

**SEVENTH ANNUAL INTER-AMERICAN
HUMAN RIGHTS MOOT COURT COMPETITION**

BENCH MEMORANDUM*

WILLIAMS ET AL. V. STATE OF BUENAVENTURA

I. INTRODUCTION

A. Initial considerations

* The hypothetical case and bench memorandum were prepared by Elizabeth Abi-Mershed and Mario López, attorneys at the Inter-American Commission on Human Rights. The authors recognize with gratitude the integral participation of Juan Pablo Albán, attorney and Rómulo Gallegos Fellow at the Commission, in the preparation of both documents, and the assistance of Commission attorneys Brian Tittermore and Andrea Galindo. Claudia Martín, Co-Director of the Academy on Human Rights and Humanitarian Law at the Washington College of Law, and Commission attorney Veronica Gómez provided comments on the hypothetical case. Claudio Grossman, Dean of the Washington College of Law, and attorney Shazia Anwar, Competition Coordinator, provided important advice and assistance throughout this process.

The Inter-American Court of Human Rights [hereinafter “Inter-American Court,” “Court” or “IACtHR”] has scheduled a public hearing to receive oral arguments in the case of *Williams et al. v. Buenaventura* on (1) preliminary objections; (2) arguments on the merits; and (3) the request for provisional measures submitted pursuant to the filing of the application before the Court.

The present bench memorandum is intended to outline the principal legal issues and the corresponding arguments each team may raise. It is a guide, and not intended to be exhaustive. While the teams will naturally vary in terms of their perspectives and points of emphasis, and may not necessarily cover all the arguments suggested or be familiar with all the applicable case law, they are expected to address each of the principal legal issues raised in the hypothetical.

In terms of methodology, this memorandum reviews the arguments concerning admissibility with reference, first, to the arguments of the state, and then to the arguments of the Inter-American Commission on Human Rights [hereinafter “Inter-American Commission,” “Commission” or “IACHR”]. The arguments concerning the merits and the request for provisional measures are organized in the reverse order.

As noted in the hypothetical case, these proceedings before the Court are governed by the new Rules of Procedure of both the Court and the Commission.¹ In this regard, while these new Rules provide the petitioners with independent standing to present their positions in all the stages subsequent to the filing of the application by the Commission, for the purposes of this hypothetical case, the petitioners and the Commission share the positions taken before the Court.

B. The focus of the hypothetical case

The petition that gave rise to the present proceedings denounced:

- The killing of Elena Williams and Alberta Jones, and the subsequent lack of judicial protection and due process;
- The threats against the members of Equal Justice Now (EJN), and the impact on the ability of those members to function in association with one another; and,
- The chilling effect of the application of the coercive power of the judiciary to force Teodoro Collins to reveal a confidential source on his freedom of expression.²

The petitioners contended that the facts denounced constituted violations of Articles 1(1), 4, 5, 8, 13, 16, 24 and 25 of the American Convention on Human Rights [hereinafter

¹ The respective new Rules entered into force in 2001. Please note that information about the system, its instruments, and the jurisprudence of the Inter-American Commission are available at www.cidh.org. Information about the Inter-American Court, its instruments, and its jurisprudence are available at www.corteidh.or.cr. Another useful source in analyzing the jurisprudence of the system is *Centro de Derechos Humanos y Derecho Internacional Humanitario* (Claudio Grossman et al.), *Repertorio de jurisprudencia del sistema interamericano de derechos humanos 1980-1997* (Washington College of Law, 1998).

² See *hypothetical*, para. 31.

“American Convention” or “Convention”]. In its admissibility report of January 22, 2001, the Commission determined that the claims concerning Articles 1(1) (obligation to respect and ensure), 4 (right to life), 8 (right to judicial guarantees), 13 (right to freedom of expression) and 25 (right to judicial protection) were admissible, and the denunciations concerning Articles 5 (right to humane treatment), 16 (right to freedom of association) and 24 (right to equal protection) were inadmissible.³

On October 10, 2001, the Commission adopted its report on the merits of the case, finding that the acts denounced constituted violations of Articles 1(1), 4, 8, 13 and 25 of the American Convention. In consequence, the Commission recommended that Buenaventura: (1) investigate and clarify the circumstances of the violations; (2) prosecute and punish those responsible; and (3) provide just reparation to those affected. The response of the State to that report, dated December 10, 2001, indicated that these recommendations had not been implemented.⁴ Rather, the State submitted a brief response listing the investigations underway.⁵

It is expected that in their written and oral arguments the teams will address each of the principal legal issues raised with respect to Articles 1(1), 4, 8, 13 and 25 of the American Convention. The hypothetical case does not define which acts or omissions of the State were deemed violative by the Commission, or for which reasons. It is up to the participants to determine how to orient their positions in this regard.

