

Order of the
Inter-American Court of Human Rights
of July 6, 2009
Case of Carpio-Nicolle v. Guatemala
Provisional Measures

HAVING SEEN:

1. The Orders issued by the President of the Inter-American Court of Human Rights (hereinafter, "the Court", "the Inter-American Court" or "the Tribunal") of June 4 and July 26, 1995 and the Orders of the Court of September 19, 1995, February 1 and September 10, 1996, September 19, 1997, June 19 and November 27, 1998, September 30, 1999, September 5, 2001, and July 8, 2004. In the July 8, 2004 Order the Court decided, *inter alia*:

1. To ratify, in all its parts, its Order of September 5, 2001, adopted on behalf of Mrs. Martha Arrivillaga de Carpio and Mrs. Karen Fischer.
2. To call upon the State to maintain the provisional measures necessary to protect the life and the integrity of the person of Mrs. Martha Arrivillaga de Carpio.
3. To call upon the State, in its next report[...], to submit detailed information on the reasons why it suspended the security assigned to Mrs. Martha Arrivillaga de Carpio's place of work and whether this security is currently being provided to her.
4. To call upon the State to maintain the measures necessary to protect the life and the integrity of person of Mrs. Karen Fischer, while providing the personnel charged with her security with the same working conditions accorded to any Guatemalan State security agent.
5. To call upon the State to investigate the recent events involved in the threats allegedly made against Mrs. Karen Fischer, including the alleged attempt on her life and on her security detail on June 19, 2004 [...], in order to identify those responsible and punish them in accordance with the law.
6. To call upon the State to investigate the facts that necessitated the provisional measures in question, in order to identify those responsible and punish them in accordance with the law.
7. To call upon the State to immediately expand the provisional measures called for in the Order of September 5, 2001, to protect the life and the integrity of the person of Messrs. Jorge and Rodrigo Carpio-Arrivillaga, Abraham Méndez-García, the latter's wife and children, and young Rodrigo and Daniela Carpio-Fischer, should these last two young people return to the country.
8. To call upon the State to give the beneficiaries a role in planning and implementing the measures of protection and, in general, to keep them informed of the progress of the provisional measures ordered by the Inter-American Court of Human Rights.

[...]

2. The request to rescind the provisional measures filed by the Republic of Guatemala (hereinafter, "the State" or "Guatemala") in the communication received by the Secretariat of the Court (hereinafter, "the Secretariat") on June 14, 2007.

3. The Order of the President of the Court (hereinafter, "the President") of November 18, 2008, whereby, in consultation with the other Judges of the Tribunal, she decided to convene the Inter-American Commission on Human Rights (hereinafter, "the Commission" or "the Inter-American Commission"), the State and the beneficiaries' representatives (hereinafter, "the representatives") to a private hearing to enable the Court to obtain information from the parties about the request to lift the provisional measures.

4. The private hearing held at the seat of the Court, in San José de Costa Rica, on January 20, 2009.¹ During said hearing, the State, the Commission and the representatives referred to the provisional measures currently in force. Both the State and beneficiary Abraham Méndez-García submitted documents during the hearing. Likewise, the Court requested the representatives to submit a written report with separate and individual references to each of the beneficiaries of the measures and with a description of the concrete situations and facts that would currently constitute a situation of extreme gravity and urgency likely to cause irreparable damage. This request was reiterated in a note by the Secretariat of January 28, 2009.

5. The representatives' brief of February 20, 2009, whereby they submitted the information requested by the Tribunal (*supra* Having Seen clause 4).

6. The communication of March 12, 2009, whereby the Inter-American Commission submitted its comments on the representatives' brief.

7. The brief submitted by the State on May 4, 2009, whereby it reported on the implementation of the provisional measures.

8. The brief of June 16, 2009, whereby the Commission submitted its comments on the report of the State (*supra* Having Seen clause 7). The representatives did not submit any comments.

CONSIDERING:

1. That Guatemala has been a State party to the American Convention on Human Rights (hereinafter, "the Convention" or the "American Convention") since May 25, 1978 and recognized the compulsory jurisdiction of the Court on March 9, 1987.

2. That the Court appreciates the extreme usefulness of the hearing held to learn about the status quo regarding the provisional measures.

3. That, pursuant to the orders adopted between 1995 and 2004 (*supra* Having Seen clause 1), the State has an obligation to implement such protective measures as may be necessary to preserve the life and personal integrity of Mrs. Martha Arrivillaga de Carpio, Mrs. Karen Fischer, Messrs. Jorge Carpio-Arrivillaga, Rodrigo Carpio-Arrivillaga, Abraham Méndez-García, the latter's wife and children, and young Rodrigo

¹ Pursuant to Article 6(2) of its Rules of Procedure, the Court held a hearing with a committee of Judges composed by: Judge Diego García-Sayán, Vice-president; Judge Leonardo Franco and Judge Rhadys Abreu-Blondet. At this hearing there appeared, on behalf of the Inter-American Commission: Juan Pablo Albán-Alencastro; on behalf of the beneficiaries and their representatives: Abraham Méndez and Karen Fischer, beneficiaries; on behalf of the Center for Justice and International Law (CEJIL): Gisela De León and Marcela Martino del Centro; and on behalf of the State: Ruth del Valle-Cóbar, President of the Presidential Human Rights Executive Policy Coordinating Commission (COPREDEH), Delia Marina Dávila-Salazar, Agent, and Vivian Nohemí González-Westendorff, Deputy Agent.

and Daniela Carpio- Fischer, should they return to the country. According to the information furnished by the representatives, Daniela Carpio-Fischer has allegedly returned to Guatemala.

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4. That at the private hearing, the State noted that it was "willing to maintain the protective measures adopted in favor of Mrs. Karen Fischer, her children, Rodrigo and Daniela Carpio, and Mrs. Martha Arrivillaga de Carpio, acknowledging that the adopted measures are necessary in light of the fact that the Attorney General's Office is activating the investigation before the courts, and that it [therefore] canceled its request to lift the provisional measures of June 14, 2007."

5. That, with regard to beneficiary Abraham Méndez, the State noted that "it was not calling for the measures to be canceled but for them to be implemented by the Judiciary, [which] has put in place security services for its officers, since [Mr. Méndez] works for this important Guatemalan body."

6. That the State finally noted that it had met with the representatives, who had expressed that most of the beneficiaries "do not wish to have security measures adopted in their favor", except for Mr. Abraham Méndez, who has requested protective measures. In this regard, the State deemed it "convenient to establish some form of direct communication with the beneficiaries of the measures and pointed out [that], when appropriate, said beneficiaries should give notice of any risk that may arise, for the State to coordinate such security measures as the situation may require."

7. That at the private hearing the representatives confirmed that they had met with the State and expressed that the new impetus that has been given at the domestic level to the investigation into the facts considered in the Judgment delivered by this Court in the case of *Carpio-Nicolle et al. v. Guatemala*² "results in the persistence of the risks that confront the beneficiaries", and hence they requested that the provisional measures be kept in force. They added that said risks "are even greater for Mrs. Karen Fischer, who is the public face of the instant case in Guatemala, and has been the target of threats and attacks whenever she has appeared in the media to demand justice or to talk about the case." The same is true for Mr. Jorge Carpio, since his "name is the same as his father's" and he is publicly known as the director of the newspaper "Moneda".

8. That with regard to Mrs. Karen Fischer, the representatives noted that "she has not been the target of new threats or acts of harassment" but that "the absence of violent acts against her derives, in fact, from the continuation and implementation of the provisional measures."

9. That with regard to Daniela Carpio-Fischer, the representatives expressed that "she is not protected by the State, even when she may be targeted for retaliation as a consequence of her mother's participation in giving impetus to the investigations."

10. That the representatives did not submit any information about Mr. Rodrigo Carpio-Fischer.

11. That with regard to Mrs. Martha Arrivillaga and her children Jorge and Rodrigo Carpio-Arrivillaga, the representatives expressed that "they have not reported any

² Cfr. *Case of Carpio-Nicolle et al. v. Guatemala. Merits, Reparations and Costs*. Judgment of November 22, 2004. Series C No. 117.

further threats” and that “the absence of acts of intimidation results from the fact that they rely on elements that preserve their security and personal protection.”

12. That, finally, Mr. Abraham Méndez-García informed that on January 12, 2009 “several people came to [his] house saying they had [an] authorization to carry out an ‘entry and search’, and produced a simple sheet of paper without a letterhead.” According to Mr. Méndez, “this fact coincides, quite strangely, with the hearing held before the Inter-American Court [...] and the telephone calls made to [the representatives].”

13. That the Commission expressed that it agreed with the State and the representatives “as regards the fact that the reactivation of the investigation may lead to a situation of extreme risk of irreparable damage to the beneficiaries”, although it believes that “regardless of the reopening of the investigation, risks continue to exist.” According to the Commission, “the fact that certain provisional measures may have been in force for a long time – as is the case with several measures ordered by the Court – does not [...] provide grounds for lifting said measures. Contrariwise, the Commission believes that provisional measures should be maintained for as long as the original circumstances that led to their adoption prevail. Hence, the standard is the continuity of the need for protection.”

