

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF OCTOBER 23, 2012**

**PROVISIONAL MEASURES WITH REGARD TO THE
REPUBLIC OF COLOMBIA**

CASE OF GUTIÉRREZ SOLER

HAVING SEEN:

1. The Orders of the Inter-American Court of Human Rights (hereinafter, the "Inter-American Court" or the "Court") of March 11, 2005, in which provisional measures were ordered in the instant case.

2. The Judgment on merits, reparations and costs delivered by the Inter-American Court on September 12, 2005, in this case, in the tenth operative paragraph of which, the Court decided that the Republic of Colombia (hereinafter "the State" or "Colombia") "must exercise special care to safeguard the life, integrity and safety of Wilson and Ricardo Gutiérrez Soler and his next of kin, and must provide them with the necessary protection from any person, bearing in mind the circumstances of the instant case, in accordance with the provisional measures ordered by this Court on March 11, 2005."

3. The Orders on provisional measures issued in this case on November 27, 2007, July 9, 2009, and June 30, 2011. In this last Order, the Court decided:

[...]

1. To reiterate [to the State] that it must maintain the provisional measures in favor 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. To lift and conclude the provisional measures ordered by the Inter-American Court of Human Rights in favor 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. To reiterate [to the State] that it 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. The briefs of July 26 and November 7, 2011, and February 7, May 7 and August 9, 2012, in which the State submitted information on compliance with the provisional measures ordered in this case. In the last two briefs, the State also asked the Court to assess the possibility of lifting these provisional measures.

5. The briefs of December 12, 2011, and April 24 and August 28, 2012, in which the representatives of the beneficiaries of the provisional measures (hereinafter "the representatives") presented their observations on the State's reports of July 26, 2011, and February 7, May 7 and August 9, 2012. The representatives did not present observations on the State's report of November 7, 2011 (*supra* having seen paragraph 4).

6. The communications of September 15, 2011, and January 4, April 11, July 6 and October 1, 2012, in which the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted its observations on the State's reports (*supra* having seen paragraph 4) and on the briefs of the representatives (*supra* having seen paragraph 5).

CONSIDERING THAT:

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

2. Article 63(2) of the American Convention stipulates 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. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

3. In this regard, the relevant part of Article 27 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")¹ establishes that:

1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, on its own motion, order such provisional measures as it deems 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. [...]

7. The monitoring of urgent or provisional measures ordered shall be carried out through the submission of reports by the State and the filing of observations to those reports by the beneficiaries of the measures or their representatives. The Commission shall submit observations to the State's reports and to the observations of the beneficiaries of the measures or their representatives.

[...]

4. Under international human rights law, provisional measures are not merely preventive, in that they preserve a juridical situation, but rather they are essentially protective, since they protect human rights, inasmuch as they seek to avoid irreparable damage to persons. Provided that the basic requirements of extreme gravity and urgency and the prevention of irreparable damage to persons are met, provisional measures become a real jurisdictional guarantee of a preventive nature.²

¹ The Court's Rules of Procedure approved during its eighty-fifth regular session held from November 16 to 28, 2009.

² Cf. *Case of Herrera Ulloa with regard to Costa Rica (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, and *Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Provisional measures with regard to Dominican Republic. Order of the Inter-American Court of Human Rights of September 7, 2012, fifth considering paragraph.

5. Based on its competence, within the framework of provisional measures, the Court must consider only those arguments that are strictly related to extreme gravity, urgency and the need to avoid irreparable damage to persons. Any other fact or argument can only be analyzed and decided during the consideration of the merits of a contentious case³ or when monitoring compliance with the respective judgment.

A. Provisional measures in favor of Wilson Gutierrez Soler, Kevin Daniel Gutierrez Niño and Maria Elena Soler de Gutierrez in order to protect their life and personal integrity (first operative paragraph of the Order of June 30, 2011)

A.1. Information provided by the State

6. The State reiterated that it had ordered protection services for Wilson Gutierrez Soler consisting of an ordinary vehicle and two escort units, in addition to adopting and implementing structural measures of protection at his place of residence, consisting of a bullet-proof door, anti-shrapnel coating, external windows, iron railings for the backyard, entry phone with camera, closed circuit television, and two cameras. It also presented information on the status of the investigations into the events that allegedly occurred in November 2010 at the residential complex where Mr. Gutierrez Soler lives in Bogotá, which were the subject of the Order of June 30, 2011 (*supra* having seen paragraph 3).⁴ In its last report, the State indicated that it had “taken different measures to investigate [those] events [...] and that during] the criminal proceedings [opened based on those events], it was decided to file the case.” Regarding the proceedings on the torture suffered by Mr. Gutierrez Soler, which was the purpose of the Judgment delivered on September 12, 2005, in this case, the State indicated that Luis Gonzaga Enciso Baron had made himself “available to the Colombian courts.”