In summary, this year's hypothetical concentrates on three basic issues, all firmly within the framework of the American Convention. The first concerns the right to life and the nature and scope of the State's duty to investigate killings that may or may not be tied to State agents. The central question is at what point deficiencies in an investigation implicate the responsibility of the State for a lack of due diligence in discharging its duty to investigate. The further question is whether, or at what point such deficiencies would give rise to responsibility for a violation of the right to life itself.

The second issue concerns the scope of freedom of expression, ostensibly pitting the value of free access to information against that of restrictions arguably required to safeguard the right of third persons to life and physical integrity. The third issue also concerns the question of safeguarding rights, insofar as it seeks to explore the legitimate scope of provisional measures. While such measures have traditionally been granted in favor of persons whose life or physical integrity was in imminent jeopardy, the further question posed in the hypothetical is whether, or under what circumstances restrictions on the right to liberty and freedom of expression may constitute a situation of “extreme gravity and urgency” requiring measures “to avoid irreparable damage to persons.”⁶

³ *Id.* para. 32. Please note that the ambiguous status of the claims raised under Article 5 in the hypothetical was clarified in the responses to the questions presented by the teams. The claims under Article 5 were deemed by the Commission to be inadmissible. See “hypothetical case questions,” answer 10.

⁴ See hypothetical, para. 33.

⁵ See hypothetical case questions, answer 5.

⁶ American Convention, Article 63(2).

The hypothetical case places before the competitors issues being dealt with by the Commission and Court in many pending cases. Further, it highlights the role of human rights defenders and the members of the press who play such a crucial role in the quest for transparency and accountability in our societies.

II. PRELIMINARY OBJECTIONS

Buenaventura has been a State Party to the American Convention since 1990, and recognized the contentious jurisdiction of the Inter-American Court of Human Rights in 1991.⁷ Accordingly, under the provisions of Article 62(3) the Court is competent to hear the present case. The hypothetical suggests a preliminary exception with respect to the exhaustion of domestic remedies for certain claims presented.

A. Exhaustion of Domestic Remedies

1. General considerations and applicable law

Article 46(1)(a) of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure that the state concerned has the opportunity to resolve disputes within its own legal framework. "Exhaustion" in this sense can be shown through the issuance of a final judgment.

With respect to the claims concerning Mr. Collins that were addressed by the Commission in its merits report, namely the issuance of the summons to appear in court and the subpoena, and his detention during the fall of 1999, he filed a writ of *habeas corpus*, a federal appeal, and a final appeal before the Supreme Court.⁸ This would appear to indicate compliance with the requirements of Article 46(1)(a). However, there has been no such final sentence with respect to the claims raised concerning the killings of Elena Williams and Alberta Jones and the threats against the members of EJNI.

The American Convention provides that, when domestic remedies are unavailable as a matter of fact or law, the requirement that they be exhausted is excused.⁹ More specifically, Article 46(2) provides that this exception applies: if the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; if the party alleging violation has been hindered in his or her access to domestic remedies; or if there has been unwarranted delay in the issuance of a final judgment.

The killings of Williams and Jones have been under investigation since they took place in September of 1999. The various threats against EJNI members, beginning in August of 1999,

⁷ See hypothetical, para. 38.

⁸ *Id.* para. 27.

⁹ See IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, para. 17.

were denounced by the group, and subjected to investigation by the Special Prosecutor appointed to handle the EJM complaint about police abuses.¹⁰ With respect to these claims, the competent authorities indicate they have been unable to establish the identity of those responsible, thus no one has been accused, and no final judgment has been issued.¹¹

In terms of the burden of proof with respect to the requirements of Article 46(2), it should be noted that, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31 of the Commission's Rules of Procedure establishes that the burden then shifts to the State to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged.¹² Where the State then makes a showing that a certain remedy should have been used, the burden shifts back to the petitioner to show that it was exhausted or that one of the exceptions under Article 46(2) applies.¹³

2. Arguments of the State

The inter-American system provides remedies that are subsidiary to those the State is required to provide at the national level. It is the States that are the ultimate guarantors of the rights protected in the Convention, and it is crucial that the domestic judicial systems be given the opportunity to comply with their responsibilities. The goal of the regional human rights system is that national protection systems be strengthened, not replaced.

In responding to the complaint filed by EJM concerning questionable police shootings and claims of abuse in custody, Buenaventura immediately opened a criminal investigation and named a Special Prosecutor.¹⁴ When members of EJM received threats in apparent connection with their work on that case, the response on the part of the police and the Special Prosecutor was immediate. The Special Prosecutor twice offered concrete measures of protection that would also aid in investigating the threats (namely a police presence in EJM's offices, and later a trace on the phone line), that EJM declined.¹⁵ When Alberta Jones was found shot to death, EJM requested that the State provide protective measures through private security guards, and the State promptly took the measures necessary to implement that request.¹⁶

Buenaventura has applied and continues to apply due diligence in responding to the killings of Elena Williams and Alberta Jones and the threats against the members of EJM. The

¹⁰ Hypothetical, paras. 18-19.