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14. That Article 63(2) of the Convention requires that for the Court to order the adoption of provisional measures three conditions must be met: i) “extreme gravity”; ii) “urgency”, and iii) an attempt to “avoid irreparable damage to persons.” These three conditions coexist and must be present in all the situations in which the intervention of the Tribunal is requested. Likewise, said conditions must persist for the Court to maintain the protection it has ordered. If one of them ceases to exist, the Tribunal has to assess whether or not continuation of the ordered protection is appropriate.

15. That, upon ordering the protective measures, the Court or its president do not need, in principle, evidence of the facts that, *prima facie*, appear to meet the requirements of Article 63. However, for the protective measures to be maintained, the Court has to assess the persistence of the situation of extreme gravity and urgency to avoid irreparable damage that gave rise to the measures,³ on the basis of information of evidentiary value.

16. That the Tribunal has noted that provisional measures are of a twofold nature: precautionary and protective.⁴ The precautionary nature of provisional measures is connected to the framework of international adversarial cases. In this regard, the purpose and goal of said measures is to preserve the rights that are at risk until the dispute is settled. The purpose and goal is to guarantee the integrity and effectiveness of the decision on the merits, thus preventing the rights at issue from being infringed, a situation that may render the final decision innocuous or hamper its effective

³ Cfr. *Matter of Pueblo Indígena de Kankuamo*. Provisional Measures regarding Colombia. Order of the Court of April 3, 2009, considering clause seven; and *Case of Mack Chang et al.* Provisional Measures regarding Guatemala. Order of the Court of January 26, 2009, considering clause thirty two.

⁴ Cfr. *Case of Herrera Ulloa*. Provisional Measures regarding Costa Rica. Order of the Court of September 7, 2001, considering clause four; *Case of López-Álvarez et al.* Provisional Measures regarding Honduras. Order of the Court of January 26, 2009, considering clause three, and *Matter of Fernández-Ortega et al.* Provisional Measures regarding Mexico. Order of the Court of April 30, 2009, considering clause five.

application. Hence, provisional measures enable the State concerned to comply with the final decision and, if applicable, to go ahead with the reparations so ordered.⁵ As regards the protective nature of provisional measures, this Court has pointed out that they are a true judicial guarantee of a preventive nature, since, inasmuch as they seek to avoid irreparable damage to persons, they protect human rights.⁶

17. That in the instant case the representatives remarked that "for a provisional measure to be lifted there must have been a change in the situation of extreme gravity and urgency initially verified by the Court" and that "the party requesting the modification or lifting has the burden of proof with regard to said change in the situation. If such information is missing, provisional measures ought to be maintained." According to the representatives, "the fact [that] a significant amount of time has elapsed without new threats or acts of harassment or violence being targeted at the beneficiaries could be taken into account as a factor to assess whether risks have diminished or ceased. Nevertheless, [...] it should be neither the only factor nor a major one."

18. That the Court shares the representatives' view that if a State requests the lifting or modification of the ordered provisional measures, it ought to produce enough evidence and arguments to enable the Court to realize that the risks or threats no longer meet the requirements of extreme gravity and urgency to avoid irreparable damage. In turn, the representatives of the beneficiaries who want the measures to be maintained have to file evidence of the reasons supporting their position.

19. That the Court acknowledges that a lack of threats does not necessarily imply that there exist no risks for a person. However, if a certain amount of time elapses without any threats, the Court has to analyze the causes of said absence of threats to determine whether it is appropriate to maintain the provisional measures, taking into account that they should be of a provisional and temporary nature.

20. That the Commission has held that one of the reasons for the absence of threats is that "the adopted [provisional] measures may have contributed towards the protection of the beneficiaries."

21. That, in this regard, the Court should bear in mind that, pursuant to the Preamble of the American Convention, international protection of a conventional nature should reinforce or complement the protection afforded by the domestic law of American states. Thus, if it is proved that the State involved has developed effective mechanisms or measures to protect the beneficiaries of the provisional measures, the Court may decide to lift the provisional measures and impose the obligation to provide said protection on the body that is duly responsible for it, that is, the State. It is worth reiterating that this decision belongs to the Court and not to the State, since it would be unacceptable to subject the mechanism set forth in the American Convention to restrictions rendering the role of the Court, and hence the human rights protection

⁵ Cfr. *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center*. Provisional Measures regarding Venezuela. Order of the Court of February 8, 2008, considering clause seven; *Matter of "El Nacional" and "Así es la Noticia" Newspapers*. Provisional Measures regarding Venezuela. Order of the Court of November 25, 2008, considering clause twenty-three, and *Matter of Luis Uzcátegui*. Provisional Measures regarding Venezuela. Order of the Court of January 27, 2009, considering clause nineteen.

⁶ Cfr. *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center*, *supra* note 5, considering clause eight; *Case of Bámaca-Velásquez*. Provisional Measures regarding Guatemala. Order of the Court of January 27, 2009, considering clause forty-five; and *Matter of Fernández-Ortega et al.*, *supra* note 4, considering clause five.

system enshrined in the Convention, ineffective.⁷ If the Court decides to lift the provisional measures for this reason, the State, in compliance with its duty to safeguard human rights (*infra* Considering clause 24), will have to maintain the protective measures that it may have adopted, and that were deemed effective by the Court, for as long as the circumstances so require.

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22. That the representatives believe that another factor that the Court should take into account when deciding whether or not to lift the provisional measures is the "elucidation of the facts that led to establish, *prima facie*, that risks existed."

23. That threats usually have a purpose and a form of expression. The purpose is the aim pursued by the perpetrator of threats. The form of expression is the mechanism through which threats reach their intended recipients. Both the purpose and the form of expression determine the type of investigation and the relevant strategies for analysis.

24. That Article 1(1) of the Convention establishes the general duty of 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.⁸ Consequently, regardless of the existence of specific provisional measures, the State has a special duty to guarantee the rights of persons who are at risk and to set in motion such investigations as may be necessary to elucidate the facts, followed by such consequences as the applicable legislation may set forth. Regarding investigations, the State concerned ought to use its best efforts to establish all the facts that surrounded the threat and its forms of expression; to determine whether there exists a pattern of threats against the beneficiary or the group or entity to which they belong; to establish the purpose or aim of the threat; to ascertain who is behind the threat and, if appropriate, to punish them. Nevertheless, the Court has pointed out that an alleged failure to investigate by a State does not necessarily constitute a situation of extreme gravity and urgency warranting the maintenance of the provisional measures. Furthermore, on certain occasions, the duty to investigate may take a considerable amount of time, during which the threat or risk may cease to be of an extreme and urgent nature. Finally, the Court has observed that the analysis of the effectiveness of the investigations and proceedings related to the facts that gave rise to the provisional measures is germane to the examination of the merits of the case.⁹ In short, non-compliance with the duty to investigate, while reproachable, does not in and of itself provide enough grounds to maintain the provisional measures. It is for the beneficiaries

⁷ Cfr. *Matter of Luis Uzcátegui*. Provisional Measures regarding Venezuela. Order of the Court of February 20, 2003, considering clause thirteen; *Matter of Marta Colomina*. Provisional Measures regarding Venezuela. Order of the Court of July 4, 2006, considering clause eleven, and *Case of Raxcacó-Reyes et al.* Provisional Measures regarding Guatemala. Order of the Court of February 2, 2007, considering clause twelve.

⁸ Cfr. *Case of Velásquez-Rodríguez*. Provisional Measures regarding Honduras. Order of the Court of January 15, 1988, considering clause three; *Matter of Carlos Nieto-Palma et al.* Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of January 26, 2009, considering clause twenty-two, and *Matter of Fernández-Ortega et al.*, *supra* note 4, considering clause four.

⁹ Cfr. *Matter of Pilar Noriega-García et al.* Provisional Measures regarding Mexico. Order of the Court of February 6, 2008, considering clause fourteen; *Matter of Leonel Rivero et al.* Provisional Measures regarding Mexico. Order of the Court of November 25, 2008, considering clause eighteen, and *Matter of Luis Uzcátegui*, *supra* note 5, considering clause thirty-one.

and the Commission to argue and prove that such lack of investigation contributes to or gives rise to a situation of extreme gravity and urgency to avoid irreparable damage to a concrete beneficiary.

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25. That the representatives pointed out that another element that the Court should bear in mind when assessing whether or not to maintain the provisional measures is the "information [...] that reveals or confirms the existence of significant risk to a person, group, area, etc."

26. That, in order to establish whether or not the situation of extreme gravity and urgency to avoid irreparable damage exists or persists, the Court may consider the political, historical, cultural or other factors or circumstances that affect beneficiaries, rendering them vulnerable at a certain moment and exposing them to have their rights infringed. This situation may worsen or improve with time, depending on countless variables. However, as stated above, only extreme and urgent situations will warrant protection through provisional measures.

