

**ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**OF JULY 1, 2011**

**PROVISIONAL MEASURES  
REGARDING THE UNITED MEXICAN STATES**

**CASE OF ROSENDO CANTÚ *ET AL.***

**HAVING SEEN:**

1. The Judgment of Preliminary Objections, Merits, Reparations, and Costs (hereinafter also “the Judgment”) issued by the Inter-American Court of Human Rights (hereinafter “the Inter-American,” “the Court,” or “the Tribunal”) on August 31, 2010.
2. The Order of the Court of February 2, 2010 (hereinafter “the Order”), wherein, *inter alia*, the Court required the United States of Mexico (hereinafter “the State” or “Mexico”) to adopt, immediately, the necessary measures to protect the life and personal integrity of Valentina Rosendo Cantú (hereinafter also “Mrs. Rosendo Cantú”) and her daughter, Yenis Bernardino Rosendo.
3. The briefs of March 22, May 24, July 22, September 22, and November 22, 2010, and January 24, March 23, and May 23, 2011, and their respective annexes, wherein the State submitted its reports on the implementation of the provisional measures ordered by the Court in this case.
4. The briefs of April 30, June 16, August 10, October 19, December 1 and 15, 2010, and February 10, April 14, and June 9 and 23, 2011, and their respective annexes, wherein the representatives of the beneficiaries (hereinafter “the representatives”) submitted information requested by the Court, their observations to the reports of the State and additional information on newly alleged facts.
5. The communications of June 24 and August 25, 2010, and March 25, May 17, and June 28, 2011, among others, and their respective annexes, wherein the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission” or “the Commission”) submitted their observations to the reports of the State and the briefs of the representatives.
6. The notes of March 29, June 2 and 18, July 27, October 5, December 1 and 3, 2010, and January 27, March 30, and May 26, 2011, among others, wherein the Secretariat of the Inter-American Court (hereinafter also “the Secretariat”), following instructions from the President of the Court: a) requested the parties to present their observations to the information presented by the State; b) required the representatives to respond to the specific request for information and c) made clarifications regarding the new facts regarding the threats reported by the representatives.

## CONSIDERING THAT:

1. Mexico is a State Party to the American Convention since March 24, 1981, and, according to Article 62 of the Convention, recognized the contentious jurisdiction of the Court on December 16, 1998.

2. Article 63(2) of the American Convention provides that, “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under its consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.” This provision is also regulated by Article 27 of the Rules of Procedure of the Court.<sup>1</sup>

3. The regulation established in Article 63(2) of the Convention confers an obligatory character to the adoption, on the part of the State, of the provisional measures that this Tribunal orders, so that according to the basic principle of the law of international responsibility of the State, supported by international jurisprudence, the States must comply with their obligations under the Convention in good faith (*pacta sunt servanda*).<sup>2</sup>

4. Under International Human Rights law, provisional measures are not only precautionary, in the sense of preserving a juridical situation; they are also safeguards inasmuch as they protect human rights, in that they seek to prevent irreparable harm to persons. The measures are applied when the requisite basic conditions of extreme gravity and urgency are present and when necessary to prevent irreparable harm to persons. In this manner, provisional measures become a true jurisdictional guarantee that is preventive in nature.<sup>3</sup>

### a) *Assessment of the risk*

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<sup>1</sup> Court Rules of Procedure approved in the LXXXV Regular Period of Sessions, held on November 16 to 18, 2009.

<sup>2</sup> Cf. *Matter of James et al.* Provisional Measures regarding Trinidad and Tobago. Order of the Inter-American Court of Human Rights of June 14, 1998, Considering Clause 6; *Matter of The Communities of Jiguamiandó and Curbaradó.* Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of June 7, 2011, Considering Clause 4. *Matter of The Communities of Pueblo Indígena de Kankuamo.* Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of June 7, 2011, Considering Clause 4.

<sup>3</sup> Cf. *Caso of “La Nación” Newspaper.* Provisional Measures regarding Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001, Considering Clause 4; *Matter of The Communities of Jiguamiandó and Curbaradó,* *supra* note 2, Considering Clause 5. *Matter of The Communities of Pueblo Indígena de Kankuamo,* *supra* note 2, Considering Clause 5.

5. The State reported that on March 8, 2010, a meeting was held between the representatives of the beneficiaries and the authorities involved in the present case, in which Mexico accepted the offer made by the representatives to have the risk assessment carried out by Peace Brigades International of Mexico (hereinafter “Peace Brigades”) or by the United Nation’s Office of the High Commissioner of Human Rights in Mexico (hereinafter “Office in Mexico of the High Commissioner). It reported that Peace Brigades expressed that it would be able to carry out risk assessment to the beneficiaries, and that the Office of the High Commissioner in Mexico noted that “it would follow the process of the presentation of the study of the analysis of the risk.” It affirmed that the document drafted by Peace Brigades “is accepted by the State as the appropriate mechanism to comply with the [operative] paragraph of the Order of February 2, 2010.”

6. The representatives indicated that “the intervention of actors with proven experience has been sought, [...] even if it means a process of gradual adoption of appropriate measures for the serious situation at hand.” They said that by having accepted the document prepared by Peace Brigades, the State “identified the existence of a situation of extreme gravity and urgency that is associated with the risk in which the beneficiaries live.”

7. Regarding the persistence of the situation of extreme gravity and urgency and need to avoid irreparable harm, the representatives reported on the specific facts that took place after the adoption of the provisional measures: a) on December 31, 2009, “a person was knocking at the door of [the] home [of Mrs. Rosendo Cantu], asking for her.” One of the brothers opened the door and informed that she was not available “to which the person looking for her, answered that he would return later. Nevertheless, he did not return.” Taking this into consideration, there are “very few people who know [her] address and that her brother[s] can identify all of the persons who visit in order to avoid risks”; b) on January 20, 2010, the father of the beneficiary reported that a woman “[member] of a family from Caxitepec who informally collaborates with the Army in the region [told her] mother [...] that both [the beneficiary] and her father [...] ran a serious risk ‘because they are looking for them to kill them [...] and that the money received for the judgment will not do any good because she will be dead,’” and c) on February 2, 2010 “around 23:30 [Mrs. Rosendo Cantú] received a call to her cellular phone, to which only some [of her representatives] and her family know the number, where an unknown masculine voice asked if she was Mrs. [...] Rosendo Cantu. She answered she was not, but the voice kept insisting, in a threatening tone, [...] until [she] hung up the phone.” They indicated that “the majority of threats and harassments [...] came after the filing of the case before the Court[,and] after August 14, 2009 [the beneficiary] went before the Public Prosecutor’s of the ordinary [civil] forum to expand her ministerial declaration, [when] she identified two soldiers as the aggressors.” They added that the various facts, and particularly, “the kidnapping attempt on her daughter,”<sup>4</sup> have lead to her “currently being accompanied by

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<sup>4</sup> Cfr. *Matter of Rosendo Cantú et al.* Provisional Measures regarding México. Order of the Inter-American Court of Human Rights of February 2, 2010, Having Seen Clause 4 and Considering Clauses 8 and 12.

Peace Brigades International and [that] she change her address and her routine.” They concluded that “the absence of new facts to report [...] does not comport with the deactivation of the risk [...], but rather that measures for protection have been adopted by their own means.” Moreover, due to the facts suffered, and upon having abandoned her community, Mrs. Rosendo Cantú “does not have a social support network.”

8. In regard to the request of the Court to provide clarification regarding the telling of specific facts that may have occurred against the beneficiary, the representatives noted that: a) on February 13, 2009, Mrs. Rosendo Cantú informed those accompanying her that during the first months of that year, “she would frequently and unusually see two people in the places and addresses where [she] frequented,” and she was able to recognize one of those persons. On that same day, “during her travel to work, the man she identified from her community, attempted to come too close to her, upon which she felt fear and hurried her pace and entered a store to lose him. [...] Then, she did not see either of these two men again,” and b) on October 12, 2009, upon leaving the house where she worked, she realized that a man was on the front sidewalk watching her home, subsequently, she remained at a store and the person remained watching her. As she was scared, she returned to the home where she worked and, then again, when she went towards her home, she saw the same man that had been watching her. Because she was scared, she returned to her workplace and requested that her cousin go with her, and upon exiting the man continued outside and began taking pictures with his cell phone. On October 13, 2009, upon leaving the other home where she worked, the beneficiary saw the same man watching her and taking her picture with his phone. Mrs. Rosendo Cantú filed a complaint of the facts on November 17, 2009.

9. The Commission noted that the assessment of the risk “was carried out by an institution that has provided accompaniment to Mrs. Rosendo Cantu and that this is a result of the cooperation and coordination between the State and the representatives of the beneficiaries.”

10. In accordance with its jurisdiction, in the framework of the provisional measures, the Court must consider only the arguments that relate strictly and directly with extreme gravity, urgency, and the necessity to avoid irreparable damage to persons. In this way, in order to decide whether to maintain the provisional measures in force, the Tribunal must analyze if the situation of extreme gravity and urgency that led to the adoption of the measures still exists, or if new circumstances of extreme gravity and urgency merit their maintenance. Any other issue can only be heard by the Court as a contentious case.<sup>5</sup>

11. Maintaining the measures of protection requires an assessment by the Court of the persistence of the situation of extreme gravity and urgency to avoid irreparable damage, which gave origin to the measures,<sup>6</sup> on the basis of the evidentiary information.<sup>7</sup> From

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<sup>5</sup> Cf. *Matter of James et al.* Provisional Measures regarding Trinidad and Tobago. Order of the Court of August 29, 1998, Considering Clause 6; *Matter of The Communities of Jiguamiandó and Curbaradó*, *supra* note 2, Considering Clause 6. *Matter of The Communities of Pueblo Indígena de Kankuamo*, *supra* note 2, Considering Clause 6.

<sup>6</sup> Cf. *Matter of Kankuamo Indigenous Community*. Provisional Measures regarding Colombia. Order

there, the party who seeks the continuance of the measures must provide evidence of the reasons to do so.<sup>8</sup>

12. The Court ordered the adoption of the provisional measures in favor of Mrs. Rosendo Cantú and her daughter given that their lives and personal integrity were threatened and in grave risk, as a consequence of being followed, the photographs taken, and the attempt to deprive her daughter of her liberty mentioned in the prior Order.<sup>9</sup> In the analysis of the continuance of the risk, the Court should adhere exclusively to the facts related to the adoption of these provisional measures or new circumstances that require they be maintained. Therefore, it will not refer to or analyze any situation related to the facts regarding the provisional measures adopted in the *case of Fernández Ortega et al.* (*infra* Considering clause 13 and 30), nor to the references of the alleged risk suffered by the family members of the beneficiaries in the present provisional measures (*infra* Considering clause 18), who are not beneficiaries in this case. Since the adoption of the measures to the present, new facts have come about that allegedly could compromise the security of the beneficiaries (*supra* Considering clause 7), those of who have had to adopt, on their own, specific measures of protection, as well as accompaniment by members of the Peace Brigades,<sup>10</sup> keeping the new address a secret, and changing their daily routine. These circumstances were confirmed in the report on the risk issued by Peace Brigades.

13. Likewise, the Court appreciates the willingness of the State to accept the risk assessment issued by Peace Brigades as a mechanism to comply with operative paragraph 2 of the Order of February 2, 2010 (*supra* Considering clause 5), wherein the Court requested that Mexico, among other things, present a report wherein it identifies and establishes the

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of the Inter-American Court of Human Rights of April 3, 2009, Considering Clause 7; *Case of Eloisa Barrios et al.* Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of November 25, 2010, Considering Clause 4, and *Matter of A. J. et al.* Provisional Measures regarding Haití. Order of the Inter-American Court of Human Rights of September 21, 2009, Considering Clause 11.

<sup>7</sup> Cf. *Case of Carpio Nicolle et al.* Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, Considering Clause 15; *Matter of Monagas Judicial Confinement Center ("La Pica")*; *Matter of Yare I and Yare II Capital Region Penitentiary Center Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison)*, and *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center*, Provisional Measures regarding Bolivarian Republic of Venezuela. Order of the Inter-American Court of Human Rights of November 24, 2009, Considering clause 4, and *Matter of A. J. et al.*, *supra* note 6, Considering Clause 11.

<sup>8</sup> Cf. *Case of Carpio Nicolle et al.*, *supra* note 7, Considering Clause 18. *Matter of Ramírez Hinojosa et al.* Provisional Measures regarding the Republic of Perú. Order of the Inter-American Court of Human Rights of February 3, 2010, Considering Clause 30. *Matter of Caballero-Delgado and Santana.* Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of February 3, 2010, Considering Clause 12.

<sup>9</sup> Cf. *Matter of Rosendo Cantú et al.*, *supra* note 4, Considering clauses 8 and 12.

<sup>10</sup> Peace Brigades noted in its report that since May of 2009, it took on the direct accompaniment of the beneficiaries, due to "the harassment and attacks" suffered, wherein it includes, among others, the physical presence of the international volunteers and their daily functions, regular visits to the home, and regular meetings with national authorities.

risk that looms over the beneficiaries of the present provisional measures. The mentioned report determined that the beneficiaries “are faced with a high, imminent, and continuous risk[.] The history of her being watched and the direct aggression towards her and her daughter, the pattern of similar aggressions towards Inés Fernández Ortega and her family members, [...] and the threats to other persons directly related to the case, demonstrate the extreme gravity in the situation. [. The] situation [is] urgent, for which the full implementation of the [proposed] measures is deemed necessary. [Likewise, her] family members are also in a situation of high risk.”

14. Although facts of a grave nature of not been recently reported, the Court considers that the risk to the detriment of the beneficiaries persists in this case. The Court considers that the facts that gave rise to the provisional measures occurred in a recent temporal framework; that the measures of protection offered by the State and the measures adopted by the beneficiaries themselves could have influenced the absence of recent facts of extreme gravity and urgency, and that the report of the risk presented by Peace Brigades was accepted by the State. Consequently, the Court considers that the situation of risk to the detriment of the beneficiaries, at the moment, remains in this case.

*b. Measures of protection in favor of the beneficiaries*

15. The State reported that “[on] March 8, 2010 [...] it presented the representative[s] with three sets of NEXTEL radio phones[,] requested [by the beneficiaries].” It added that on May 5, 2010, the representatives required the State to install a satellite telephone at the home of the family members of the beneficiaries. In this regard, it noted that, although the family members of Mrs. Rosendo Cantú are not beneficiaries of the present provisional measures, the State “in good faith [...] is carrying out the necessary administrative procedures to implement the requested measure.” It stated that on August 31, 2010, it signed a contract with a telephone company for its services, despite there having been some administrative difficulties with the company.” Given the foregoing, “a [...] new contract was requested,” where the possibility existed “of acquiring other sets that could better satisfy the requirements [...] of the provisional measures.” It subsequently reported that new steps have been taken in this regard and noted that “once there is a result, it will inform the Court on the matter.”

16. Regarding the other measures of protection, it indicated that on July 15, 2010, it presented the representatives with a “preliminary work plan,” wherein it included the proposals of the State regarding the implementation of the recommendations issued by Peace Brigades in its risk assessment of May 21, 2010. On September 13, 2010, it presented the representatives with a work plan for the comprehensive implementation of measures, so that the representatives could submit their comments in order to begin the implementation. On March 23, 2011, it reported that, once the observations of the representatives were received, Mexico began taking the pertinent steps, in such a way that: a) on February 8, 2011, the beneficiaries were provided with specific security equipment for their home; b) the representatives are in contact with a public employee of the Unit for the Promotion and Defense of Human Rights, who—at any time—responds to situations related to the security of the beneficiaries and implements specific actions of to coordinate with agencies to attend to the complaints; c) a “guarantee letter” was provided to the

beneficiaries, signed by the head of the Unit for the Promotion and Defense of Human Rights, which establishes the special situation of protection of the beneficiaries, and which allows for an immediate response of any security body if they encounter risk; d) a “guarantee letter” was provided to the beneficiaries, signed by the head of the Unit for the Promotion and Defense of Human Rights, addressed to the authorities at a federal, state, and municipal level, with a message of support recognizing the responsibility of the State to protect the integrity of Mrs. Rosendo Cantú, and e) together with the Ministry of Federal Public Security, efforts were made to provide the beneficiaries with a “Workshop on Stalking Detection and Response Actions to any harassment” and a “Course on Self Defense,” in the terms requested by the representatives, without receiving a response from the mentioned agency. In regard to the measures pending implementation, “it considers that due to the change in circumstances both regarding the initiation of efforts by State authorities of Guerrero as well as the initiation of the execution of the [J]udgement [...], it is necessary to establish, in consensus with the beneficiaries, a new path for the care of the provisional measures, to which [...] it will summon [...] a work meeting [with the representatives].” In regard to the measures that have not yet been agreed upon by the representatives, it expressed “its commitment and willingness to continue with the pertinent negotiations and to promptly reach an agreement regarding the handling of the matter.”

17. The representatives noted that the State, upon taking on the recommendations proposed by Peace Brigades in its report, this would “allow for [...] the creation of a comprehensive security plan that in a preventive manner mitigates the gravity and urgency of the risk and creates the conditions necessary to avoid, as little as possible, incidents associated with the security of the beneficiaries and their family.” They indicated that “the proposals of the State do not address the pressing needs facing the beneficiaries, according to the assessment prepared by Peace Brigades.” To that extent, the creation of security conditions continued to fall on the beneficiaries and their representatives. They indicated that the state “has failed to report [...] that the implementation of those measures not covered by its proposal remains pending[, as well as] the appropriateness of those, which being covered, do not meet the specifications and the purpose of the evaluation of risk undertaken.” They confirmed that “in terms of the security infrastructure for the home of the beneficiaries [...] the State presented [specific] equipment [...] on February 8, 2011.” They added that several of the measures proposed by the State have not been accepted, without there being a counteroffer by the State representatives to date.

18. Likewise, they confirmed that the State gave the requested cellular phones on March 8, 2009, one of which was stolen from the sister of Mrs. Rosendo Cantú, to which they requested “that the stolen radio phone be returned and the necessary change of number be done for the two phones that continue to work, in order to ensure the security of the beneficiaries.” They indicated that the State had not complied with the request to install a satellite telephone in the home of the family members of the beneficiary and that “for her, the isolation of her father and mother in her native community, increases the risk and founded fear. [One] of the satellite telephones would allow Mrs. Rosendo Cantú to monitor the situation regarding the security of her parents and family.” They specified that “her family, [although they are not beneficiaries of the present measures,] have suffered threats and intimidations, which are intended to impact the search for justice that [Mrs.] Rosendo Cantu has lived for a duration of [...] eight years. They noted that the conduct of the State

in regard to the installation of the satellite telephone demonstrates reluctance to comply with this measure

19. They concluded that the actions that to date the State has carried out “are administrative actions that consist of the submission of two official letters, and [...] it has provided specific infrastructure, which is only part of that requested. [Nevertheless,] it has not implemented actions that remove the administrative or financial obstacles that would allow for prompt specific actions or to pay for the expenses to guarantee the security of the beneficiaries. Based on the foregoing, they anticipate a summons by the State for a follow-up meeting, recalling that the last meeting was carried out in July 2010.”

20. The Commission expressed “the need for the State to adopt the necessary measures to protect the life and integrity of the beneficiaries as promptly as possible and the importance of the participation of representatives in the design of its implementation.” It added that “the design of the sufficient and appropriate provisional measures for [her] protection [...] should not be subject to obtaining resources from the Mexican State, and [should be implemented] as soon as possible.” It valued the implementation of agreements between the parties and that the State “is responding to the requests of [the representatives],” waiting “for the limitations posed to be overcome” regarding those measures for which no agreements have been reached. It concluded that the “procederes carried out by the [State] can be of use, but do not constitute the most substantive or specific measures required for the effective protection of the beneficiaries.”

21. In regard to the measures of protection adopted to date, first, the Court values that State provided equipment for the protection of the beneficiaries at their home, as well as the provision of three phones requested for use by the beneficiaries and the sister of Mrs. Rosendo Cantú, and its willingness to replace the stolen phone. Nevertheless, the Court does not have sufficient information on the progress made regarding the delivery of the stolen phone and the change of number requested by the representatives, to which it asks the State to submit up to date information on this point.

22. As for the satellite phone to be installed in the home of the parents of Mrs. Rosendo Cantú, the Court appreciates the willingness of the State to provide this measure in order for the beneficiary to monitor the situation of her family in the community where they reside, as requested by the representatives, notwithstanding that it notes that the family members of Mrs. Rosendo Cantú are not beneficiaries of the provisional measures, to which the Court is not able to analyze the measure (*supra* Considering clause 12).

23. For the measures of protection related to the proposal made by Peace Brigades in its report, the Court will refer, first, to those which have already been implemented by agreement between the parties, second, to those where there has been an agreement by the parties but have not yet been implemented, third, to the measures where there is no agreement between the parties, and finally, to the specific measures that, although requested, are not related to the provisional measures.

24. On the first point, the Court notes that the representatives and the State have come to an agreement and have implemented the following measures of protection, in addition to the those regarding the delivery of the radio equipment and the protection of the home: a) delivery of security infrastructure for the home of the beneficiaries (*supra* Considering clause 21); b) the provision of the contact information of a public employee to the beneficiaries of the Unit for the Promotion and Defense of Human Rights of the Ministry of the Interior; c) delivery of a “guarantee letter” to the beneficiaries, signed by the head of the Unit for the Promotion and Defense of Human Rights, which establishes the special situation of protection of the beneficiaries, and which allows for an immediate response of any security body if they encounter risk; d) delivery of a “guarantee letter,” signed by the head of the Unit for the Promotion and Defense of Human Rights, addressed to the authorities at a federal, state, and municipal level, with a message of support recognizing the responsibility of the State to protect the integrity of the beneficiaries, and e) efforts to assure the participation of the beneficiary in a “Workshop on Stalking Detection and Response Actions to any harassment” and a “Course on Self Defense.” The Court appreciates the steps taken by Mexico to reach a compromise with the representatives that has allowed for the implementation of these measures and requests that the State submit an update on the progress of the measure referred to in paragraph e) of this paragraph.

25. Second, the Court notes from that reported by the parties that there are certain measures of protection where there is no apparent controversy between the parties, but the State has not reported on implementation of these measures. In this regard, the Court notes that the representatives do not specify all of the measures, but rather they indicate “among them, for example, [...] the support of the Ministry of Education for the security of Yenís Bernardino at the school, and the establishment of bi-monthly meetings to assess compliance with the provisional measures.” Consequently, the Court asked the representatives to specify the specific measures proposed by the State that have been accepted without question by the beneficiaries, and also requires the State to submit specific information on this point.

26. As regards the other measures of protection on which the parties have not reached an agreement, the Court recalls that in its previous Order it determined that the State should take the steps necessary to ensure that the provisional measures are planned and implemented with the participation of the beneficiaries or their representatives, so that the measures are provided for in a diligent and effective manner. The Court emphasized that the positive involvement of the State and particularly of the representatives is essential to coordinate the implementation of provisional measures in this case. Consequently, the Court considers it necessary that the process for determining these protective measures continue to be performed in joint form, constructively and promptly, and with the constant communication and agreement between the parties. In this regard, the Court notes that the parties agree on the need to hold meetings in order to specify the pertinent actions to continue to implement appropriate security measures, given the current circumstances, and therefore calls on the State and representatives to come together to promptly carry out the relevant meetings, with the participation of all authorities and agencies involved, and to submit to the Court an updated reported on the progress that results therein.

27. Lastly, the Court considers that specific measures of protection have been proposed that are not directly related to the adoption of urgent and effective provisional measures that guarantee the protection of the integrity or life of the beneficiaries, but rather that involve measures related to the general situation suffered by Mrs. Rosendo Cantu and her daughter, as a consequence of the facts related to the contentious case and that, in large part, concern the measures of reparation ordered in the Judgment; or, where applicable, involve measures in favor of third parties that are not beneficiaries of these provisional measures. For this reason, the Court will not rule on the following measures of protection: a) the provision of a computer and high-speed internet connection for the home of the beneficiaries and computer and internet-use training; b) delivery of a photographic camera; c) facilitate the registration of the daughter in a study center for her to continue her school year, cover expenses related to her education, and fund a babysitter or a trustworthy person to care for the child when Mrs. Rosendo Cantú is not around; d) permanent lighting system on the outside of Mrs. Rosendo Cantú's parents home, and a monitoring system camera and security plates in the her sister's home, e) cover of the costs of psychological care until the beneficiary no longer wants such services; f) coverage of expenses related to professional training that will enable her to have stable employment while she manages the situation of exile she is in; g) coverage of the beneficiaries travel expenses for trips made to visit their relatives and members of their organization, and h) accountability of the military operations in the Mountains of Costa Chica de Guerrero.

c) *Investigation of the facts that led to the provisional measures*

28. In regard to the investigation of the threats and harassment experienced by the beneficiaries, the State noted that in the framework of the preliminary investigation GRO/SC/125/2009, a site-visit was carried out at the place where the events occurred that was turned over to the Ministerial Police of the State for the investigation of what occurred, nevertheless, “[i]n order to continue with the investigations], it is necessary that the injured parties [...] ratify and expand their statements,” not appearing when summoned. In response to the representatives, Mexico noted that it is not its intention to apply, to her detriment, any measures, enshrined in domestic legislation, to pressure her to appear; on the contrary, “it is willing to offer the necessary legal guarantees to adapt the proceedings to any special needs” and preserve her security when she decides to go before the authorities. Notwithstanding the foregoing, it reiterated that as this regards crimes challenged on a complaint, the participation of the victims is essential to continue with the integration of the investigations. Subsequently, it reported that the Attorney General of Guerrero “stated that the all steps to continue the preliminary investigation have been exhausted [...] without the appearance of the beneficiaries, to which it reiterates its willingness that the ministerial authorities be moved to where the [beneficiaries] are to seek the expansion of their statements.” Consequently, Mexico “will await, within the limits permitted by law, the necessary time for the [beneficiaries] to provide the information they already have about the events that gave rise to the provisional measures.” Finally, it required the psychologist who has carried out the psychological studies on Mrs. Rosendo Cantu to go before the Attorney General of the Republic to ratify her expert report made, in order for “the corresponding legal effects to follow-suit.” Regarding the investigation of events surrounding the rape of Mrs. Rosendo Cantú, the State indicated that it is the subject of the

Judgment delivered by the Court in this case, and therefore "it will be processed as part of the monitoring of compliance of [it]."

29. The representatives reported that the identification of those responsible cannot depend solely on a sketch or of the direct recognition of the victim, but rather that the investigation can move forward based on the extensive investigations carried out by the ministerial police. Nevertheless, "the State has not shown that it has developed a line of investigation to establish the truth of what happened. By contrast, it only lists two procedures taken and seems to depend on the progress of the investigation only on the initiative of the victim." They indicated that the beneficiary is in a situation of PTSD and the psychologist that is treating her recommends "that she avoid revictimizing events or meetings, [including] to appear before authorities in the procurement and administration of justice." That is why, even though Mrs. Rosendo Cantu is "entirely willing to appear before the authorities and to help clarify the facts," such appearance should "not to be required" if her security and psycho-emotional integrity do not allow for it. They noted that "the Mexican constitutional framework establishes that the security and support of the victims is a right, and as such possible coercitive measures that can be applied to the detriment of the [beneficiary] are incomprehensible." Subsequently, they reported that "the work of accompaniment carried out for [Mrs. Rosendo Cantú] have confirmed that both beneficiaries do not have any information to contribute to the investigation. Therefore, it is unnecessary that they go before the prosecuting authority." On the other hand, they stated that "the forwarding of the investigation to the civil justice system regarding the rape by members of the Army against [Mrs.] Rosendo Cantú is essential to add to her security."

30. The Commission noted that there is not enough information regarding the possible link between the case of Mrs. Rosendo Cantu before the Court, the threats against her that led to the provisional measures, and the case before the Court of Mrs. Fernández Ortega, and the threats that she and her defenders suffer, without sufficient information regarding "whether the investigations of the preliminary investigation are linked with the investigation into the facts of the case or regarding possible lines of investigation." It also emphasized the importance of investigating the threats made in a comprehensive manner, considering that "the implementation of [the] measures of protection, together with the investigation to determine the source of the risk in which the beneficiaries are in, and the effective punishment, are crucial factors to prevent the occurrence of more irreparable harm." It stressed that "the impunity in which the case remains [regarding the rape of Mr. Rosendo Cantu], including the failure to forward the case to the ordinary jurisdiction, is one of the elements that has not allowed for substantial progress regarding the elimination of risk factors for the beneficiaries [...] through the administration of justice." It affirmed that "it is not clear from the information provided by the State whether it is necessary that the beneficiaries have to go to ratify the expert report of the psychologist or whether it is enough that said professional ratifies it."

31. The Court first notes that the representatives and the Commission refer in this aspect both to the investigation of the events that led to the adoption of provisional measures, as well as to the investigation of the facts related to the case on the merits resolved by the Court through the Judgment on preliminary objections, merits, reparations and costs, issued

on August 31, 2010 in the *case of Rosendo Cantú et al.* In this regard, and notwithstanding any relationship that might exist between the two procedures, the analysis of the effectiveness of the investigation carried out domestically on the facts related to this Judgment, as well as the intervention of the ordinary criminal courts, should be done under the monitoring of compliance with the Judgment.

32. In relation to the obligation to investigate the facts in the complaint that resulted in the present measures, the Court recalls that Article 1(1) of the American Convention establishes that the State has the general obligation to respect the rights and liberties recognized therein and to guarantee their free and full exercise to each person subject to its jurisdiction. As a consequence, independent of the existence of specific provisional measures, the State is especially obligated to guarantee the rights of the persons in situations of risk and must promote the necessary investigations in order to clarify the facts, and where necessary, punish those responsible.<sup>11</sup> Nevertheless, this Court has noted that the analysis of the effectiveness of investigations and proceedings concerning the facts that motivate the provisional measures should be done in the examination of the merits of the case.<sup>12</sup>

33. The Court notes that in this case, the State, although it has only reported on some procedures taken in connection with the investigation of the allegations, confirmed that it is willing to provide the legal guarantees necessary to adapt the procedure to the special needs of the beneficiaries in order for them to appear before a court to continue with the respective proceeding (*supra* Considering clause 28). Moreover, the representatives initially demonstrated the “broad willingness of [Mrs. Rosendo Cantú] to appear before the authorities to contribute to the clarification of the facts.” In this manner, the Court considers it convenient for the parties to agree on appropriate mechanisms for a possible statement of the beneficiaries that does not imply any damage to the emotional or psychological state, which could involve the taking of a statement by female personnel of the public prosecutor’s office, in a trustworthy environment for the beneficiaries, in a tranquil environment and with psychological assistance by the professionals that usually accompany her.

## **THEREFORE:**

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<sup>11</sup> Cf. *Case of Velásquez Rodríguez*. Provisional Measures regarding Honduras. Order of the Inter-American Court of Human Rights of January 15, 1988, Considering Clause 3; *Matter of Caballero Delgado and Santana*. Provisional Measures regarding the Republic of Colombia. Order of the Inter-American Court of Human Rights of November 25, 2010, Considering Clause 21, and *Matter of the Mapiripán Massacre*. Provisional Measures regarding the Republic of Colombia. Order of the Inter-American Court of Human Rights of March 1, 2011, Considering Clause 32.

<sup>12</sup> Cf. *Matter of Pilar Noriega García et al.* Provisional Measures regarding México. Order of the Inter-American Court of Human Rights of February 6, 2008, Considering Clause 24; *Matter of Giraldo Cardona et al.* Provisional Measures regarding the Republic Colombia. Order of the Inter-American Court of Human Rights of February 22, 2011, Considering Clause 42, and *Matter of Caballero Delgado and Santana*, *supra* note 11, Considering Clause 24.

## **THE INTER-AMERICAN COURT OF HUMAN RIGHTS,**

In use of the powers conferred upon it in Article 63(2) of the American Convention on Human Rights and Article 27 of the Rules of the Tribunal,

### **DECIDES TO:**

1. Require the State to continue adopting the measures that may be necessary to protect the life and personal integrity of Valentina Rosendo Cantú and Yenis Bernardino Rosendo, taking into account the situation and specific circumstances of the case.
2. Require the State to continue reporting to the Inter-American Court of Human Rights, every two months, as of legal notice of this Order, on the provisional measures adopted in conformity with this decision.
3. Request the representatives of the beneficiaries and the Inter-American Commission on Human Rights to present their observations in a period of two and four weeks, respectively, as of legal notice of the reports of the State noted in operative paragraph 2. Moreover, the representatives should respond to the request for information noted in Considering clause 25 of this Order.
4. Request the Secretariat to provide legal notice of the present Order to the United Mexican States, the Inter-American Commission on Human Rights, and the representatives of the beneficiaries.

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, which accompany this Order.

Diego García-Sayán  
President

Leonardo A. Franco

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Eduardo Vio Grossi

Pablo Saavedra Alessandri  
Secretariat

So ordered,

Diego García-Sayán  
President

Pablo Saavedra Alessandri  
Secretariat

## DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

### PROVISIONAL MEASURES REGARDING THE UNITED MEXICAN STATES CASE OF ROSENDO CANTÚ *ET AL.*

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*,"<sup>1</sup> 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*,"<sup>2</sup> 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.

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<sup>1</sup> Article 38(1)(d) of the Statute of the International Court of Justice.

<sup>2</sup> Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

## 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.

Basically, it affirms that these measures are ordered under the contentious jurisdiction of the Court.<sup>3</sup> 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:

*"the 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,<sup>4</sup> a meaning of the term "to know" is to *"[h]ear an issue with the legitimate power to do*

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<sup>3</sup> 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."

<sup>4</sup> Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

so."<sup>5</sup> The example provided is "[t] he judge hearing the case." <sup>6</sup> 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.<sup>7</sup> While among the meanings of the term "matter" are the "[m]aterial concerned" and "the case,"<sup>8</sup> in relation to the latter it states that "[m]aterial concerned or proposed to consult someone and ask for their opinion" and "[a]ny matters investigated by the police or matters that are settled at trial before the courts."<sup>9</sup>

But also, it can be said that, according to the context of the terms,<sup>10</sup> 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.<sup>11</sup> this patten 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 duties<sup>12</sup> and, in the other two, in reference to contentious jurisdiction.<sup>13</sup> Furthermore, in a fourth provision, the term "case" is used.<sup>14</sup> And, in the

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

<sup>6</sup> *Idem.*

<sup>7</sup> *Idem.*

<sup>8</sup> *Idem.*

<sup>9</sup> *Idem.*

<sup>10</sup> Art. 31(1) quoted above.

<sup>11</sup> 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).

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

<sup>13</sup> 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).

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

Rules of Court, the same thing can be seen because while the word "*case*" is used in 27 articles,<sup>15</sup> "*matter*" is used only in the provision concerning the authority of the Court to order provisional measures at the request of the Commission,<sup>16</sup> 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 reiterating<sup>17</sup> 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 that the words "*matter*" and "*case*" are, with regard to the provisional measures, synonyms, but also the States themselves in the Statute of the Court<sup>18</sup> and the latter even stated it in its Rules of Procedures, which it also approved.<sup>19</sup>

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.

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<sup>15</sup> 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)).

<sup>16</sup> Art. 27(2) of the Rules of Procedure.

<sup>17</sup> Art. 27(1) of the Rules of Procedure.

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

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

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."* <sup>20</sup>

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,*" <sup>21</sup> 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.

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

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<sup>20</sup> 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.

<sup>21</sup> 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.*"

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,<sup>22</sup> 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.<sup>23</sup>

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*

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<sup>22</sup> 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.*"

<sup>23</sup> *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 [...]."*

*party's right or freedom that was violated be guaranteed," a judgment that State Parties to the Convention "agree to comply with,"<sup>24</sup> and, failing to do so, the Court, after receiving "the relevant information" obtained by monitoring compliance,<sup>25</sup> shall include it in its annual report to the OAS General Assembly, requesting the relevant "recommendations."<sup>26</sup>*

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,<sup>27</sup> it can no longer be altered, and it is also definitive for the Court; therefore, it can not 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*"<sup>28</sup> 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.<sup>29</sup> And, secondly, submit an annual report to the OAS General Assembly on the States that have not complied with their judgments.<sup>30</sup> At the same time, and in this case, the Statute of the Court refers only to

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<sup>24</sup> Art. 68(1) of the Convention.

<sup>25</sup> Art. 69(4) of the Rules of Procedure.

<sup>26</sup> Art. 65 of the Convention.

<sup>27</sup> 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.*"

<sup>28</sup> 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.*"

<sup>29</sup> Art. 67 of the Convention.

<sup>30</sup> Art. 65 of the Convention.

the aforementioned OAS General Assembly report,<sup>31</sup> and in turn, the Rules of Procedure of the Court govern the judgment on reparations and costs,<sup>32</sup> recourse for interpretation,<sup>33</sup> the monitoring of compliance with judgments and other decisions made by the Court,<sup>34</sup> and rectify any obvious mistakes, clerical errors or calculation errors.<sup>35</sup> 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 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 Treaty<sup>36</sup> and thus such powers must be understood to be granted. In contrast, these powers are expressly awarded the Court, and

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<sup>31</sup> Art. 30 of the Statute of the Court.

<sup>32</sup> Art.66 of the Rules of Procedure of the Court.

<sup>33</sup> Art.68 of the Rules of Procedure of the Court.

<sup>34</sup> Art.69 of the Rules of Procedure of the Court.

<sup>35</sup> Art.76 of the Rules of Procedure of the Court.

<sup>36</sup> 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."

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,<sup>37</sup> and in the Statute of the Court,<sup>38</sup> the monitoring of compliance with judgments<sup>39</sup> was established in the Rules of Procedure and thus a procedural institution.<sup>40</sup>

Nor would it be appropriate to invoke the principle *pro homine*, at least in the way it is enshrined in the Convention,<sup>41</sup> 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 Court<sup>42</sup> and, 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

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<sup>37</sup> Arts. 65 and 68 of the Convention.

<sup>38</sup> Art. 30 of the Statute of the Court

<sup>39</sup> Art. 60 of the Convention.

<sup>40</sup> 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.

<sup>41</sup> Art. 29 of the Convention.

<sup>42</sup> 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 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."

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*."<sup>43</sup>

### **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.*"

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*

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

*treaty obligations to protect,"*<sup>44</sup> 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.*"<sup>45</sup>

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,*"<sup>46</sup> reasonably requests it.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>44</sup> *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."*

<sup>45</sup> Art. 1(1) of the Convention.

<sup>46</sup> 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 THE UNITED MEXICAN STATES  
CASE OF ROSENDO CANTÚ *ET AL.***

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 Rights<sup>1</sup> (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.<sup>2</sup> Similarly, it stated that the European Convention is a living instrument, which must be interpreted in the light of present-day conditions.<sup>3</sup> 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.<sup>4</sup>

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

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<sup>1</sup> Agreement to Protected Human Rights and Fundamental Freedoms.

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

<sup>3</sup> *Mamatkulov and Askarov. v. Turkey*, *supra* note 2, para. 121.

<sup>4</sup> *Wemhoff v. Germany*. Judgment of June 27, 1968, para. 8.

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.<sup>5</sup> 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 [...]."<sup>6</sup>

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

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.

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

<sup>6</sup> “*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 [...].*”

<sup>7</sup> *Mamatkulov and Askarov. v. Turkey*, *supra* note 2, para. 128.

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,<sup>8</sup> such that the interpretation does not lead in any way to weaken the system of protection set forth the Convention.<sup>9</sup> The "ordinary

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<sup>8</sup> 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.

<sup>9</sup> 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.

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 belong<sup>10</sup> 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."<sup>11</sup> 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.<sup>12</sup>

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.'" <sup>13</sup>

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 can not 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;

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<sup>10</sup> 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

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

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

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

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;

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.<sup>14</sup>

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."<sup>15</sup>

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

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<sup>14</sup> 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.

<sup>15</sup> *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.

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.<sup>16</sup>

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,

[...] 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

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

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.<sup>17</sup>

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 [...]."<sup>18</sup>

### ***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

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

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

measures for the first time in three cases brought before it.<sup>19</sup> 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:

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.<sup>20</sup>

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.<sup>21</sup>

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<sup>19</sup> 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 that in the State witnesses who appeared before the Court were being killed.

<sup>20</sup> *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.

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."<sup>22</sup> 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."<sup>23</sup> Additionally, in several cases where a

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

<sup>23</sup> 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 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*

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.<sup>24</sup> All in accordance with the precautionary and protective nature of provisional measures because the American Convention provides only "factual information"<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> 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 been 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 Judgement 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

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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.

<sup>24</sup> 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 Masacre. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of November 19, 2009, operative paragraph one.

<sup>25</sup> Cf. García Ramírez, Sergio, *The Inter-American Court of Human Rights*, Mexico, Porrúa, 2007, p. 68.

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

<sup>27</sup> 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.

declares, leaving no doubt, thus, that in that context the Court has perfect and strong jurisdiction in matters of provisional measures.

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."<sup>28</sup> 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."<sup>29</sup> 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 Mister 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,

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

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

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.<sup>30</sup>

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.<sup>31</sup> This is the first 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.<sup>32</sup>

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<sup>30</sup> *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.

<sup>31</sup> *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 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.

<sup>32</sup> *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.

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."<sup>33</sup> 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.

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."<sup>34</sup>

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<sup>33</sup> 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.

<sup>34</sup> 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

34. Considering the provisional measures largely "determine the effectiveness of the right to individual application at the international level,"<sup>35</sup> 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  
Secretary

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Cantor Rey, Ernesto and Rey Anaya, Ángela, *supra* note 27, p. XVII. XVII.

<sup>35</sup> 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.



## DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

### PROVISIONAL MEASURES REGARDING THE UNITED MEXICAN STATES CASE OF ROSENDO CANTÚ *ET AL.*

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*,"<sup>36</sup> 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*,"<sup>37</sup> 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

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<sup>36</sup> Article 38(1)(d) of the Statute of the International Court of Justice.

<sup>37</sup> Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

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.

Basically, it affirms that these measures are ordered under the contentious jurisdiction of the Court.<sup>38</sup> 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:

*"the 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,<sup>39</sup> a meaning of the term "to know" is to "[h]ear an issue with the legitimate power to do so."<sup>40</sup> The example provided is "[t] he judge hearing the case."<sup>41</sup> **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**

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<sup>38</sup> 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*."

<sup>39</sup> Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

<sup>40</sup> Dictionary of the Spanish Language, Real Academia Española, Twenty-Second Edition, Madrid, Spain, 2001.

<sup>41</sup> *Idem*.

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.<sup>42</sup> While among the meanings of the term "*matter*" are the "*[m]aterial concerned*" and "*the case*,"<sup>43</sup> in relation to the latter it states that "*[m]aterial concerned or proposed to consult someone and ask for their opinion*" and "*[a]ny matters investigated by the police or matters that are settled at trial before the courts*."<sup>44</sup>

But also, it can be said that, according to the context of the terms,<sup>45</sup> 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.<sup>46</sup> 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 duties<sup>47</sup> and, in the other two, in reference to contentious jurisdiction.<sup>48</sup> Furthermore, in a fourth provision, the term "*case*" is used.<sup>49</sup> And, in the Rules of Court, the same thing can be seen because while the word "*case*" is used in 27 articles,<sup>50</sup>

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<sup>42</sup> *Idem.*

<sup>43</sup> *Idem.*

<sup>44</sup> *Idem.*

<sup>45</sup> Art. 31(1) quoted above.

<sup>46</sup> 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).

<sup>47</sup> That may well relate to the Court's advisory role and even administrative matters (Art. 12(2)).

<sup>48</sup> 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).

<sup>49</sup> Annual report that should be issued to the OAS General Assembly (Art. 30).

<sup>50</sup> 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

"matter" is used only in the provision concerning the authority of the Court to order provisional measures at the request of the Commission,<sup>51</sup> 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 reiterating<sup>52</sup> 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 that the words "matter" and "case" are, with regard to the provisional measures, synonyms, but also the States themselves in the Statute of the Court<sup>53</sup> and the latter even stated it in its Rules of Procedures, which it also approved.<sup>54</sup>

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.

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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)).

<sup>51</sup> Art. 27(2) of the Rules of Procedure.

<sup>52</sup> Art. 27(1) of the Rules of Procedure.

<sup>53</sup> Approved by Resolution N° 448, passed by the OAS General Assembly during its ninth session, held in La Paz, Bolivia, October 1979.

<sup>54</sup> Passed by the Court during the LXXXV Ordinary Period of Sessions, held from November 16 to 28, 2009.

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."*<sup>55</sup>

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,*"<sup>56</sup> 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.

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

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<sup>55</sup> 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.

<sup>56</sup> 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 ."*

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,<sup>57</sup> 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.<sup>58</sup>

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<sup>57</sup> 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.*"

<sup>58</sup> *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*

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,*"<sup>59</sup> and, failing to do so, the Court, after receiving "*the relevant information*" obtained by monitoring compliance,<sup>60</sup> shall include it in its annual report to the OAS General Assembly, requesting the relevant "*recommendations.*"<sup>61</sup>

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,<sup>62</sup> it can no longer be altered, and it is also definitive for the Court; therefore, it can not 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

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*witnesses in the domestic proceedings and take all legally prescribed measures for their investigation [...]".*

<sup>59</sup> Art. 68(1) of the Convention.

<sup>60</sup> Art. 69(4) of the Rules of Procedure.

<sup>61</sup> Art. 65 of the Convention.

<sup>62</sup> 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..*"

"provisional"<sup>63</sup> 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.<sup>64</sup> And, secondly, submit an annual report to the OAS General Assembly on the States that have not complied with their judgments.<sup>65</sup> At the same time, and in this case, the Statute of the Court refers only to the aforementioned OAS General Assembly report,<sup>66</sup> and in turn, the Rules of Procedure of the Court govern the judgment on reparations and costs,<sup>67</sup> recourse for interpretation,<sup>68</sup> the monitoring of compliance with judgments and other decisions made by the Court,<sup>69</sup> and rectify any obvious mistakes, clerical errors or calculation errors.<sup>70</sup> 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 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

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<sup>63</sup> 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.*"

<sup>64</sup> Art. 67 of the Convention.

<sup>65</sup> Art. 65 of the Convention.

<sup>66</sup> Art. 30 of the Statute of the Court.

<sup>67</sup> Art.66 of the Rules of Procedure of the Court.

<sup>68</sup> Art.68 of the Rules of Procedure of the Court.

<sup>69</sup> Art.69 of the Rules of Procedure of the Court.

<sup>70</sup> Art.76 of the Rules of Procedure of the Court.

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 Treaty<sup>71</sup> 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,<sup>72</sup> and in the Statute of the Court,<sup>73</sup> the monitoring of compliance with judgments<sup>74</sup> was established in the Rules of Procedure and thus a procedural institution.<sup>75</sup>

Nor would it be appropriate to invoke the principle *pro homine*, at least in the way it is enshrined in the Convention,<sup>76</sup> to justify the adoption of provisional measures after the issuance of the judgment on merits, since, although this principle refers to "*rights*" of the

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<sup>71</sup> 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."

<sup>72</sup> Arts. 65 and 68 of the Convention.

<sup>73</sup> Art. 30 of the Statute of the Court.

<sup>74</sup> Art. 60 of the Convention.

<sup>75</sup> 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.

<sup>76</sup> Art. 29 of the Convention.

persons recognized therein, such measures are conceived as a power of the Court<sup>77</sup> and, 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*."<sup>78</sup>

## **Conclusion.**

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<sup>77</sup> 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 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."

<sup>78</sup> Art. 31(1)(b) of the 1969 Vienna Convention on the Law of Treaties.

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.*"

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,*"<sup>79</sup> 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.*"<sup>80</sup>

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

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<sup>79</sup> *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."*

<sup>80</sup> Art. 1(1) of the Convention.

Commission, in exercising its "*principal role of promoting the observance and defense of human rights*,"<sup>81</sup> reasonably requests it.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>81</sup> 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 THE UNITED MEXICAN STATES  
CASE OF ROSENDO CANTÚ *ET AL.***

35. 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.

36. 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.

37. 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.

38. 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.

## ***II. The European Court of Human Rights and its competence to order provisional measures.***

39. 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 Rights<sup>82</sup> (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.<sup>83</sup> Similarly, it stated that the European Convention is a living instrument, which must be interpreted in the light of present-day conditions.<sup>84</sup> 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.<sup>85</sup>

40. 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.<sup>86</sup> 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

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<sup>82</sup> Agreement to Protected Human Rights and Fundamental Freedoms.

<sup>83</sup> *Mamatkulov and Askarov. v. Turkey*. Judgment of February 4, 2005, para. 101.

<sup>84</sup> *Mamatkulov and Askarov. v. Turkey*, *supra* note 2, para. 121.

<sup>85</sup> *Wemhoff v. Germany*. Judgment of June 27, 1968, para. 8.

<sup>86</sup> *Cruz Varas v. Sweden*. Judgment of 20<sup>th</sup> March 1991, para. 102. It refers to the Commission and the European Court.

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 [...]."<sup>87</sup>

41. 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 breach of provisional measures may constitute a violation of Article 34 of the European Convention, which enshrines the right of individual complaint.<sup>88</sup>

42. 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.

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

43. 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.

44. 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.

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<sup>87</sup> “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 [...].”

<sup>88</sup> *Mamatkulov and Askarov. v. Turkey*, *supra* note 2, para. 128.

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 to a request for provisional measures, which must be related to the subject of the case.

[...]

45. 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.

46. 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,<sup>89</sup> such that the interpretation does not lead in any way to weaken the system of protection set forth the Convention.<sup>90</sup> 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 belong<sup>91</sup> to ensure a harmonious interpretation of the American Convention.

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<sup>89</sup> 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.

<sup>90</sup> 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.

<sup>91</sup> 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

47. 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."<sup>92</sup> 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.<sup>93</sup>

48. 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.'" <sup>94</sup>

49. 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 can not 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;

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<sup>92</sup> *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09, *supra* note 8, para. 23.

<sup>93</sup> *Case of González et al. ("Cotton Field") v. Mexico*, *supra* note 9, para. 33.

<sup>94</sup> *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.

50. 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.<sup>95</sup>

51. 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."<sup>96</sup>

52. 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

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<sup>95</sup> 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.

<sup>96</sup> *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.

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.<sup>97</sup>

53. 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,

[...] 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

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<sup>97</sup> *Case of Baena Ricardo et al. v. Panama. Competence.* Judgment of November 28, 2003. Series C No. 1, para. 90 and 91.

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.<sup>98</sup>

54. 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 [...]."<sup>99</sup>

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

55. 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.<sup>100</sup> In practice, it has largely been at this stage of the procedure that the Court has ordered provisional measures.

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

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<sup>98</sup> *Case of Ivcher Bronstein v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 54, para. 38, 40 and 41.

<sup>99</sup> *Cf. Case of the Anglo-Iranian Oil Company Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of July 22, 1952, p. 104.

<sup>100</sup> *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 that 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.<sup>101</sup>

57. 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.<sup>102</sup>

58. 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."<sup>103</sup> 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.

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<sup>101</sup> *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.

<sup>103</sup> Cf. Burbano Herrera, Clara, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, p. 1.

59. 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."<sup>104</sup> Additionally, in several cases where a 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.<sup>105</sup> All in accordance with the precautionary and protective nature of

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<sup>104</sup> 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 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.*

<sup>105</sup> 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

provisional measures because the American Convention provides only "factual information"<sup>106</sup> 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.

60. 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."<sup>107</sup> 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."<sup>108</sup> 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 been 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.

61. 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."<sup>109</sup> Therefore, on several occasions, the Court has

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of September 3, 2004, operative paragraph second, and Case of the Rochela Masacre. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of November 19, 2009, operative paragraph one.

<sup>106</sup> Cf. García Ramírez, Sergio, *The Inter-American Court of Human Rights*, Mexico, Porrúa, 2007, p. 68.

<sup>107</sup> Gimeno Sendra, José Vicente, *Fundamentos del Derecho Procesal*, Madrid, Civitas, 1981, p. 31.

<sup>108</sup> 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.

<sup>109</sup> *Case of Baena Ricardo et al. v. Panama. Competence*. Judgment of November 28, 2003. Series C No. 104, para. 73.

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."<sup>110</sup> 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 Mister 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.

62. 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.<sup>111</sup>

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<sup>110</sup> *Case of Baena Ricardo et al. v. Panama, supra note 28, para. 74.*

<sup>111</sup> *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*

63. In this regard, in 2000 the Court ratified, during the monitoring of compliance with a previous ruling, provisional measures ordered prior to this stage.<sup>112</sup> This is the first 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.<sup>113</sup>

64. 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.

### ***VII. Importance of provisional measures during monitoring compliance with judgments.***

65. 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

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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.

<sup>31</sup> *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 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.

<sup>113</sup> *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.

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."<sup>114</sup> 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 [...]."

66. 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.

67. 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."<sup>115</sup>

68. Considering the provisional measures largely "determine the effectiveness of the right to individual application at the international level,"<sup>116</sup> 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.

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<sup>114</sup> 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.

<sup>115</sup> 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.

<sup>116</sup> 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.

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