¹¹ *Id.* para. 30.

¹² See also, e.g., IACtHR, *Velásquez Rodríguez Case*, Merits, Judgment of July 29, 1988, Ser. C Nº 4, paras. 59-60; *Godínez Cruz Case*, Merits, Judgment of Jan. 20, 1989, paras. 62-63; *Fairen Garbi and Solís Corrales Case*, Judgment of March 15, 1989, paras. 83-84; *OC-11/90, supra*, para. 41.

¹³ See generally, IACtHR, *Velásquez Rodríguez Case, supra*, para. 60. It may be noted that the analysis of the admissibility of claims corresponds first and foremost to the Commission.

¹⁴ See hypothetical, para. 16.

¹⁵ *Id.* paras. 18-19.

¹⁶ *Id.* para. 21.

duty to investigate is one of means, not of results.¹⁷ The State's inability to individualize the perpetrators and bring them to justice is a function of: the complexities of the case; the fact that the members of EJN were not fully cooperative in the sense that they twice declined to accept measures of protection and investigation; and that journalist Teodoro Collins, who possesses information that could help clarify these crimes, has refused to cooperate, notwithstanding the State's best efforts to employ all available means to require him to do so. As a contextual factor, it should be noted that criminal investigations in Buenaventura have become more complicated in recent years, due to the rise in crime, including drug trafficking and the increasing penetration of organized crime.¹⁸

In fact, the measures taken to investigate the complaint filed by EJN with respect to questionable police shootings and abuses in custody demonstrate that the legal system of Buenaventura offers available and effective domestic remedies. Between the filing of that complaint on August 1, 1999, and March 12, 2000, eight police officers were arrested, prosecuted and sentenced at first instance.¹⁹ That process was prompt, thorough and achieved the ends for which it was designed. The State's efforts to investigate the killings of Williams and Jones and the related threats remain active and ongoing, most especially in terms of continuing to try to gather vital information from Mr. Collins.

The domestic system simply needs additional time to be able to fully resolve these complex crimes. In other cases where the Inter-American Court has established unwarranted delay in domestic proceedings, examples of the lapses in question range from five to seven years or much more.²⁰ The petitioners sought recourse before the Commission prematurely, and by admitting their petition in January of 2000, the Commission deprived the State of a reasonable opportunity to resolve the situation.

3. Arguments of the Commission

The requirement that domestic remedies be exhausted must be excused in this case on the basis that the petitioners have been impeded from having access to such measures, and the proceedings have been subjected to undue delay. First, the petitioners were effectively impeded from exhausting domestic remedies due to deficiencies in the investigation by the authorities. While it is the responsibility of the petitioner in a given instance to ensure that the State is placed on proper notice of an alleged violation of the Convention, so as to have an adequate opportunity to resolve the complaint within its own legal system, it is the State that is obliged to advance the investigation of any crime which may be prosecuted *de oficio*.²¹ In such

¹⁷ See generally, IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 175; *Godínez Cruz Case*, *supra*, para. 185.

¹⁸ See hypothetical, para. 3.

¹⁹ See *id.* paras. 16, 20, 29.

²⁰ In the *Genie Case* the lapse at issue was five years. See IACtHR, *Case of Jean Paul Genie*, Merits, Judgment of January 29, 1997, para. 81. In the *Case of Las Palmeras*, the lapse was seven years. See IACtHR, *Case of Las Palmeras*, Preliminary Exceptions, Judgment of 4 Feb. 2000, para. 38.

²¹ See, e.g., IACHR, Report N° 72/01, Petition 11.804, *Juan Angel Greco*, Argentina (admissibility) Oct. 10, 2001, *Annual Report of the IACHR 2001*, para. 51; Report N° 52/97, Case 11.218, Nicaragua, *Arges Sequeira Mangas* (merits), *Annual Report of the IACHR 1997*, paras. 96, 97.

cases, it can only be demanded that the petitioner exhaust domestic remedies where the State concerned investigates the facts alleged with due diligence and proceeds to punish any persons found responsible in accordance with its duties under both domestic law and the Convention.²²

Deficiencies in the early stages of the investigation of the killings of Williams and Jones included failing to find certain physical evidence, or to take scrapings under the fingernails of Alberta Jones, or to interview all potential witnesses at the scene of Elena Williams' murder. These errors, coupled with the negligent loss or criminal concealment of the bullets used in both killings are so grave as to vitiate the possibility that this investigation could produce effective results.²³

Second, there has been undue delay in the domestic legal proceedings, which date back to the fall of 1999. While over two and half years have passed since the killings and threats, the investigation remains in its initial stage. Not a single person has been implicated in connection with these crimes. Nor do the facts refer to ongoing measures that have any reasonable possibility of correcting those deficiencies or otherwise producing effective results. With the passage of time, the physical and testimonial evidence only becomes harder to find and less reliable, thereby further impeding the possibility of clarifying the crimes and holding those responsible to account.

III. THE MERITS

The analysis concerning the merits of the case is focussed on the rights to life (Article 4 of the Convention), freedom of expression (Article 13), and judicial protection and guarantees (Articles 25 and 8), all in connection with the general obligation of the State to respect and ensure human rights (Article 1(1)).

Potential State responsibility for the violation of the right to life is raised both directly and indirectly with respect to the killing of Alberta Jones and Elena Williams. On the one hand, there are circumstantial indicia that suggest the possible involvement of State agents in those killings. On the other hand, the hypothetical case raises an issue as to whether the State adopted adequate preventive measures in the face of threats against those connected with EJM's investigation of police abuses, including Jones and Williams. Further, the hypothetical calls into question the adequacy of the State's investigation into the killing of Jones and Williams. Given that the hypothetical doesn't clarify whether State agents were directly involved in the killings, the key issues concern the extent to which the State complied with its duties of prevention and due diligence in relation to these facts.

With respect to the right to freedom of expression, the issues raised focus on the legitimacy of the State's efforts to compel Teodoro Collins to reveal the identity of his

²² See, e.g., IACHR, Report N° 62/00, Case 11.727, *Hernando Osorio Correa*, Colombia (admissibility), *Annual Report of the IACHR 2000*, para. 24.

²³ See Hypothetical, para. 30.

anonymous source. The hypothetical case pits his interest in free expression against the presumed need to protect members of EJM against threats to their lives and physical integrity.

Lastly, this section addresses the right to judicial protection and guarantees and the obligation of the State to respect and ensure human rights, principally with respect to the killings of Alberta Jones and Elena Williams.

A. The right to life

1. General considerations and applicable law

In its October 10, 2001 report on the merits of this case, the Commission determined that the State of Buenaventura had violated Article 4 of the American Convention with respect to the killings of Alberta Jones and Elena Williams.²⁴ Article 4 provides that “[e]very person has the right to have his life respected,” and that “[n]o one shall be arbitrarily deprived of his life.” Because the right to life is the essential basis for the exercise of all other rights, it is accorded special importance within the system of Convention guarantees.²⁵

The right to life not only presupposes that no person may be deprived of life arbitrarily, but further requires that the State take all appropriate measures to protect and preserve this right.²⁶ The State’s obligation to respect and ensure this right must be interpreted so as to guarantee its efficacy, and subjected to the strictest scrutiny.

The hypothetical presents circumstantial information that points to the possibility of involvement by State agents in the killings of Jones and Williams, although that possibility has yet to be clarified in terms of the State’s investigation. The demonstrated involvement of State agents would necessarily give rise to State responsibility, as, in principle, any exercise of public power in violation of a protected right constitutes a failure on the part of the State to uphold its duty to respect set forth in Article 1(1).²⁷ This principle applies to the acts of State agents within their official capacity, as well as to the omissions of such agents, even when acting outside the scope of their authority or in violation of domestic law.²⁸

²⁴ See *id.* para. 33.

²⁵ See IACtHR, *Villagrán Morales et al. Case (the “Street Children” Case)*, Merits, Judgment of Nov. 19, 1999, para. 144

²⁶ See *id.* para. 144 (indicating that the State must not only ensure that its agents refrain from any arbitrary deprivation of life, but must also “guarantee the creation of the conditions required in order that violations of this basic right do not occur.” See also *Gangaram Panday Case*, Merits, Judgment of 21 of January 1994, para. 3, Dissenting Opinion of Judges Picado Sotela, Aguiar-Aranguren y Cançado Trindade (affirming the duality of the State’s “negative” and “positive” obligations in this regard).

²⁷ See, e.g., IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 169; *Godínez Cruz Case*, *supra*, para. 178.

²⁸ See, e.g., IACtHR, *Velásquez Rodríguez Case*, *supra*, paras. 169-71; *Godínez Cruz Case*, *supra*, paras. 178-80; *Neira Alegría Case*, Merits, Judgment of Jan. 19, 1995, para. 63; *Caballero Delgado y Santana Case*, Merits, Judgment of December 8, 1995, para. 56.

Responsibility may also be imputed to the State -- even where the act denounced was committed by a private actor, or responsibility has not been clarified -- if it is shown that the State failed to apply due diligence in preventing the violation or responding to it as required by the Convention. It has been long-established that:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, [and] to impose the appropriate punishment²⁹

While deficiencies in investigation would normally give rise to State responsibility in relation to Articles 25 and 8 of the Convention, concerning the rights to judicial protection and guarantees respectively, under certain circumstances, such deficiencies can give rise to responsibility for the violation of the right to life itself, even where the circumstances of the violation have not been clarified. Given the lack of clarification as to direct involvement by agents of Buenaventura, a key question in this case is whether responsibility should be imputed to the State for having failed to take adequate measures of prevention in favor of Jones and Williams following the threats against EJM, or for having failed to apply due diligence in investigating the killings once they took place.³⁰ [It may be noted that there is necessarily some overlap between this argument in relation to Article 4, and the arguments related to Articles 25, 8 and 1(1) in section III.C, *infra*.]

2. Arguments of the Commission

The State of Buenaventura is responsible for the violation of the right to life with respect to Elena Williams and Alberta Jones for three reasons: first, because all available indicia point to the involvement of State agents in the murders; second, because the State failed to take adequate measures to prevent these killings by safeguarding the victims in the face of serious threats; and third, because the State failed to respond to the killings with due diligence to investigate, and to prosecute and punish those responsible.

First, the State of Buenaventura bears responsibility because there are substantial indicia that Alberta Jones and Elena Williams were killed by agents of the police department to prevent them from pursuing an investigation into police abuses including torture and murder. As will be recalled, EJM, working with Williams as its Legal Director, had initiated its investigation upon its discovery that the victims of five police shootings had previously filed formal complaints of abuse in police custody. The shootings and abuse were all tied to the Central Police Station in Cambacropolis.³¹ Alberta Jones, who witnessed one of those killings, contradicted the justification of self-defense and the related scenario contained in the police report.³² Alberta Jones and Elena Williams were killed in September of 1999, following: the filing of EJM's formal complaint and the press conference detailing alleged abuses by officers of the Central Police

²⁹ IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 174; *Godínez Cruz Case*, *supra*, para. 184.

³⁰ See generally, IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 172; *Godínez Cruz Case*, *supra*, paras. 181-82; *Caballero Delgado y Santana Case*, *supra*, para. 56.

³¹ See hypothetical, paras. 8, 11.

³² *Id.* para. 10.

Station, including premeditated killings; the publication of a front page article in the Free Press recounting the allegations; the suspension of eight officers linked to the abuses; the declaration by Jones; the arrest and preventive detention of the three officers linked to the shooting witnessed by Alberta Jones; and the receipt of anonymous threats aimed at intimidating EJM to drop the investigation.³³

Strikingly, Alberta Jones' body was found at almost the same exact location as the police shooting she herself had witnessed.³⁴ Further, it appears that 9 mm. weapons, the type utilized by the Buenaventura police, were used in the killings of both Jones and Williams. Moreover, the killings of both Jones and Williams were followed by the disappearance of the bullets used.³⁵ Given that the police were the first to arrive on the scene, it can only be concluded that the investigating officers took the bullets as part of a plan to obstruct justice in this case.

Second, the State of Buenaventura bears responsibility because it failed to take reasonable measures to prevent these violations. Given the context of this investigation of grave abuses by the police, the State was on notice of the need to adopt special measures of protection for those involved. The allegations raised by EJM implicated officers of the Central Police Station, indicating that they had abused the power and authority vested in them by the State to torture and even kill. The fact that the abuses alleged by EJM were not isolated, but part of a pattern evidently involving multiple officers, and that the investigation opened as a result of EJM's complaint was being carried out by the police department itself, should have raised clear warning signals for the competent authorities to adopt protective measures for all involved in pursuing the investigation.

The need for protective measures was especially evident with respect to individuals such as Alberta Jones and Elena Williams, who were playing critical roles in seeking justice for those abuses. Particularly following the receipt of anonymous threats aimed at intimidating EJM into dropping their participation, the competent authorities were on notice that it was those most directly involved in the investigation who were at the greatest risk. While the anonymous threats were nominally directed at EJM and Elena Williams,³⁶ the authorities would clearly have been aware that, as the only witness to have implicated officers of the Central Police Station in crimes involving torture and killings, Alberta Jones was also at grave risk.

The duty to prevent violations "includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights."³⁷ "States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent [their] agents from violating it."³⁸ Similarly, in emphasizing the "paramount importance" of the need to protect against arbitrary

³³ See *id.* paras. 12-19.

³⁴ See *id.* para. 20.

³⁵ See *id.* paras. 20, 23, 30.

³⁶ See *id.* paras. 18-19.

³⁷ IACtHR, *Velásquez Rodríguez*, *supra*, para. 175.

³⁸ IACtHR, *Case of the Street Children*, *supra*, para. 144.

deprivations of the right to life, the Human Rights Committee has indicated that, under the International Covenant on Civil and Political Rights:

States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, [the State] must strictly control and limit the circumstances in which [a person] may be deprived of his life by such authorities.³⁹

In examining the duty to take positive measures of protection for the right to life, the European Court of Human Rights has considered “whether the authorities did all that could be reasonably expected of them to avoid the risk” to the victim.⁴⁰ Where “defects” in the State’s response “removed the protection which [the victim] should have received by law” the European Court concluded that “in the circumstances ... the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the [victim’s] life.”⁴¹

The State may attempt to rely on the fact that EJM, legitimately concerned that the imposition of the measures of protection suggested by the State (i.e. a police presence in their office and a trace on their phone lines) would hinder their ability to serve their other clients, declined the measures of protection offered by the Special Prosecutor.⁴² However, the fact that EJM declined this offer on the basis of its legitimate concerns did not vitiate the duty of the State to take reasonable measures of protection. Rather, it was incumbent upon the State to seek other less intrusive means of protection which would have accomplished the objective of protection without impeding EJM in its work; to give one example, police patrols in the vicinity of the office.

Third, the State of Buenaventura bears responsibility for the violation of the right to life in this case because of its failure to respond with due diligence to investigate the killings, and to prosecute and punish those responsible. Article 4 must be interpreted with reference to the object and purpose of the Convention “as an instrument for the protection of individual human beings” which “requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.”⁴³ The obligations of the State to protect the right to life, read in conjunction with its obligation under Article 1(1) to respect and ensure the rights set forth in the Convention, necessarily require an “effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.”⁴⁴ International and regional human rights law have established that any violation of the right to life requires the State

³⁹ *Id.*, para. 145, citing UNHum.Rts.Committee, General Comments 6/1982, para. 3 and cf. General Comment 14/1984, para. 1.

⁴⁰ Eur.Ct.H.R., *Mahmut Kaya v. Turkey*, 03/28/2000, para. 87.

⁴¹ *Id.*, paras. 99, 101.

⁴² See hypothetical, paras. 18-19.

⁴³ Eur.Ct.H.R., *McCann and Others v. the United Kingdom* (1995), Ser. A No. 324, para. 146 (citations omitted).

⁴⁴ *Id.* at para. 161.

to undertake a judicial investigation by a criminal court designed to "prosecute criminally, try and punish those held responsible for such violations."⁴⁵

Accordingly, in certain cases where the State concerned failed to adequately investigate allegations of arbitrary killings, international human rights tribunals have established State responsibility for violations of the right to life, notwithstanding that the circumstances of the deaths had not been fully clarified.⁴⁶ Given the pattern of obstruction of justice in the present case, and the failure of the State to apply due diligence to clarify these crimes, the proper application of the Convention's guarantees requires that Buenaventura be held responsible for these violations of the right to life.⁴⁷

3. Arguments of the State

First, there has been no showing of participation by State agents in the killings of Alberta Jones and Elena Williams, and thus no basis for the attribution of responsibility to the State. Notwithstanding that the competent authorities responded to these killings promptly, and carried out the prescribed measures of investigation at the crime scenes, these measures produced limited physical evidence and no eye witnesses.⁴⁸ There is, accordingly, no evidence linking these crimes to any State agents. While it may be noted that the killers apparently utilized 9 mm. weapons, which happen to be in use by the public security forces, it is well known that such weapons are also widely used by the criminal element in Buenaventura.⁴⁹

Second, the State took reasonable measures to prevent these killings, and bears no responsibility for omissions in this regard. It should be noted that, in response to a rise in crime over the last five years, Buenaventura has been strongly increasing its efforts to improve security for all of its citizens.⁵⁰

The State is especially attentive to the needs of individuals involved in ongoing police or judicial investigations. It is for this reason that the Special Prosecutor appointed to handle the investigation of the complaint of police abuses filed by EJM was also responsible for coordinating the State's response to the threatening note and phone call received by EJM.⁵¹ In this regard, the State notes that as soon as its authorities were informed that a threatening note had been found in EJM's offices, they sent a special unit to investigate, and the Special

⁴⁵ UNH.R.Committee, *Bautista v. Colombia*, Decision of 27 Oct. 1995, para. 8.6; see IACHR, Reports 28/92 (Argentina), *Herrera et al*, and 29/92 (Uruguay), *de los Santos Mendoza et al.*, in *Annual Report of the IACHR 1992-93*, March 12, 1993, pp. 35, 154.

⁴⁶ See e.g. Eur.Comm.H.R., *Kaya v. Turkey*, Decision of 24 Oct. 1996 (App. No. 22729/93)(finding insufficient grounds to determine that a killing by State security forces had been unlawful, but sufficient grounds for a finding of a violation of the right to life based on the inadequacy of the investigation); UN H.R.Committee, *Dermi Barbato v. Uruguay*, No. 84/1981, para. 9.2 (examining similar considerations with respect to whether a death in custody was murder or suicide, as claimed by State).

⁴⁷ See also the arguments set forth in section III.C.2 concerning the duty to investigate.

⁴⁸ See hypothetical, paras. 20, 23, 30.

⁴⁹ See *id.* para. 30.

⁵⁰ See *id.* paras. 4, 7.

⁵¹ See *id.* paras. 16, 18, 19, 21.

Prosecutor offered police protection for their offices that same morning. Members of EJM declined that offer, as was their right, in view of preferences concerning their operations. Further, it may be noted, EJM personnel indicated that they had doubts as to the seriousness of the threat.⁵² When Elena Williams received a threatening phone call the next day, the police again initiated an immediate investigation. The Special Prosecutor reiterated the offer of police protection, and further offered to put a trace on their phone lines. Again, EJM declined that offer, as they were entitled to do.⁵³ Taking into account, *inter alia*, the rights of the members of EJM to privacy, expression and association, the State was not free to unilaterally impose the exercise of public power in any way it saw fit.

The State's duty is to take reasonable measures to prevent violations. It is a duty of means rather than results. As the Inter-American Court has clarified: "Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures."⁵⁴ In this sense, the State cannot be held responsible for failing to take measures of protection when the measures it offers, calculated to effectively address the presumed risk, are then refused. Buenaventura considers that the duty to prevent is breached, for example, when a State is placed on notice of a situation of risk, but purposefully or negligently fails to respond. For example, in the *Case of Joao Canuto de Oliveira*, the Commission established the responsibility of Brazil for the violation of the victim's right to life on the basis that the police had refused to provide him with measures of protection, notwithstanding that he had received a series of death threats, reported them to the competent authorities, and had expressly requested such protection.⁵⁵ In that case, the State "failed to fulfill its duty to prevent [] the commission of an illicit act in violation of human rights by not affording protection to the victim when he requested it, leaving him unprotected and thereby facilitating his subsequent murder."⁵⁶

In the present case, it must be emphasized that when the members of EJM subsequently requested that the State provide protection for their office through a private security company, the Special Prosecutor accepted that same day,⁵⁷ notwithstanding that the State's preference for both substantive and budgetary reasons would have been to provide such security through its police force. This is just one example of how the State in fact prioritizes the needs of persons presumably at risk in relation to ongoing criminal investigations. In summary, the State considers that it has taken all reasonable measures to discharge its duty of prevention, and that the Commission has demonstrated no causal link between its actions in this regard and the unfortunate deaths of Alberta Jones and Elena Williams.

Third, the State has responded to the killings of Alberta Jones and Elena Williams with due diligence aimed at achieving full clarification of the facts, and the prosecution and

⁵² *Id.* para. 18.

⁵³ *Id.* para. 19.

⁵⁴ IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 175; *Godínez Cruz Case*, *supra*, para. 185.

⁵⁵ See IACHR, Report No 24/98, Case 11.287, Brazil, April 7, 1998, in *Annual Report of the IACHR 1997*.

⁵⁶ *Id.* para. 53.

⁵⁷ See hypothetical, para. 21.

punishment of those responsible. "The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result."⁵⁸ In contrast to the kinds of cases where the Inter-American Court has established State responsibility for failing to apply due diligence, Buenaventura has assumed the investigation as its own duty, and search for the truth. The State has never discounted the seriousness of the crimes, or attempted to resort to requiring third parties to impel the investigation or come forward with proof.⁵⁹ Nor is it the case that the procedures in place are ineffective.⁶⁰ In fact, the ability of the system to produce prompt and effective results is demonstrated by the arrest, detention, trial and conviction of the eight police officers implicated in relation to EJM's complaint.⁶¹

Buenaventura considers the right to life to have a priority value within the system of Convention guarantees. For this reason, it accepts that there may be very exceptional cases in which a State may be held responsible for a violation of that right, not on the basis of proof of participation by its agents, but solely for having failed to respond with due diligence. The justification for such a finding would arise, in principle, where the participation of State agents could not be clarified because the State had permitted the willful obstruction of justice. However, as the Inter-American Court cautioned in a recent decision, while it is possible that in a particular case the failure to investigate could be interpreted as a form of covering up responsibility for a crime against life, this reasoning is not valid for all cases.⁶² Rather, this criteria is applicable in the absence of an effective investigation.⁶³ The facts presently before the Inter-American Court demonstrate that Buenaventura is applying its best efforts to clarify these killings and bring the perpetrators to justice.

B. The right to freedom of expression

1. General considerations and applicable law

In its October 10, 2001 report on the merits, the Commission determined that the State of Buenaventura had violated Article 13 of the American Convention, in prejudice to the rights of Teodoro Collins, with respect to the use of public power to compel him to reveal his confidential source. In pertinent part, Article 13 sets forth that:

⁵⁸ IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 177.