27. That, first of all, there may exist a group of factors or circumstances that reveal serious attacks against a certain group of persons, putting them in a situation of extreme gravity and urgency in which they are likely to suffer irreparable damage. In such an extreme situation, for example, if a number of serious attacks are directed towards the group to which the beneficiaries belong in such a way that it may be reasonably inferred that they will also be attacked, the granting of provisional measures may be justified even if no direct threats have been recently targeted at such beneficiaries. The assessment of the existence of this group of factors is different from the one involved in adversarial cases, where the parties discuss the attribution of international responsibility to the State for engaging in or tolerating said practices. Proceedings for provisional measures are only aimed at verifying the existence of a risky situation, at a certain moment, and do not amount to a prejudgment of the case or the merits.

28. That, secondly, there may exist a situation with different characteristics from the ones described above (Considering clause 27) and that, in and of itself, does not constitute a situation of extreme gravity and urgency to avoid irreparable damage to a certain group. Should this be the case, said situation will only serve for assessing the concrete threat directed towards the beneficiary but not to justify the granting or maintenance of provisional measures.¹⁰

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29. That in the instant case, the State, the representatives and the Commission agree that provisional measures ought to be maintained.

¹⁰ Cfr. *Matter of Carlos Nieto et al.* Provisional Measures regarding Venezuela. Order of the Court of January 26, 2009, considering clause nineteen, and *Matter of Luis Uzcátegui*, *supra* note 5, considering clause twenty-three.

30. That, as it has done in previous cases,¹¹ the Court takes into account the agreement of the parties and decides to maintain, for at least six months, the provisional measures ordered in favor of Mrs. Karen Fischer, Ms. Daniela Carpio-Fischer, Mr. Rodrigo Carpio-Fischer, Mrs. Martha Arrivillaga de Carpio, Messrs. Jorge Carpio-Arrivillaga, Rodrigo Carpio-Arrivillaga and Abraham Méndez-García, his wife and children.

31. That, notwithstanding the foregoing, the Court, in light of the preceding paragraphs (*supra* paras. 14 through 28) and taking into account that these provisional measures have remained in force for almost fourteen years, deems it relevant to order the State to submit a report, within the period of time established in the operative part hereof: a) identifying and establishing the different degrees of risk that confront each of the persons mentioned in the preceding paragraph; b) carefully assessing for each individual situation the existence, characteristics and origins or sources of risk, and c) eventually defining specific, suitable and adequate means and measures of protection to prevent the risk, if any, from becoming a reality. To such effect, the beneficiaries will have to collaborate in full with the State, facilitating the preparation of said report.

32. That once said report is received, the Commission and the representatives will have the possibility of submitting such comments as they deem necessary, within the period of time set forth in the operative part hereof.

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 26 and 30 of its Rules of Procedure,¹²

DECIDES:

1. To call upon the State to maintain and adopt such measures as may be necessary to continue protecting the life and personal integrity of Mrs. Karen Fischer, Ms. Daniela Carpio-Fischer, Mr. Rodrigo Carpio-Fischer, Mrs. Martha Arrivillaga de Carpio, Messrs. Jorge Carpio-Arrivillaga, Rodrigo Carpio-Arrivillaga and Abraham Méndez-García, his wife and children, for at least six months.

2. To call upon the State to send the Tribunal the report mentioned in considering clause 31 hereof, as well as information on the implementation of the measures, by no later than October 1, 2009.

3. To call upon the beneficiaries' representatives and the Inter-American Commission to submit such comments as they may deem relevant to the report mentioned in the preceding operative paragraph within four weeks after receiving said report. Each party's comments are to be independent from one another.

¹¹ *Cfr. Case of the Gómez-Paquiyaury Brothers*. Provisional Measures regarding Peru. Order of the Court of May 3, 2008, considering clause seventeen.

¹² Rules of Procedure of the Court, partially amended in its LXXXII Regular Session, held from January 19 through January 31, 2009.

4. To remind the State that it ought to continue giving the beneficiaries a role in planning and implementing the protective measures and, in general, to keep them informed of any progress made in connection with said measures.

5. To request the Secretariat to notify this Order to the State, the Inter-American Commission, and the beneficiaries' representatives.

Cecilia Medina-Quiroga
President

Diego García-Sayán

Sergio García-Ramírez

Manuel E. Ventura-Robles

Leonardo A. Franco

Margarette May-Macaulay

Rhadys Abreu-Blondet

Pablo Saavedra-Alessandri
Secretary

So ordered,

Cecilia Medina-Quiroga
President

Pablo Saavedra-Alessandri
Secretary