7. In addition, it indicated that, at a meeting held on April 12, 2012, to monitor the implementation of the provisional measures, Wilson Gutierrez had advised that his son, Kevin Daniel Gutierrez Niño, was abroad. The State therefore underlined that, “when the beneficiary Kevin Daniel [...] was in the country, [...] authorization had been granted for the security system approved for Wilson Gutierrez to be used also by” his son. Regarding the obligation to adopt measures of protection in favor of Maria Elena Soler de Gutierrez, the State indicated that, in July 2011, it had agreed with the representatives of the beneficiaries that the “Presidential Human Rights Program of the Vice Presidency of the Republic would act as a liaison in case of any incident, and this was reaffirmed in the monitoring meeting of April 12,” 2012. According to the State, to date, no new situation has occurred that has required the use of this liaison. During the same meeting, the State undertook to forward a request from the representatives that Mrs. Soler de Gutierrez be

³ Cf. *Matter of James et al.* Provisional Measures with regard to Trinidad and Tobago. Order of the Inter-American Court of Human Rights of August 20, 1998; sixth considering paragraph, and *Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic*, *supra*, seventh considering paragraph.

⁴ As can be seen in considering paragraph 12 of the Order issued on November 30, 2011, in this case, “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 residents 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”.

provided with a ground transportation service as a specific measure of protection to the Committee for Regulation and Risk Assessment of the Protection Program.

8. Lastly, the State indicated that “the international protection granted by the organs of the inter-American system is complementary to the protection provided by the domestic law of the American States.” In addition, it indicated that it had demonstrated its constant commitment to implementing all the necessary legal actions to comply with its obligation to guarantee the life and physical integrity of Wilson Gutierrez Soler, Kevin Daniel Gutierrez Niño and Maria Elena Soler de Gutierrez. Moreover, it affirmed that, “to date, it has not received any communication from the [representatives] or from the beneficiaries of the provisional measures with information on new incidents that constitute a risk for Mr. Gutierrez Soler and his family.” In the State’s opinion, this “shows that the situation of risk of the [...] beneficiaries has changed [...] in relation to the facts that gave rise to the adoption of provisional measures.” Therefore, it asked the Court to assess the actual situation of the provisional measures, given that the requirements for maintaining them under Article 63(2) of the American Convention are no longer met.

A.2. Observations of the representatives

9. They considered that provisional measures represent a support and a significant mechanism of protection if they are implemented in a timely manner. Therefore, in this case, they assessed positively the measures implemented in favor of Wilson Gutierrez Soler and his family. Furthermore, they did not deny the fact that the authorities had adopted measures of protection that had reduced the risk and contributed to the protection of the beneficiaries. Regarding Maria Elena Soler de Gutierrez, the representatives indicated that, in order to assign a security system without the participation of armed escorts, they had agreed with the State on the establishment of a liaison with the Presidential Human Rights Program of the Vice Presidency of the Republic to report any incident. In addition, they had agreed that the beneficiary’s risk be reassessed, because the last report was issued by the authorities two years ago. In this regard, the representatives indicated that the new risk assessment should take into account aspects such as the beneficiary’s age and circumstances; accordingly, they requested psychological assistance to the extent possible. They also indicated that they had asked the State to provide a means of transport to guarantee safe transfers for Mrs. Soler. As for the situation of Kevin Daniel Gutierrez Niño, the representatives stated that “the beneficiary [was] abroad,” but that the State agencies had ratified that, should the young man visit Colombia, he could use the protection system assigned to Wilson Gutierrez Soler.

10. The representatives also indicated that even though, recently, there have been no direct threats against the beneficiaries, it cannot necessarily be concluded that a situation of “extreme gravity and urgency” does not exist because, according to the representatives, it is evident that at times of intense activity in the judicial proceedings relating to the torture suffered by Wilson Gutierrez Soler, the threats and harassment against him and his family have increased. In this regard, they stated that, during the last year, significant progress has been made in the criminal proceedings underway for the ill-treatment suffered by Mr. Gutierrez Soler, and this supposes a risk for him and his family that may be considered extreme. In this regard, they indicated that the delegated Prosecutor had confirmed the charges brought against Luis Gonzaga Enciso before the Bogotá Superior Court, and that this had led to the opening of the trial stage. At this time, “the investigation is at the trial stage, where the testimony of Wilson Gutierrez will be heard.” In addition, they indicated that although Luis Gonzaga Enciso had surrendered to the authorities “the existence of this progress creates a situation of risk as a result of the trial of one of those responsible and the absence of an investigation into the other one who, despite having

been identified, has not been investigated by any authority, and is therefore, free." Consequently, they asked the Court to maintain the provisional measures ordered in favor of Wilson Gutierrez Soler, Maria Elena Soler de Gutierrez and Kevin Daniel Gutierrez Niño.

