

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF JULY 5, 2011**

**PROVISIONAL MEASURES REGARDING THE
REPUBLIC OF HONDURAS**

CASE OF KAWAS FERNÁNDEZ v. HONDURAS

HAVING SEEN :

1. The Order issued by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") on November 29, 2008, in which it ordered the Republic of Honduras (hereinafter "the State" or "Honduras"):

1. To [...] adopt, without delay, such measures as may be necessary to effectively ensure the protection of Mr. Dencen Andino Alvarado's life and physical integrity[;]

2. To [...] adopt such measures as may be necessary to ensure that Mr. Dencen Andino Alvarado is not persecuted or threatened as a result of his participation as a witness in the investigation conducted by authorities in the case regarding the murder of Blanca Jeannette Kawas Fernández[; and]

3. To require [...] that the measures of protection ordered [t]herein be designed and implemented with the participation of the beneficiaries of such measures or their representatives.

[...]

2. The briefs of January 23, April 1, May 27, July 31, October 5, November 25, and December 10, 2009, April 14, 2010, and June 1, 2011, in which the State presented information on its compliance with the provisional measures ordered in this case.

3. The briefs of December 16, 2008, January 9 and 16, February 24, April 29, June 30, September 7, November 2, and December 16, 2009, March 5, and May 31 2010, May 5 and June 17, 2011, in which the representatives of the beneficiary submitted their observations to the State's reports (*supra* Having Seen clause 2) and additional information on the implementation of the provisional measures.

4. The briefs of March 13, May 14, July 16, October 6, and November 30, 2009, and June 30, 2010, in which the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") presented its observations to the reports of the State and the briefs of the representatives (*supra* Having Seen clauses 2 and 3).

5. The note of the Secretariat of June 24, 2011, wherein the requested extension of the Inter-American Commission to present observations to the State's report of May 5, 2011 (*supra* Visto 2) was granted. The Inter-American Commission did not present these observations.

CONSIDERING THAT:

1. Honduras has been a State Party to the American Convention since September 8, 1977 and accepted the jurisdiction of the Court on September 9, 1981.

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

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

3. Article 27 of the Rules of Procedure establishes that:

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

[...]

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 matter of the case.

[...]

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

5. Under international human rights law, provisional measures are not merely precautionary in nature, in the sense that they preserve a juridical situation; however, they are also fundamentally protective, because they safeguard human rights, inasmuch as they seek to avoid irreparable harm to persons. The measures are applicable provided that the basic requisites of extreme gravity and urgency, and the prevention of irreparable harm to persons are met. In this way, provisional measures become a real jurisdictional guarantee of a preventive nature.²

¹ Cf. *Matter of James et al.* Provisional measures with regard to Trinidad and Tobago. Order of the Inter-American Court of Human Rights of June 14, 1998, Considering Clause 6; *Matter of Mery Naranjo et al.* Provisional measures with regard to Colombia. Order of the Inter-American Court of Human Rights of March 4, 2011, Considering Clause 4, and *Matter of Alvarado Reyes et al.* Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of May 15, 2011, Considering Clause 4.

² Cf. *Case of the "La Nación" Newspaper.* Provisional measures with regard to Costa Rica. Order of the Inter-American Court of Human Rights of September 7, 2001, Considering Clause 4; *Matter of Wong Ho Wing.* Provisional measures with regard to Peru. Order of the Inter-American Court of Human Rights of March 4, 2011, Considering Clause 10, and *Matter of Alvarado Reyes et al.* Provisional measures with regard to Mexico. Order of the Inter-American Court of Human Rights of May 15, 2011, Considering Clause 5.

6. On various occasions, the representatives of the beneficiary and the Inter-American Commission referred to “the investigation of the facts that g[ave] rise to these [provisional] measures”. The representatives requested that the Court “require that the Honduran State provide precise, clear, timely, and relevant information [in that regard], which is fundamental for guaranteeing respect for [the beneficiary's] life and physical integrity.” The Court observes that in its Order of November 29, 2008 (*supra* Having Seen clause 1), it did not request information from the State regarding the investigation of these facts. Additionally, in the Judgment issued in the case of *Kawas Fernández v. Honduras*, the Court ordered that the State, as part of its obligation to investigate the facts, “in a 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 domestic proceedings and to take all legally prescribed measures for the investigation.”³ Thus, information relating to investigations into the facts that led to the adoption of provisional measures in favor of Mr. Dencen Andino Alvarado, which arose from the facts analyzed by the Tribunal in the case of *Kawas Fernández*, must be analyzed in proceedings for the monitoring of the State's compliance with that Judgment. Consequently, the Tribunal shall not refer to that issue in this Order.

A. Adopt, without delay, the measures necessary to effectively ensure the protection of Mr. Dencen Andino Alvarado's life and personal integrity (Operative Paragraph one of the Order of November 29, 2008)

7. In the briefs submitted in 2009, the State reported on a series of meetings held with Mr. Dencen Andino Alvarado and his representatives in order to agree upon the measures of protection that would be implemented in his favor. According to the State, measures such as a police escort, a bulletproof vest for use while selling his goods on public streets, and his inclusion in the witness protection program of the Public Prosecutor's Office were agreed upon. Mr. Andino also received telephone numbers to call in case of emergency. In order to supervise the police protection provided, it was later determined that a record book signed by Mr. Andino and his escorts should be kept for the purpose of controlling compliance with assigned shifts. The State indicated on various occasions that Mr. Andino had not complied with his commitments, given that he was not at his home when surveillance personnel arrived and that the beneficiary “goes to liquor stores and bars where he wants to stay and the police continue escorting him.” Subsequently, the State indicated that the bulletproof vest had not been provided to Mr. Andino because he no longer made a living selling candy and because he had stated that it was uncomfortable to wear.

8. Additionally, the State reported that on January 12, 2009, “a prosecutor's request for an indictment [was issued] against Mr. Dencen Andino Alvarado for the alleged commission of the crime of Theft” to the detriment of another. Apparently, Mr. Andino had sold some “necklaces [...] allegedly stolen from the injured party” to a pawnshop. On January 13, 2009, a “hearing [was held] so that the accused could render a statement.” At that hearing, “in accordance with the [p]rovisional [m]easures [o]rdered by the [...] Court in favor of Mr. Andino Alvarado, the latter was provided with [...] the [p]recautionary [m]easure of periodic appearance before the [Sectional Court of First Instance of Tela, Atlántida, Honduras].” The State submitted a copy of the request for indictment. On April 14, 2010, the State reported

³ Case of *Kawas Fernández v. Honduras*. Merits, Reparations, and Costs. Judgment of April 3, 2009. Series C No. 196, para. 193.

that Mr. Dencen Andino Alvarado had been sentenced, through a judgment dated February 4, 2010, for the crime of theft and had been incarcerated in the Prison of El Porvenir, located in La Ceiba, in the Department of Atlántida, since February 7, 2010. Thus, a meeting was held with the beneficiary in that detention center for the purpose of coordinating the measures of protection that would be implemented in his favor. According to the agreement, Mr. Andino would have police protection during his incarceration and would be placed in an isolated cell with other persons that were also in situations of risk. Arrangements would be made so that Mr. Andino would be transferred to the Tela Prison, as it was closer to his family, and meetings would be held with him on a monthly basis or "when circumstances warrant[ed] it." Regarding the attack that Mr. Andino allegedly suffered at the hands of his cellmates on May 2, 2011 (*infra* Considering clause 10), the State indicated that it had not been informed of that event. However, it stated that on May 25, 2011, a meeting was held with the beneficiary in which he allegedly stated that he was "satisfied with the provisional measures of protection agreed upon with police authorities, as they were being carried out in full."⁴ Authorities inspected Mr. Andino's cell and verified that "conditions are optimal with respect to all basic services."⁵

9. Initially, the representatives stated that in a meeting held on December 13, 2008, after analyzing Mr. Dencen Andino's activities as a street vendor, police officials recommended that he leave the City of Tela, where he resided, "given that the exercise of [that] activity increase[d] the risk of an attack against his life and personal integrity." Additionally, officials offered periodic patrols at his home and provided telephone numbers that he could call in case of emergency. According to the representatives, Mr. Andino had indicated that he was not satisfied with this measure because he would have to cover transportation costs even though his income is low and because it would mean leaving his mother, wife, and daughter to fend for themselves. The representatives indicated that in accordance with the Law for the Protection of Witnesses in Criminal Proceedings passed in 2007 in Honduras, measures of protection "shall not generate any costs to their beneficiaries."⁶ The representatives submitted a copy of the Law to the Tribunal. Subsequently, the representatives reported that Mr. Andino was renting an apartment in another area using his own resources, but that he did not have personal security nor patrols, and that police authorities occasionally arrived at his place of work in order to ask how he was doing. Also, the representatives stated that police protection was not being carried out as agreed, given that on some occasions, the established schedules were not kept, which left Mr. Andino without protection at certain times. However, the representatives indicated that later Mr. Andino had stated that "the service ha[d]

⁴ The State also indicated that Mr. Andino had stated that "he was in an isolated cell for his own security and that all of his rights and guarantees were respected there. [His incarceration in that cell] did not mean that, with his isolation, his fundamental rights were being undermined. Instead, his isolation was intended to safeguard his life and physical integrity by avoiding his exposure to the rest of the prison population."

⁵ Also, Mr. Andino was provided with telephone numbers which he could call for immediate attention in case of emergencies, and was told that arrangements would be made "before the appropriate police authorities so that they would receive precise instructions on the case and compliance with the provisional measures w[ould] continue."

⁶ The representatives stated that this Law also states that protection entails "socio-economic, psychological, and medical support, as well as other types of actions directed toward protecting needs previously analyzed."

improved." Even so, the representatives expressed their concern over "possible changes in police agents announced" by the State, indicating that the criteria used for that purpose must be clarified and conveyed to the beneficiary beforehand. Furthermore, the representatives stated that Mr. Andino had not been given a bulletproof vest at times when he had been in need of one.

10. Furthermore, the representatives reported that on January 13, 2009, Mr. Andino was detained by police due to an alleged theft. Mr. Andino was freed on the following day with measures in lieu of detention. At that point, the representatives were unaware of the factual and legal basis for Mr. Andino's arrest. Afterward, the representatives informed the Tribunal that they would not comment on the claims filed against Mr. Andino (*supra* Considering clause 8), as "none of them relate[d] to the events that gave rise" to these provisional measures. On March 5, 2010, the representatives reported that on February 4, 2010, Mr. Andino had been sentenced for the crime of theft, and that he was incarcerated in the Prison of El Porvenir. They indicated that the provisional measures ordered in his favor should continue despite this situation, those of which made him even more vulnerable. The representatives expressed their dissatisfaction with the conditions in which Mr. Andino was deprived of liberty.⁷ They also highlighted that even though a request had been made for Mr. Andino's transfer to the Tela Prison, which is closer to his family, authorities had not yet issued a decision thereon. The representatives also indicated, according to more recent information, that Mr. Andino had been threatened by four of his cellmates on May 4, 2011. Two days before, he had been involved in a confrontation in which a detainee attacked one of his cellmates, and "both had to take certain measures for their own security." The representatives consider Mr. Andino's life to be in danger; consequently, they requested that the Court order the State to transfer him to the Tela Prison, which would also guarantee contact with his family. Regarding the information submitted by the State on the meeting held with the beneficiary on May 25, 2011 (*supra* Considering clause 8), the representatives indicated that one of them had met with Mr. Andino on June 14, 2011, and that the Director of the Prison where the beneficiary is incarcerated had been present. Mr. Andino had manifested at that time that he was satisfied with the implementation of the measures. However, when the Director left, Mr. Andino stated that he "was afraid that he would suffer greater reprisals if he denounced the threats that he received." Moreover, Mr. Andino stated in a letter written by him that "several policemen" in that place had threatened him, stating that "they were going to find out how much his head was worth," given "his status as a protected witness in the case of Jeanet[t]e Kawas," and that this places him at risk because "other prisoners can find out and cause him harm." Thus, the representatives reiterated their request that Mr. Andino be transferred to another prison.

11. The representatives also referred to other specific events that occurred after the Court ordered these provisional measures (*supra* Having Seen clause 1) and that, in their opinion, put Mr. Andino at risk:

- a) on December 15, 2008, he received a message from an attorney representing two persons involved in the events that occurred to Blanca Jeannette Kawas Fernández and the obstruction of their investigation, requesting a meeting with him. Mr. Dencen Andino was afraid and did not want to attend this meeting.

⁷ They stated that he shared an isolated cell with six other persons, that they only received natural light for 5 minutes every eight or fifteen days, and that they received 10 pounds of rice, beans, and butter once a week so that they could prepare their own meals.

This was communicated to the Secretary of Security, who indicated that he would inform local police authorities;

- b) on December 31, 2008, while Mr. Andino was selling, a young man apparently belonging to a gang drew near and stated that "he was being paid very well to get rid of him, but that he was thinking about it because it was not going to be easy to end his life due to the fact that [Dencen Andino] was well-known." On January 8, 2009, this event was denounced before the General Office for Criminal Investigations (hereinafter, "DGIC" for its acronym in Spanish);
- c) on January 5, 2009, an agent of the DGIC "tried to urgently locate Mr. Dencen Andino on two occasions." When he found Mr. Andino, the agent indicated that he had an arrest warrant and that Mr. Andino should follow him immediately. Mr. Andino asked to see the warrant but the agent refused, and thus the beneficiary stated that he would later turn himself in voluntarily;
- d) on January 7, 2009, Mr. Andino ran into the same DGIC agent on the street. The latter again insisted that Mr. Andino go to the Public Prosecutor's Office, but this time, it was for the purpose of "confronting" one of the persons involved in the events that occurred to Mrs. Kawas Fernández;
- e) on January 8, 2009, Mr. Andino spoke with the Chief of the GOIC in order to inform him that an agent of that institution had stated that an arrest warrant had been issued for his capture. However, this agent did not appear despite the fact that he had been summoned by his Chief. Thus, Mr. Andino and his representatives contacted an agent of the Public Prosecutor's Office, who indicated that no arrest warrant had been issued for Mr. Andino's capture;
- f) on June 1, 2009, a police officer involved in the obstruction of the investigation into the events that occurred to Mrs. Kawas Fernández threatened Mr. Dencen Andino's life while at his place of work. The representatives highlighted that this occurred after the police officer guarding Mr. Andino had left, in breach of the schedule that had been established. The representatives also indicated that Mr. Andino had stated that he had seen that same police officer speaking to the person that threatened him on various occasions. Furthermore, they indicated that one of the witnesses to this event had refused to testify because an agent of the GOIC had told him "not to get involved in that because he would only get problems," and
- g) on November 13, 2009, while walking close to the central part of the City of Tela, Mr. Andino was approached by the police agent that had threatened his life, who told him that he needed to speak with him in private. Mr. Andino refused, and the police official responded in a threatening tone, "we'll see each other then." The representatives indicated that the police official that guarded him witnessed this; however, he did not intervene in order to protect the beneficiary's integrity.

12. Initially, the Inter-American Commission took note "of the commitments assumed by the State under the agreements subscribed on December 13, 2008 and January 16, 2009," but expressed concern that Mr. Andino still had not been included in the witness protection program and that he had not received a bulletproof vest. Additionally, in relation to the implementation of Mr. Andino's police protection, the Commission recommended that a "mechanism for controlling presence and schedules, [...] signed by the beneficiary and indicating his police escort's time of arrival and departure," be established. Later, the Commission indicated that it "consider[ed] important that ways of resolving the difficulties in providing protection and the most appropriate mechanisms of protection after the beneficiary change[d] homes [be agreed upon]." Additionally, it considered that the State had to ensure that "the persons in charge of guarding the beneficiary [did] not have any links" to

the police official that had threatened Mr. Andino with death. Given that Mr. Andino is currently deprived of his liberty, the Commission indicated that “the measures of protection should be accommodated to the new situation in such a way that they continue to be effective for the protection of his life and personal integrity.” It requested that the State submit more detailed information on the measures of protection that will be implemented and, in particular, that it explain the isolation cell and how the cell and the beneficiary’s location far from his place of residence contribute to his protection.

13. The Tribunal notes that ever since these provisional measures were ordered, the State has made efforts to implement some measures of protection in favor of Mr. Dencen Andino Alvarado. However, these measures have not always been implemented effectively. The Court highlights that according to information submitted by the representatives, the year following the adoption of these measures, Mr. Andino continued to receive threats and intimidation due to his status as a witness to the events that occurred to Mrs. Blanca Jeannette Kawas Fernández. At the same time, this information demonstrates that, on occasion, the police officers charged with guarding Mr. Andino have been seen conversing with another police officer that had apparently threatened him with death.

14. Additionally, the Court notes that Mr. Andino is currently deprived of his liberty due to the sentence imposed upon him due to acts that, according to the representatives and the State, are not related to his status as a witness. However, the Court has been informed that the beneficiary has been threatened inside of the Prison where he is being held, both by his cellmates and by police personnel assigned to that prison, and that he is afraid of denouncing those threats. In that regard, on one hand, it is not clear to the Tribunal how keeping Mr. Andino in an isolated cell is more appropriate for his protection as a witness, or how this form of detention and its characteristics comply with the purpose of the provisional measures ordered by the Court. In particular, the Tribunal highlights that, apparently, some of the threats received come from his cellmates. Additionally, in its last report, the State did not inform the Court of other measures effectively implemented, in addition to Mr. Andino’s isolated detention, in order to protect his life and integrity. The Court also highlights that the State had previously reported that the possibility of transferring him to another detention center would be evaluated; however, the representatives have indicated that this issue has not yet been resolved by State authorities.

15. From the foregoing, the Court considers that Mr. Dencen Andino Alvarado’s situation, *prima facie*, continues to be extremely grave and urgent, which makes it necessary that the provisional measures ordered in his favor be maintained in order to prevent irreparable harm to him. The Tribunal considers it appropriate to affirm that, “as it is responsible for its detention centers, the State is in a special position as guarantor of the rights of every person in its custody.”⁸ Additionally, the Court has maintained that, independent of the existence of specific provisional measures, the State is especially obligated to guarantee the rights of persons who are deprived of

⁸ *Case of Neira-Alegría et al. V. Peru*. Merits. Judgment of January 19, 1995. Series C No. 20, para. 60; *Case of Vélez Loor V. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, para. 198; and *Case of Vera-Vera et al. v. Ecuador*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of May 19, 2011. Series C No. 226, para. 42.

their liberty.⁹ Thus, the Tribunal considers that the State must adopt the measures necessary to overcome every situation of risk to Mr. Dencen Andino's life and physical, psychological, or moral integrity, such that his security inside of the prison where he is detained or where he may be transferred is fully guaranteed and that he is not longer subjected to threats or attacks on the part of other detainees, personnel, or any other persons that could affect his rights.¹⁰

B. Adopt the measures necessary to guarantee that Mr. Dencen Andino Alvarado is not persecuted or threatened due to his participation as a witness in the investigation into Blanca Jeannette Kawas Fernández's murder (Operative Paragraph two of the Order of November 29, 2008).

16. According to the information submitted by the State on January 23, 2009 (*supra* Having Seen clause 2), Mr. Andino's inclusion in the witness protection program was still pending. However, if it is shown that he committed the crimes he is accused of (*supra* Considering clause 8), Mr. Andino must "be held accountable before the competent authorities." In its brief of April 1, 2009, the State reported that on March 4, 2009, "as part of the Witness Protection Program of the Prosecutor's Office, the first economic aid package had been disbursed to Mr. Dencen Andino Alvarado for relocation purposes." He was thus provided with the two thousand lempiras he had requested "so that he could transfer his belongings to another city," among other things. However, Mr. Andino's domicile had not yet changed, given that, as he had indicated, the amount of money provided to him had not been enough, despite that it was what he had requested. Thus, the State agreed to evaluate the possibility of providing him, for one time only, with an additional amount of fifteen to twenty thousand lempiras so that he could start a business at the place where he moved (*infra* Considering clause 17) or with a monthly amount for a set period of time agreed upon by the parties. Afterward, the State reported that due to budgetary constraints, the Finance Secretariat had not been able to provide that aid, but that it would try to obtain funding for that purpose from the Prosecutor's Office. It also stated that under this program, it could only provide a maximum amount of twenty thousand lempiras, and that it was possible that this amount would be channeled to Mr. Andino's representatives so that they would be the ones to assist him in the procurement of "what they thought appropriate for initiating his business." However, on October 5, 2009, the State reported that in light of the oral trial pending due to the accusations of theft against him, the representatives and the State had agreed that Mr. Andino's transfer to another city could "obstruct the proceeding against him, as it would directly intervene in a proceeding assigned to another branch of the Prosecutor's Office." Thus, the parties would wait until the oral trial concluded in order to reconsider this issue.

17. The representatives stated that even though Mr. Andino had received "economic assistance" from the Witness Protection Program of the Prosecutor's

⁹ *Cfr. Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center*. Request for Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of February 8, 2008, Considering Clause 11; *Matter of Natera Balboa*. Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of December 1, 2009, Considering Clause 11, and *Matter Guerrero Larez*, Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of November 17, 2009, Considering Clause 13.

¹⁰ *Matter of María Lourdes Afiuni*. Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of December 10, 2010, Considering Clause 12.

Office, "the beneficiary had not yet been formally included in the program." They also stated the Mr. Andino had still not changed his domicile, but that they had requested a meeting with State agents in order to come to an agreement as to the terms of his move. They also indicated that Mr. Andino had expressed his intent to move to San Lorenzo, Valle, and to start a business selling food. Thus, the representatives requested that instead of the additional amount offered by the State, Mr. Andino receive "economic assistance through the purchase of the elements necessary in order to do so, as well as the payment of the business's rent during its first three months." The representatives indicated that they did not approve of the State's offer of an additional amount in favor of Mr. Andino for the purpose of starting a business, indicating that the monies should be provided directly to Mr. Andino, who would be responsible for its use in a manner that is appropriate given its purpose." Subsequently, the representatives also stated that they "they were also of the opinion that [Mr. Andino's] definitive inclusion [in the witness protection program] should be postponed until his legal situation [was] resolved."

18. The Inter-American Commission indicated that it considered "important that the State explain why [Mr. Andino's] transfer would obstruct proceedings and indicate whether mechanisms existed so that those proceedings could continue in the place where Mr. Andino was to establish his new residence."

19. The Tribunal notes that, as a measure of protection, the State provided Mr. Andino with economic aid so that he could change his place of residence. According to the information provided by the representatives and the State, this assistance came from the Witness Protection Program of the Prosecutor's Office. Afterward, the State was not able to provide the additional aid it had offered, partly because the criminal proceedings against Mr. Andino had not concluded. However, the information provided does not demonstrate that Mr. Andino has been effectively incorporated to that program, as his representatives have stated. Therefore, the Court requests the State to include detailed information in that regard in its next report, and that it indicate, if applicable, what Mr. Andino's protection provided though that program consists of, the entity in charge of providing his protection, and the entity in charge of supervising its effective implementation.

C. Planning and implementation of the measures of protection with the participation of the beneficiary or his representatives (Operative Paragraph three of the Order of November 29, 2008)

20. In their briefs, the State and the representatives referred to various meetings held with the beneficiary and his representatives in order to come to an agreement on and supervise the measures of protection implemented in his favor. These meetings occurred on December 13, 2008, January 16, May 19, September 12, and October 31, 2009, February 7, 2010, and May 25, 2011.

21. The Commission indicated that there "exist[ed] a certain level of dialogue in the process of designing and implementing the measures of protection."

22. The Tribunal positively assesses the contact between the State, Mr. Dencen Andino Alvarado, and his representatives for the purpose of agreeing upon and implementing the provisional measures ordered by the Tribunal in Mr. Andino's favor. The Court urges the parties to continue maintaining channels of communication open that are appropriate for this end.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

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

DECIDES TO:

1. Reiterate to the Republic of Honduras that it must adopt, without delay, the measures necessary to effectively ensure the protection of Mr. Dencen Andino Alvarado's life and personal integrity, in accordance with Considering clauses 13 to 15 of this Order.
2. Reiterate to the Republic of Honduras that it must adopt the measures necessary to ensure that Mr. Dencen Andino Alvarado is not persecuted or threatened as a result of his participation as a witness in the investigation conducted by authorities in the case regarding the murder of Blanca Jeannette Kawas Fernández, in accordance with Considering clause 19 of this Order.
3. Reiterate to the Republic of Honduras that the measures of protection ordered herein be designed and implemented with the participation of the beneficiary or his representatives, in accordance with the Considering clause 22 of this Order
4. Request the Republic of Honduras to report to the Court on the provisional measures adopted to comply with this Order by September 5, 2011, at the latest. In addition, that it subsequently continue reporting to the Court on the implementation of the provisional measures every three months.
5. Require the representatives of the beneficiary of these measures to submit their observations to the State's reports indicated in the preceding Operative Paragraph within four weeks as of the date legal notice is served, and the Inter-American Commission on Human Rights to present its observations to those reports within six weeks as of the date on which they are received.
6. Require the Secretariat of the Court to provide legal notice of this Order upon the Republic of Honduras, the Inter-American Commission on Human Rights, and the beneficiary of these provisional measures.

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

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretariat

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretariat

**CONCURRING OPINION OF JUDGES DIEGO GARCÍA-SAYÁN, LEONARDO A.
FRANCO, MANUEL VENTURA ROBLES, MARGARETTE MAY MACAULAY AND RHADYS
ABREU BLONDET
PROVISIONAL MEASURES REGARDING HONDURAS
CASE OF KAWAS FERNÁNDEZ**

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

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

3. This concurring opinion strives to reaffirm, in general, the competence of the inter-American Court Human Rights in relation to provisional measures, and in particular those which the Court orders, and can order, during the course of proceedings for contentious cases —including the monitoring compliance with judgments phase. All of the above is

perfectly coherent with the American Convention on Human Rights, and the norms and principles of international law that have supported the constant jurisprudence and the jurisdiction of the Tribunal in this area.

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

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

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

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

¹ Agreement to Protected Human Rights and Fundamental Freedoms.

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

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

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

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

measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it [...]."⁶

7. Although the European Court previously considered that the provisional measures it ordered were not legally enforceable since they were not explicitly referred to in the European Convention, from 2005 onwards, the European Court has maintained that a State is obliged to comply with such measures and to avoid any act or omission that undermines the authority and effectiveness of the final ruling. It also set forth that the breach of provisional measures may constitute a violation of Article 34 of the European Convention, which enshrines the right of individual complaint.⁷

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

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

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

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

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

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

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

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

[...]

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

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

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 cannot in itself be a norm, but rather it must be considered within the context and, particularly, within its object and purpose,⁸ such that the interpretation does not lead in any way to weaken the system of protection set forth the Convention.⁹ The "ordinary meaning of the terms" should be analyzed as part of a whole whose meaning and scope should be established in accordance with the judicial system to which they belong¹⁰ to ensure a harmonious interpretation of the American Convention.

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

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

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

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

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

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

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

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

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

a) allow[s] a State Party, group or person to suppress the enjoyment or exercise of rights and freedoms recognized in this Convention or restrict them more than the manner provided for in the Convention;

b) limit[s] the enjoyment or exercise of any right or freedom recognized pursuant to the laws of any State Party or pursuant to any another convention that the States form part of;

c) exclud[es] other rights or guarantees that are inherent to the human being or that are derived from a representative democratic form of government;

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

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

17. Moreover, the Court has stipulated that:

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

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

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

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

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

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

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

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

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

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

[...]

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

Article 29(a) of the American Convention provides that no provision of the Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for therein. Any interpretation of the Convention that allows a State Party to withdraw its recognition of the Court's binding

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

jurisdiction, as Peru would in the instant case, would imply suppression of the exercise of the rights and freedoms recognized in the Convention, it would be contrary to its object and purpose as a human rights treaty, and it would deprive all the Convention's beneficiaries of the additional guarantee of protection of their human rights that the Convention's jurisdictional body affords.¹⁷

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

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

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

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

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

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

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

¹⁹ *Cf. Cases of Velásquez Rodríguez, Fairén Garbí 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.

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

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

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

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

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

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

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

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

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

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

26. Since it is the responsibility of the Inter-American Court to monitor compliance with its judgments, it is clear that the "consideration" of the case does not cease with the issuance of the ruling on the merits of the case and when the corresponding reparations are awarded. The jurisdictional power of the Court, like any judicial body, "is exercised by ruling and making rulings be exercised."²⁶ This is because the Court "can [n]ot ignore the fate of its decisions, which are always mandatory for States and exempt from review by a higher court. The inter-American justice is exercised in one instance and the corresponding Convention states that the decisions of the Court are binding on the parties."²⁷ Therefore, the Court still legally has "consideration" of the case while compliance of the respective judgment is being verified by the Court. This has been reflected in the judgments of the Court where it has consistently been set forth in the operative paragraphs, with varying

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 Paquiyaury Brothers. Provisional Measures regarding Peru; Order of the Inter-American Court of Human Rights of September 22, 2006, operative paragraph one; Resolution of the Inter-American Court of Human Rights of May 3, 2008, operative paragraph two. Case of the Plan de Sánchez Massacre. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of November 25, 2006, operative paragraph one; Order of the Inter-American Court of Human Rights of November 26, 2007, operative paragraph three. Case of Mapiripán Massacre. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of May 3, 2008, operative paragraph one; Order of the Inter-American Court of Human Rights of September 2, 2010, operative paragraph one. Caso of Gutiérrez Soler. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of November 27, 2007, operative paragraph one; Order of the Inter-American Court of Human Rights of July 9, 2009, operative paragraph one. Case of García Prieto et al.. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of February 3, 2010, operative paragraph two. Case of Fernández Ortega et al.. Provisional Measures regarding Mexico. Order of the Inter-American Court of Human Rights of November 23, 2010.

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

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

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

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

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" 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.

27. The jurisprudence of the Inter-American Court illustrates, incidentally, that even when a judgment has been passed there have been situations that endanger the rights involved in the decision of the Court and, therefore, hinder the effective compliance with the ruling. On this point, it should be noted that the Court has already ruled, "the effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling."²⁸ Therefore, on several occasions, the Court has ordered provisional measures, or has maintained provisional measures ordered prior to its decision on merits, during the monitoring of compliance with judgments, precisely because the compliance of its decisions "is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention."²⁹ Furthermore, the Inter-American Court has ordered the adoption of provisional measures after a decision to lift them, when during the monitoring of compliance events have taken place that, according to Article 63(2) of the Convention, have made them necessary. On this point, it is worth stating that the measures ordered in *the case of 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, 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.

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

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

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

29. In this regard, in 2000 the Court ratified, during the monitoring of compliance with a previous ruling, provisional measures ordered prior to this stage.³¹ This is the first precedent where the Court, during the monitoring of compliance with the respective judgment, decided to maintain the measures ordered prior to ruling on the merits. However, in 2002, the Court, for the first time, ordered provisional measures following issuance of the judgment on merits and reparations. In the years that followed, this competence has continued to be exercised without it being questioned by any State, let alone a Judge of the Court. In the 2002 decision, the Court made specific reference to its jurisdiction to grant provisional measures at this stage by stating the following:

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

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

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

31. Based on general international law, the Court has stated that, much like any body with a jurisdictional function, it has the inherent power to determine the scope of its competence (*compétence de la compétence/Kompetenz-Kompetenz*). The Court "cannot

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

³¹ *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.

³² *Case of the Mayagna (Sumo) Awajitj 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.

abdicate this prerogative, as it is a duty that the Convention imposes upon the it, requiring it to exercise its functions in accordance with Article 62(3) thereof."³³ This provision states that "the jurisdiction of [t]he Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction [...]."

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

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

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

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

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

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

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DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

PROVISIONAL MEASURES REGARDING HONDURAS CASE OF KAWAS FERNÁNDEZ

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

Introduction

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

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

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

I. - Provisional measures and a contentious case.

In this perspective, it states that the cited rule must be understood in the sense that the Court can only order provisional measures in matters it has under its consideration or regarding issues for which the Inter-American Commission on Human Rights, hereinafter "the Commission," requested such measures, even if

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

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

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

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

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

Therefore, the harmonious interpretation of the aforementioned conventional rules lead to the conclusion that "*the matters before*" the Court, and the scope within which provisional measures may be ordered, can be in 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, first, that according to its ordinary meaning,⁴ a meaning of the term "to know" is to "*[h]ear an issue with the legitimate power to do so.*"⁵ The example provided is "*[t]he judge hearing the case.*"⁶ Therefore, it can be said that the jurisdiction of the Court with respect to the "*case*" that is "*brought before it*", consists in solving or ruling on whether the provisions of the Convention have been interpreted and applied therein. This is what the Court hears. Therefore, the authority of the Court to "hear" a contentious case translates as "ruling on it."

Secondly, the aforementioned theory states that provisional measures are in order, as a general rule, during the course of a contentious case, and the words "*matters*" and "*cases*" must be understood for the purposes indicated, as synonyms. And this

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

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

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

⁶ *Idem.*

is, firstly, because of the ordinary meaning of such terms.⁷ While among the meanings of the term "*matter*" are the "[*m*]aterial concerned" and "*the case*,"⁸ in relation to the latter it states that "[*m*]aterial concerned or proposed to consult someone and ask for their opinion" and "[*a*]ny matters investigated by the police or matters that are settled at trial before the courts."⁹

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

But even regarding the latter provision, it should be borne in mind that it comes after reiterating¹⁷ the provisions of Article 63(3) of the Convention and before

⁷ Idem.

⁸ Idem.

⁹ Idem.

¹⁰ Art. 31(1) quoted above.

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

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

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

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

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

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

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

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,¹⁸ and the latter even stated it in its Rules of Procedures, which it also approved.¹⁹

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

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

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

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

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

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

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

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

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 it not 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 regard, is different to the provisions of the regulatory texts. Therefore, it should be added that, without a doubt, the facts giving rise to the risk that the provisional measures so ordered seek to prevent, and the beneficiaries of such measures, are clearly linked to the corresponding contentious case. It is appropriate to note, finally, that even the Court's own resolutions adopted with regard to provisional measures refer, in their names and therefore perhaps as a result, to the contentious case.

II.- Effects of the judgment.

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

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

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

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

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

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

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

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

In this regard, it should be considered that this rule forms a whole with the aforementioned Article 63(2), which means therefore that the Convention not only expressly regulates the provisional measures as part of the contentious jurisdiction

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 ."

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

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

In short, it is reiterated that the abovementioned does not mean anything other than that, effectively, the ruling on the merits of the contentious case is "*final and non-appealable*", i.e., it is "*the decision on the case*," which, as noted in the

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

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

doctrine, is the solemn decision of the judge to conclude the process, a statement of legal certainty regarding the corresponding case. And this also happens especially "*when [the Court] finds a violation of a right or freedom protected*" in the Convention and, consequently, orders that "*the injured party's right or freedom that was violated be guaranteed,*" a judgment that State Parties to the Convention "*agree to comply with,*"²⁴ and, failing to do so, the Court, after receiving "*the relevant information*" obtained by monitoring compliance,²⁵ shall include it in its annual report to the OAS General Assembly, requesting the relevant "*recommendations.*"²⁶

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

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

As a result, the pertinent conventional rules set forth that, after the issuance of a judgment, the Court may take, in the relevant contentious case, only two actions: one that is procedural, and another that is administrative but that can become procedural. Firstly, it may interpret the judgment, if necessary.²⁹ And, secondly, submit an annual report to the OAS General Assembly on the States that have not complied with their judgments.³⁰ At the same time, and in this case, the Statute of

²⁴ Art. 68(1) of the Convention.

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

²⁶ Art. 65 of the Convention.

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

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

²⁹ Art. 67 of the Convention.

³⁰ Art. 65 of the Convention.

the Court refers only to the aforementioned OAS General Assembly report,³¹ and in turn, the Rules of Procedure of the Court govern the judgment on reparations and costs,³² recourse for interpretation,³³ the monitoring of compliance with judgments and other decisions made by the Court,³⁴ and rectify any obvious mistakes, clerical errors or calculation errors.³⁵ All these matters, except the latter, are, incidentally, addressed in the Rules of Procedure as part of Title II "*Procedure*" and before the start of Title III "*Advisory opinions*."

Considering, therefore, the principle of public law that you can only do what the rule orders, the aforementioned actions are the only actions the Court may undertake in a contentious case that has already been ruled on; furthermore, they must all be exclusively addressing compliance with the respective judgment by the State concerned.

III.- Lack of authority.

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

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

³¹ Art. 30 of the Statute of the Court.

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

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

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

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

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

³⁷ Arts. 65 and 68 of the Convention.

the Statute of the Court,³⁸ the monitoring of compliance with judgments³⁹ was established in the Rules of Procedure and thus a procedural institution.⁴⁰

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

³⁸ Art. 30 of the Statute of the Court

³⁹ 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.

⁴⁰ Art. 60 of the Convention.

⁴¹ Art. 29 of the Convention.

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

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

Conclusion.

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

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

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

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

And, indeed, all this is no obstacle for the Court to order provisional measures for the same people for whom they were issued in the resolved case, both if it wishes or if required in a new case before it, as well as if, in a case not yet submitted to it,

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

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

⁴⁵ Art. 1(1) of the Convention.

the Commission, in exercising its "*principal role of promoting the observance and defense of human rights*,"⁴⁶ reasonably requests it.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

⁴⁶ Art. 41 of the Convention.