

**CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI,
ORDER OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
OF MARCH 31, 2014,
REQUEST FOR PROVISIONAL MEASURES
CASE OF ARTAVIA MURILLO *ET AL.* ("IN VITRO FERTILIZATION")
v. COSTA RICA**

This concurring opinion to the Order indicated in the abovementioned title is issued based on the fact that although the decision to dismiss the requested provisional measures is one I share, it is not for the reasons noted therein, which is "*that the matter as filed before the Court is not considerable as a provisional measure pursuant to Article 63(2) of the American Convention on Human Rights, but rather must be assessed within the framework of the monitoring of compliance stage of the Judgment rendered on November 28, 2012 in this case,*" but rather because, it is my opinion that in this matter and given that provided in the American Convention on Human Rights, hereinafter the Convention, has precluded the power of the Inter-American Court of Human Rights, hereinafter the Court, to render provisional measures, that is, it was not authorized to render such an order.

The reasons for the stance taken in this opinion has been presented in other opinions issued by those mentioned in the footnotes¹ and they are, among others, the following.

For one thing, in that provisional measures were created as part of the process by which the Court hears a case, that is, when the Court hears the case in exercise of its contentious jurisdiction.² Article 63(2) of the Convention³, the norm which established provisional measures, distinguishes between those measures which the Court can decree "*in the matters it has under consideration*" and in those in which it can decree "*in matters which have not been submitted to the Court.*" In fact, in the Rules of Procedure of the Court, adopted by the Court, that distinction is not only made, rather it provides that, regarding the matters under its consideration, provisional measures

¹ Particularly in the Dissenting opinions of July 15, 2011, regarding the Orders of the Court in "*Provisional Measures regarding the Republic of Colombia, Case of Gutiérrez Soler V. Colombia,*" of June 30, 2011; "*Provisional Measures regarding the United States of Mexico, Case of Rosendo Cantú et al. V. Mexico,*" of July 1, 2011, and "*Provisional Measures regarding the Republic of Honduras, Case of Kawas Fernández V. Honduras,*" of July 5, 2011, and the brief in the *Complaint brief*, related to the Orders, filed before the Court on August 17, 2011.

² Art.62(3) of the Convention. "*The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.*"

³ "*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.*"

can be adopted *"in any stage of the proceeding,"*⁴ which, without a doubt and as indicated below, ends in a final judgment.

It is clear that this case does not involve a matter⁵ that has not yet been filed before the Court. Moreover, under such a hypothesis, for the Court to decree provisional measures, it would be necessary for the Inter-American Commission on Human Rights, hereinafter the Commission, to request the measures, and such a request has not been made. To the contrary, it was Mr. Huberth May Cantillano, representative of the victims in this case, who made the request, and at that, *"during the implementation stage of the judgment."*

What remains irrefutable is that the Court has heard the matter in which a request for provisional measures has been made, and the case has ended in a final and not subject to appeal judgment.⁶ Thereby lacking the power to modify or complement it, the Court can only render a decree orders in this regard that unequivocally stem from powers specifically expressed in the Convention, the Statute or Rules of Procedure of the Court.

Indeed, once the judgment in a case has been rendered, the Court can only, pursuant to that which is stated in the Convention, interpret it if this is so required⁷ and inform the General Assembly of the Organization of American States, in the annual report it must provide, if it has not been carried out.⁸ In turn and under such a hypothesis, the

⁴ Art. 27, 1 and 2: *"1. At any stage of 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"*

⁵ "Case" and "matter" are, in this regard, synonyms pursuant to the Convention, and it alludes to *"matters"* only in the text of Article 63(2), while in five other provisions it refers to *"cases"* (Art.57: power to appear before the Court, Art. 61 its jurisdiction, Art. 65: the obligation to report its work to the General Assembly of American States yearly, Art.68(1): the obligation to comply with the judgments and Art. 69: provide notification. But, it is also in the Statute of the Court, where in two of its provisions it refers to *"matters."* In one, it refers to the powers of the President of the Court, which may apply to the advisory opinions of the Court as well as administrative matters (Art. 12(2)), and in the others, it refers to the contentious jurisdiction (Art. 19(1), (2) and (3)), and impediments and powers of the judges in contentious matters). Also, the Rules of Procedure of the Court, approved by it, uses the text *"case"* in 32 of its articles (Arts, 2(3), 2(17), 16, 17, 19, 20, 21, 22, 23, 25, 26, 27(3), 30, 32, 34, 35, 36, 37, 38, 39(1), 39(2), 39(4), 40(1), 40(2), 41(2), 42(6), 43, 44(1), 44(3), 48(1)(b),(d),(e), 51(1) and 51(10). And only in one article, specifically Article 27(2), regarding provisional measures ordered per request of the Commission, does it use the term *"matter"*.

⁶ Art.67, first phrase, of the Convention: *"[t]he judgment of the Court shall be final and not subject to appeal."*

⁷ Art. 67, second phrase, of the Convention. *"In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."*

⁸Art. 65 of the Convention: *"To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."*

Statute only mentions the annual report⁹ and, in turn, the Rules of Procedure regulate the judgment on reparations and costs,¹⁰ the interpretation of the judgment,¹¹ the monitoring of compliance with the judgments and other decisions of the Court¹² and the correction of notorious errors regarding edits or calculations.¹³ It must be stated that, particularly given the request made by Mr. May Cantillano that precautionary measure be decreed “*during the implementation stage*” that in the rules of procedure regarding monitoring of compliance, the possibility of rendering provisional measures is also not established.

In sum, based on the principle of public law that only what is established by law can be done and considering that the Court does not have the power to render provisional measures once a final and not subject to appeal ruling has been rendered by the

⁹ Art. 30 Statute of the Court: “*The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a State has failed to comply with the Court's ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the inter-American system of human rights, insofar as they concern the work of the Court.*”

¹⁰ Art. 66: “*1. When no specific ruling on reparations and costs has been made in the judgment on the merits, the Court shall set the date and determine the procedure for the deferred decision thereon. 2. If the Court is informed that the victims or their representatives, the respondent State, and, if applicable, the petitioning State have reached an agreement with respect to the execution of the judgment on the merits, it shall verify that the agreement accords with the Convention and rule accordingly.*”

¹¹ Art. 68: “*“1. The request for interpretation referred to in Article 67 of the Convention may be made in connection with judgments on preliminary objections, on the merits, or on reparations and costs, and shall be filed with the Secretariat. It shall state with precision questions relating to the meaning or scope of the judgment of which interpretation is requested. 2. The Secretary shall transmit the request for interpretation to all those participating in the case and shall invite them to submit any written comments they deem relevant within the time limit established by the Presidency. 3. When considering a request for interpretation, the Court shall be composed, whenever possible, of the same Judges who delivered the judgment whose interpretation is being sought. However, in the event of death, resignation, impediment, recusal, or disqualification, the judge in question shall be replaced pursuant to Article 17 of these Rules. 4. A request for interpretation shall not suspend the effect of the judgment. 5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.”*

¹² Art. 69: “*1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives. 2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate. 3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing. 4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders. 5. These rules also apply to cases that have not been submitted by the Commission.”*

¹³ Art. 76: “*The Court may, on its own motion or at the request of any of the parties to the case, within one month of the notice of the judgment or order, rectify obvious mistakes, clerical errors, or errors in calculation. The Commission, the victims or their representatives, the respondent State, and, if applicable, the petitioning State shall be notified if an error is rectified.*”

Court, if it were to grant such measures, this would imply that the case is still under consideration, that the controversy it has heard and resolved in fact continues.

As such, if such measures are rendered it would be important for the Court to recognize that the corresponding judgment, which declared that "*there has been a violation of a right or freedom protected*" in the Convention, and thus, provided "*the injured party be ensured the enjoyment of his right or freedom that was violated*"¹⁴, has not fulfilled its objective, has not been sufficient to "*avoid the irreparable harm*" that the violation caused in each person, that is, that it has not resolved the matter or case that was filed before the Court and thus it is paramount that such measures be issued.

For the abovementioned reasons, I consider that perhaps it should be necessary that in judgments where the Court declares a violation of the Convention, the Court expressly recall the State's general and permanent obligation to "*respect the rights and freedoms recognized*" in the Convention and to "*ensure to all persons subject to their jurisdiction the free and full exercise of those rights*,"¹⁵ and that this specifically includes the obligation to "*avoid irreparable damage to persons*"¹⁶ involved in the case and matter at hand. Perhaps, it would be similarly convenient for the Court to order that, as part of the monitoring of compliance with the respective judgment, that it be informed of the measures adopted by the State to eradicate the situations of extreme gravity or urgency that gave rise to the provisional measures rendered in the case in order to "*avoid irreparable damage to persons.*"

And, certainly, all this does not prevent the Court from once again ordering provisional measures regarding the same persons named in the case that was previously decided by the Court, either in a new matter filed before the Court or in one that has not yet been filed, if the Commission so requests.

EDUARDO VIO GROSSI
Judge

Pablo Saavedra Alessandri
Secretary

¹⁴ Art. 63(1) of the Convention: "*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.*"

¹⁵ Art. 1(1) of the Convention: "*the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*"

¹⁶ Art.63(2) of the Convention.