A.3. Observations of the Inter-American Commission

11. The Commission observed the State's implementation of the protection system in favor of the beneficiaries with satisfaction and emphasized the representatives' positive assessment. Nevertheless, it indicated that the State itself had qualified the situation of the beneficiaries as one of "extraordinary risk" and that, during the monitoring meeting held with the representatives on April 12, 2012, it had been agreed to make a new risk assessment with regard to Maria Elena Soler de Gutierrez. It also recalled that the adoption and maintenance of these provisional measures is related to the situation of harassment, arrests, threats and abuse endured by the Gutierrez Soler family, in relation to their search for justice owing to the human rights violations suffered. Consequently, according to the Commission, there is still a connection "between the progress made in the domestic investigations and the increase in the beneficiaries' situation of risk"; thus, it considered that a situation of extreme gravity and urgency subsisted that required maintaining these provisional measures in favor of the beneficiaries.

B. Participation of the beneficiaries or their representatives in the planning and implementation of the measures of protection (third operative paragraph of the Order of June 30, 2011)

B.1. Information provided by the State

12. The State indicated that, on July 21, 2011, and on April 12, 2012, meetings had been held with the representatives and Mr. Gutierrez Soler to monitor and to reach agreements on the implementation of the provisional measures. The purpose of the last meeting was to establish a mechanism for dialogue on the implementation of the provisional measures in order to assess the said measures in favor of the beneficiaries. In this regard, the State indicated that, within the framework of the discussions, "there has been constant and fluid communication with the petitioners and beneficiaries," which has allowed each State agency to listen to and assess the observations of the beneficiaries and their representatives in order to adopt the necessary corrective measures, if appropriate.

B.2. Observations of the representatives

13. The information submitted by the representatives reveals that meetings to monitor the provisional measures were indeed held on July 21, 2011, and April 12, 2012.

B.3. Observations of the Inter-American Commission

14. It appreciated the fact that the parties continued to hold monitoring meetings, because they represent a mechanism for the participation of and coordination with the beneficiaries and their representatives, and also allow the measures of protection to be adapted to specific measures.

C. Considerations of the Court

15. The Court recalls that, when ordering measures of protection, the Court or its President uses *prima facie* criteria in order to assess the requirements and, at times, it may

be necessary to apply presumptions based on the needs for protection.⁵ However, maintaining the measures of protection requires the Court to make a more rigorous assessment as regards the persistence of the situation that gave rise to them.⁶ If the State requests that the provisional measures be lifted, it must present sufficient evidence and arguments to allow the Court to assess that the risk or threat no longer meets the requirements of extreme gravity and urgency to avoid irreparable damage. In turn, the burden of proof and argument of the beneficiaries and of the Inter-American Commission will increase as time goes by without any new threats. Evidently, the fact that no new threats occur may be due precisely to the effectiveness of the protection provided or to the deterrent effect of the Court's Order. Nevertheless, the Court has considered that the passage of a reasonable period of time without threats or intimidation, added to the absence of an imminent risk, may lead to the lifting of the provisional measures.⁷

16. The Court must also take into account that, according to the Preamble of the American Convention, the international protection in the form of a convention "reinforce[s] or complement[s] the protection provided by the domestic law of the American States". Therefore, if it is proved that the State in question has developed effective protection mechanisms or measures for the beneficiaries of the provisional measures, the Court could decide to lift the provisional measures, delegating the protection obligation to the entity that bears the main responsibility: namely, the State.⁸ If the Court lifts the provisional measures for this reason, under its obligation to ensure human rights, the State would have to maintain the protective measures it has adopted and that the Court found effective for as long as the circumstances warranted.⁹

17. The Court assesses positively the willingness of the representatives, the beneficiaries and the State to create mechanisms for dialogue and agreement which have helped to establish commitments designed to implement the provisional measures in question in favor of the beneficiaries. In this regard, the Court observes that, under the existing domestic mechanisms in Colombia, physical and structural measures of protection have been implemented for Wilson Gutierrez Soler and his family, and that agreements have been reached such as the creation of a liaison with the Human Rights Program of the Vice Presidency of the Republic for Maria Elena Soler de Gutierrez to report any incident, and the agreement reached with the State so that Kevin Daniel Gutierrez Niño may use the protection system assigned to his father, Wilson Gutierrez Soler, when he is in Colombia.

18. Nevertheless, the Court notes that the latest incidents that presumably placed the life and integrity of Mr. Gutierrez Soler at risk occurred in November 2010; in other words,

⁵ Cf. *Case of Raxcacó Reyes et al* Provisional measures with regard to Guatemala. Order of the Inter-American Court of Human Rights of August 30, 2004, tenth considering paragraph, and *Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic, supra*, twenty-fifth considering paragraph.

