REPUBLIC OF COLOMBIA

JUDICIAL BRANCH

MUNICIPAL COURT

PUEBLO RICO, RISARALDA

Reference: Case involving protection against domestic violence

Plaintiffs: M.B. of seventeen days of age (17), A.N.M. and S.N.M., indigenous minors of sixteen (16) days of age

Daughters of G.M.N.

Defendants: Under review

Case No.: 66573 -40-89-001-2008-00005-00

Twenty-fourth of July (24) of two-thousand and eight (2008)

JUDGMENT THAT DECLARES AN ABSENCE OF DOMESTIC VIOLENCE IN THE CASE OF FEMALE GENITAL ABLATION OR MUTILATION. (A/MGE) WE ABSTAIN FROM ORDERING PROTECTION MEASURES, REQUEST THAT COLOMBIAN STATE AUTHORITIES AND THE INDIGENOUS AUTHORITIES OF THE EMBERÁ – CHAMÍ COMMUNITY OF RISARALDA ADOPT URGENT MEASURES TO IMMEDIATELY BAN A PRACTICE THAT THREATENS THE LIVES AND PERSONAL INTEGRITY OF NEWBORN GIRLS AND VIOLATES THEIR RIGHTS TO REPRODUCTIVE AND SEXUAL HEALTH, VIOLATES THE NATIONAL CONSTITUTION, HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW.

## 1 BACKGROUND

FEMALE GENITAL MUTILATION OR ablation (A/FGM) is a practice that exists among the indigenous EMBERÁ-CHAMÍ community, grouped among other organizations at the Unified Indigenous Reservation Emberá – Chamí of the San Juan River of Pueblo Rico, Risaralda. It consists of suppression via a cut and cauterization of the clitoris in newborn female children (Declaration of surgeon Hugo Hernando Marsiglia Vargas, page 36). It is considered a hidden practice, even to indigenous authorities and women are the ones in charge of it, without involving men. However, men approve this practice to a certain extent, and it relates to a woman's approval for marriage. Although men do not find out at the time of mutilation, they consider a mutilated woman desirable for sexual companionship and matrimony. Indigenous women find it strange that white women do not practice this mutilation, and they cannot believe that a woman could be desired without it. This allows us to state that this cultural practice has been accepted for quite some time (Conversation with Doctor Nancy Haydee Millán Echeverría – Nutritionist with a masters in Anthropology, employed by the Colombian Institute of Familial Wellbeing I.C.B.F. p. 75).

On the tenth (10) of January of this year, the Municipal Court of Pueblo Rico, Risaralda, received Police Municipal Inspection reports as well as reports from the Ombudsman of Pueblo Rico, Risaralda. They reported the alleged abuse of underage female indigenous women, under sixteen (16) days of age, daughters of G.M.N. who were subsequently identified as S.N.M. and A.N.M., who were subject to ablation

procedures (Pages 1 to 8 – submissions of the Inspection and Ombudsman and answers to the statements of the minors, pp. 81 to 84).

Through a writ dated January thirty (30) of two-thousand and eight (2008), this Court chose to commence proceedings geared towards establishing whether the facts reported by the submitted proceedings, including the epidemiological reports of domestic violence cases numbers 1216 – 1217 and 1218 dated seventh (7) of December of two-thousand and seven (2007) and fourteen (14) of December of two-thousand and seven (2007), signed by Doctors Hugo Hernando Marsiglia Vargas and Maria Cristina Rodriguez Castaño, physicians who are members of Hospital San Rafael de Pueblo Rico, Risaralda, who treated the referenced minors for female genital mutilation, constitute domestic violence or not and the feasibility of applying law 294 of 1996.

## 2 PROCEEDINGS PERFORMED AND DOCUMENTS INCORPORATED INTO THE RECORD

### 2.1 DECLARATION OF THE PHYSICIAN WHO TREATED THE INDIGENOUS FEMALE MINORS

We received a declaration of Dr. Hugo Hernando Marsiglia Vargas, doctor at Hospital San Rafael de Pueblo Rico, Risaralda, who treated the minors and indicated that he admitted them because they showed fever, chills, frequent vomiting. He claimed that when he performed their general physical assessment, he found that they were missing a clitoris and it had been mutilated. He stated that he knew that this was an ancestral practice of a few indigenous settlements, performed because they wish to prevent these children from being unfaithful when they reach adolescence or adulthood. He reported that other indigenous leaders state that this practice arises from the belief that this organ (the clitoris) can develop into a penis if it is not removed in time. He reports that the children's clitoris had been completely removed, and that the area was infected. This infection was associated with the foregoing systemic symptoms. He reports that the most serious and immediate consequence is a generalized infection that threatens the neonate's life, due to the fact that newborns' immunological system has yet to develop and an infection could cause deathly consequences. The procedure is performed with improper tools, such as knives and even using fingernails. Persons will have other types of consequences, from a psychological perspective, but we cannot determine these because we are not aware of how the indigenous community operates. He reports that, from an anatomic perspective, this practice does not affect vaginal penetration, but it will decrease sensitivity during sex. (Pages 35 to 38).

### 2.2 CONVERSATION WITH NANCY HAYDEE MILLÁN ECHEVERÍA – NUTRITIONIST WITH A MASTERS DEGREE IN ANTHROPOLOGY – OFFICER AT THE COLOMBIAN INSTITUTE OF FAMILY WELLBEING

Dr. Millán Echeverría told the court that the Colombian Institute of Family Wellbeing knows that the Emberá-Chamí indigenous community practices Female Genital Mutilation. She referenced the agreement reached by the indigenous authorities of the municipalities of Mistrató and Pueblo Rico of the Department of Risaralda and local institutions responsible for guaranteeing the rights of the children population,

including the I.C.B.F. itself, and signed in the city of Pereira on November six (6), two-thousand and seven (2007). She noted that this agreement was not very clear about how to act with respect to the matter, but that the United Nations and I.C.B.F. were developing a project to seek transformation of the practice. Moreover, at the meeting where the agreement was signed, it was clear that this practice threatens the physical integrity of girls and their right to life, because many infant girls have died. They spoke of a need to raise the awareness of indigenous authorities regarding the matter.

Regarding the origins of the FGM, she specified that it is difficult to determine whether it is an ancestral practice, although certain studies have been performed that hypothesize that it was acquired a long time ago pursuant to contact with communities of African descent. Other academics on the subject indicate that this was a regulatory measure adopted by indigenous authorities to prevent the Spanish from using their women and, to the extent that this contact could be regulated, this practice started to be incorporated into the communities. However, academics have not pinpointed the source of the practice, although it is true that it does exist and it has been performed for a long time, even if we do not know whether it arose before or after the arrival of the Spanish. The United Nations and the I.C.B.F. project attempts to determine its source, reason and importance—something that it considers necessary in order to begin an informed discussion and seek its change.

She noted that I.C.B.F.'s stance given the rights of the indigenous community under the Colombian Constitution consists of seeking change, conscious that the practice violates the four minimum legal values established by the Constitutional Court—minimum values that prevail over the respect for ethnic diversity, though it must protect the standards of immunity and the extraordinary nature of the subject – that requires careful analysis as it is no ordinary subject.

She believes that the Constitutional Court, in its judgments, and in order to manage the issue, must perform significant pedagogic work prior to considering punitive orders against the community or prohibitions, because the rules of the indigenous people do not contemplate banning the practice. Indigenous women do not consider this practice inappropriate and the community does not recognize the harm caused to girls. As a result, the Constitutional Court must further a discussion with the authorities and the community, in order to begin changing the practice. She states that because it is women and midwives who perform this practice in the community, they do not recognize, as we do, the harm to the life and personal integrity of girls. Thus, the Constitutional Court must engage in thorough discussions and perform pedagogic efforts with indigenous leaders in order to change this practice.

Doctor Millán Echeverría ended by stating that she invites all state authorities to participate in the dialogues promoted by the United Nations and I.C.B.F. and not to create initial restrictive measures, but rather, to engage in a thorough analysis and then adopt pedagogic measures to change or modify this practice. In other words, put their money on education and not on prohibition.

Doctor Millán Echeverría submitted a written document that explains this foregoing position, and sets forth her concern that if FGM were immediately forbidden, or if it were the result of a process like the one that was agreed with the Emberá-Chamí authorities and includes sections of judgment C-370-02 issued by the Constitutional Court, referring to measures that apply to those who are declared immune for socio-cultural reasons, when it studied the constitutional challenge filed against article 33 of

Law 599 of 2000. The latter highlights the question in the judgment regarding "**…What to do with serious behavior, such as a crime, when it affects essential legal property and it is codified and unlawful, but the behavior is performed by persons who, because of certain reasons, could not act with intent? This situation brings up difficult questions regarding constitutional regimes that are based on human dignity, because such persons cannot be criminally punished for their behavior, since they did not act with the requisite intent. However, society must also take measures to prevent this behavior that, despite the fact that it was not carried out with a malicious intent, they seriously affect essential legal property, to the extent that they are not only codified and unlawful but there is also a possibility that a person can do them again, in many cases, for the same reasons why he is not able to act culpably."** (Pp. 74 to 79)

**2.3 Meeting of the judges of the municipalities of Pueblo Rico, Marsella, Guatica and Quinchia, Risaralda, with indigenous leaders who belong to the Regional Indigenous Council of Risaralda (C.R.I.R., for its initials in Spanish) carried out during the workshop with the village of Emberá – Chamí, on the twenty-seventh (27) and twenty-eighth (28) of March of two thousand and eight (2008) as part of the project to coordinate with the National Judicial System and the Special Indigenous Jurisdiction, organized by Judicial School "Rodrigo Lara Bonilla".**

The minutes of the referenced meeting were added to the record, as transcribed from the recording of the undersigned judge. At said meeting, Mr. Alberto Wazorna Bernaza, Lead Councilmembers of the Regional Indigenous Council of Risaralda (C.R.I.R., for its initials in Spanish) gave a presentation regarding FGM – and stated that the matter must be investigated thoroughly. He indicated that he did not understand why the practice was portrayed as an ancestral custom. He is concerned that the subject can lead to a public attack against his community. He mentioned that the matter had been brought up the year before (2007) at a national encounter of the indigenous leaders of Tierra Alta (Córdoba) and they believed that certain indigenous communities had similar practices, and THEY HAD DETERMINED THAT THESE PRACTICES SHOULD DISAPPEAR. He stated that he met with the women of a series of indigenous communities and he confirmed that the practice is absent in some of these. But, given the evidence that it does exist in some places, he thinks that the community itself is the one who must decide on the subject. He insisted that it is the indigenous village itself and no other authority, or the Colombian state, the party that must decide on the subject. (p. 67).

Mr. Julio Tascon Panche, Jaibaná and Junior Governor of the Community of Corozal de Quinchía, Risaralda, agreed with thestatements of the Senior Councilmembers and reported that his wife performed FGM on his daughters. He is conscious that new generations do not know how to perform this custom properly, and thus, the community members, women, midwives, men and authorities must be made aware, so that it is regulated and it does not endanger the lives of girls. He said that the matter deserves more analysis, but he rejects any scientist who is foreign to his community – or any North-American anthropologist who questions this custom. However, he proposes that we must reach the communities in order to defend babies' lives, but the solutions should come from the communities themselves (p. 68).

Doctor Manuel Antonio Marín Arredondo, Municipal Judge of Guatica, Risaralda, pointed out to Mr. Tascon Pache, that they did not seek to regulate the practice in order to continue it, nor did they seek to endanger the life of the girls at the indigenous community, but that the idea was to completely suppress the practice, because it is an attack against life and personal integrity, and that it is a barbaric and unjustifiable practice. And although the indigenous communities have a right to be recognized as an ethnic group and they have a right to their autonomy, as admitted by the state, according to the constitution, they must respect its precepts and international treaties regarding the respect for life and personal integrity and the respect for human dignity. The practice should not be regulated, but banned instead, and the indigenous authorities, pursuant to this meeting, must commit to eliminating it. (p. 68)

Dr. Jose Jesus Marin Gonzales, Municipal Judge of Marsella, Risaralda, echoed this conclusion. He stated that, according to the statements of the indigenous authorities, we must defend the lives and personal integrity of indigenous women and, as a result, this practice should be eliminated. (pp. 68 and 69).

William Nayaza Enebia, General Departmental Education Coordinator, Member of the Indigenous Emberá – Chamí de Mistrató Community stated that the communities must apply certain rules of behavior under their indigenous beliefs and he agrees with an investigation on the subject. However, Colombian State authorities cannot ban this practice, not even indigenous authorities themselves, but rather, the indigenous village itself pursuant to the respective studies. (p. 69).

Baarlan Díaz Ibarra, member of the CIEC and Secretary of the Regional Indigenous Council of Risaralda (C.R.I.R.) stated that they should determine the source of the custom and the indigenous authorities should be the ones to establish the steps to be taken in how to address the matter (p. 69).

Jorge Ulises Velez Osorio, Senior Vice-Councilmember of the Regional Indigenous Council of Risaralda (C.R.I.R., for its initials in Spanish) said that he has been reviewing the topic for a few months and that he recognizes that this practice threatens the lives of indigenous human beings and that the indigenous authorities are committed to defending human rights and children's survival, who are the future and will perpetuate the indigenous communities.

Doctor MARINO DE JESÚS ARCILA ALZATE, Municipal Judge of Pueblo Rico, Risaralda, stated that, as reported by the indigenous authorities present at that time, indigenous authorities do not share the FGM practice. And they hope that the Colombian state's authorities do not make the decision, but rather, that indigenous authorities should participate in them as an expression of their autonomy. He emphasizes that, on other occasions, the Constitution has recognized the autonomy of the indigenous authority, such as in the constitutional action of Carlos Arce Tunay and Virgelina Queragama Manugama, members of the Emberá Chamí indigenous community of Risaralda, against the indigenous authorities of the SENIOR MAYOR OF THE INDIGENOUS RESERVATION, Unified Emberá – Chamí of River San Juan and the Junior Governor of the Pechugare or Bichubara village, who had been punished by indigenous authorities, under their regulations and said penalty was respected by the constitutional judgment dated January three (3) of two thousand and eight (2008), affirmed on appeal by the Court of the Circuit of Apía, Risaralda, on February fifteenth (15) of two thousand and eight (2008). These judgments denied the protection requested, which consisted of voiding the penalties that had been imposed. Thus, it can be said, that the Municipal Court of Pueblo Rico, Risaralda and

the Court of the Circuit of Apía, Risaralda, respected the autonomy of the indigenous authorities, at least. The plaintiffs were imposed a penalty of six (6) months of community service. The trial judgment concluded that this was an application of penalties contemplated in the internal indigenous regulations that had been ordered by indigenous authorities, under the Emberá – Chamí legal framework. This fell within the limits of the indigenous jurisdiction and the penalty was applied pursuant to the guidelines of the Constitutional Court regarding restrictions to the exercise of these powers, such as the right to life, the prohibition against slavery and torture and the application of minimum due process when a penalty is applied by an authority as well as respect for the right to a defense, denying the constitutional action requested by the plaintiffs. We must highlight that in the appellate judgment, the Judge of the Circuit of Apia, Risaralda, observing a possible violation of the rights of indigenous children, students at the village school where plaintiff Carlos Arce Tunay received schooling, when he was judged to perform six (6) months of community service, recommended that indigenous authorities should "if they deemed appropriate and desirable," consider alternative penalties to prevent the child from missing classes. This shows that both judges recognized the powers of the indigenous jurisdiction and gave full recognition to article 246 of the Political Constitution and the judgment of the Constitutional Court. (pp. 69 – 70 and 71)

### 2.4 Official Letter 108-5787-DET-1000- dated February twenty-ninth (29) of two thousand and eight (2008) addressed to the Court by the Assistant Director of Indigenous Affairs of the Ministry of Interior and Justice of the Republic of Colombia.

The assistant direction of the Ministry of Interior and Justice of Colombia addressed the court pursuant to the request for a ruling on the FGM matter and addressed the recognition of the rights of indigenous peoples as differential populations, noting that their autonomy was the most important right, as other rights derive from it. He states that this autonomy requires that governments must be flexible and they must have an exceptional capacity to respond to unprecedented situations, because, as authorities, they are responsible for guiding and leading people in various challenges imposed by daily life. In this context, which is unprecedented for certain cultures, there is a tension between certain traditional practices and the national and international legal frameworks. This is the case of FGM. In this case, the FGM practice has injured human rights and minimum universal standards.

He cites Birdart Campos (1989) cited by Figueroa and Sanchez (1990) in the piece, Sanchez, E. "Política de Reconocimiento a la diversidad étnica y cultural y de la protección al menor" 2002. Ministry of Health.Colombian Institute of Family Wellbeing. p. 39: "**Even when human rights are proposed as universal, the social conditions and collective representation, as well as beliefs and ideas that make up society's cultural dimension, grant "observance" in specific times and spaces based on the context in which they are experienced. In other words, they are historical and situational."**

Therefore, the letter continues, the paradox that we face in the words of Galvez (1997) is **"How to reconcile the recognition of indigenous autonomy with international treaties, attempting to reconcile ethnic-cultural peculiarities and the development of universal, modern standards."**

The Ministry also indicates, without disregarding the rights of our indigenous peoples to cultural identity, self-determination and autonomy, that it agrees with the position that "**the protection of diversity (C.P. Article 7), as a general principal, can only be restricted when its exercise disregards constitutional rules (C.P. Article 246 and/or legal; C.P. Article 330).** In concrete terms, this implies that any cultural behavior that implies violation of any of the four minimum legal standards (right to life, right to bodily integrity, right not to be subjected to slavery and right to due process) must necessarily change within the framework of autonomy and with the monitoring of institutions that were called upon because of the facts.

The document also states that the court should take the importance of a child's best interest into account. It states that international treaties signed by Colombia, especially article 3.1 of the Convention on the Rights of the Child, provide: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The document continues listing the series of activities performed by the Ministry with other public entities and indigenous authorities to address the subject and their interest in changing the FGM practice successfully.

**2.5 Official Letter 4080 – 0164 dated February fourteenth (14) of two thousand and eight (2008) addressed to the Court by the Public Ombudsman for Indigenous Peoples and Ethnic Minorities and the Public Ombudsman for the Rights of the Child, Women, Youth and the Ombudsman.**

The letter included in the record begins by giving an overview of the series of activities developed by the ombudsman jointly with the United Nations Population Fund, the Colombian Institute of Family Wellbeing, the Ethnic Direction of the Ministry of Interior and Justice and the indigenousauthorities of community EC, that have informed the participating entities of the FGM practice, thereby establishing the following facts and agreements:

1. The indigenous Emberá – Chamí authorities recognized that, in their communities, FGM is recognized as a socially accepted practice that is generally performed on newborn girls.
2. The indigenous Emberá – Chamí authorities recognized that FGM violates the minimum legal standards noted by constitutional precedent, that set the scope and are used to weigh the fundamental rights of the collective subjects; that in this case, is represented by the indigenous Emberá – Chamí peoples, as opposed to the rights of individuals, in this case, girls, namely, the right to life and the right to bodily integrity.
3. The indigenous institutions and authorities agreed to develop a project to change the FGM culture– via an agreement to which the Regional Indigenous Council of Risaralda, C.R.I.R., The Colombian Institute of Family Wellbeing, the State Ombudsman and the United Nations Population Fund.

The letter sates that the project developed by these entities seeks to change FGM so that it does not affect the physical integrity of the Emberá – Chamí girls, via a process that accommodates the culture and beliefs of this village. In this manner, the project would fulfill article 7 of the Political Constitution: The state recognizes and protects the ethnic and cultural diversity of the Colombian nation. Under this principle, the project must harmonize recognition of the collective rights of indigenous peoples with

the priority of the rights of girls enshrined in international treaties and the domestic legal framework.

The Ombudsman's document considers that this entity has been working with these entities to further the efforts of the Committee for the Elimination of Discrimination Against Women, with respect to "female circumcision" (document A/45/38 – ninth period of sessions 02/02/90) and the United Nations General Assembly: "**Calling on states to d) To develop, adopt and implement national legislation, policies, plans and programmes that prohibit traditional or customary practices affecting the health of women and girls, including female genital mutilation, and to prosecute the perpetrators of such practices; and m) To explore, through consultations with communities and religious and cultural groups and their leaders, alternatives to harmful traditional or customary practices, in particular where those practices form part of a ritual ceremony or rite of passage, as well as through alternative training and education possibilities for traditional practitioners."** (A/RES/56/128 January 30, 2002).

The letter mentions article 33 of Law 599 of 2000, regarding immunity from prosecution for sociocultural reasons, and the order declared the term "sociocultural diversity" unenforceable, under the following understandings: i) that immunity is not derived from incapacity, but rather, it derives from a different set of beliefs, and ii) that in the case of an error that cannot be prosecuted, caused by this cultural diversity, the person must be absolved, not declared guilty, pursuant to this judgment.

Finally, the document states that despite the foregoing, the indigenous community has the responsibility of furthering and adopting appropriate and effective measures geared to eradicating female circumcision, because it is a flagrant violation of the rights to life, personal integrity, liberty and the sexual and reproductive rights of the community's girls (pp. 46 to 51).

2.6 THE DOCUMENT SUBMITTED TO THIS COURT BY DR. AGUSTIN CONDE, SURGEON OF UNIVERSIDAD DEL VALLE, GYNECOLOGIST, OBSTETRICIAN AND EPIDEMIOLOGIST, REGARDING THE OFFICIAL OPINION OF THE INTERNATIONAL FEDERATION OF OBSTETRICIANS AND GYNECOLOGISTS "F.I.G.O." FOR ITS INITIALS IN SPANISH, URGES THE ELIMINATION OF THE PRACTICE OF FEMALE GENITAL MUTILATION IN ALL COUNTRIES WHERE IT IS PRACTICED. – We were made aware of this document because it was posted on the Internet in English and we have included it in the record because of its importance, relevance, clarity and value as a guide regarding the actions that the Colombian state should adopt to eradicate FGM, it is incorporated in its entirety, translated from English, in another section of this decision. (pp. 96 and 97).

2.7 THE OPINION OF DOCTOR JOSE DANIEL TRUJILLO ARCILA, PROFESSOR OF CONSTITUTIONAL LAW, PRINCIPLES AND VALUES OF *UNIVERSIDAD ANDINA*, PEREIRA SECTION

Dr. Trujillo Arcila begins by explaining the existence of FGM in a series of sister communities such as Tanzania, Somalia, Sudan and other regions and its significance related to chastity, health, beauty and family honor. It is often justified by claims that it protects girls from experiencing excessive sexual desire and thus, helps to preserve their morality, chastity, and faithfulness.

The document specifies that FGM is treated as a "habitual or traditional – harmful"

practice in two important and binding international human rights instruments: THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, signed in 1979 and THE CONVENTION ON THE RIGHTS OF THE CHILD, signed in 1989. These international agreements promote the individual's right to participate in cultural life. Based on these, we can conclude that this practice causes girls harm and reinforces gender inequalities.

The opinion references the Emberá – Chamí culture and FGM and states certain sociological aspects related to the instability of current relationships between men and women and other socioeconomic problems of the indigenous community.

Dr. Trujillo Arcila asks whether the Emberá – Chamí peoples have the same feelings or justifications for the practice, as in Africa, and whether it arises prior to the Spanish conquest. He says that certain French academics have toured the jungles in Chocó and noted that ablation is subsequent to the conquest and it was a way of protecting the indigenous woman from Spanish lust and greed, when the Spaniards satisfied their sexual drive with them, especially given the fact that, in contrast to the North-American colonists, the Spaniards came alone, without any women and without sentimental ties. This allowed them to give free reign to their erotic desires. He states that they prevented the Spaniards from taking their women away and prevented their women from becoming excited about the experimental enjoyment that they offered – pleasures learned in societies in which eroticism played an important role – through removing the so called *amor veneris*, the center of female pleasure, the G-spot, the clitoris and then the Spaniards would spurn the women and return to their men.

Cr. Trujillo Arcila references Constitutional Court judgments that have interpreted article 246 of the Constitution and he emphasizes that**"Fundamental rights constitute minimum mandatory standards of cohabitation for all private parties. This standard of interpretation must consider the fundamental rights that constitute a substantive limitation to the principle of ethnic and cultural diversity; in other words, the jurisdictional autonomy of indigenous authorities is limited by an individual's fundamental rights,"** then, the legal rules have priority over the uses and customs of indigenous communities provided that they directly protect a constitutional value that has priority over the principle of ethnic and cultural diversity. Regarding the uses and customs of indigenous peoples, constitutional rules have priority. This indicates that such uses and customs cannot violate higher constitutional values.

The opinion references author ESTHER SANCHEZ BOTERO in her piece "*JUSTICIA Y PUEBLOS INDÍGENAS DE COLOMBIA,"* in which she recalls the existence of agreement 169 of 1989 that recognizes and values the difference, indicating that "**Social, cultural, religious and spiritual practices must be recognized and protected"** and that Colombia has formally recognized these today, that these peoples have ceased to be a factual and legal reality and have gone on to be subjects of fundamental rights.

Finally, he states that the ablation practice on indigenous girls cannot be punished criminally by the so called white justice, because, although it violates higher fundamental rights, it is also true that the matter investigated is also surrounded by a certain air of protection or lawfulness (recall, the agreement of November 6, 2007) and especially "a usual and normal use of this practice," by those who believe they are acting properly and validate these practices.

He states that these viperous practices will not be eradicated through punitive measures, but rather, through adequate pedagogy and a true ultimatum, via indigenous authorities. That is the only way to end this threat to life and the quality that it deserves. Ablation as a practice does not prevent an indigenous woman from exploring other avenues in the company of persons of a different race. Today, this violating behavior does not preserve the women for the men of the Emberá – Chamí ethnic group, but it does affect their life or quality of life (pp. 86 to 94).

## 3 LEGAL ARGUMENTS

### 3.1 THE AUTONOMY OF INDIGENOUS ETHNIC GROUPS IN THE NATIONAL CONSTITUTION

In order to address the subject and arrive at a conclusion, we will study article 246 of the Political Constitution and the rulings of the Constitutional Court regarding this subject, because we consider that we must delineate the actions of Colombian authorities with respect to a practice that is normal among the indigenous Emberá – Chamí community in the department of Risaralda, known by this judicial office and initially considered domestic violence, and whether we can interfere with the ethnic autonomy recognized by the political charter.

Article 246 of the Political Constitution provides

**"The authorities of indigenous peoples can exercise jurisdictional functions within their territorial scope, in accordance with their rules and procedures, provided that they are not contrary to the constitution and the laws of the republic. The law will provide for the ways that this special jurisdictionwill coordinate with the national system."**

In its judgment T-009 dated January 19, 2007, M.P. Manuel Jose Cepeda Espinosa, the Constitutional Court analyzed the autonomy of indigenous peoples under the Constitution:

**The constitutional jurisprudence has stated that the indigenous jurisdiction has four elements: i) the power of judicial authorities that are proper to indigenous peoples; ii) their power to establish their own rules and procedures; iii) the respect for the Constitution and the law within the principle of maximization of autonomy; and iv) the legislator's power to specify the manner of coordination of the indigenous jurisdiction with the national judicial system."**

Judgment C-139 dated 1996, M.P. Carlos Gaviria Diaz, provides: **"An analysis of this rule shows four central elements of the indigenous jurisdiction in our constitutional framework: the power of judicial authorities that are proper to indigenous peoples; their power to establish their own rules and procedures; the respect for the Constitution and the law within the principle of maximization of autonomy; and the legislator's competence to specify the manner of coordination of the indigenous jurisdiction with the national judicial system."**

**Judgments T-349 dated 1996, M.P. Carlos Gaviria Diaz; T-030 of 2000 M.P. Fabio Morón Diaz; T-728 of 2002,** M.P. Jaime Cordoba Treviño; T-811 of 2004 M.P. Jaime Cordoba Treviño).

On the matter of the legislator's competence to specify the form of coordination of the indigenous jurisdiction with the national judicial system, the court has indicatedthat the exercise of the indigenous jurisdiction is not subject to a specific law that

develops itbecause this jurisdiction cannot be invalidated simply because there is no regulation. This was the finding in judgment T-344 of 1998 M.P. Alfredo Beltrán Sierra, in the case of a native of the "Chenche agua fría" community, "Tortaco Dinde" who settled in the municipality of Coyaima, Tolima. He was being prosecuted in 1980 for homicide and was sentenced to 9 years in prison in 1993 by ordinary justice. He was detained in 1998 and sent to prison and he filed the constitutional action from there. He claimed that, as a member of this indigenous community and pursuant to article 246 of the Constitution, the "authorities of indigenous villages can exercise their jurisdictional functions within their territory" and his community should have issued his sentence, not a different authority than the one in his community and thus, the court's sentence disregarded his fundamental rights to due process and equality pursuant to articles 29 and 13 of the Constitution because the appropriate judge was an indigenous leader, not a judge of the Republic. The Court did not find any due process violation because he never claimed that he was a native, in order to be processed by that jurisdiction. The Court said: "**Pursuant to article 246 of the Political Constitution, the Colombian state recognizes and respects the indigenous jurisdiction, pursuant to which we accept the existence of judicial authorities that are proper to the indigenous peoples, as well as the power of these communities to establish their own rulesand procedures, adopt imperative decisions, provided that they do not violate the minimum basic principles to guarantee due process. However, this does not mean that we can accept a claim of membership of an indigenous community after a judicial proceeding has been completed and punishment has been imposed, as subterfuge to evade its enforcement or, even more serious yet, to claim the invalidity of a process that has been furthered by the state jurisdiction."** See also, judgment T-552 of 2003, M.P. Rodrigo Escobar Gil.

### 3.2 THE PRINCIPLE OF MAXIMIZATION OF INDIGENOUS AUTONOMY AND ITS EMERGENCE IN VARIOUS AREAS.

Case law has also established that this jurisdiction is governed by the principles of maximization of indigenous autonomy and minimization of the restrictions to this autonomy, within the respect for ethno-cultural diversity. Nevertheless, case law has set certain limits on this jurisdiction, such as judgments T-254 of 1994, M.P. Eduardo Cifuentes Muñoz

T-349 de 1996 M.P: CARLOS GAVIRIA DIAZ; T-523 de 1997 M.P: CARLOS GAVIRIA DIAZ; T-932 DE 2001 M.P: CLARA INES VARGAS; T-1022 de 2001 M.P: JAIME ARAUJO RENTERIA; T- 1127 DE 2001 M.P: JAIME ARAUJO RENTERÍA; T- 048 DE 2002 M.P: ALVARO TAFUR GALVIS; T-239 DE 2002 M.P: ALFREDO BELTRAN SIERRA.

Judgment T-254 dated 1994 is one of the main decisions on the subject, establishing that the rules of public order were limits to the indigenous jurisdiction, provided that they protected a constitutional value with greater weight than the principle of ethnic and cultural diversity. It thus stated that, a greater preservation of uses and customs merits greater autonomy. Colombian reality shows that the various indigenous communities that exist in the national territory have suffered a greater or lesser cultural destruction because of their subordination to colonial rule and subsequent integration into "civilized life" (law 89 of 1890), thereby weakening the social coercion ability of the authorities of certain indigenous peoples over their members. The need for an objective legal framework that guarantees legal security and social stability among these collective nations requires distinguishing between the groups

that preserve their uses and customs – which must be respected, from those that do not preserve them and must, therefore, be governed to a greater extent by the laws of the republic, since the constitutional and legal order dislikes a person being relegated to the outer boundaries of law because of an imprecise or nonexistent delineation of the legal framework that regulates this person's rights and obligations.

### 3.3 FUNDAMENTAL CONSTITUTIONAL RIGHTS CONSTITUTE A MINIMUM MANDATORY STANDARD FOR THE COHABITATION OF ALL PRIVATE PERSONS

Despite the fact that all nationals have a duty to abide by the constitution and the law (Articles 4, 6 and 95 of the Political Constitution), including indigenous peoples, it is worth highlighting that the axiological system contained by the charter of rights and duties, especially fundamental duties, constitutes a substantive limitation on the principle of ethnic and cultural diversity and the codes of values that are proper to the various indigenous communities who inhabit the national territory. It is worth stating as well that the Constituent National Assembly represented them.

### 3.4 THE REPUBLIC'S (PUBLIC ORDER) LEGAL IMPERATIVE RULES HAVE PRIORITY OVER THE USES AND CUSTOMS OF INDIGENOUS COMMUNITIES, PROVIDED THAT THEY DIRECTLY PROTECT A CONSTITUTIONAL VALUE THAT IS HIGHER THAN THE PRINCIPLE OF ETHNIC AND CULTURAL DIVERSITY

The law cannot be interpreted such that it imposes a limit on uses and customs that is so extreme that the mere existence of a legal rule would obliteratetheir content. The normative nature of the Constitution imposes a need to weigh the relative importance of values protected by the constitutional rule – diversity, plurality – against values that are protected by imperative legal rules. The law cannot dispose of the plurality and ethnic and cultural diversity of indigenous peoples—this would endanger its preservation and undermine their richness – whichdepends on maintaining cultural differences. Special jurisdiction (Article 246 of the Political Constitution) and self-government functions delegated to indigenous councils (article 330 of the Constitution) should be exercised, therefore, according to their uses and customs, but with respect for imperative laws on the matter that protect higher constitutional values.

### 3.5 THE USES AND CUSTOMS OF AN INDIGENOUS COMMUNITY HAVE PRIORITY OVER DISPOSITIVE LEGAL NORMS

This rule involves the principles of pluralism and diversity and does not imply acceptance of a custom in violation of any law, because they are dispositive norms. The nature of civil laws, for example, grants a broad margin of the autonomy of private wills, and this, in turn, supports the prevalence of uses and customs on the subject over rules that must only be applied in the absence of a communities' self-regulation.

The Court's case law has developed certain aspects to this position. Thus, judgment T-349 of 1996 established that, in order to maximize indigenous autonomy, the limitations on the exercise of indigenous jurisdiction are limited to a hard core of rights, in other words, the right to life, the prohibition against slavery, the prohibition against torture, respect for due process, determined according to the beliefs of the respective indigenous tribe and, in criminal matters, the lawfulness of crimes and punishments. In order to avoid any imperative law from being invoked as a restriction of indigenous jurisdiction, the Court said:

The principle of maximization of autonomy acquires great relevance on this point because it addresses domestic relationships and its regulation greatly depends on the subsistence of the groups' cultural identity and cohesiveness. The limits on the ways this internal control can be exercised, therefore, must be minimum acceptable standards, and thus, these can only refer to matters that are truly intolerable because they threaten man's most precious assets.

In Judgment T-349 of 1996 M.P. Carlos Gaviria Diaz, the court heard a constitutional action brought by an Emberá – Chamí native – Ovidio Gonzalez Wasorna, against the General Assembly of Indigenous Leaders of his community and the Sole Senior Indigenous leader of Risaralda over a violation of his rights to due process, to a defense, life and physical integrity, pursuant to articles 29, 11, and 12 of the political Constitution. He was sentenced for homicide, first, to 8 years in prison, then to 20 years in prison, in a proceeding in which he had no defense nor was present. The legal problems resolved by the court at this time were the following: i) Concretely, what are the limits thattheConstitution imposes on the exercise of jurisdictional powers by the authorities of the indigenous communities, specifically in the case of judging the behavior of one of its members against another, when the action has taken place within the respective community territory? And ii) were these limits violated in the instant case? The court stated that the limits to the exercise of the indigenous jurisdiction that address internal affairs cover intangible rights and consist of the right to life, the prohibition against slavery, the prohibition against torture, the respect for the lawfulness of the proceedings, and, in criminal matters, the lawfulness of the crimes and the punishments. Thus, the court concluded that the community exercised the constitutionally granted jurisdictional powers, closely following the procedure established in its legal ordainment. However, the jurisdiction did overstep its bounds when it imposed a penalty because it did not correspond to the penalties that had traditionally been imposed for this type of actions, thus, it held that "**in order to guarantee the plaintiff's right, but safeguard the autonomy of the community to decide its own affairs, we will ask the community whether it wishes to judge the plaintiff again, imposing one of the traditional penalties or whether, on the contrary, it prefers that ordinary justice resolve the case."**

In the chamber's judgment, this core of intangible rights would only include the right to life, the prohibition against slavery and the prohibition against torture, for two reasons: Firstly, the recognition that the existence of a true intercultural consensus can only be predicated on these. In the second place, confirmation that this group of rights is found within the core of intangible rights that recognize all the human rights treaties, rights that cannot be suspended even in armed conflict situations.

(…).

To this set of rights, we would add the right to legality in proceedings and, the legality of offenses and punishments in criminal matters, under express constitutional requirement. Article 246 specifically states that judging must reflect the "rule and procedures" of the indigenous community. This presupposes their existence prior to judging the action. But it is true, the demands of this case cannot go beyond what is necessary to ensure the foreseeability of the actionsof authorities. If it did, this would lead to a complete disregard of the development of rules and the community's own rituals for judgment. This is precisely what we are attempting to preserve.

As explained previously, the right to life, the prohibition against slavery and torture and minimum legality, functionally understood as the existence of the rules of the

competent authority, its procedures, its acts and penalties – providing community members a minimum of foreseeability with respect to the actions of its authorities – are the limits on indigenous jurisdictional powers, when the matter addresses a purely internal affair. (Judgment T-349 of 1996 M.P. Carlos Gaviria Diaz).

Judgment SU-510 of 1998, M.P. Eduardo Cifuentes Muñoz upheld the foregoing case law, but the court ruled on whether freedom of religion and cults of some of the members of the ika indigenous community prevailed over the collective right of the indigenous peoples to preserve their cultural identity, including their religious traditions, which occupied a core position.

The court held that traditional authorities could prohibit religious preaching within their territory, because it was contrary to the people's right to preserve their cultural identity. In its reasoning, the court highlighted that an individual'sfreedom of religion and cult does not comprise a part of the hard core of rights that prevail over the fundamental collective rights of the indigenous people.

**"…As a result, the court holds, in light of the above facts, that the Colombian Political Charter prefers an intermediate position. It does not choose extreme universality, nor is it inclined to an unconditional cultural relativism."** According to the court **"cultural survival is only possible with a great degree of autonomy." (**Judgments T-349 of 1996 and T-523 of 1997; M.P. Carlos Gaviria Diaz. This statement translates the fact that ethnic and cultural diversity (article 7 of the Political Constitution), as a general principle, can only be limited when its exercise disregards constitutional or legal rules with more seniority than the principle that one seeks to protect (articles 246 and 330 of the Political Constitution).

Indeed, respect for the Constitution's normative character (Article 4) and the prevalent nature of ethnic and cultural diversity imply that not just any constitutional or legal rule can prevail over the latter (Judgment T-428 of 1992 M.P.: Ciro Angarita Baron; Judgment C-139 of 1996 M.P.: Carlos Gaviria Diaz). Only provisions founded on a higher principle than ethnic and cultural diversity can be imposed. (Per judgment T-254 of 1994 M.P.: Eduardo Cifuentes Muñoz), the constitutional provisions that arrive at the above conclusion are supplemented by articles 8 and 9 of the ILO 169 Convention (Law 21 of 1991), pursuant to which the indigenous peoples have a right to apply and preserve their uses and customs, "**provided that these are not incompatible with the fundamental rights defined by the national legal system or internationally recognized human rights."** In this sense, case law has specified that, although the senior text refers, in general terms, to the Constitution and the Law as limits to the indigenous jurisdiction, "**it is clear that this does not refer to all constitutional and legal rules; otherwise, recognition of cultural diversity would have nothing more than a rhetoric meaning. The determination of a constitutional text would then have to refer to the principle of maximization of autonomy."** (Judgment T0349 of 1996, M.P. Carlos Gaviria Diaz.

According to the Court's case law, in principle, the effectiveness of the rights of indigenous peoples determines that the limits that can be imposed on the normative and jurisdictional autonomy of these communities, are only such limits that reference "**what is truly intolerable because it threatens man's most precious property"** (Judgment T-349 of 1996 M.P. Carlos Gaviria Diaz).

In the first place, this property is composed of the right to life (Article 11 of the Political Constitution), the prohibition against torture (Article 12) and slavery (article 17) and the legality of proceedings, crimes and punishments (article 29). Indeed, as

stated by the court, there is true intercultural consensus on these rights. These rights belong to the group of intangible rights that all international human rights treaties recognize and that cannot be suspended even in armed conflict situations (Covenant on Civil and Political Rights (law 74 of 1968), article 4-1 and 2 of the American Convention on Human Rights (law 16 of 1972), article 27-1 and 2; Convention against Torture and other Cruel, Inhuman and Degrading Treatment (law 78 of 1986), article 2-2; Geneva Conventions (law 5 of 1960), article 3; European Human Rights Convention, article 15-2 and 2, and, with respect to the right to legality of the proceedings, crimes and punishments, article 246 of the Constitution expressly states that a person shall be judged pursuant to the indigenous community's "rules and procedures" which implies their preexisting regarding the judging of acts.

In second place, this Court has accepted certain limits to the autonomy of indigenous authorities, provided that they seek toprevent arbitrary acts that seriously harm human dignity because they affect the essential core of the fundamental rights of community members.

Given the foregoing, we conclude that the indigenous jurisdiction is limited by the hard and intangible core of rights identified by constitutional case law. These rights are: the right to life, the prohibition against slavery and torture and the minimum respect for the legality of proceedings seen in the light of the beliefs of the respective indigenous people and, in criminal matters, the legality of crimes and punishments. These limits in reality are minimum standards pursuant to our evolution of case law, and they are justified because they are **"necessary to protect higher interests and they are the lowest restrictions imaginable in light of the constitutional text."**

### 3.6 THE COURT'S COMPETENCE TO HEAR THE MATTER OF FGM

As noted at the beginning, the court was informed of the case through the submission of the listed epidemiological charts created by the Police Inspector and the Ombudsman of Pueblo Rico, Risaralda, and based on numeral 1 of article 4 of law 294 of 1996, that assigns jurisdiction over domestic violence cases to the municipal judge. The court ordered the proceedingsto determine whether this involved a domestic abuse act and whether it should order any protective measure pursuant to subsection G of article 5 of the referenced law.

Notwithstanding the fact that paragraph 2 of article 4 of law 294 of 1996 provides that the respective indigenous authority in the special jurisdiction is competent to hear domestic violence cases in indigenous communities, pursuant to article 246 of the NationalConstitution, the court decided, through a writ dated January thirty (30) of two-thousand and eight (2008) that it would continue performing the judicial proceedings, as it was a special case, and that it needed to delve into its circumstances. Thus, it postponed the decision to send the matter to indigenous authorities, until it was able to establish whether such delegation was applicable or not. The matter was not resolved until this ruling because, the court considers, as stated below, that indigenous jurisdiction has no power to decide on this type of human rights violations, because this jurisdiction does not act as an expression of ethnic autonomy in cases that ignore the minimum rights established by the Constitutional Court for the indigenous autonomy to prevail. As a result, a court must determine the protective measures, if applicable.

## 4 THE LEGAL PROBLEMS THAT WE HAVE OBSERVED

There are a series of legal problems to be solved in the present case.

4.1 Does FGM – practiced by the Emberá – Chamí indigenous community of the department of Risaralda, constitute a danger to the lives and personal integrity of the women and children of that community and, as such, can it be conceived as a domestic violence case?

4.2 Does the practice of FGM ignore one or more of the four minimum legal standards established by constitutional case law, as limits to the indigenous autonomy – recognized by article 246 of the Constitution?

4.3 In the event that this practice is considered to violate the rights of indigenous women and children and constitutes domestic violence, and also disregards the foregoing minimum legal standards, what should the Colombian state's authorities do with respect to the matter?

## 4.1 THE CIRCUMSTANCES IN WHICH FGM IS PRACTICED

Dr. Hugo Hernando Marsiglia Vargas, a physician who works at Hospital San Rafael de pueblo Rico, Risaralda and who treated the newborn minors M.B., of 17 days of age, S.N.M. and A.N.M. Niaza Mejia, of 16 days of age, was clear when he specified that these minors showed fever, chills and vomiting as a result of the removal of their clitoris and he specified that this practice could have ended their lives, because the immune system of newborns has yet to fully develop and an infection could cause deathly consequences. He stated that the practice was performed with improper tools, such as knives or pocket-knives (p. 36).

Dr. Nancy Haydee Millán Echeverría, an anthropologist of the Colombian Institute of Familial Wellbeing noted that the participants at events and meetings regarding the subject of FGM had agreed that this practice threatens the lives and physical integrity of girls, as many infants had died. (p. 75).

The document attached to the record, written by Agustin Conde, a surgeon at Universidad del Valle, specialist in gynecology-obstetrics and epidemiology, member of the International Federation of Obstetricians and Gynecologists F.I.G.O., for its initials in Spanish, was clear when he specified thatthe practice of FGM causes a risk of physical complications and acute pain, shock, hemorrhage, tetanus, septicemia, urine retention, ulceration of the genital region and lesions adjacent to genital tissue and, in the long term, it causes a great risk of maternal morbidity, recurrent bladder and urinary tract infections, cysts, infertility and greater birth morbidity of babies born tomothers who have been subjected to feminine mutilation. (p. 95).

The foregoing specifications allow this court to determine without a doubt, that FGM is undoubtedly a harmful practice that threatens the lives and physical integrity of the women and girls of the indigenous Emberá – Chamí community in the department of Risaralda, both at the time that it is performed as well as subsequently, and it could constitute a domestic violence case, as we have established that this practice is being performed in families' hearths (see the information in the epidemiological sheets that indicates that the girls were taken to the hospital by their mothers).

## 4.2 NON-APPLICATION OF DOMESTIC VIOLENCE PROTECTION RULES OR THE CRIMINAL CODE TO THE PRACTICE OF FGM

Since we consider that FGM is a use or custom that exists among the Emberá – Chamí indigenous community of the department of Risaralda, which arises during the Spanish colonization, we cannot consider it an individual act of the mothers and midwives of this community and therefore, we cannot apply law 294 of 1996. The legislature developed article 42 of the Political Constitution and it issued rules to

prevent, remedy and punish domestic violence- as well as the Colombian Criminal Legislation – because the acts described therein arise from negligent or reckless acts by individuals, and this case differs in this regard.

Article 33 of the Criminal Code indicates, in its first subsection:

**"Article 33. Immunity from prosecution.A party who, at the time of performing the codified and unlawful act, does not have the ability to understand or determine the act's unlawfulness, according to his or her understanding, due to psychological immaturity, mental disturbance, socio-cultural diversity or similar situations, is immune from prosecution."**

This provision, along with others that speak to the security measures that apply to the individual who is declared immune from prosecution for socio-cultural reasons, was challenged before the Constitutional Court and judgment C-370-02 M.P.: Eduardo Montealegre Lynette, declared it enforceable under two assumptions: i) that the immunity does not derive from incapacity, but from a different set of beliefs and ii) that in cases of an error that cannot be banned, that arise from this cultural diversity, the person must be absolved and not declared immune from prosecution, pursuant to the ruling.

"**Constitutionalizinga criminal law that always seeks to identify the guilty party leads to the following question: What should we do with acts that are as serious as a crime, in that theyaffect essential legal assets, when the acts are codified and unlawful, but are performed by persons who, because of certain conditions, could not act with intent? This situation triggers difficult questions for constitutional regimes that are founded on human dignity, because these persons cannot be punished criminally for their acts, since they did not act with the requisite mens rea. However, society must also adopt measures to avoid these acts that, although they are not performed with mens rea, seriously affect essential legal assets, to the extent that not only are the acts codified and unlawful but, also, there is a possibility that the person could commit them again, in many cases, for the same reasons that he or she does not have the ability to act with mens rea."**

**"… In these cases, the Criminal Code does not set penalties, as this would violate the basic principle of a criminal law based on fault, but it provides security measures, that do not seek to penalize but to protect, cure and rehabilitate. And for this reason, the punitive statute does not require the party's act to have mens rea, since this person specifically lacks the capacity to act with mens rea."**

**"…And, in a social state of law, based on human dignity and the liberty and autonomy of persons (C.P. articles 1, 5 and 16), it is disproportionate for the legislator to choose the means that interfere the most with personal liberty, such as criminal law, when he or she has instruments that cause less harm to constitutional rights. Criminal law in a social state of law is then also limited by the principle of necessity, as it is *ultima ratio* in nature. As a result, unnecessary punishment is unconstitutional."**

**"… In these circumstances, in order to prevent persons with minority beliefs from affecting legal property that is considered important by national law, the state, instead of criminalizing in order to impose majority values, can resort to other instruments, such as intercultural discussions, that allow progressive respect and understanding among the various cultures that comprise the Colombian state (C.P. art. 70). And in this scope, the criminal process itself, that**

**eventually leads to a declaration of innocence becauseof an error that has been culturally conditioned or a declaration of immunity from prosecution, can lose its purely punitive connotation and become a privileged space for intercultural dialogue." (Judgment C-370-02 M.P. Eduardo Montealegre Lynett).**

We can reach similar conclusions regarding law 294 of 1996, that describes the acts that constitute offenses against family harmony and unity in its articles 22, 23 and 24, and the respective penalties. Its application is divided with respect to the residents in Colombian territory, as paragraph 2 of article 4 of this law orders that the respective indigenous authority is competent to review domestic violence cases in indigenous communities, developing thereby the special jurisdiction provided by the National Constitution in its article 246.

Thus, we cannot consider the practice of FGM a phenomenon that can be addressed by the two state frameworks, in order to penalize or correct this conduct. Thus, we must declare that this is no criminal act of domestic violence, but, as we have been stating, it is a conduct that violates human rights and that must be subject to a different treatment.

Now, it is one thing not to apply the criminal law, or the law that protects againstdomestic violence against mothers and midwives, for the reasons explained above and it is a different thing to then conclude that state authorities can only address FGM through the actions described by the I.C.B.F, the Ministry of Interior and Justice and the Ombudsman, that limit themselves to "pedagogic, intercultural processes to change the practice." As we shall see below, these are insufficient and ineffective, and slow to prevent the girls of the Emberá – Chamí community from continuing to risk their lives and personal integrity with the argument of respect for ethnic autonomy that, as we have been stating, is a lower constitutional value as compared to the constitutional value of life and other rights with greater weight than the right to diversity.

### 4.2.1 THE LIMITS TO THE RECOGNITION OF INDIGENOUS AUTONOMY

Having analyzed article 246 of the Political Constitution and the foregoing judgments of the Constitutional Court that specified its scope and application, this court can also peacefully conclude as in the previous point, that the practice of FGM exceeds all limits established on indigenous jurisdiction and the autonomy of ethnic communities, as these limits cover public order rules that protect constitutional values having greater weight than the constitutional principle of ethnic and cultural diversity (Judgment 254 of 1994 M.P. Eduardo Cifuentes Muñoz).

In this judgment, the Court also noted that the greater the preservation of uses and customs, the greater the autonomy that must be recognized. This leads us to bring up a related topic, regarding the level of "contact" of the indigenous Emberá – Chamí community with the rest of Colombian society and, specifically, with the rest of the region's inhabitants.

The indigenous population of the department of Risaralda forms a part of the Emberá – Chamí ethnic group, descendants from the Katios, which belong to the linguistic subfamily of the CHOCOES Indians who comprise a part of the linguistic macro family of the Caribe Indians. (Socioeconomic study by the Chamí community performed by Incora in 1975).

Upon arrival of the settlers to this region, the Chamí community inhabited the medium and lower areas of the San Juan River, as part of the Emberá group, initially

traversed the Atrato River and subsequently populated the east and south of the current department of Chocó.

With respect to the historical origin of the indigenous settlers of the department of Risaralda, some researchers refer to three branches or roots:

"The true Chamíes" who inhabited the adjacent territory at the east of the area that they currently inhabit, that were subject to conquest and colonization, through plantations, reductions and settlements.

The second group of Emberá – Chamí originarrived at the region over 100 years ago, following the current of the San Juan River, reaching its source. They currently inhabit the lands from the Mistrató River towards the southwest, at Purembará, the mountain, Inamur, and adjacent areas.

A third group descends from the Catía, from the north (Jardin – Andes) and certain sectors of the interior of Caldas.Today they reside close to Mistrató and San Antonio del Chamí. (Socioeconomic study of the Chamí community – performed by INCORA in 1975).

The Spaniards had difficulty colonizing these indigenous communities, given the fact that they were spread out and they significantly diminished the Indian population as a result of the methods that they used to capture the Indians and force them to work in mines and plantations. In turn, this caused the greater part of the Chamí population to migrate from the eastern section of the western mountain range to its western section – the site where they are settled today.

During the colonial period, between 1593 and 1637, the Spanish crown decided to promote a government policy that sought the creation of Indian reservations – a policy that sought to bring a stop to the annihilation of Indians, facilitate their assimilation and indoctrination and exercise control over taxes. The Indigenous Reservation of San Antonio del Chamí was created during this period.

In mid 17$^{th}$ century, the greater part of the Emberá Indians had been converted into taxpayers for the Spanish crown; obligated by Indian brokers, they paid their taxes with corn and by transporting merchandise from Anserma, Caldas to Chocó in order to support mineworkers.

The Spanish founded two gold agencies in this region: San Juan del Chaí, at the site where the Chamí River meets the San Juan River, and San Antonio del Tatamá, at the intersection between the Tatamá River and the San Juan River; the priest, the broker and the Indians inhabited these two villages. The land assigned to the Reservation, covered the current Mistrató municipality, half of Pueblo Rico in Risaralda and a part of the current municipality of Bagadó. (Indian Development Plan Workshop for Risaralda, Government of Risaralda, 1992).

During the mid 18$^{th}$ century, San Juan del Chaí was the area's administrative, political and religious center; it had an Assistant Lieutenant, Lieutenant, Captain, General, Greater Justice, Natural Products Broker, Mayor of Mines and a Priest. At this time, the election of the "cacique' [*Indian leader*] gained a great amount of importance. The indigenous society gains a different social structure as compared to the tribal structure, because of the taxes and doctrine imposed on it. Further, the hereditary leadership structure from father to oldest legitimate son began. (The CHAMÍ indigenous community of Pueblo Rico and Mistrató, Risaralda, INCORA, 1992).

The lands occupied by the Chamí community initially belonged to the Cauca government. However, they later passed on to Chocó and later to the Department of Caldas and today, they comprise a part of the Risaralda department.

During the mid 19th century, the Emberá – Chamí community was subject to strong religious conversion effortsby catholic priests who set up large evangelization centers in Santa Cecilia, Aguasal, San Antonio del Chamí and Purembará. (Update by socioeconomic study of the Chamí indigenous community of Pueblo Rico and Mistrató of the department of Risaralda, prepared by Uriel Patiño Pavas. Colombian Institute of Agrarian Reform – INCORA regional former Caldas. Pereira, November 1994).

This brief sociological account leads us to conclude that the Emberá – Chamí is a community that shares lands in the Department of Risaralda with Afro- Colombians and descendants of the Indians from Antioquia and Cauca starting 400 years ago in an intense cultural exchange, ended by the almost complete Catholic indoctrination of the last 50 years. Thus, thiscommunity has strong "contacts" with our own. Although they preserve their cultural identity and many of their uses and customs, we cannot understandtheir retention of a use or custom that is as barbaric as FGM, a practice that is "weakly justifiable or admissible" by societies with the lowest levels of intercultural "contacts or proximity" with the modern world, as can be said about certain African or Middle Eastern Societies on the planet.

And precisely with respect to the practice of FGM, the indigenous leaders of the Emberá – Chamí community themselves, at a meeting held with the judges of various municipalities of the indigenous lands, held in Pereira, Risaralda on the 27th and 28th of May of 2008, stated that they were not sure that the practice was traditional and some of them even admitted that they did not know of it; even Julio Tascon Panche himself, Junior Governor of the Corozal de Quinchia Community, Risaralda, and one of the Jaibaná of the Emberá – Chamí community, said that he did not know of the practice until one year ago, when it came out in public and only because he "forced his wife to tell him the truth" about the practice and admit that she performed it on their five daughters (p. 68).

The indigenous leaders said that they were not aware of the practice and they admitted that it puts the lives of the community's girls at risk. They noted that public opinion must recognize that the indigenous leaders were committed to defending human rights, and especially the rights of children who are the hope and the future of their indigenous communities. (Presentation of Mr. Jorge Ulises Velez Osorio, Vice-Councilmembers of the Indigenous Regional Council of Risaralda, CRIR – p. 69).

The indigenous leaders never claimed that the FGM practice was a respectable or defensible custom in their community. On the contrary, they recognized that it was inappropriate. For this reason, we should ask ourselves whether we are analyzing a practice that should be tolerated or allowed or subjected to a long transformation process and not an immediate ban.

The indigenous leaders were even more concerned about the interference with their own matters and they demanded that it should be they and their community who resolves the matter (Presentation of Willian Nayaza Enebia, General Education Coordinator and Member of the Emberá – Chamí Indigenous Community of Mistrató and Baarlan Diaz Ibarra, member of the Indigenous Community and secretary of C.R.I.R. – p. 69).

As the indigenous leaders themselves are open, from their "cosmovision" to eschew the practice as part of their cultural identity, we should conclude that this is not one of the customs that support, per the Court's resolution, their statement that as uses and customs are preserved over a longer time, the greater the autonomy that should be granted to the communities.

Now, if, as we have concluded, the practice violates one or many of the four referenced minimum standards, we find ourselves before the situation that an indigenous authority cannot, not even the Emberá – Chamí community themselves, decide on this subject alone, because they are part of the residents of the Colombian State. As such, they must abide by the Constitution and admit that public order rules that protect constitutional values that are more senior than the principle of autonomy (violated by FGM) also have greater weight than the constitutional right to ethnic and cultural diversity.

Thus, the words of the Social Researcher, Attorney, Professor of Constitutional Law, Principles and Values of Universidad Andina, Dr. Jose Daniel Trujillo Arcila also ring true, when he states:

**"In a civilized world, given a culture that is highly primitive in certain cases, but is also westernized, penetrated by modern inventions such as television, cellular phone, the consumption of distilled alcohol in our capital cities, as we have personally observed, with constant travel from their territory to the city or coffee fields and subsequent return to their original lands, we cannot accept when in advanced models of civility, poor treatment or torture violates the right to a dignified life, under the pretext of protection of traditional methods"** and

**"We cannot allow horrific forms of mutilation even when they are performed under the pretext of respect for autonomy and ethnic diversity, regardless of their reasoning or justification. More so even when these procedures breach the most elemental protocols of asepsis, absence of pain, pre-surgical control – given the danger of losing a life that barely begins or the deterioration of its future quality, or other consequences" (p. 92).**

Since FGM threatens the lives and personal integrity of indigenous girls, it violates fundamental constitutional rights that are senior tothe constitutional values of ethnic diversity. Thus, we cannot uphold the autonomy of the indigenous community in said matter. FGM threatens man's most precious assets, composed of the right to life and other constitutional rights that are recognized by international conventions, as explained in points 3.4 and 3.5 regarding the fact that the uses and customs of an indigenous community have priority over dispositive legal rules, but not over those rights with greater weight, pursuant to judgment T-349 of 1996 (MP Carlos Gaviria Diaz).

### 4.3 ATTITUDE OF THE COLOMBIAN AUTHORITIES, INCLUDING INDIGENOUS AUTHORITIES, TOWARDS FGM

If the majority of the above conclusions apply, we should review the statements of doctor Nancy Haydee Millán Echeverría – a nutritionist with a Masters degree in Anthropology – Officer of the Colombian Institute of Family Wellbeing – official letter ofi108-5787-DET-1000 dated February 29 of two thousand and eight (2008) addressed to the court by Mr. Edilberto Herrera Cañon, Assistant Director of Indigenous Affairs of the Ministry of Interior and Justice of the Republic of Colombia; official letter 4080 – 0164 dated February 14 of two thousand and eight (2008) addressed to the court by Dr. Gabriel Muyuy Jacanamejoy – Assistant

Defender for Indians and Ethnic Minorities and the Assistant Defender for the Rights of the Child, Women and Youth of the Ombudsman's Office; and the opinion of Dr. Jose Daniel Trujillo Arcila, Professor of Constitutional Law, Principles and Values of *Universidad Andina*, Pereira Section, regarding their legal assessment of the practice under Constitutional and International Humanitarian Law. They have conflicting views regarding what the attitude of state authorities should be towards the practice.

Under the assessment of the referenced entities, the practice should be changed. Hence, the statements of Millán Echeverría: **"We can only put a process into practice such as the one that is already being performed – one that uses intercultural dialogue to bring about the conditions to change a practice that violates constitutional principles"** (p. 79).

Dr. Herrera Cañon of the Ministry of Interior and Justice believes that, under the constitution and international treaties and agreements signed by Colombia, we must implement an institutional strategy that includes indigenous authorities, "to transform a practice on the basis of a pedagogic and reflexive process that covers the historic memory of these indigenous communities; such that, through a detailed review of their own cultural beliefs and via the active participation of indigenous women, they can decide on cultural change and the progressive modification of the practice. We note that by "modification" we mean the ability to alter certain particularitiesof the practice, preserving its cultural content and underlying social principles, from the particular beliefs of the communities. In other words, we must promote a replacement of mutilation by behavior that does not injure women's integrity and that preserves the entire symbolic content of the current practice." (p. 62).

Doctors Muyuy Jacanamejoy and Hurtado Saenz of the Ombudsman, in listing this entity'sefforts to address FGM, state that they seek to **"change it so that it does not affect the physical integrity of the Emberá – Chamí girls, via a process that is in harmony with the culture and beliefs of this people."** They believe that only then would they would satisfy article 7 of the political constitution, as it specifies that the state recognizes and protects the ethnic and cultural diversity of the Colombian nation. Further, under this principle, the project must harmonize recognition of the collective rights of indigenous peoples with the priority of the rights of girls, under international treaties and the domestic legal framework (p. 49).

In turn, we received the document submitted by Dr. Agustin Conde, a specialist in gynecology-obstetrics and epidemiology of the *Universidad del Valle*, members of the International Federation of Obstetricians and Gynecologists. Given the delay of the world's governments in implementing efficient measures to eliminate the practice, they first designated February 6$^{th}$ of each year as the "INTERNATIONAL DAY FOR ZERO TOLERANCE OF FGM" and they call for the immediate and urgent elimination of this practice. This document describes the practice in the world, noting the large number of the female population that has been subjected to the practiceas well as the population that runs a risk of experiencing it each year; [the document] describes the immediate and long-term consequences of the practice; invites the governments to immediately ratify or put a convention on the elimination of all forms of discrimination against women into practice; calls on state authoritiesand non-governmental organizations to promote and support measures to eliminate the practice and strongly opposes the medicalization of the practice; in other words, that we admit the practice through surgical methods in a supposed effort to decrease its risks. Because of tis importance, and as the court considers that this is the attitude that state

authorities should adopt, including indigenous authorities, we transcribe the referenced document in its integrity:

The International Day of Zero Tolerance to Female Genital Mutilation (FGM) is held each 6 February.

The International Federation of Gynecologists and Obstetricians (F.I.G.O.) reaffirms its position regarding the need to eliminate female genital mutilation.

Female Genital Mutilation or "Female Genital Cutting" as it is sometimes called, continues to be an important public health problem that affects the health of women and girls worldwide. It is common in 28 countries in Asia and the Middle East.

Between 100 and 140 million girls and women worldwide have been subjected to this harmful practice and close to three million girls and women run the risk of being subjected to this procedure each year.

The serious health consequences of Female Genital Mutilation are a reason for great concern of the International Federation of Gynecologists and Obstetricians (F.I.G.O.), because of the risk of immediate complications, including acute pain, shock, hemorrhage, tetanus, septicemia, bladder retention, ulceration of the genital region and adjacent lesions in the genital tissue.

The long-term consequences include a greater risk of maternal morbidity, recurrent bladder and urinary tract infections, cysts, infertility and adverse psychological and sexual consequences. There is a greater risk of neonatal death of babies born to mothers who have been subjected to female genital mutilation.

In 1994, the General Assembly of the International Federation of Gynecologists and Obstetricians (F.I.G.O.) approved a resolution that invites associations of Obstetricians and Gynecologists around the world to work to eliminate Female Genital Mutilation.

In this resolution, F.I.G.O.:

INVITES Member Societies to:

URGE their governments to ratify the Convention on the Elimination of ALL Forms of Discrimination Against Women, if they have not already done so, and to ensure the implementation of the articles of the Convention, if the Convention has already been ratified.

URGE their governments to take legal and/or other measures to render this practice socially unacceptable by all sectors and groups in society.

COLLABORATE with national authorities, non-governmental and inter-governmental organizations to advocate, promote and support measures aiming at the elimination of female genital mutilation.

RECOMMENDS that obstetricians and gynecologists:

EXPLAIN the immediate dangers and long-term consequences of female genital mutilation to religious leaders, legislators and decision makers.

EDUCATE health professionals, community workers and teachers about this harmful traditional practice.

SUPPORT those men and women who want to end the practice in their families or communities.

ASSIST in research for the documentation of the prevalence of the practice and its harmful consequences.

OPPOSEany attempt to medicalize the procedure or to allow its performance, under any circumstances, in health establishments or by health professionals.

Throughout the years, the General Assembly of the International Federation of Gynecologists and Obstetricians (F.I.G.O.) has adopted a series of resolutions demanding the elimination of Female Genital Mutilation, namely:

-Violence against women (Copenhagen, 1997)

- Women's rights with respect to sexual and reproductive health (Washington D.C., 2000)

- Women's sexual and reproductive rights – A social responsibility of Obstetricians and Gynecologists (Santiago, 2003).

- Ethical and professional responsibility of Obstetricians and Gynecologists in sexual and reproductive matters (Santiago, 2003).

Progress towards the elimination of Female Genital Mutilation has been slow.

The growing participation of healthcare professionals in the practice is a great cause for concern and F.I.G.O. reaffirms its firm position against its medicalization and promotes the inclusion of legislative measures and professional regulations to prevent it from continuing.

Coordinating multiple national and international efforts in support of abandonment of the practice, as an important contribution to the achievement of the millennium's development objectives on gender quality, women's rights, reducing child mortality and improving maternal health (end of document). – pp. 96 and 97. [TN: Unofficial translation]

As specified in other sections of this providence – FGM is an indigenous custom that, because of its characteristics, threatens constitutional values that are higher than those related to the right to recognition of ethnic diversity and, as a result, the former has priority. Thus, the efforts geared towards transforming the practice via pedagogic processes, as referenced by the foregoing entities, the I.C.B.F., the Ministry of Interior and Justice and the State Ombudsman, are insufficient and ineffective because, while they would trigger this pedagogic process, the Emberá – Chamí girls continue running the risk of losing their lives.

Having observed the agreement signed by the Emberá – Chamí indigenous authorities of the Mistrató and Pueblo Rico municipalities and local institutions that are competent to defend and guarantee the rights of the children population, signed in Pereira on November 6, 2007, we note that it specifies the following in its numeral 1:

**"1. – The indigenous authorities shall instruct their communities, especially women and midwives, that women and girls cannot die or become ill on account of the "practice". In the event that a girl gets sick or dies from the "practice," the mother and the midwife shall be sued by the Reservation's justice; in the event that this justice does not prosper, the case shall be brought before the ordinary justice."**

Thus, the agreement cannot allow mutilated girls to get sick or die, and therefore, it gives instructions to prevent this from happening, as if the immediate consequences of the "practice" depended on the good will and adoption of certain instructions (the

agreement does not say which ones) and these consequences did not turn on the fact of the cutting of the clitoris. This agreement is absurd and has no logical support from a medical-scientific perspective.

In the agreement's second point, indigenous authorities commit to instructing their communities to send any girl who shows affectations to the closest healthcare center, in order to prevent complications and risk of death. In the following subsections, the agreement sets up a monitoring system among indigenous authorities, police inspectors and the Colombian Institute of Family Wellbeing, in order to monitor the cases that arise. The agreement ends by stating that the communities shall perform the pedagogic sensitivity, reflection and transformation process for the cultural practice, without prejudice to giving proper treatment to the affected girls (pp. 6, 7, and 8).

It is clear that, for the indigenous authorities and the representatives of entities charged with protecting children's rights in Colombia (as explained at court), this agreement satisfies women and children's expectations for rights pursuant to the National Constitution and international agreements. However, this is false. The procedures established therein, for example, did not work in the cases of the girls M.B. of 17 days of age, who was treated on December 7, 2007 and A.N.M. and S.N.M. of 16 days of age, who were treated on December 14, 2007 at local hospital San Rafael de Pueblo Rico, Risaralda. In other words, over a month after the agreement was signed, (see the epidemiological charts at pp. 3, 4 and 5) the procedure contemplated in the agreement was not applied. This is apparent because on April 1, 2008, the date that the judges met with the indigenous authorities in Pereira, Risaralda, noted in another section of this ruling, neither the indigenous authorities, nor the I.C.B.F., nor the State Ombudsman at that, knew of the case until the court informed them of its existence.

The above leads us to conclude that this agreement is no assurance that the lives and physical integrity of the girls of the Emberá – Chamí Risaralda community will be defended. Thus, we must conclude that the Colombian entities that signed the agreement, including indigenous authorities, were not satisfying their constitutional obligations to defend the lives, honor and property of the inhabitants of our national territory.

We repeat, while we apply pedagogic and intercultural proceedings to change this practice, many girls shall be subjected to the threat of losing their lives and suffering the horrific consequences of a barbaric practice that violates human rights.

We cannot understand how, despite a conduct that is qualified by entities and persons in these proceedings as a practice that violates human rights, and further, having concluded that indigenous autonomycarries less weight than the constitutional rights to life and personal integrity, these entities only seek to attempt to change the practice, when instead, the only admissible decision given international human rights treaties is the practice's immediate and urgent elimination.

However, once the practice has been banned completely, the authorities should not resort to criminal penalties against mothers or midwives who violate the ban, applied by indigenous authorities or the Colombian state. For this reason, we explained the nonexistence of individual criminal responsibility when a practice is a cultural custom. However, the practice must be banned and, when someone disobeys that practice, then pedagogic proceedings, intercultural dialogues should apply, as well as other procedures that anthropologists, sociologists and social workers wisely devise

using their excellent competence, as they seek to formulate a policy geared not towards changing a practice, but providing sociocultural treatment to parties who disobey the ban. This is in line with the different treatments mentioned by the Court in judgment C-370 of 2002, above.

On the merits of the foregoing, the Municipal Court of Pueblo Rico, Risaralda,

**RESOLVES:**

**First**: Declares that in this case, Family Protection Measures do not apply, in light of law 294 of 1996, in favor of minor children M.B., A.N.M. and S.N.M. and against their mothers, because the mutilation that they were subjected to is not a matter that can be resolved through criminal and family protection law, as explained in our reasoning.

**Second**: Abstains from ordering Family Protection Measures in this case.

**Third**: Declares that the practice of Female Genital Mutilation performed in the Emberá – Chamí indigenous community of the department of Risaralda is a barbaric and inhumane practice that violates the rights of the women and girls of that community, and is arbitrary and unjustifiable. It disregards the National Constitution and International Human Rights Treaties signed by Colombia.

**Fourth**: Declares that the rights that were violated and were disregarded to the detriment of the girls of the Emberá – Chamí indigenous community of the department of Risaralda, on account of their female genital mutilation, the right to life and personal integrity, contemplated in the National Constitution and international treaties have greater weight and, as a consequence, override the constitutional rights derived from the respect for cultural diversity and autonomy of indigenous peoples, pursuant to the Constitutional Court's interpretation of the applicability of article 246 of the National Constitution.

**Fifth**: Declares that the efforts of the indigenous authorities, the Ministry of Interior and Justice, the State Ombudsman and the Colombian Institute of Family Wellbeing are insufficient, ineffective, slow, tolerant and innocuous to defend the lives and personal integrity of the girls of the Emberá – Chamí indigenous community of the department of Risaralda, in light of the Female Genital Mutilation practice in that community.

**Sixth**: Requests that Colombian state authorities: President of the Republic of Colombia; Governor of the Department of Risaralda; Municipal Mayor of Pueblo Rico, Risaralda; Municipal Mayor of Mistrató, Risaralda; Senior Governor of the Unified Indigenous Reservation Emberá – Chamí of the San Juan River of Pueblo Rico, Risaralda; Senior Governor of the Indigenous Gito-Docabu Reservation; Senior Councilmember of the Indigenous Regional Council of Risaralda (C.R.I.R.) or those who are represented by those positions issue the administrative acts, decrees, resolutions, agreements or orders that are necessary to immediately and urgently ban the practice of female genital mutilation in the community of Emberá – Chamí of the department of Risaralda.

**Seventh**: Orders the Ministry of Interior and Justice, the State Ombudsman and the Colombian Institute of Family Wellbeing, I.C.B.F. to adopt the policies and efforts that effectively lead to the urgent and immediate elimination of the practice of female genital mutilation in the Emberá – Chamí indigenous community of the department of Risaralda.

**Eighth**: Orders the private entities and non-governmental organizations (NGO's) in the department of Risaralda, human rights defenders and women and children's rights advocates to adopt social policies and actions to support the immediate and urgent elimination of female genital mutilation in the Emberá – Chamí indigenous community of the department of Risaralda.

**Ninth**: Orders the international human rights entities to exercise activities in Colombia so that it does not adopt public or private policies that tolerate or transform the practice of female genital mutilation, but rather, seeks its immediate and complete elimination.

Service is hereby ordered

Marino de Jesus Arcila Alzate

Municipal Judge of Pueblo Rico, Risaralda