

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS*
OF JUNE 30, 2011**

**PROVISIONAL MEASURES REGARDING THE
REPUBLIC OF COLOMBIA**

CASE OF GUTIÉRREZ SOLER v. COLOMBIA

HAVING SEEN:

1. The order issued by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal") on March 11, 2005, in which it ordered provisional measures in the instant case.

2. The Judgment on merits, reparations and costs handed down by the Inter-American Court on September 12, 2005, in this case, in the tenth operative paragraph of which it ruled that the State "should pay special attention to ensuring the life, integrity and security of Wilson and Ricardo Gutiérrez Soler and their next of kin and provide them with the necessary protection from any individual, taking into account the circumstances of the case, in accordance with the order for provisional measures issued by the Court on March 11, 2005."

3. The provisional measures orders issued by the Inter-American Court on November 27, 2007, and August 9, 2009; in the latter, the Court ordered the Republic of Colombia (hereinafter "the State" or "Colombia"):

1. To maintain any measures it has adopted to protect the life and personal integrity of Wilson Gutiérrez Soler, Kevin Daniel Gutiérrez Niño, Ricardo Gutiérrez Soler, Yaqueline Reyes, Leonardo Gutiérrez Rubiano, Ricardo Gutiérrez Rubiano, Sulma Tatiana Gutiérrez Rubiano, Paula Camila Gutiérrez Reyes, Luisa Fernanda Gutiérrez Reyes, María Elena Soler de Gutiérrez, Carlos Andrés Gutiérrez Rubiano and Leydi Caterin Gutiérrez Peña[;]

2. To allow the participation of the beneficiaries or their representatives in the planning and implementation of the measures of protection and, in general, keep them informed about the advance of the provisional measures[;]

3. To continue informing the Inter-American Court of Human Rights, every three months, on the provisional measures adopted and to require the representatives of the beneficiaries of the provisional measures and the Inter-American Commission on Human Rights to present their observations on the said reports of the State within four and six weeks of notification of the respective State reports[;]

[...]

4. The briefs of July 16 and December 14, 2009; March 15, May 11, August 25 and December 9, 2010; and March 31, 2011, in which the State submitted information on compliance with the provisional measures ordered in this case.

* Judge Alberto Pérez Pérez informed the Tribunal that due to reasons of *force majeure*, he would not be able to be present during the deliberation and signing of this Order.

5. The briefs of August 28, 2009, July 15, 2010, and June 6, 2011, in which the representatives of the beneficiaries of the provisional measures (hereinafter “the representatives”) submitted their comments on the State’s reports, with the exception of the one presented on August 25, 2010 (*supra* Having Seen 4).

6. The briefs of September 23 and November 4, 2009; May 7, June 28 and October 28, 2010; and January 25 and May 17, 2011, in which the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) presented its observations on the reports of the State and the briefs of the representatives (*supra* Having Seen 4 and 5).

7. The notes of the Secretariat of the Inter-American Court (hereinafter “the Secretariat”) of May 13, June 30, November 17 and December 10, 2010, and February 1 and May 23, 2011, in which it reiterated to the representatives that they should submit their observations on the State’s reports of December 14, 2009; March 15, May 11, August 25 and December 9, 2010; and March 31, 2011 (*supra* Having Seen 4).

CONSIDERING THAT:

1. Colombia has been a State Party to the American Convention on Human Rights (hereinafter, “American Convention”) since July 31, 1973, and accepted the contentious jurisdiction of the Court on June 21, 1985.

2. Article 63(2) of the Convention establishes that:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent, in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

3. In this regard, Article 27 of the Rules of Procedure of the Court establishes in its pertinent part that:

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

[...]

3. In contentious cases already submitted to the Court, the victims or alleged victims or their duly accredited representatives, may present a request for provisional measures in relation to the cases directly to the Court.

[...]

4. The provisions of Article 63(2) of the Convention confer an obligatory nature on the State’s adoption of the provisional measures ordered by this Tribunal, as the basic principle of the law on State responsibility, supported by international case law, indicates that a State must comply with its international treaty obligations in good faith (*pacta sunt servanda*).¹

5. Under international human rights law, provisional measures are not merely precautionary in nature, in the sense that they preserve a juridical situation, but rather

¹ Cf. *Matter of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the Inter-American Court of Human Rights of June 14, 1998, sixth considering paragraph; *matter of Mery Naranjo et al.* Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of March 4, 2011, fourth considering paragraph, and *matter of Alvarado Reyes et al.* Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of May 15, 2011, fourth considering paragraph.

they are fundamentally protective, because they safeguard human rights, inasmuch as they seek to prevent irreparable harm to persons. The measures are applicable provided that the basic requirements of extreme gravity and urgency, and the prevention of irreparable harm to persons are met. In this way, provisional measures become a real jurisdictional guarantee of a preventive nature.²

6. The representatives and the Inter-American Commission submitted information and observations relating to the domestic judicial investigations. In this regard, the Court recalls that, in the order of July 9, 2009 (*supra* third having seen paragraph), the Court indicated that the “investigations into the acts that gave rise to these provisional measures are part of the inquiry that the State authorities must conduct to comply with the first operative paragraph of the judgment on merits, reparations, and costs handed down by the Court in this case on September 12, 2005.” Consequently, it no longer required the parties to present information on the investigations conducted by the State into the facts that gave rise to these provisional measures. Accordingly, supervision of the implementation of the measures will be limited to the elements ordered by the Court in said order.

A. Maintenance of the measures that have been adopted to protect the life and personal integrity of Wilson Gutiérrez Soler, Kevin Daniel Gutiérrez Niño, Ricardo Gutiérrez Soler, Yaqueline Reyes, Leonardo Gutiérrez Rubiano, Ricardo Gutiérrez Rubiano, Sulma Tatiana Gutiérrez Rubiano, Paula Camila Gutiérrez Reyes, Luisa Fernanda Gutiérrez Reyes, María Elena Soler de Gutiérrez, Carlos Andrés Gutiérrez Rubiano and Leydi Caterin Gutiérrez Peña (first operative paragraph of the order of July 9, 2009)

7. The analysis of this point refers to two types of beneficiaries of these provisional measures. On the one hand are the beneficiaries who reside in Colombian territory, namely: María Elena Soler de Gutiérrez, Carlos Andrés Gutiérrez Rubiano and Leydi Caterin Gutiérrez Peña. According to the most recent information provided by the State and the representatives (*infra* Considering 9, 10 and 11), Wilson Gutiérrez Soler and his son, Kevin Daniel Gutiérrez Niño, who were outside the country, have returned to reside permanently in Colombia. On the other hand are the beneficiaries who live outside Colombian territory, namely: Ricardo Gutiérrez Soler, Yaqueline Reyes, Leonardo Gutiérrez Rubiano, Ricardo Gutiérrez Rubiano, Sulma Tatiana Gutiérrez Rubiano, Paula Camila Gutiérrez Reyes and Luisa Fernanda Gutiérrez Reyes.

a) Information on the beneficiaries who reside in Colombian territory

8. Throughout its reports, the State has described a series of measures approved and implemented to the benefit of María Elena Soler de Gutiérrez and Wilson Gutiérrez Soler during their temporary stays in the country.³ The State indicated that these measures of protection were adopted under the Human Rights Protection Program of the Ministry of the Interior and Justice, which has an advisory body known as the Regulation and Risk Assessment Committee (CRER in its Spanish acronym).⁴ In this regard, in its report of December 14, 2009, the State indicated that according to the assessment

² Cf. *Case of the “La Nación” Newspaper*. Provisional measures with regard to Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001, fourth considering paragraph; *matter of Wong Ho Wing*. Provisional measures with regard to Peru. Order of the Inter-American Court of Human Rights of March 4, 2011, tenth considering paragraph, and *matter of Alvarado Reyes et al.**supra* footnote 1, fifth considering paragraph.

³ In general these measures have consisted of special aid for transportation, for moving house, bodyguards, Avantel and mobile means of communication, support for temporary relocation, bulletproof vests, plane tickets, and medical and therapeutic aid.

⁴ According to information provided by the State, this committee recommends the adoption of the most appropriate measures to protect an individual, taking into account both the specific characteristics of each case, and also the results of a risk assessment prepared by the competent security agencies.

prepared by CRER, Wilson Gutiérrez Soler had a normal level of risk; nevertheless, the Committee recommended re-evaluating the assessment. Regarding some of the measures requested by the representatives to Mr. Gutiérrez Soler's benefit prior to his definitive return to Colombia, particularly those relating to "architectural" safety measures in his house, the State indicated that it had advised the representatives that this type of measure could only be implemented if the house was owned by the beneficiary because it entailed a series of structural modifications that could not be carried out without the owner's prior consent. Nevertheless, the State advised subsequently that Wilson Gutiérrez Soler "had acquired his own residence;" the National Police were therefore asked to assess the security of his home. In addition, Colombia indicated that the beneficiary had reported his definitive return to the country; consequently, the CRER had authorized a civilian vehicle and two private body guards for six months. This had also been approved by Wilson Gutiérrez Soler. This security plan will also cover his immediate family "which includes Kevin Gutiérrez."

9. According to the most recent information submitted by the State, since Wilson Gutiérrez Soler and his son, Kevin Daniel Gutiérrez Niño, now reside permanently in Colombia, CRER prepared a new assessment indicating that Mr. Gutiérrez Soler has an extremely high level of risk. In this regard, the State reported that several measures of protection are in force. Furthermore, based on a risk assessment for María Elena Soler de Gutiérrez, "it was established that her situation of risk was directly related to the events of which her son, Wilson Gutiérrez Soler, was a victim, and therefore, the result of the risk assessment was also extremely high." As regards the assertions of the representatives and of Wilson Gutiérrez Soler on alleged requests for migratory reports on Mr. Gutiérrez Soler in the context of the criminal proceedings underway for the torture to which he was subjected, which have caused him fear (*infra* Considering 12), the State indicated that it had "asked the Administrative Security Department (DAS) to report on whether any individuals and/or judicial authorities have asked for the migratory records of Wilson Gutiérrez Soler."

10. Furthermore, in its report of December 14, 2009 (*supra* Having Seen 4), the State indicated that the requests to conduct risk assessments for Carlos Andrés Gutiérrez Rubiano and Leidy Caterin Gutiérrez Peña were being processed. Subsequently, particularly as of its report of May 11, 2010, the State indicated that it had not received any information from the representatives concerning any "new threats to the life and integrity" of the beneficiaries, or requests for measures of security and/or protection to their benefit, and that it was unaware of the location of these individuals. Thus, it had not carried out the corresponding risk assessments.

11. The representatives made reference to the way in which some of the measures of protection were being implemented by the State, particularly as regards the delay in preparing the risk assessments for Wilson Gutiérrez Soler and his mother, María Elena Soler de Gutiérrez. In addition, they mentioned that although some of the measures had been approved, they had not yet been executed. Thus, for example, in their brief of August 28, 2009 (*supra* Having Seen 5), they indicated that Mr. Gutiérrez Soler had paid the transportation support expenses approved by the State. Furthermore, they indicated that the State had been aware since May of 2010 that Wilson Gutiérrez Soler and his son, Kevin Daniel Gutiérrez, had decided to return to the country, which "made it necessary to implement the necessary measures to protect their lives and personal integrity." In this regard, they emphasized that during the meetings held with the State in May and June 2010, they had asked various authorities to implement the transportation, communication and architectural security measures. In this regard, they assessed positively the transportation support, but observed that this has been beset by some problems. Also, the representatives expressed their concern about "events that [...] give rise to justified fear for the safety [of Wilson Gutiérrez]; namely, the interest in obtaining information on his entries into and departure from the country of the only person who has been charged." They indicated that several months have gone by without all the agreed-upon measures of protection being implemented; instead, some

that would have contributed to the family's safety have been eliminated. Regarding the safety of María Elena Soler, the representatives indicated that the State had informed them that the interview to assess her level of risk had been conducted; however, it was only on April 5, 2011, that they heard that the result was extremely high and, to date, they have had no information on the specific protective measures implemented to her benefit. They observed that with the issuing of Decree 1740, the transportation aid that ensured the safety of their movements was eliminated. Regarding the protection plan for Wilson Gutiérrez, they stated that, in general, the plan has had a positive effect. However, they considered that it was incomplete, because to date the second member of the bodyguard team has not been appointed. They also noted that the plan was insufficient in view of "the insecure situation of other members of the family." Regarding the protective measures taken in Mr. Gutiérrez Soler's residence, they indicated that the National Police had made an assessment of the security of the place over a year ago, but no measures of protection had been implemented as yet.

12. Regarding alleged new facts, the representatives stated that, on several occasions in November 2010, individuals identifying themselves as members of the National Police came to the residential complex where Wilson Gutiérrez Soler lives in order to conduct a "search." The representatives indicated that it was strange that even though these individuals had identified themselves, they entered several apartments located in the same building and repeated this operation on November 6, 7, 8 and 13, 2010, between approximately 10 p.m. and 11 p.m. The representatives also stated that those who live in the building indicated that at about 8 p.m. on November 12, two individuals came to the residential complex and identified themselves as employees of the Bogotá Telephone Company; the inhabitants decided to call the company and were told that no one had been sent to carry out repairs in that place or at that time. The representatives considered that these facts could compromise the safety of Wilson Gutiérrez Soler and some members of his family.

13. The Commission took note of the information forwarded by the State; however, in its last brief (*supra* Having Seen 6), it indicated that "the information provided concerning the specific measures in effect is very brief and does not correspond to the nature of the situation." In this regard, it awaited updated information on the effective implementation of the measures of protection to the benefit of Wilson Gutiérrez Soler and his immediate family, particularly as regards the security measures in his residence.

b) Information on the beneficiaries who live outside Colombia.

14. Initially, the State provided information on some protective measures adopted to the benefit of Ricardo Gutiérrez Soler during his temporary entries into Colombia. Subsequently, in most of its reports, the State indicated that it had not received any information from the representatives on events that could endanger the life and personal integrity of the beneficiaries who live outside Colombia, or any request to implement protective measures to their benefit. According to recent information provided by the State, during a meeting with Wilson Gutiérrez Soler and his representatives, Mr. Gutiérrez Soler indicated that the beneficiaries "were considering returning to Colombia, and would undertake to inform the State promptly once he knew the return date of any of them."

15. In the brief of August 28, 2009 (*supra* Having Seen 5), the representatives advised the Court that they would "provide information on the way in which the provisional measures concerning the beneficiaries who are outside the country will be implemented when the corresponding agreements are reached with the Colombian State."

16. The Commission recalled that in its last order (*supra* Having Seen 3), the Court had indicated that it "assume[d] [that the State's] willingness to provide protection to the beneficiaries include[d] each and every one of them, in the event that they return to

Colombia temporarily and until they report that the situation of extreme gravity and urgency has been surmounted. To this end, the beneficiaries, their representatives and the State should reach an agreement on ways and means of protection for each beneficiary.”

c) *Considerations of the Court.*

17. The Court observes that despite some discrepancies and difficulties, the State has implemented protective measures to the benefit of Wilson Gutiérrez Soler that include his mother, María Elena Soler de Gutiérrez, and his son, Kevin Daniel Gutiérrez Niño. Furthermore, the Court notes that the State has reported that, according to the most recent risk assessments of Mr. Gutiérrez Soler and his mother, they face an extremely high level of risk. However, the State has not informed the Court of any specific measures adopted to the benefit of Mrs. Soler de Gutiérrez, nor has the Court received precise information on young Gutiérrez Niño. In this regard, the Court finds it would be pertinent to receive precise, updated information from the State on the situation of these three beneficiaries. Furthermore, the Court requires information from the State on the events recently reported by the representatives concerning the presence of certain individuals in the place where Mr. Gutiérrez Soler lives (*supra* considering 13).

19. Furthermore, the Court takes into consideration that the State mentioned that it had not received information from the representatives on Carlos Andrés Gutiérrez Rubiano and Leidy Caterine Gutiérrez, and measures of protection had not been requested for them. In this regard, the Court recalls that in the order of July 9, 2009 (*supra* Having Seen 3), it had stated that “the information provided [...] [was] neither clear enough nor sufficient to understand what constitute[d] the circumstances of extreme gravity and urgency of the possibility of suffering irreparable harm” of these persons. In this regard, the Court maintained the provisional measures to their benefit, but indicated that “it hope[d] that the information submitted and the corresponding observations of the parties [would] address this point in detail.” The Court observes that the only information on these beneficiaries received from the representatives is dated August 28, 2009 (*supra* Having Seen 6), to the effect that they are living in Bogotá and that “no specific situations of danger have occurred recently and, consequently, the adoption of individual measures of protection has not been requested.”

20. The Court also takes into consideration that the State has indicated that it has not received information about the beneficiaries who live outside Colombian territory, nor has it received requests to adopt measures of protection to their benefit. The State has only been informed that said beneficiaries intend to return to the country. As has already been mentioned in this order (*supra* Considering 16), in the brief of August 28, 2009, the representatives committed to submitting information to the Court on these people. However, to date, this information has not been provided to the Court. The Court recalls that in the order of July 9, 2009 (*supra* Having Seen 3), it stressed that it had repeatedly asked the representatives to provide information on the situation of risk and the location of the beneficiaries, including those who are outside Colombian territory, and that, despite this, the information provided was partial. Consequently, the Court asked the parties, particularly the representatives and the beneficiaries, to forward more detailed information in the future because “they are the ones who are most aware of their situation.”

21. In order to maintain the provisional measures, the verified situation of extreme gravity and urgency and the need to avoid irreparable harm must be ongoing, as must their direct relationship to the facts that justified granting the provisional measures in the instant case; accordingly, in view of the Court’s requirements for assessing whether to maintain the measures, this information must be duly authenticated and founded.⁵ The

⁵ Cf. *Case of the Constitutional Court*. Provisional measures with regard to Peru. Order of the Inter-American Court of Human Rights of March 14, 2001, third considering paragraph; *Matter of Leonel Rivera et al.*

Tribunal has also indicated that provisional measures are exceptional in nature and related to a specific temporary situation; also, owing to their nature, they cannot be extended indefinitely.⁶ Clearly the fact that no new threats are occurring may be due precisely to the effectiveness of the protection provided or to the dissuasive nature of the order of the Tribunal. Nevertheless, the Court has considered that the passage of a reasonable period of time without threats or harassment, added to the absence of imminent danger, may lead to the lifting of the provisional measures.⁷ Also, irrespective of the fact that the Court has specified in this order that it will not examine the information provided by the representatives and the Inter-American Commission on the status of the domestic investigations in the context of these provisional measures (*supra* Considering 7), the Court finds it pertinent to indicate that an alleged failure to investigate by the State does not necessarily in itself constitute a circumstance of extreme gravity and urgency that justifies maintaining the provisional measures.⁸

22. In this regard, the Court observes that on repeated occasions the representatives were asked to present their comments on various reports of the State (*supra* Having Seen 7). Lastly, as regards Ricardo Gutiérrez Soler, Yaqueline Reyes, Leonardo Gutiérrez Rubiano, Ricardo Gutiérrez Rubiano, Sulma Tatiana Gutiérrez Rubiano, Paula Camila Gutiérrez Reyes, Luisa Fernanda Gutiérrez Reyes, who are outside Colombia, and Carlos Andrés Gutiérrez Rubiano and Leydi Caterin Gutiérrez Peña, who reside in Bogotá, the briefs presented by the representatives make no mention of facts, particularly recent ones, that would confirm the continuation of the situation of extreme gravity and urgency and the danger of irreparable harm that gave rise to the provisional measures ordered in their favor. The same situation is reflected by the briefs submitted by the Commission. In this regard, in view of the absence of elements that would allow the Court to assess the situation of these people, and given that approximately two years have elapsed since the last order delivered by the Court in this matter without the representatives having presented the information it requested concerning said persons, the Court finds it appropriate to lift the provisional measures ordered to their benefit.

23. Nevertheless, the Court reiterates that Article 1(1) of the American Convention establishes the general obligations of States Parties to respect the rights and freedoms embodied therein and ensure their free and full exercise to all persons subject to their jurisdiction, in all circumstances. In this regard, the assumptions made for the Court to lift provisional measures can never imply that the State is relieved of its obligations of protection under the Convention. Consequently, the Court emphasizes that, irrespective of the existence of specific provisional measures, the State is obliged to ensure the rights of Ricardo Gutiérrez Soler, Yaqueline Reyes, Leonardo Gutiérrez Rubiano, Ricardo Gutiérrez Rubiano, Sulma Tatiana Gutiérrez Rubiano, Paula Camila Gutiérrez Reyes,

Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of November 25, 2008, thirteenth considering paragraph; and *Case of López Álvarez et al.* Provisional measures with regard to Honduras. Order of the Inter-American Court of Human Rights of January 26, 2009, twenty-fifth considering paragraph.

⁶ Cf. *Matter of the Communities of the Jiguamiandó and of the Curbaradó*. Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of August 30, 2010, seventieth considering paragraph, and *Matter of the Peace Community of San José de Apartadó*. Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of August 30, 2010, forty-sixth considering paragraph.

⁷ Cf. *Matter of Gallardo Rodríguez*. Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of July 11, 2007, eleventh considering paragraph; *Case of the Mapiripán Massacre*, *supra* note 6, twenty-eighth considering paragraph, and *Matter of the Mendoza Prisons*, *supra* note 5, thirty-ninth considering paragraph.

⁸ Cf. *Case of the Constitutional Court*. *supra* footnote 6, fourth considering paragraph; *Matter of newspapers El Nacional and Así es la Noticia*. Provisional measures with regard to Venezuela. Order of the Court of November 25, 2008, thirty-sixth considering paragraph, and *Case of López Álvarez et al.* *supra* footnote 6, twenty-third considering paragraph.

Luisa Fernanda Gutiérrez Reyes, Carlos Andrés Gutiérrez Rubiano and Leydi Caterin Gutiérrez Peña.

B. Participation of the beneficiaries or their representatives in the planning and implementation of the measures of protection and, in general, keeping them informed about any advances in the provisional measures (second operative paragraph of the order of July 9, 2009).

24. The State referred to several coordination and monitoring meetings held with the representatives of the beneficiaries and, at times, with Wilson Gutiérrez Soler, on April 19, 2009, February 18, May 13, June 10, July 15, October 7 and November 25, 2010, attended by the State agencies responsible for implementing the measures of protection. The State advised that said meetings have permitted constant communication among the State agencies, the representatives and the beneficiary, which has meant that the observations and comments of each of the parties concerning the implementation of the measures can be assessed by the agencies and, if appropriate, the necessary corrective measures taken.

25. The representatives indicated that on April 15, 2009, a meeting was held to monitor and coordinate these measures. They mentioned that this meeting was requested by Wilson Gutiérrez, and was refused for several weeks, so that, in order to take part in it, Mr. Gutiérrez Soler had to postpone his returns to Colombia until the State agreed to hold the meeting. They highlighted that comments were presented orally during the meeting, and that those responsible for making decisions on specific protective measures were unaware of the background to the measures, the judgment handed down by the Court in the instant case and the specific circumstances of the beneficiaries. The representatives also referred to the meetings held on May 13 and June 10, 2010.

26. The Commission assessed positively the information presented by the State, and indicated that there needed to be fluid communication and constant collaboration between the parties in order to improve implementation of the provisional measures. Additionally, it indicated that the State "must make it a higher priority for [the provisional measures] to be agreed upon with the beneficiaries through adequate mechanisms of participation and coordination."

27. The Court assesses positively the contact maintained between the State, the representatives and Wilson Gutiérrez Soler toward coordinating and implementing the provisional measures ordered by the Court. In this regard, the Court urges the parties to continue keeping pertinent channels for communication open in the most effective and expeditious way.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

pursuant to the authority conferred by Article 63(2) of the American Convention on Human Rights and Articles 27 and 31 of its Rules of Procedure,

DECIDES TO:

1. Reiterate that the Republic of Colombia maintain the provisional measures to the benefit of Wilson Gutiérrez Soler, Kevin Daniel Gutiérrez Niño and María Elena Soler de Gutiérrez in order to protect their life and personal integrity, as established in considering paragraph 18 of this Order.

2. Lift and conclude the provisional measures ordered by the Inter-American Court of Human Rights to the benefit of Ricardo Gutiérrez Soler, Yaqueline Reyes, Leonardo Gutiérrez Rubiano, Ricardo Gutiérrez Rubiano, Sulma Tatiana Gutiérrez Rubiano, Paula Camila Gutiérrez Reyes, Luisa Fernanda Gutiérrez Reyes, Carlos Andrés Gutiérrez Rubiano and Leydi Caterin Gutiérrez Peña, in keeping with considering paragraphs 19 through 22 of this Order.

3. Reiterate that the Republic of Colombia must allow the beneficiaries or their representatives to take part in the planning and implementation of the protective measures and, in general, keep them informed about any progress in the provisional measures ordered by the Inter-American Court of Human Rights, in the terms of considering paragraph 27 of this Order.

4. Ask the State to report to the Court on the provisional measures adopted to comply with this order by November 4, 2011, at the latest. In addition, the State must subsequently continue reporting to the Court every three months on the implementation of the provisional measures.

5. Require the representatives of the beneficiaries of these provisional measures to submit their comments on the State's reports indicated in the preceding operative paragraph within four weeks of their notification, and to require the Inter-American Commission on Human Rights to present its comments on said reports within six weeks of receiving them.

6. Require the Secretariat of the Court to notify the Republic of Colombia, the Inter-American Commission on Human Rights, and the representatives of the beneficiaries of these provisional measures of this Order.

Judge Vio Grossi presented his Dissenting Vote before the Court, and Judges García-Sayán, Franco, Ventura Robles, Macaulay and Abreu Blondet presented their Concurring Opinion, all of which accompany this Order.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

PROVISIONAL MEASURES REGARDING COLOMBIA CASE OF GUTIÉRREZ SOLER

The present dissenting opinion concerns the aforementioned order, in view of the fact that by issuing the judgment on merits in proceedings, a preclusion took effect regarding the authority of the Inter-American Court of Human Rights, hereinafter "the Court," to enact new provisional measures in the case, having ceased, furthermore, the previously ordered measures, however, its object and effects were undertaken in the aforementioned judgment.

Introduction

The conventional rule applicable in the present case is Article 63(2) of the American Convention on Human Rights, hereinafter "the Convention," which states:

"[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

Considering jurisprudence is the "*subsidiary means for the determination of rules of law*,"¹ it is thus the responsibility of the Court to define the meaning and scope of the provisions provided for in the above treaty rule, i.e., to interpret it "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*,"² and, therefore, seeking the will of the States that created it, all considering, furthermore, that the greatest guarantee of protection that the Court should grant in accordance with its role in delivering justice in human rights is the unconditional respect for the rules that govern it.

I. - Provisional measures and a contentious case.

In this perspective, it states that the cited rule must be understood in the sense that the Court can only order provisional measures in matters it has under its consideration or regarding issues for which the Inter-American Commission on Human Rights, hereinafter "the Commission," requested such measures, even if they have not been brought before the Court. In other words, in the first eventuality, as part of the contentious cases proceedings, and, in the second, concerning matters likely to become contentious cases.

¹ Article 38(1)(d) of the Statute of the International Court of Justice.

² Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

Basically, it affirms that these measures are ordered under the contentious jurisdiction of the Court.³ It should also be noted, for this purpose, that, within the Convention, the aforementioned provision 63(2) is found after the provisions of Articles 61 and 62, which refer to said jurisdiction, and before Article 64, which refers to advisory jurisdiction, from which it becomes evident that the first three rules comprise a whole. The same happens with the Rules of Procedure of the Court, where the provisional measures are addressed in Article 27, i.e., in Title II "Procedure" thereof.

Furthermore, it should be recalled that Article 62(3) of the Convention states:

"[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

Therefore, the harmonious interpretation of the aforementioned conventional rules lead to the conclusion that "*the matters before*" the Court, and the scope within which provisional measures may be ordered, can be no other than "*case[s] on the interpretation and application of the provisions of this Convention brought before it*" in the exercise of its jurisdiction, that is, in those which it delivers justice, and in those which it rules on.

Thus, it must be borne in mind, firstly, that according to its ordinary meaning,⁴ a meaning of the term "to know" is to "*[h]ear an issue with the legitimate power to do so.*"⁵ The example provided is "*[t]he judge hearing the case.*"⁶ Therefore, it can be said that the jurisdiction of the Court with respect to the "*case*" that is "*brought*" before it, consists in solving or ruling on whether the provisions of the Convention have been interpreted and applied therein. This is what the Court hears. Therefore, the authority of the Court to "hear" a contentious case translates as "ruling on it."

Secondly, the aforementioned theory states that provisional measures are in order, as a general rule, during the course of a contentious case, and the words "*matters*" and "*cases*" must be understood for the purposes indicated, as synonyms. And this is, firstly, because of the ordinary meaning of such terms.⁷ While among the meanings of the term "*matter*" are the "*[m]aterial concerned*" and "*the case*,"⁸ in relation to the latter it states that "*[m]aterial concerned or proposed to consult someone and ask for their opinion*" and

³ The Court has contentious jurisdiction and non-contentious or advisory jurisdiction. The former is set forth in Articles 61, 62 and 63 of the Convention. The latter is provided for in Article 64 thereof. As set forth by Article 2 of the Statute of the Court. And perhaps as a result, the Rules of Procedure of the Court refer to Title II as "*Procedure*" and Title III as "*Advisory Opinions*."

⁴ Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

⁵ Dictionary of the Spanish Language, Real Academia Española, Twenty-Second Edition, Madrid, Spain, 2001.

⁶ *Idem.*

⁷ *Idem.*

⁸ *Idem.*

"[a]ny matters investigated by the police or matters that are settled at trial before the courts."⁹

But also, it can be said that, according to the context of the terms,¹⁰ the actual rules applicable to provisional measures give both words the same meaning, as is evident when one notes that the Convention refers to "*matters*," with regard to the Court only in the transcript of Article 63(2), in contrast, it uses the word "*case*," in singular or plural, in five of its provisions.¹¹ This pattern is repeated in the Statute of the Court, where, although in three of its provisions it refers to "*matter*," in one example it does so in relation to the President's duties¹² and, in the other two, in reference to contentious jurisdiction.¹³ Furthermore, in a fourth provision, the term "*case*" is used.¹⁴ And, in the Rules of Court, the same thing can be seen because while the word "*case*" is used in 27 articles,¹⁵ "*matter*" is used only in the provision concerning the authority of the Court to order provisional measures at the request of the Commission,¹⁶ in "*matters yet to be submitted to (its) consideration*."

But even regarding the latter provision, it should be borne in mind that it comes after reiterating¹⁷ the provisions of Article 63(3) of the Convention and before stipulating that in "*contentious cases under [its] consideration*," the victims or their representatives may request provisional measures, in such a manner that this rule does not contradict, but quite the contrary, the interpretation in any way such that the words "*matter*" and "*case*" are for these purposes, synonymous.

Consequently, not only the Convention, an agreement between States and an autonomous and foremost source, therefore, of the rule applicable to this matter, states

⁹ *Idem*.

¹⁰ Art. 31(1) quoted above.

¹¹ They refer, respectively, to the right to appeal before the Court (Art. 57), to its jurisdiction (Art. 61), to the obligation to annually inform the OAS General Assembly of its work (Art. 65), the binding nature of its judgments (Art. 68(1)) and the notification of its judgments (Art. 69).

¹² That may well relate to the Court's advisory role and even administrative matters (Art. 12(2)).

¹³ Obstacles and incapacities of the judges in contentious matters (Art. 19(1), 2 and 3) and the attendance of the Commission in the trials held before the Court (Art. 28).

¹⁴ Annual report that should be issued to the OAS General Assembly (Art. 30).

¹⁵ In the articles concerning definition of *amicus curiae* (Art. 2(3)) and judge (Art. 2(17)), decisions and voting (Art. 16), continuation of judges in their roles (Art. 17), national judges (Art. 19), *ad hoc* judges in interstate cases (Art. 20), obstacles, recusals and disqualification (Art. 21), official languages (Art. 22), State representation (Art. 23), participation of the alleged victims or their representatives (Art. 25), State cooperation (Art. 26), joinder of cases and proceedings (Art. 30), publication of judgments and other decisions (Art. 32), initiation of proceedings (Art. 34), submission of the case by the Commission (Art. 35), inter-American defense (Art. 37), preliminary review of the presentation of the case (Art. 38), notification of the case (Art. 39(1) 39(2) and 39(4)), brief containing pleadings, motions and evidence (Art. 40(1) and 40(2)), the State's answer (Art. 41(2)), preliminary objections (Art. 32), other steps in written proceedings (Art. 43), *amicus curiae* arguments (Art. 44(1) and 44(3)), disqualification of expert witnesses (Art. 48(1)b, d, e) and hearing (Art. 51(1) and 51(10)).

¹⁶ Art. 27(2) of the Rules of Procedure.

¹⁷ Art. 27(1) of the Rules of Procedure.

that the words "*matter*" and "*case*" are, with regard to the provisional measures, synonyms, but also the States themselves in the Statute of the Court¹⁸ and the latter even stated it in its Rules of Procedures, which it also approved.¹⁹

Additionally, it must be emphasized that in Article 27 of the Rules of Procedure of the Court, found, as stated, in Title II "*Procedure*," it states that, "[a]t any stage of the proceedings" the Court may order provisional measures, which leaves no doubt as to how this legislative body interpreted the provisions of Article 63(2) of the Convention, namely that such measures take place within a contentious case proceeding that the Court is hearing or ruling upon.

The above is strengthened by what the Court itself expressed regarding the second possibility to adopt provisional measures in accordance with Article 63(2) of the Convention, i.e., in "*matters yet to be brought before it*":

*"[o]n previous occasions, the Court interpreted that the phrase 'matters not yet submitted to it', contained in Article 63(2) of the Convention, supposes that there is at least a possibility that the matter behind the request for provisional measures may be brought before the Court in its contentious jurisdiction. For this small possibility to exist, the procedure set forth in Articles 44 and 46 to 48 of the American Convention must have been initiated before the Commission."*²⁰

This jurisprudence therefore implies that in order for the Court to order provisional measures with respect to "*matters not yet brought before it*" is necessary, on the one hand, that there is a possibility that they may become contentious cases and, on the other, that the Commission, "*even when there is strictly still no contentious case before the inter-American system*,"²¹ makes the corresponding request.

The Court's affirmations clearly set forth that the general rule is that the provisional measures proceed in contentious cases, i.e., in which it rules, and only exceptionally and where requested by the Commission, on matters that are likely to become contentious cases.

¹⁸ Approved by Resolution N° 448, passed by the OAS General Assembly during its ninth session, held in La Paz, Bolivia, October 1979.

¹⁹ Passed by the Court during the LXXXV Ordinary Period of Sessions, held from November 16 to 28, 2009.

²⁰ Cf. *Matter of García Uribe et al.* Provisional Measures regarding Mexico. Order of the Court of February 2, 2006, Considering Clause three and four; *Matter of José Luis Álvarez Galdámez et al.* Provisional Measures regarding Honduras. Order of the Court of February 22, 2011, Considering Clause nine, and *Matter of Alvarado Reyes et al.* Provisional Measures regarding the United Mexican States Order of the Court of May 15, 2011, Considering Clause 10.

²¹ Cf. *Matter of Alvarado Reyes et al.* Provisional Measures regarding the United Mexican States, *supra* note 20, Considering Clause 11: "*The Court has deemed it necessary to clarify that, given the protective nature of provisional measures [...], exceptionally, it is possible order them, even if strictly speaking there is no contentious case before the inter-American system, in situations that, prima facie, could result in a serious and urgent affectation of human rights. To do so, an assessment of the following should be carried out: the problem raised, the effectiveness of State actions in light of the situation, and the lack of protection the beneficiaries of the measures would face if they were not adopted. To achieve this it is necessary that the Commission present sufficient grounds to meet the above criteria and that the State fails to clearly and sufficiently demonstrate the effectiveness of certain measures adopted within the internal jurisdiction ."*

And could not it be otherwise, given that if it were not so, the procedure for such measures would be completely different, separate, and unrelated to the contentious case, which requests and decrees that which, in every regards, is different to the provisions of the regulatory texts. Therefore, it should be added that, without a doubt, the facts giving rise to the risk that the provisional measures so ordered seek to prevent, and the beneficiaries of such measures, are clearly linked to the corresponding contentious case. It is appropriate to note, finally, that even the Court's own resolutions adopted with regard to provisional measures refer, in their names and therefore perhaps as a result, to the contentious case.

II.- Effects of the judgment.

From the foregoing, it appears therefore that if the provisional measures are admissible and are decreed in the proceeding before the Court relating to an act that it hears or rules upon within its contentious jurisdiction, they cease once such consideration or trial ends, being replaced, however, by the judgment.

Indeed, the judgment on merits resolves the corresponding contentious case; it rules on it, i.e., there is no dispute, since it has been resolved. The first phrase of Article 67 of the Convention sets forth that:

"the Court's decision is final and non-appealable."

As a result letter g. of paragraph 1 of Article 65 of the Rules of Procedure of the Court adds that:

"[t]he judgment shall contain: [...] the ruling on the case."

However, a final order may be a conviction or acquittal for the State concerned.

In the first eventuality, the provision of Article 63(1) of the Convention applies, which states:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

In this regard, it should be considered that this rule forms a whole with the aforementioned Article 63(2), which means therefore that the Convention not only expressly regulates the provisional measures as part of the contentious jurisdiction of the Court, but it also does so in the sense that they are admissible before the Court orders a judgment on merits in the case, since if they were ordered later, they would not be related to a matter "*under its consideration*," as set forth in Article 63(2) and within which it determines and states the provisions of Article 63(1).

Equally, it should be mentioned that if "*the*" decision or judgment is damning for the State in accordance with the terms set forth in the aforementioned Article 63(1) of the Convention, this latter rule should be understood, then, in accordance with that provided for in the following Article 63(2), which leads logically to the conclusion that when the

Court decides or rules that there has been a "*violation of a right or freedom protected*" by the Convention, consequently, it orders that the State "*guarantees the injured party enjoyment of his right or freedom that was violated,*" which necessarily entails an obligation " *to prevent irreparable damage to people,*" particularly "*[i] n cases of extreme gravity and urgency.*"

In other words, if the judgment on merits ordered is damning, the precautionary nature of provisional measures makes no sense,²² since they were specifically intended to preserve a legal situation that would allow for the issuance of the judgment. And obviously, once issued, as an essential part of its object, the protective nature of such measures is assumed. Otherwise the "final and non-appealable" nature of that decision would not be understood. It is perhaps for this reason that on more than one occasion, in judgments of the Court, devices have expressly been included that are the essence of provisional measures.²³

Obviously the provisional measures would be even less justifiable on the assumption that the ruling was an acquittal.

In short, it is reiterated that the above does not mean anything other than, effectively, the ruling on merits of the contentious case is "*final and non-appealable*", i.e., it is "*the decision on the case,*" which, as noted in the doctrine, is the solemn decision of the judge to conclude the process, a statement of legal certainty regarding the corresponding case. And this also happens especially "*when [the Court] finds a violation of a right or freedom protected*" in the Convention and, consequently, orders that "*the injured party's right or freedom that was violated be guaranteed,*" a judgment that State Parties to the Convention "*agree to comply with,*"²⁴ and, failing to do so, the Court, after receiving "*the relevant information*" obtained by monitoring compliance,²⁵ shall include it in its annual report to the OAS General Assembly, requesting the relevant "*recommendations.*"²⁶

²² Cf. *Matter of Alvarado Reyes et al.* Provisional Measures regarding the United Mexican States, *supra* note 20, Considering Clause 5: "*Under the International Law of Human Rights, provisional measures are not only precautionary in nature, in the sense that they safeguard a legal situation, but they are also fundamentally protective because they protect human rights, insofar as they seek to avoid irreparable damage to persons. The measures apply whenever all the basic requirements of extreme gravity and urgency, and preventing irreparable damage to people, are present. Thus, provisional measures become a true jurisdictional guarantee which is preventive in nature.*"

²³ *Case of Kawas Fernández v. Honduras.* Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 193: "*Moreover, it has been established that various witnesses related to the events of the instant case have been threatened, and that one such witness is a beneficiary of the provisional measures ordered by this Court in the course of the proceeding before it [...]. Accordingly, based on the body of evidence in this case, the State must apply its domestic law to provide effective protection to any witnesses of the events related to the murder of Mrs. Blanca Jeannette Kawas-Fernández and offer guarantees to any person who may wish to testify. The State must guarantee the enforcement of any and all orders issued by a competent authority restricting or limiting any contact between said witnesses and the parties who are likely to be responsible for the facts and take the necessary measures should such orders not be observed. Also, the State must, in a fully diligent manner and within a reasonable period of time, process and fully deal with any complaint of coercion, intimidation or threats made by the witnesses in the domestic proceedings and take all legally prescribed measures for their investigation [...].*"

²⁴ Art. 68(1) of the Convention.

²⁵ Art. 69(4) of the Rules of Procedure.

²⁶ Art. 65 of the Convention.

It is also appropriate to note that from the above, it can be logically gathered that since the judgment on merits is the "final" and "non-appealable" "*decision*" that after hearing and ruling on the relevant case, it resolves it in its entirety or completely and in a sole and ultimate instance, the Court can no longer hear or rule on it. The ruling is the result, thus, of the consideration that the Court took regarding the case, i.e., the prosecution it makes "*relating to the interpretation and application*" of the Convention. Therefore, following the ruling it ceases to hear or rule on the case, and therefore the circumstances provided for in Article 63(2) are not present in order to proceed with provisional measures, i.e., that it concerns "*matters that [Court] is hearing*" or ruling on.

But, in addition, this ruling is *res judicata* in nature,²⁷ it can no longer be altered, and it is also definitive for the Court; therefore, it cannot be replaced or devalued by provisional measures or create the risk that such eventualities may occur, which could happen if the measures ordered before the judgment continued to have effect, or if after the ruling new, measures were enacted. If this is the case, such measures would not only be "*provisional*"²⁸ but it could also imply the violation of the principle of "*res judicata*," i.e., that the case be re-examined.

As a result, the pertinent conventional rules set forth that, after the issuance of a judgment, the Court may take, in the relevant contentious case, only two actions: one that is procedural, and another that is administrative but that can become procedural. Firstly, it may interpret the judgment, if necessary.²⁹ And, secondly, submit an annual report to the OAS General Assembly on the States that have not complied with their judgments.³⁰ At the same time, and in this case, the Statute of the Court refers only to the aforementioned OAS General Assembly report,³¹ and in turn, the Rules of Procedure of the Court govern the judgment on reparations and costs,³² recourse for interpretation,³³ the monitoring of compliance with judgments and other decisions made by the Court,³⁴ and rectify any obvious mistakes, clerical errors or calculation errors.³⁵ All these matters, except the latter, are, incidentally, addressed in the Rules of Procedure as part of Title II "*Procedure*" and before the start of Title III "*Advisory opinions*."

Considering, therefore, the principle of public law that you can only do what the rule orders, the aforementioned actions are the only actions the Court may undertake in a

²⁷ Article 59 of the Statute of the International Court of Justice: " *t[he decision of the Court has no binding force except between the parties and in respect of that particular case..*"

²⁸ In the case of the International Court of Justice, Article 41(2) of its Statute refers more directly to the provisional nature of the measures: "*pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.*"

²⁹ Art. 67 of the Convention.

³⁰ Art. 65 of the Convention.

³¹ Art. 30 of the Statute of the Court.

³² Art.66 of the Rules of Procedure of the Court.

³³ Art.68 of the Rules of Procedure of the Court.

³⁴ Art.69 of the Rules of Procedure of the Court.

³⁵ Art.76 of the Rules of Procedure of the Court.

contentious case that has already been ruled on; furthermore, they must all be exclusively addressing compliance with the respective judgment by the State concerned.

III.- Lack of authority.

In short, the treaty rules, statutes and regulations do not explicitly include provisional measures among the proceedings that follow the relevant judgment. There is no rule that allows the Court to proceed with provisional measures after it has ruled on the contentious case in question.

Thus it would not be possible to apply to the institution of provisional measures "*the theory of inherent powers*" since they, by their very nature, were conceived as powers that an international organization requires to comply with the roles not provided for, however, in its base Convention or constituent Treaty³⁶ and thus such powers must be understood to be granted. In contrast, these powers are expressly awarded the Court, and are therefore are "*explicit*," they are found in Article 63(2) of the Convention and this rule must be adhered to, which is the rule that should be applied or, if appropriate, interpreted. Therefore, it is not possible that the "*theory of implicit powers*" principle be applied with regard to such measures, as, in contrast, occurred with the provisions in the report submitted by the Court to the OAS General Assembly, where, based on the provisions of the Convention,³⁷ and in the Statute of the Court,³⁸ the monitoring of compliance with judgments³⁹ was established in the Rules of Procedure and thus a procedural institution.⁴⁰

Nor would it be appropriate to invoke the principle *pro homine*, at least in the way it is enshrined in the Convention,⁴¹ to justify the adoption of provisional measures after the issuance of the judgment on merits, since, although this principle refers to "*rights*" of the persons recognized therein, such measures are conceived as a power of the Court⁴² and,

³⁶ Cour Internationale de Justice. Réparation des dommages subis au service des Nations Unies. Avis Consultatif du 11 avril 1949: "[d]e l'avis de la Cour, l'[O]rganisation était destinée à exercer des fonctions et à jouir de droits - et elle l'a fait - qui ne peuvent s'expliquer que si l'Organisation possède une large mesure de personnalité internationale et la capacité d'agir sur le plan international. Elle est actuellement le type le plus élevé d'organisation internationale, et elle ne pourrait répondre aux intentions de ses fondateurs si elle était dépourvue de la personnalité internationale. On doit admettre que ses Membres, en lui assignant certaines fonctions, avec les devoirs et les responsabilités qui les accompagnent, l'ont revêtue de la compétence nécessaire pour lui permettre de s'acquitter effectivement de ces fonctions."

³⁷ Arts. 65 and 68 of the Convention.

³⁸ Art. 30 of the Statute of the Court

³⁹ Art. 60 of the Convention.

⁴⁰ Cf. *Case of Baena Ricardo et al. v. Panama. Competence*. Judgment of November 28, 2003. Series C No. 104, para. 100: "[T]he legal grounds for the authority of the Inter-American Court to supervise compliance with its decisions is to be found in Articles " 33, 62(1), 62(3) and 65 of the Convention.

⁴¹ Art. 29 of the Convention.

⁴² Cf. *Matter of certain Venezuelan Prisons. Provisional Measures regarding Venezuela*. Order of the Court of July 6, 2011, Considering Clause 4. " *Article 63(2) of the Convention requires that for the Court to order provisional measures three conditions must be present: i) 'extreme gravity' ii) 'urgency', and iii) the intention to' avoid irreparable damage to person.'* These three conditions are coexistent and must be present in any situation where the intervention of the Court is requested. Similarly, the three conditions must persist for the

furthermore, it should keep in mind that if an application included that principle with regard to the latter, it would be referring to the fact that the rule that regulates them should be interpreted in view of its object and purpose, which is to avoid the irreparable damage that a person involved in a contentious case could suffer, during the proceeding before the Court.

Finally, it is not admissible to allude to the practice of the Court regarding the repeated declarations of provisional measures after pronouncing the judgment on merits in the respective contentious case to argue that, thereby, the act is legitimate, specifically because it was accepted by States who did not protest against it and effectively complied with the provisions of such measures. And such a reference would not be worthy of consideration because the attitude of the State concerned would not be an unequivocal demonstration of their will or intention to accept or agree that the aforementioned practice is a new rule that arises in the absence of treaty addressing the matter and, consequently, it imposes a new obligation upon them, but rather it moreover would be an expression that, on the subject, it says nothing and, simply, having previously and conventionally committed to it, complies with a court order. Therefore, such compliance does not create a new obligation for the State, but rather the State responds to the provisions of a conventional rule. The *estoppel* rule or the *doctrine of one's own acts* or the *preclusion* would not be admissible regarding the State Party to proceedings, since with its indicated act, it had no intention of creating, through the relevant proceeding provided for in the Convention, a new international legal rule or a new international legal obligation.

Furthermore, one should also note that the State ruling has been, with respect to such measures, individual and not from the whole or the majority of States Parties to the Convention such that in the case the "*authentic interpretation*" may not be applied, i.e., deem that it is a *subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*."⁴³

Conclusion.

In short, upon issuance of the judgment on merits, reparations and costs in proceedings, a preclusion takes effect regarding the power of the Court to order provisional measures in relation to the contentious case in question, since, following this, one can only amend the obvious mistakes, clerical errors and calculation errors, interpret it and then monitor compliance, and report annually to the political body—the OAS General Assembly—in the case of non-compliance.

The judgment does not mean, however, that the object and purpose pursued by the provisional measures issued during the proceeding are legally unprotected, but precisely the opposite, since it imposes upon the State concerned the specific obligation to ensure "*the injured party his right or freedom that was violated,*" particularly in "*cases of extreme gravity and urgency and when it is necessary to avoid irreparable damage to persons.*"

Court to maintain the protection so ordered. If a condition ceases to be effective, the Court shall assess the need to continue the protection so ordered."

⁴³ Art. 31(1)(b) of the 1969 Vienna Convention on the Law of Treaties.

In this sense, it is thus a question, not of undermining but rather strengthening and even enhancing the effect of the judgment on merits, understanding also, and specifically included within the effects, that concerned with "*cases of extreme gravity and urgency and when it is necessary to avoid irreparable damage to persons*" addressed by the case in question.

However, the judgment on the merits in a contentious case does not imply, as stated by the Court regarding the lifting of provisional measures, that "*the State is relieved of its treaty obligations to protect*,"⁴⁴ since the general and permanent obligation remains regarding "*respecting the rights and freedoms recognized (in the Convention), and to ensure the free and full exercise to all persons subject to its jurisdiction*."⁴⁵

And, indeed, all this is no obstacle for the Court to order provisional measures for the same people for whom they were issued in the resolved case, both if it wishes or if required in a new case before it, as well as if, in a case not yet submitted to it, the Commission, in exercising its "*principal role of promoting the observance and defense of human rights*,"⁴⁶ reasonably requests it.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

⁴⁴ *Matter of A.J. et al.* Provisional Measures regarding Haiti, Order of February 22, 2011, Considering Clause 16: "*Finally, the Court reiterates that Article 1(1) of the Convention establishes the general obligations of States Parties regarding the rights and freedoms recognized therein and to ensure the free and full exercise to all persons subject to its jurisdiction, in all circumstances. Meanwhile, provisional measures are exceptional and are complementary to this general obligation of States. In this sense, the lifting of provisional measures, by the Tribunal, does not imply that "the State is relieved of its treaty obligations to protect."*

⁴⁵ Art. 1(1) of the Convention.

⁴⁶ Art. 41 of the Convention.

CONCURRING OPINION OF JUDGES DIEGO GARCÍA-SAYÁN, LEONARDO A. FRANCO, MANUEL VENTURA ROBLES, MARGARETTE MAY MACAULAY AND RHADYS ABREU BLONDET
PROVISIONAL MEASURES REGARDING COLOMBIA
CASE OF GUTIÉRREZ SOLER

1. The authority to order provisional measures "to prevent irreparable damage to persons" in cases of "extreme seriousness and urgency" is one of the core competencies of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court" or "the Tribunal"). As set forth in Article 63(2) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and, based on said provision and through its constant jurisprudence, the Court has issued provisional measures ever since the beginning of its jurisdictional activities, and it has had a significant impact on human rights protection. At present, this is one of the principal activities of the Court, which is exercised and implemented by the Court in accordance with the provisions of the aforementioned Article 63(2), the whole of the Convention and the norms and principles of international law. The constant exercise of this jurisprudence by the Court has made it possible "to avoid irreparable damage" to thousands of people whose lives or physical integrity were in danger.

2. The Convention stipulates that the Court may order provisional measures "in matters brought before [the Court]." The constant jurisprudence of the Court, and the subsequent internal rules of the Court, have interpreted this provision in the sense that it may order such measures "at any stage of proceedings," which has included, and includes, the monitoring compliance with judgment phase of a contentious case. This jurisdiction has never been questioned by a State, let alone by a Judge of the Court. Although the right of a judge to think and vote differently to other judges is incontrovertible—as is the presentation of a dissenting opinion—, questioning the competence of the Court not only lacks any sort of merit and precedent in this case, but it is also very serious since it affects and weakens the Tribunal. And it does so in a highly sensitive area, such as that concerning, none other than, "irreparable damages," which many people could suffer if it were not for the provisional measures ordered by the Court in exercising its jurisdictional powers. In this case, moreover, it cannot be overlooked that the Judge who presents the dissenting opinion has voted in favor of no less than five orders for provisional measures in the monitoring compliance with the judgment phase. In all of these orders, the maintenance of the provisional measures was requested for all or some of the beneficiaries.

3. This concurring opinion strives to reaffirm, in general, the competence of the inter-American Court Human Rights in relation to provisional measures, and in particular those which the Court orders, and can order, during the course of proceedings for contentious cases—including the monitoring compliance with judgments phase. All of the above is perfectly coherent with the American Convention on Human Rights, and the norms and principles of international law that have supported the constant jurisprudence and the jurisdiction of the Tribunal in this area.

4. This opinion is divided into four parts: it begins with a brief analysis of the competencies of the European Human Rights Court in relation to provisional measures; followed by an analysis of the competencies of the Inter-American Court of Human Rights in relation to provisional measures; thirdly, the specific area of the Tribunal's competence to order provisional measures during the monitoring of compliance with judgments is discussed; and, finally, the importance of provisional measures during the monitoring phase is emphasized.

I. The European Court of Human Rights and its competence to order provisional measures.

5. The European Court of Human Rights (hereinafter "European Court" or "European Tribunal") has argued that the object and purpose of the European Convention on Human Rights¹ (hereinafter "European Convention") is the protection of persons, and to do so its safeguards must be practical and effective, as part of the system of individual applications.² Similarly, it stated that the European Convention is a living instrument, which must be interpreted in the light of present-day conditions.³ Also, it is worth noting that the European Court has stated that the interpretation of a provision of the European Convention should be the that which is most appropriate for the purposes of achieving the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.⁴

6. Unlike the inter-American System for the Protection of Human Rights (hereinafter "inter-American System"), the European Convention contains no provision that expressly authorizes the European Court to order provisional measures. Thus, for a long time, the European Court abstained from ordering such measures on the understanding that the treaty contained no provision that empowered the designated bodies to request the implementation of provisional measures.⁵ However, subsequently, the European Court incorporated a provision into its Rules of Procedure pursuant to which it can order provisional measures. Indeed, Article 39(1) of its current Rules of Procedure stipulates that: "[T]he Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it [...]."⁶

7. Although the European Court previously considered that the provisional measures it ordered were not legally enforceable since they were not explicitly referred to in the European Convention, from 2005 onwards, the European Court has maintained that a State is obliged to comply with such measures and to avoid any act or omission that undermines the authority and effectiveness of the final ruling. It also set forth that the

¹ Agreement to Protected Human Rights and Fundamental Freedoms.

² *Mamatkulov and Askarov. v. Turkey*. Judgment of February 4, 2005, para. 101.

³ *Mamatkulov and Askarov. v. Turkey*, *supra* note 2, para. 121.

⁴ *Wemhoff v. Germany*. Judgment of June 27, 1968, para. 8.

⁵ *Cruz Varas v. Sweden*. Judgment of 20th March 1991, para. 102. It refers to the Commission and the European Court.

⁶ "The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it [...]."

breach of provisional measures may constitute a violation of Article 34 of the European Convention, which enshrines the right of individual complaint.⁷

8. It can be concluded from the above that the European Court no longer characterizes provisional measures as an institution that stems —or should stem— from a provision expressly provided for in a convention, and it now considers it to come from the actual protection object of the treaty.

II. The Inter-American Court of Human Rights and its competence to order provisional measures.

9. In Article 63(2) of the Convention it sets forth that:

[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

10. In turn, Article 27 of the existing Rules of Procedure of the Court states:

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

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

3. In contentious cases before the Court, victims or alleged victims, or their representatives, may submit to it a request for provisional measures, which must be related to the subject of the case.

[...]

11. The Inter-American Court has the express power to order provisional measures. Considering this competence, the consistent interpretation that the Court has made of such provisions has been based on methods of interpretation of international law that are derived from Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention"), among other principles.

12. The Vienna Convention states in Article 31(1) that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Repeatedly, the Court has stated that the interpretation of the "ordinary meaning of the terms" of the treaty can not in itself be a norm, but rather it must be considered within the context and, particularly, within its object and purpose,⁸ such that the interpretation does not lead in

⁷ *Mamatkulov and Askarov. v. Turkey*, *supra* note 2 , para. 128.

⁸ *Cf. Proposed Amendments to the Constitution of Costa Rica with regard to Naturalization*. Advisory Opinion AO-4/84 of January 19, 1984. Series A No. 4, para. 23; *Compatibility of a Bill with Article 8(2) of the American Convention on Human Rights*. Advisory Opinion AO-12/91 of December 6, 1991. Series A No. 12, para. 21; *Article 55 of the American Convention on Human Rights*. Advisory Opinion AO-20/09 of September 29, 2009. Series A No. 20, para. 26; *Case of González et al. ("Cotton Field" v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 16, 2009. Series C No. 205, para. 42, and *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 30.

any way to weaken the system of protection set forth the Convention.⁹ The "ordinary meaning of the terms" should be analyzed as part of a whole whose meaning and scope should be established in accordance with the judicial system to which they belong¹⁰ to ensure a harmonious interpretation of the American Convention.

13. Thus, the Court ruled "the aforementioned Article 31 incorporates several elements that conform a general interpretation norm which, in turn, can be supported with the supplementary norm referred to in Article 32 of said instrument."¹¹ Furthermore, the Court emphasized that:

International Law of Human Rights consists both of a set of norms (conventions, agreements, treaties and other international documents) and a set of values that these norms seek to develop. Therefore, the interpretation of the norms must also be executed based on a model of values that the inter-American system strives to preserve, from the 'best perspective' for the protection of the individual.¹²

14. Ever since the first case was brought before the Court, it has stipulated, "[t]he object and purpose of the American Convention is the effective protection of human rights. Therefore, the Convention must be interpreted so as to give it its full meaning and to allow the system of protection of human rights of the Commission and the Court to become fully 'effective.'" ¹³

15. The Court also took into account that Article 29 of the American Convention on the "Norms of Interpretation" provides clear hermeneutical guidelines such that the interpretation of the Convention cannot be done in a way that:

- a) allow[s] a State Party, group or person to suppress the enjoyment or exercise of rights and freedoms recognized in this Convention or restrict them more than the manner provided for in the Convention;
- b) limit[s] the enjoyment or exercise of any right or freedom recognized pursuant to the laws of any State Party or pursuant to any another convention that the States form part of;
- c) exclud[es] other rights or guarantees that are inherent to the human being or that are derived from a representative democratic form of government;

⁹ Cf. "Other treaties" object of the advisory role of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion AO-1/82 of September 24, 1982. Series A No. 1, para. 43 to 48; *Restrictions on the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*. Advisory Opinion AO-3/83 of September 8, 1983. Series A No. 3, para. 47 to 50; *Proposed Amendments to the Constitution of Costa Rica in relation to Naturalization*. Advisory Opinion OC-4/84, *supra* note 8, para. 20 to 24, and *Case of González et al. ("Cotton Field") v. Mexico*, *supra* note 8, para. 42.

¹⁰ Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Legal Process*. Advisory Opinion AO-16/99 of October 1, 1999. Series A No. 16, para. 113; *Case of Ituango Massacre. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1 2006 Series C No. 148, para. 156, and *Case of Bueno Alves v. Argentina*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 78. and *Case of González et al. ("Cotton Field") v. Mexico*, *supra* note 8, para. 43

¹¹ *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09, *supra* note 8, para. 23.

¹² *Case of González et al. ("Cotton Field") v. Mexico*, *supra* note 9, para. 33.

¹³ *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 30.

d) exclud[es] or limit[s] the effect produced by the American Declaration of the Rights and Duties of Man, and other international acts of the same nature.

16. The jurisprudence of the Court sets forth that although this provision is in "Part I—State Obligations and Rights Protected" of the American Convention, Article 29 requires not only the States that have ratified the Convention but also the Court itself to exercise its jurisdiction and authority to interpret the Convention. In this sense, both in its contentious and advisory role, on several occasions, the Court has referred to this provision for the purposes of interpreting the American Convention, in three areas: 1) to clarify the content of certain provisions of the Convention, 2) to establish criteria for interpretation, such as the principle of "evolutionary interpretation" of human rights treaties, the principle of "implementation of the most favorable norm for the protection of human rights" and the prohibition of depriving rights of their core content, and 3) to determine the scope of its advisory jurisdiction.¹⁴

17. Moreover, the Court has stipulated that:

it [h]as jurisdiction to issue, with complete authority, interpretations of all provisions of the Convention, including those of a procedural nature, and it is the most appropriate body to do so as "the ultimate interpreter of the American Convention."¹⁵

18. In exercising its jurisdiction to interpret procedural provisions of the American Convention, the Court has adopted fundamental decisions for the inter-American system. One decision was that the Tribunal is the competent body to monitor compliance with its own judgments. Indeed, on the sole occasion that a State challenged the Court's authority to carry out such monitoring, the Court stated that:

when adopting the provisions of Article 65 of the Convention, [t]he intention of the States was to grant the Court the authority to monitor compliance with its rulings, and that the Court would be responsible for informing the OAS General Assembly, through its annual report, of cases in which the decisions of the Court had not been complied with, since it is not possible to apply Article 65 of the Convention unless the Court monitors compliance with its decisions.

To determine the scope of the provisions of Articles 33, 62(1), 62(3) and 65 of the American Convention, and also Article 30 of the Statute of the Court, and to comply adequately with the obligation to monitor compliance with its decisions, the Court has respected the interpretation guidelines set forth in the American Convention and the 1969 Vienna Convention on the Law of Treaties, and also took into consideration the nature and superior common values which the Convention is inspired by.¹⁶

19. Another important decision taken by the Court concerns the alleged "withdrawal" by a State of the recognition of the jurisdiction of the Court. In various judgments issued against said State, the Court stated that:

According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties,

¹⁴ Cf. *Case of Apitz Barbera et al. ("First Disputes Court") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 217 to 219.

¹⁵ *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09, *supra* note 8, para. 18. See also *Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 12, para. 124, and *Case of La Cantuta v. Perú. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, para. 173.

¹⁶ *Case of Baena Ricardo et al. v. Panama. Competence*. Judgment of November 28, 2003. Series C No. 1, para. 90 and 91.

[...] a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose

[...]

An interpretation of the Convention done "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" leads this Court to the view that a State Party to the American Convention can only release itself of its obligations under the Convention by following the provisions that the treaty itself stipulates. In the instant case, under the Convention, the only avenue the State has to disengage itself from the Court's binding contentious jurisdiction is to denounce the Convention as a whole [...]; if this happens, then the denunciation will only have effect if done in accordance with Article 78, which requires one year's advance notice.

Article 29(a) of the American Convention provides that no provision of the Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for therein. Any interpretation of the Convention that allows a State Party to withdraw its recognition of the Court's binding jurisdiction, as Peru would in the instant case, would imply suppression of the exercise of the rights and freedoms recognized in the Convention, it would be contrary to its object and purpose as a human rights treaty, and it would deprive all the Convention's beneficiaries of the additional guarantee of protection of their human rights that the Convention's jurisdictional body affords.¹⁷

20. As demonstrated above, the Inter-American Court has broadly interpreted the procedural provisions of the American Convention for the purposes of complying with its mandate as a body "with jurisdiction over matters related to compliance with the commitments entered into by States Parties to [the] [American] Convention", in accordance with Article 33 thereof. That interpretation has been executed in accordance with the norms provided for both in the Vienna Convention on the Law of Treaties as well as in the American Convention. The International Court of Justice itself has stated that "it can[not] base itself on a purely grammatical interpretation of the text. [The Court] must seek an interpretation which is harmonious with a natural and reasonable way of reading the text [...]."¹⁸

III. The jurisdiction of the Inter-American Court of Human Rights to order provisional measures to monitor compliance with judgments.

21. The Convention stipulates that the Inter-American Court may order provisional measures "in matters brought before the Court." The Tribunal has continually interpreted this provision using its constant jurisprudence and its various Rules of Procedure, throughout its thirty years of operation, in the sense that it may order such measures "at any stage of proceedings." Thus, on January 15, 1988, the Court ordered provisional measures for the first time in three cases brought before it.¹⁹ In practice, it has largely been at this stage of the procedure that the Court has ordered provisional measures.

22. The Court has already made numerous references to the precautionary and protective nature of these types of measures:

¹⁷ *Case of Ivcher Bronstein v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 54, para. 38, 40 and 41.

¹⁸ *Cf. Case of the Anglo-Iranian Oil Company Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of July 22, 1952, p. 104.

¹⁹ *Cf. Cases of Velásquez Rodríguez, Fairén Garbi and Solís Corrales, and Godínez Cruz v. Honduras.* Order of the Inter-American Court of Human Rights of January 15, 1988. The Court was informed the in the State witnesses who appeared before the Court were being killed.

Under the International Law of Human Rights, provisional measures are not only precautionary in nature, in the sense that they safeguard a legal situation, but they are also fundamentally protective because they protect human rights, insofar as they seek to avoid irreparable damage to persons. The measures are implemented whenever all the basic requirements of extreme gravity and urgency, and of preventing irreparable harm to people, are present. Thus, provisional measures become a true jurisdictional guarantee, which is preventive in nature.²⁰

23. However, with regard to the dual nature of provisional measures, the Court has also stated that:

[t]he precautionary nature of the provisional measures is connected to the framework of international adversarial cases. In such sense, these measures are intended to preserve those rights, which are at risk until the controversy is finally settled. Its purpose is to ensure the integrity and effectiveness of the decision on the merits and in this way, avoid the litigious rights being impaired, situation which may adversely affect the useful purpose of the final decision. The provisional measures make it possible for the State in question, in this sense, to comply with the final decision and, if applicable, to go ahead with the reparations so ordered.

As to the protective nature of the provisional measures, this Court has [stated] that, providing the basic requirements of extreme gravity and urgency as well as avoidance of irreparable damage of people are met, provisional measures are transformed in a true judicial guarantee of precautionary nature, since they protect human rights inasmuch as they are intended to avoid irreparable damage to persons.²¹

24. Therefore, it is clear that one of the fundamental purposes of provisional measures is to "ensure the practical effectiveness of rights so that they are not merely rhetorical."²² Thus, during the functioning of the Inter-American Court, the Court has ordered provisional measures in 91 matters and cases brought before it, providing protection for more than 25,000 people.

25. However, it should be noted that, procedurally, the fact that the Court has ruled on the merits and ordered the appropriate reparation measures does not automatically lead to the lifting of provisional measures. Quite the contrary. Even in the monitoring compliance with judgments stage, the Court, on numerous occasions, has decided to maintain the measures, and even extend them due to the threat of irreparable damage and situations of "extreme gravity and urgency."²³ Additionally, in several cases where a

²⁰ *Case of the "La Nación" Newspaper*. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of September 7, 2001, Considering Clause four.

Matter of Capital El Rodeo I and El Rodeo II Judicial Confinement. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of February 8, 2008, Considering Clause 7 and 8.

²² *Cf. Burbano Herrera, Clara, Provisional Measures in the Case Law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, p. 1.

²³ *Cf. Case of Blake*. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of August 18, 2000, operative paragraph one; Order of the Inter-American Court of Human Rights of June 2, 2011, operative paragraph one; Order of the Inter-American Court of Human Rights of June 6, 2003, operative paragraph two, and Order of the Inter-American Court of Human Rights of November 17, 2004, operative paragraph one. *Case of Carpio Nicolle*. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, operative paragraph one. *Case of Loayza Tamayo*. Provisional Measures regarding Peru. Order of the Inter-American Court of Human Rights of February 3, 2001, operative paragraph two. *Matter of James et al.* Provisional Measures regarding Trinidad and Tobago: Order of the Inter-American Court of Human Rights of September 3, 2002, operative paragraph two; Order of the Inter-American Court of Human Rights of December 2, 2003, operative paragraph three, and Order of the Inter-American Court of Human Rights of February 28, 2005, operative paragraph two. *Case of Bámaca Velásquez*. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of February 21, 2003, operative paragraph two; Order of the Inter-American Court of Human Rights of November 20, 2003, Considering Clause sixteen and operative paragraph two, Order of the Inter-American Court of Human Rights of March 11, 2005, operative paragraph one, and Order of the Inter-American Court of Human Rights of January 27, 2009, operative paragraph four. *Case of Raxcacó Reyes et al.* Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of July 4, 2006, operative paragraph two; Order of the

judgment on merits has already been ordered and the respective reparations measures awarded, the Court has ordered provisional measures during the first stage of monitoring compliance.²⁴ All in accordance with the precautionary and protective nature of provisional measures because the American Convention provides only "factual information"²⁵ for the Inter-American Court to order such measures. In other words, there is "a situation of extreme gravity and urgency" and "when it is necessary to avoid irreparable damage to persons" while the case is before it.

26. Since it is the responsibility of the Inter-American Court to monitor compliance with its judgments, it is clear that the "consideration" of the case does not cease with the issuance of the ruling on the merits of the case and when the corresponding reparations are awarded. The jurisdictional power of the Court, like any judicial body, "is exercised by ruling and making rulings be exercised."²⁶ This is because the Court "can[n]ot ignore the fate of its decisions, which are always mandatory for States and exempt from review by a higher court. The inter-American justice is exercised in one instance and the corresponding Convention states that the decisions of the Court are binding on the parties."²⁷ Therefore, the Court still legally has "consideration" of the case while compliance of the respective judgment is being verified by the Court. This has been reflected in the judgments of the Court where it has consistently set forth in the operative paragraphs, with varying wording, that "[p]ursuant to the provisions of the American Convention on Human Rights, the Court shall monitor the full compliance with this Judgment and it will close the [...] case once the State has fully implemented the provisions set forth thereof." Therefore, the Court's "consideration" of the case ends only after the State has complied in full with the respective judgment and when the Court so declares, leaving no doubt, thus, that in that context the Court has perfect and strong jurisdiction in matters of provisional measures.

Inter-American Court of Human Rights of February 2, 2007, operative paragraph two; Order of the Inter-American Court of Human Rights of November 21, 2007, operative paragraph two, and Order of the Court of Human Rights of May 9, 2008, operative paragraph six. Case of 19 Merchants. Provisional Measures regarding Colombia. Order of the *Inter-American Court of Human Rights* of April 28, 2006, operative paragraphs one and second, Order of the Court Human Rights July 4, 2006, operative paragraphs one and second, Order of the Court Human Rights May 12, 2007, operative paragraph two and three; Order of the Inter-American Court Human Rights of July 8, 2009, operative paragraph four and five, and Order of the Inter-American Court of Human Rights of August 26, 2010, operative paragraphs one and two; Case of the Gómez Paquiyauri Brothers. Provisional Measures regarding Peru; Order of the Inter-American Court of Human Rights of September 22, 2006, operative paragraph one; Resolution of the Inter-American Court of Human Rights of May 3, 2008, operative paragraph two. *Case of the Plan de Sánchez Massacre*. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of November 25, 2006, operative paragraph one; Order of the Inter-American Court of Human Rights of November 26, 2007, operative paragraph three. *Case of Mapiripán Massacre*. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of May 3, 2008, operative paragraph one; Order of the Inter-American Court of Human Rights of September 2, 2010, operative paragraph one. *Caso of Gutiérrez Soler*. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of November 27, 2007, operative paragraph one; Order of the Inter-American Court of Human Rights of July 9, 2009, operative paragraph one. *Case of García Prieto et al.*. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of February 3, 2010, operative paragraph two. *Case of Fernández Ortega et al.*. Provisional Measures regarding Mexico. Order of the Inter-American Court of Human Rights of November 23, 2010.

²⁴ Cf. *Case of Mayagna (Sumo) Awas Tingni*. Provisional Measures regarding Nicaragua. Order of the Inter-American Court of Human Rights of September 6, 2002, operative paragraph one; Case of 19 Merchants. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of September 3, 2004, operative paragraph second, and Case of the Rochela Massacre. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of November 19, 2009, operative paragraph one.

²⁵ Cf. García Ramírez, Sergio, *The Inter-American Court of Human Rights*, Mexico, Porrua, 2007, p. 68.

²⁶ Gimeno Sendra, José Vicente, *Fundamentos del Derecho Procesal*, Madrid, Civitas, 1981, p. 31.

²⁷ García Ramírez, Sergio, "Reflexiones sobre las medidas provisionales en la jurisdicción interamericana," presentation of the first edition by Cantor Rey, Ernesto and Rey Anaya, Angela *Medidas provisionales y medidas cautelares en el sistema interamericano de derechos humanos* 2nd Edition, Bogota, Temis, 2008, pp. XLIII y XLIV.

27. The jurisprudence of the Inter-American Court illustrates, incidentally, that even when a judgment has been passed there have been situations that endanger the rights involved in the decision of the Court and, therefore, hinder the effective compliance with the ruling. On this point, it should be noted that the Court has already ruled, "the effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling."²⁸ Therefore, on several occasions, the Court has ordered provisional measures, or has maintained provisional measures ordered prior to its decision on merits, during the monitoring of compliance with judgments, precisely because the compliance of its decisions "is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention."²⁹ Furthermore, the Inter-American Court has ordered the adoption of provisional measures after a decision to lift them, when during the monitoring of compliance events have taken place that, according to Article 63(2) of the Convention, have made them necessary. On this point, it is worth stating that the measures ordered in *the case of Caballero Delgado and Santana v. Colombia*. On January 29, 1997, the Court issued a judgment on reparations in this case. Two days later, the Court issued an order lifting the provisional measures it had previously ordered. But three months later, on April 16, 1997, the Court issued an order, again, providing for the adoption of these measures. This was not only at the request of representatives of the victims but also the State itself. What Colombia specifically requested on that occasion was:

To [c]onsider the possibility of reviewing the content of the order [of January 31, 1997], and instead, to order the continuation of the measures ordered, as long as the risk situation continues, bearing in mind that the internal proceedings are currently being carried out by the investigating authorities [...] The Government of Colombia will inform the Honorable Court when it considers that the situation no longer warrants maintenance of the measures requested, but until then, it trusts that these will be maintained, inasmuch as it is a question of protecting the life and physical integrity of those persons who have given evidence in the proceedings now under way and at those conducted by the [...] Inter-American Court of Human Rights.

28. In this regard, in some decisions the Court has established a comparison between the provisional measures ordered by the Court and the precautionary measures, provisional or precautionary measures that are issued internally to ensure the effectiveness of domestic judgments or decisions:

the purpose of the provisional measures in national (domestic procedural) legal systems generally is to protect the rights of contending parties, ensuring that the execution of judgments on the merits and reparations is not hindered or impeded by their conduct.

under the International Law of Human Rights, provisional measures have, furthermore, a preventive purpose inasmuch as they are intended to protect human rights, preventing individuals from suffering irreparable harm.³⁰

29. In this regard, in 2000 the Court ratified, during the monitoring of compliance with a previous ruling, provisional measures ordered prior to this stage.³¹ This is the first

²⁸ *Case of Baena Ricardo et al. v. Panama. Competence.* Judgment of November 28, 2003. Series C No. 104, para. 73.

²⁹ *Case of Baena Ricardo et al. v. Panama*, supra note 28, para. 74.

³⁰ *Case of Massacre Plan de Sánchez (Salvador Jerónimo et al.)* Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of September 8, 2004, Considering Clause five and six, and Integrantes del Equipo de Estudios Comunitarios y Acción Psicosocial (ECAP). Plan de Sánchez Massacre. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of November 25, 2006, Considering Clause five and six.

Case of Blake. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of August 18, 2000, operative paragraph one. A year later, in the *Case of Loayza Tamayo v. Peru*, the

precedent where the Court, during the monitoring of compliance with the respective judgment, decided to maintain the measures ordered prior to ruling on the merits. However, in 2002, the Court, for the first time, ordered provisional measures following issuance of the judgment on merits and reparations. In the years that followed, this competence has continued to be exercised without it being questioned by any State, let alone a Judge of the Court. In the 2002 decision, the Court made specific reference to its jurisdiction to grant provisional measures at this stage by stating the following:

The purpose of provisional measures, in International Human Rights Law, is to effectively protect fundamental rights, inasmuch as they seek to avoid irreparable damage to persons. Said measures can also be applied during the stage in which compliance with the judgment is overseen; in the instant case it is probable that irreparable damage will occur [preventing] faithful and full compliance with the judgment on merits and reparations in the case of the Mayagna Community, [thus the] adoption of said measures is in order.³²

30. Thus, the Court has ordered provisional measures in 26 cases during the monitoring compliance with judgments stage, which has protected the rights of approximately 2,500 people. It should be emphasized that through the adoption of these provisional measures the Court has been able to ensure the protection of such fundamental rights as life and integrity and personal freedom.

IV. Importance of provisional measures during monitoring compliance with judgments.

31. Based on general international law, the Court has stated that, much like any body with a jurisdictional function, it has the inherent power to determine the scope of its competence (*compétence de la compétence/Kompetenz-Kompetenz*). The Court "cannot abdicate this prerogative, as it is a duty that the Convention imposes upon the it, requiring it to exercise its functions in accordance with Article 62(3) thereof."³³ This provision states that "the jurisdiction of [t]he Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction [...]."

32. In exercising its power to determine its own jurisdiction, the Court has interpreted Article 63(2) of the American Convention in the sense that at any stage of proceedings it may order provisional measures. This has enabled the Court to enact such measures, whilst monitoring compliance, even if it has already ruled on the merits, and the respective reparations have been ordered because the case continues under the Court's consideration until the State fully complies with the ruling.

Court also continued the provisional measures ordered prior to the judgment on reparations issued in the case. Cf. Order of the Inter-American Court of Human Rights of February 3, 2001, operative paragraph two.

³² *Case of the Mayagna (Sumo) Awas Tingni Community*, *supra* note 24, Considering Clause nine. See also *Case of Bámaca Velásquez*. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of February 21, 2003, Considering Clause ten.

³³ Cf. *Case of the Constitutional Court*, *supra* note 17, paras. 31; *Case of Hilaire*. Preliminary Objections. Judgment of September 1, 2001. Series C No. 80, paras. 80 and 81; *Case of Benjamin et al.* Preliminary Objections. Judgment of September 1, 2001. Series C No. 81, para. 71 and 72; *Case of Constantine et al.* Preliminary Objections. Judgment of September 1, 2001. Series C No. 82, para. 71 and 72; *Case of Baena Ricardo et al v. Panama*. Competence. Judgment of November 16, 2009. Series C No. 12, para. 70; *Case of the Serrano Cruz Sisters v. El Salvador*. Preliminary Objections. Judgment of November 23, 2009. Series C No. 118, para. 74; *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 14, and *Case of the Dos Erres Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 34.

33. Provisional measures, in this sense, "have taken on [...] great importance in the jurisprudence of the Inter-American Court, especially in the preventive aspect of the international protection of human rights. Moreover, at the present day they represent a preventative jurisdictional guarantee, and constitute one of the most rewarding aspects of the international safeguarding work of the fundamental rights of human beings."³⁴

34. Considering the provisional measures largely "determine the effectiveness of the right to individual application at the international level,"³⁵ which implies that the Court's decisions are implemented fully ensuring the effectiveness of the inter-American system and the protection of human rights it recognizes, the judges who subscribe this opinion reaffirm the constant jurisprudence of the Court in the sense that Article 63(2) of the American Convention grants the Court jurisdiction to order provisional measures whilst monitoring compliance with its judgments.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretariat

³⁴ Cançado Trindade, Antonio A., "Reflexiones sobre la evolución y estado actual de las medidas provisionales de protección en el derecho internacional contemporáneo," preface to the first edition by Cantor Rey, Ernesto and Rey Anaya, Ángela, *supra* note 27, p. XVII. XVII.

³⁵ Cf. MacDonald, R. ST. J., "Interim measures in international law, with special reference to the European System for the Protection of Human Rights," in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 52, 1993, p. 703.