⁶ Cf. *Matter of the Kankuamo Indigenous People*. Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of April 3, 2009, seventh considering paragraph, *Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic, supra*, twenty-fifth considering paragraph.

⁷ Cf. *Matter of the Constitutional Court*. Provisional Measures with regard to Peru. Order of the Inter-American Court of Human Rights of March 14, 2001, fourth considering paragraph, and *Case of the 19 Tradesmen*. Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of June 26, 2010, twenty-fifth considering paragraph.

⁸ Cf. *Case of Carpio Nicolle et al*. Provisional measures with regard to Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, twenty-first considering paragraph, and *Case of Fernández Ortega et al*. Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of February 20, 2012, eighth considering paragraph.

⁹ Cf. *Case of Carpio Nicolle et al., supra*, twenty-first considering paragraph, and *Case of Fernández Ortega et al, supra*, eighth considering paragraph.

almost two years ago. In addition, those facts were the subject of the Order of the Court issued in this case on June 30, 2011. Furthermore, the Court has not been informed of any possible incidents related to Maria Elena Soler de Gutierrez or Kevin Daniel Gutierrez Niño. Hence, the representatives and the Inter-American Commission justify the maintenance of the provisional measures on the fact that the criminal and disciplinary procedural activities underway in the context of the domestic judicial investigations against the presumed perpetrators of the human rights violations committed to the detriment of Wilson Gutierrez and his family constitute, *per se*, a situation of extreme gravity and urgency. In this regard, even though the obligation to investigate may, at times, extend over a considerable period of time, the threat or risk does not necessarily remain extreme and urgent.¹⁰ The Court observes that the representatives and the Commission assessed positively the usefulness of the measures implemented, which, according to the representatives, "have reduced the risk and contributed to the protection of the beneficiaries."

19. Moreover, the Court recalls that, in the Judgment delivered in this case on September 12, 2005, it ordered the State to "investigate the facts effectively [...] in order to identify, try and punish the perpetrators of the arrest and torture of Wilson Gutiérrez Soler" (paragraph 96). Furthermore, the State was ordered to "exercise special care to safeguard the life, integrity and safety of Wilson [...] Gutiérrez Soler and his next of kin, and to provide them with the necessary protection from any person, bearing in mind the circumstances of the case [...]" (tenth operative paragraph). Consequently, the Court considers that the said Judgment reveals not only the State's obligation to investigate with due diligence the torture, threats and harassment reported by Wilson Gutierrez Soler, but also the State's obligation to implement all necessary mechanisms to ensure the participation of the victims, in particular, Mr. Gutierrez Soler, in the judicial proceedings and to guarantee his life, personal integrity and safety.

20. In conclusion, the Court observes that, over the last two years, no specific situations of risk to the beneficiaries have occurred; accordingly, the Court considers that the alleged and hypothetical "extreme risk" to Wilson Gutierrez Soler and his family, owing to his participation in the domestic legal proceedings and the failure to clarify the facts that gave rise to the adoption of the provisional measures in this case, is not sufficient to conclude that a situation of extreme gravity and urgency persists that could result in irreparable damage against him and that justifies the existence of provisional measures ordered by this Court. Therefore, the Court finds it appropriate to lift the measures ordered in this case. The foregoing does not prevent the Court from re-ordering the provisional measures if, in the future, the three conditions established in Article 63(2) of the American Convention are again met.

21. Notwithstanding the above, the Court must reiterate that Article 1(1) of the Convention establishes the general obligation of the States Parties to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, under any circumstance. Therefore, despite the lifting of the provisional measures ordered by this Court, the State is especially obliged to guarantee the rights of Wilson Gutierrez Soler, Kevin Daniel Gutierrez Niño and Maria Elena Soler de Gutierrez by means of the relevant existing domestic mechanisms.

¹⁰ Cf. *Case of the Constitutional Court*, *supra*, third considering paragraph, and *Case of the 19 Tradesmen*, *supra*, thirty-seventh considering paragraph.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

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

DECIDES:

1. To lift the provisional measures ordered by the Inter-American Court of Human Rights on March 11, 2005, and subsequently ratified, in favor of Wilson Gutierrez Soler, Kevin Daniel Gutierrez Niño and Maria Elena Gutierrez de Soler.
2. To clarify that, under the terms of Article 1(1), of the American Convention, the lifting of the provisional measures does not imply that the State is relieved of its treaty-based obligations of protection, in accordance with considering paragraph 21 of this Order.
3. To require the Secretariat of the Inter-American Court of Human Rights to notify this Order to the Inter-American Commission on Human Rights, the representatives of the beneficiaries of the provisional measures, and the Republic of Colombia.
4. To close the case file on this matter.

Diego García-Sayán
President

Manuel Ventura Robles

Leonardo A. Franco

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary