluxes, sanctioning the so-called *illegal* migrants. Since, in the view of the States, there does not exist a human right to immigrate and to remain wherever one is, the control of migratory entries, added to the procedures of deportations and expulsions, are subject to their own sovereign criteria. It is not surprising that inconsistencies and arbitrary acts derive therefrom[14].

9. The norms of protection pertaining to human rights continue to be insufficient, in face of the lack of agreement as to the bases of a true international cooperation relating to the protection of all those who are uprooted. There are no effective juridical norms without the corresponding and underlying values[15]. In relation to the problem at issue, some norms of protection already exist, but the acknowledgment of the values, and the will to apply those norms, are lacking; it is not simply casual, for example, that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[16], one decade after being approved, has not yet entered into force.

10. In relation to capital (including the purely speculative one), the world has been "globalized"; in relation to work and to the human beings (including those who attempt to escape from grave and imminent threats to theis own life), the world has been atomized in sovereign units. In a "globalized" world of profound iniquities such as the one of our days, of the irruption of so many disrupting internal conflicts, how to identify the origin of so much structural violence? The evil appears to be of the human condition itself. The question of the uprootedness ought to be dealt with not in the light of State sovereignty, but rather as a problem of a truly *global* dimension that it is (requiring a concert at universal level), bearing in mind the obligations *erga omnes* of protection[17].

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[14]. Nor is one to lose sight of the fact that current programs of "modernization" of justice, with international financing, do not take care of this aspect, as their main motivation is to guarantee the security of investments (capitals y and). This is a small sign of the world wherein we live...

[15]. It may be observed that contemporary legal doctrine itself has simply been remiss in relation to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), - in spite of the great significance of this latter. The basic idea underlying this Convention is that all migrants - including the *undocumented* and *illegal* ones - ought to enjoy their human rights irrespective of their legal situation. Hence the central position occupied, also in this context, by the principle of *non-discrimination* (Article 7). Not surprisingly, the list of the protected rights follows a necessarily holistic or integral vision of human righs (comprising civil, political, economic, social and cultural rights).

[16]. Which prohibits measures of collective expulsion, and determines that each case of expulsion ought to be individually examined and decided, pursuant to the law (Article 22).

[17]. The conceptual development of such obligations is a high priority of contemporary legal science, such as I have been insisting in some of my Opinions in distinct Judgments of the Inter-American Court (mainly in the cases *Blake*, 1996-1999, and *Las Palmeras*, 2000).

11. In spite of being a problem which affects the whole *international community* (a concept which has already been supported by the more lucid contemporary doctrine of international law[18]), uprootedness continues to be treated in an atomized way by the States, with the outlook of a legal order of a purely inter-State character, without apparently realizing that the Westphalian model of such international order is, already for a long time, definitively exhausted. It is precisely for this reason that the States cannot exempt themselves from responsibility in view of the global character of the uprootedness, since they continue to apply to this latter their own criteria of domestic legal order.

12. On this eve of the XXIst century, there persists a *décalage* [cf.] between the demands of protection in a "globalized" world and the means of protection in an atomized world. The so-called "globalization", I allow myself to insist, has not yet encompassed the means of protection of the human being. Regrettably, the *universal juridical conscience* - in which I firmly believe[19] - does not yet appear to have awakened sufficiently either for the necessity of the conceptual development of the international responsibility other the purely of the State[20]. This latter ought, thus, to respond for the consequences of the practical application of the norms and public policies that it adopts in the matter of migration, and in particular of the procedures of deportations and expulsions.

III. Uprootedness and Human Rights: The Juridical Nature of the Provisional Measures of Protection.

13. Having pointed out, in relation to the uprootedness, the complementary aspects of its global dimension and of the State responsibility, may I move on to the third and last aspect of the problem, pertaining to its place in the context of the provisional measures of protection. A special emphasis, in tackling the tragedy of uprootedness, ought to fall on the *prevention*[21], of which the very adoption of provisional measures of protection in the

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18. As from the first systematic formulations in visionary books such as, *inter alia*, those by C.W. Jenks (*The Common Law of Mankind*, 1958) and by R.-J. Dupuy (*La communauté internationale entre le mythe et l'histoire*, 1986).

19. If it did not exist, one would not have, in the past, e.g., abolished the international trade of slaves, abandoned the practice of secret treaties, prohibited war as an instrument of foreign policy, and put and end to colonialism with the crystallization and the exercise of the right of self-determination of peoples; if it did not exist, one would not have, in our times, e.g., affirmed the existence of imperative norms of international law (*jus cogens*) and of obligations *erga omnes* of protection of the human being, and configured a true contemporary international regime against torture, forced disappearances of persons, and summary, extra-legal and arbitrary executions. Such as I have been pondering for already some time (and more recently in my essay "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", *in Quem Está Escrevendo o Futuro? 25 Textos para o Século XXI*, Brasília, Ed. Letraviva, 2000, pp. 99-112), it is due to this universal juridical conscience that international law has been transformed, from a legal order of pure *regulation* (as in the past) into a new *corpus juris* of *liberation* of the human being.

20. As it can be inferred from the hesitations and uncertainties of the voluminous work on the matter, throughout so many years, of the International Law Commission of the United Nations.

21. In 1997, the United Nations High-commissioner for Human Rights observed that, in the context of mass exoduses and human rights, "the term `prevention' ought not to be interpreted in the sense of impeding that the persons abandon a zone or country but rather in the sense of impeding that the situation of human rights is deteriorated to such an extent that the abandonment is the only option and also of impeding (...) the deliberate adoption of measures to displace by force a great number of persons, such as mass expulsions, internal displacements and forced eviction, resettlement or repatriation". U.N., *Derechos Humanos y Éxodos en Masa - Informe del Alto Comisionado para los Derechos Humanos*, document E/CN.4/1997/42, of 14.01.1997, p. 4, par. 8.

framework of the International Law of Human Rights constitutes an eloquent manifestation. The intertemporal dimension is thus manifested in the phenomenon of uprootedness as well as in the application of provisional measures of protection.

14. Likewise, the indivisibilidad of all human rights is manifested in the phenomenon of uprootedness (cf. *supra*) as well as in the application of provisional measures of protection. It being so, there is, juridically and epistemologically, no impediment at all for such measures, which so far have been applied by the Inter-American Court in relation to the fundamental rights to life and to personal integrity (Articles 4 and 5 of the American Convention on Human Rights), to be also applied in relation to other rights protected by the American Convention. All those rights being interrelated, it is perfectly possible, in my understanding, to order provisional measures of protection of each one of them, whenever are met the two requisites of the "extreme gravity and urgency" and of the prevention of "irreparable damage to persons", set forth in Article 63(2) of the Convention.

15. As to the protected rights, I understand that the extreme gravity of the problem of uprootedness brings about the extension of the application of the provisional measures not only to the rights to life and to personal integrity (Articles 4 and 5 of the American Convention) but also to the rights to personal liberty, to the special protection of the children in the family, and to circulation and residence (Articles 7, 19 and 22 of the Convention), as in the present case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. This is the first time in its history that the Court proceeds in this way, in my view correctly, aware of the necessity to develop, by its evolutive case-law, new means of protection inspired in the reality of the intensity of human suffering itself.

16. The present Resolution of the Court reveals, furthermore, that the concept of *project of life*, recently dealt with in the exercise of its contentious function pertaining both to the merits (*"Street Children"* case, Judgment of 19.11.1999) and to reparations (*Loayza Tamayo* case, Judgment of 27.11.1998), marks likewise presence at the level of provisional measures of protection, as ensued from the facts alleged by the Delegations of both the Dominican Republic and the Inter-American Commission, as well as by the two witnesses presented by this latter, in the public hearing before the Court of 08 August 2000.

17. One ought to bear always in mind the evolution of the provisional measures of protection, which have their historical roots in the precautionary process (*proceso cautelar*) at the level of the internal legal order, originally conceived to safeguard the effectiveness of the jurisdictional function itself. Gradually the autonomy of the precautionary action (*acción cautelar*)[22] was affirmed, having reached the international level in the arbitral and judicial practice. The *rationale* of the provisional measures did not change substantially with this transposition to the level of Public International Law, in which they continued to seek the preservation of the rights claimed by the parties and the integrity of the decision as to the

[22]. Mainly due to the contribution of the Italian procedural law doctrine of the first half of the XXth century, in particular the well-known works by G. Chiovenda (*Istituzioni di Diritto Processuale Civile*, 1936), P. Calamandrei (*Introduzione allo Studio Sistematico dei Provvedimenti Cautelare*, 1936), and F. Carnelutti (*Diritto e Processo*, 1958).

merits of the case. The change of the object of such measures only took place with the impact of the emergencie of the International Law of Human Rights[23].

18. With their transposition from the ambit of the traditional inter-State *contentieux* to that of the International Law of Human Rights, the provisional measures began to beyond, in the matter of protection, revealing a scope without precedents, in moving on to protect the *sustantive rights* themselves of the human beings, to the extent that they seek to avoid irreparable damages to the human person as subject of the International Law of Human Rights. The human being is taken as such, irrespective of the colectivity which he belongs to. This gradual evolution concerning provisional measures of protection is nowadays consolidated, and the Inter-American Court of Human Rights has surely contributed to that more than any other contemporary international tribunal.

19. The Inter-American Court has acted, so far, at the same time with prudence and prospective vision, without indulging into the still nebulous doctrinal debate about the existence or otherwise of an *actio popularis* in international law. In his well-known and progressive Dissenting Opinion in the *South-West Africa* case (1966) before the International Court of Justice, Judge Philip Jessup did not base his reasoning on an *actio popularis* in international law either. This did not impede him to point out that international law has, nevertheless, accepted and created situations in which one recognizes "a right of action without having to prove an individual harm or an individual substantive interest, distinct from the general interest"[24].

20. On his turn, in his equally well-known and visionary Dissenting Opinion in the same *South-West Africa* case, Judge Kotaro Tanaka tampoco did not need to resort either to the figure of the *actio popularis* (even though recognized in the national legal systems) in order to affirm that every member of a human society has interest in the accomplishment of social justice and of certain humanitarian principles, and that this historical evolution itself of Law shows that this latter is enriched from the cultural point of view in encompassing values which were previously outside its domain[25]. Hence, for example, the jurisdictionalization of social justice; in the case of the protection of social groups, - added perspicaciously Judge Tanaka, - what is protected is not the group *per se* as a whole, but rather the individuals who compose it[26].

21. The domain is, in my understanding, open to an evolution towards the crystallization of an *actio popularis* in international law, to the extent that one achieves a greater conscientization of the existence of a true *international community*, formed by the States as well as by the peoples, communities, private groups and individuals (both governed and governors), - such as was propounded as from the XVIth century by the so-

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23. Such as I seek to demonstrate in my Preface to volume II of the *Compendium of Provisional Measures* (June 1996 - June 2000) of the Inter-American Court of Human Rights (pp. VII-XVIII).

24. International Court of Justice, *ICJ Reports* (1966) p. 388.

25. International Court of Justice, *ICJ Reports* (1966) pp. 252-253.

26. *Ibid.*, p. 308.

called founding fathers of the law of nations (*droit des gens*)[27]. There is a difference between to request provisional measures of protection for a community of an "indeterminate" character[28], and to request them for a community or group whose members can be *individualized*[29].

22. To reason, in the circumstances of the present case, as from the existencie of an *actio popularis*, would present the risk of distorting the character of the provisional measures of protection, in their current stage of historical evolution. It being so, as to the persons protected by the Provisional Measures which the Court has just ordered, in the present case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, the Tribunal has duly individualized them, without failing to singling out the context of their situation, in further requiring from the State detailed information on the situation of the frontier communities or "*bateyes*" whose members may find themselves involved in the problem dealt with herein.

23. In this way, the Court, at the same time that it has innovated and taken a qualitative step in its case-law - of growing importance in the last years - in the matter of Provisional Measures of Protection, has also acted with prudence: it has listened attentively to the oral pleadings of the Commission and the State and has verified the great seriousness of both in the treatament of the theme in their interventions during the aforementioned public hearing before the Tribunal; it has recognized the high complexity of the problem dealt with herein in its distinct aspects; it has taken care not to prejudge the merits of the case pending before the Inter-American Commission (in particular as to the question of the guarantees of the due process of law); it has shown its sensitiveness to the needs of protection; and it has contributed to the definitive characterization of the *tutelary*, rather than purely *precautionary*, character of the provisional measures of protection in the conceptual universe of the International Law of Human Rights (cf. *supra*).

24. I cannot, thus, fail to express my hope that the measures which the Dominican Republic comes to take, in conformity with the Provisional Measures of Protection individualized in the present Resolution of the Court, are reverted to the benefit of all the other persons - not indicated nominally in the petition of the Inter-American Commission - who find themselves in the same situation of vulnerability and risk. Law does not operate in the vacuum; it evolves pursuant to the fulfilment of social needs and to the recognition of the values underlying its norms.

25. A role of fundamental importance is reserved to Law in order to fulfil the new needs of protection of the human being, particularly in the dehumanized world in which we live. At the beginning of the XXIst century, there is, definitively, pressing need to situate

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27. As can be seen, e.g., in the works by Francisco de Vitoria (*Relecciones Teológicas*, 1538-1539), Alberico Gentili (*De Jure Belli*, 1598), Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612), Hugo Grotius (*De Jure Belli ac Pacis*, 1625), Samuel Pufendorf (*De Jure Naturae et Gentium*, 1672), Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1749).

28. As does the Inter-American Commission in paragraph 31 of its petition of 30 May, 2000.

29. As the Inter-American Court has already admitted, in its recent Resolutions on Provisional Measures of Protection in the cases *Digna Ochoa and Others* (of 17.11.1999) and *Clemente Teherán* (of 12.08.2000).

the human being in the place which corresponds to him, that is, in the centre of the public policies of the States (such as population policies) and of all process of development, and certainly above capitals, investments, goods and services. There is, moreover, pressing need to develop conceptually the law of the international responsibility, so as to comprise, besides the responsibility of the State, also that of non-State actors. This is one of the greatest challenges of public power and of legal science in the "globalized" world in which we live, from the perspective of the protection of human rights.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary