

**CONCURRING OPINION OF JUDGES DIEGO GARCÍA-SAYÁN, LEONARDO A. FRANCO,  
MANUEL VENTURA ROBLES, MARGARETTE MAY MACAULAY AND RHADYS ABREU  
BLONDET  
PROVISIONAL MEASURES REGARDING THE UNITED MEXICAN STATES  
CASE OF ROSENDO CANTÚ *ET AL.***

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

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

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

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

discussed; and, finally, the importance of provisional measures during the monitoring phase is emphasized.

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

5. The European Court of Human Rights (hereinafter "European Court" or "European Tribunal") has argued that the object and purpose of the European Convention on Human Rights<sup>1</sup> (hereinafter "European Convention") is the protection of persons, and to do so its safeguards must be practical and effective, as part of the system of individual applications.<sup>2</sup> Similarly, it stated that the European Convention is a living instrument, which must be interpreted in the light of present-day conditions.<sup>3</sup> Also, it is worth noting that the European Court has stated that the interpretation of a provision of the European Convention should be the that which is most appropriate for the purposes of achieving the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.<sup>4</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

[...]

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

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

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

<sup>8</sup> *Cf. Proposed Amendments to the Constitution of Costa Rica with regard to Naturalization. Advisory Opinion AO-4/84 of January 19, 1984. Series A No. 4, para. 23; Compatibility of a Bill with Article 8(2) of the*

system of protection set forth the Convention.<sup>9</sup> The "ordinary meaning of the terms" should be analyzed as part of a whole whose meaning and scope should be established in accordance with the judicial system to which they belong<sup>10</sup> to ensure a harmonious interpretation of the American Convention.

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

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

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

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

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*American Convention on Human Rights*. Advisory Opinion AO-12/91 of December 6, 1991. Series A No. 12, para. 21; *Article 55 of the American Convention on Human Rights*. Advisory Opinion AO-20/09 of September 29, 2009. Series A No. 20, para. 26; *Case of González et al. ("Cotton Field" v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 16, 2009. Series C No. 205, para. 42, and *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 30.*

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

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

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

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

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

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.<sup>14</sup>

17. Moreover, the Court has stipulated that:

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

18. In exercising its jurisdiction to interpret procedural provisions of the American Convention, the Court has adopted fundamental decisions for the inter-American system. One decision was that the Tribunal is the competent body to monitor compliance with its 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.

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

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

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

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

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

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

[...]

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

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

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

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

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

interpretation which is harmonious with a natural and reasonable way of reading the text [...]."<sup>18</sup>

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

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

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

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

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

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

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

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

<sup>19</sup> 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.

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

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

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

25. However, it should be noted that, procedurally, the fact that the Court has ruled on the merits and ordered the appropriate reparation measures does not automatically lead to the lifting of provisional measures. Quite the contrary. Even in the monitoring compliance with judgments stage, the Court, on numerous occasions, has decided to maintain the measures, and even extend them due to the threat of irreparable damage and situations of "extreme gravity and urgency."<sup>23</sup> Additionally, in several cases where a judgment on merits has already been ordered and the respective reparations measures awarded, the Court has ordered provisional measures during the first stage of monitoring compliance.<sup>24</sup> All in

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

<sup>23</sup> Cf. *Case of Blake. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of August 18, 2000, operative paragraph one; Order of the Inter-American Court of Human Rights of June 2, 2011, operative paragraph one; Order of the Inter-American Court of Human Rights of June 6, 2003, operative paragraph two, and Order of the Inter-American Court of Human Rights of November 17, 2004, operative paragraph one. Case of Carpio Nicolle. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, operative paragraph one. Case of Loayza Tamayo. Provisional Measures regarding Peru. Order of the Inter-American Court of Human Rights of February 3, 2001, operative paragraph two. Matter of James et al. Provisional Measures regarding Trinidad and Tobago: Order of the Inter-American Court of Human Rights of September 3, 2002, operative paragraph two; Order of the Inter-American Court of Human Rights of December 2, 2003, operative paragraph three, and Order of the Inter-American Court of Human Rights of February 28, 2005, operative paragraph two. Case of Bámaca Velásquez. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of February 21, 2003, operative paragraph two; Order of the Inter-American Court of Human Rights of November 20, 2003, Considering Clause sixteen and operative paragraph two, Order of the Inter-American Court of Human Rights of March 11, 2005, operative paragraph one, and Order of the Inter-American Court of Human Rights of January 27, 2009, operative paragraph four. Case of Raxcacó Reyes et al.. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of July 4, 2006, operative paragraph two; Order of the Inter-American Court of Human Rights of February 2, 2007, operative paragraph two; Order of the Inter-American Court of Human Rights of November 21, 2007, operative paragraph two, and Order of the Court of Human Rights of May 9, 2008, operative paragraph six. Case of 19 Merchants. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of April 28, 2006, operative paragraphs one and second, Order of the Court Human Rights July 4, 2006, operative paragraphs one and second, Order of the Court Human Rights May 12, 2007, operative paragraph two and three; Order of the Inter-American Court Human Rights of July 8, 2009, operative paragraph four and five, and Order of the Inter-American Court of Human Rights of August 26, 2010, operative paragraphs one and two; Case of the Gómez Paquiyauri Brothers. Provisional Measures regarding Peru; Order of the Inter-American Court of Human Rights of September 22, 2006, operative paragraph one; Resolution of the Inter-American Court of Human Rights of May 3, 2008, operative paragraph two. Case of the Plan de Sánchez Massacre. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of November 25, 2006, operative paragraph one; Order of the Inter-American Court of Human Rights of November 26, 2007, operative paragraph three. Case of Mapiripán Massacre. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of May 3, 2008, operative paragraph one; Order of the Inter-American Court of Human Rights of September 2, 2010, operative paragraph one. Caso of Gutiérrez Soler. Provisional Measures regarding Colombia. Order of the Inter-American Court of Human Rights of November 27, 2007, operative paragraph one; Order of the Inter-American Court of Human Rights of July 9, 2009, operative paragraph one. Case of García Prieto et al.. Provisional Measures regarding El Salvador. Order of the Inter-American Court of Human Rights of February 3, 2010, operative paragraph two. Case of Fernández Ortega et al.. Provisional Measures regarding Mexico. Order of the Inter-American Court of Human Rights of November 23, 2010.*

<sup>24</sup> Cf. *Case of Mayagna (Sumo) Awaj 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.



accordance with the precautionary and protective nature of provisional measures because the American Convention provides only "factual information"<sup>25</sup> for the Inter-American Court to order such measures. In other words, there is "a situation of extreme gravity and urgency" and "when it is necessary to avoid irreparable damage to persons" while the case is before it.

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

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

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

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

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

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

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

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

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.

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

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

The purpose of provisional measures, in International Human Rights Law, is to effectively protect fundamental rights, inasmuch as they seek to avoid irreparable damage to persons. Said measures can also be applied during the stage in which compliance with the judgment is overseen; in the

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

<sup>31</sup> *Case of Blake*. Provisional Measures regarding Guatemala. Order of the Inter-American Court of Human Rights of August 18, 2000, operative paragraph one. A year later, in the *Case of Loayza Tamayo v. Peru*, the Court also continued the provisional measures ordered prior to the judgment on reparations issued in the case. Cf. Order of the Inter-American Court of Human Rights of February 3, 2001, operative paragraph two.

instant case it is probable that irreparable damage will occur [preventing] faithful and full compliance with the judgment on merits and reparations in the case of the Mayagna Community, [thus the] adoption of said measures is in order.<sup>32</sup>

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

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

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

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

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

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

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

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

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

Diego García-Sayán  
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Pablo Saavedra Alessandri  
Secretary

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