⁵⁹ See *id.* paras. 177-79 (analyzing the State's failure to take the violations seriously, and attempts to require the victim's relatives to prove their allegations of violations absent any effective investigation); *Godínez Cruz Case*, *supra*, paras. 188-90.

⁶⁰ The State notes that in many of the cases with respect to which the Inter-American Court has established State responsibility for a lack of due diligence in this regard, the procedures for obtaining the investigation of an alleged violation were shown to be completely ineffectual during the period in question. See, e.g., IACtHR, *Case of Paniagua Morales et al.*, Merits, Judgment of March 8, 1998, paras. 164, 166, 168 (concerning the inefficacy of the writ of *habeas corpus* at the time of the facts).

⁶¹ See *generally* hypothetical, para. 29.

⁶² IACtHR, *Las Palmeras Case*, Merits, Judgment of Dec. 6, 2001, para. 42. *With respect to judgments of the Inter-American Court and other materials issued in late 2001 and early 2002, it should be noted that some participants may not have been able to access these.

⁶³ *Id.*

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
-

The Inter-American Court has emphasized that “those who are protected by the Convention not only have the right and the freedom to express their own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds. Consequently, freedom of expression has an individual and a social dimension.”⁶⁴ “These two dimensions must be guaranteed simultaneously.”⁶⁵

The day after Elena Williams was killed, journalist Teodoro Collins, a member of the investigative team of the Free Press, published an article reporting that a source inside the police had contacted him to express concern for the safety of members of the EJM. That source had overheard two men presumably referring to their involvement in the killing, the fact that the bullets had disappeared from the scene, and threatening that “if the others don't drop it, we will take care of them too.” Later that morning, the police arrived at the Free Press to question Collins. He repeated the information that had been published, but declined to reveal his source, and refused to hand over his notes from the interview.⁶⁶

Collins was summoned to appear in court on October 5, 1999, with a subpoena to turn over his notes. In view of Collins' refusal to reveal the requested information, the court fined him the equivalent of US \$10,000. When he refused to pay, the judge ordered that he be imprisoned for contempt of court. He was held for 48 days and released.⁶⁷ In response to his imprisonment, Mr. Collins filed a writ of *habeas corpus*, which was rejected on the basis that his detention had been ordered by a competent court in accordance with the law. His appeal was rejected on the basis that appeals were only heard in relation to convictions resulting in prison sentences in excess of six months, and his final appeal to the Supreme Court was rejected without comment.⁶⁸

⁶⁴ IACtHR, “*The Last Temptation of Christ Case*” (*Olmedo Bustos et al. vs. Chile*), Judgment of February 5, 2001, para. 64; *Ivcher Bronstein Case* (*Baruch Ivcher Bronstein vs. Peru*), Judgment of February 6, 2001, para. 146.

⁶⁵ IACtHR, “*The Last Temptation of Christ Case*,” *supra*, para. 67; *Ivcher Bronstein Case*, *supra*, para. 149.

⁶⁶ See hypothetical, paras. 24-25.

⁶⁷ *Id.* paras. 26-27.

⁶⁸ See *id.* para. 27. It should be noted that the facts related to Mr. Collins' second imprisonment (hypothetical, para. 35) arose subsequent to the filing of the application before the Inter-American Court. These are

The Inter-American Court has indicated that limitations on freedom of expression may only be justified by “an imperative public interest.”⁶⁹ More specifically, in accordance with the terms of Article 13, freedom of expression may not be subject to prior restriction or censorship, and any subsequent imposition of liability must meet certain conditions to be deemed legitimate:

- a) the existence of previously established grounds for liability;
- b) the express and precise definition of these grounds by law;
- c) the legitimacy of the ends sought to be achieved;
- d) a showing that these grounds of liability are “necessary to ensure” the aforementioned ends.⁷⁰

It should be noted that, in prohibiting all prior censorship, Article 13 of the American Convention provides protection for freedom of expression that is broader than that set forth in the International Covenant on Civil and Political Rights, the European Convention on Human Rights or the African Charter on Human and Peoples’ Rights. The American Convention contemplates a system in which individuals must be able to freely express themselves, although those who have exercised this right “shall be answerable for the consequences for which they are responsible,” in accordance with the conditions set forth above.⁷¹

The hypothetical case asks whether the State’s actions seeking to compel Mr. Collins to reveal his confidential source constitute a restriction of the journalist’s freedom of expression that could be justified by the arguable necessity to obtain that information in order to protect the lives and physical integrity of the members of EJN.

2. Arguments of the Commission

The measures applied by the State of Buenaventura to coerce Teodoro Collins to reveal the identity of his anonymous source constituted an undue restriction on his right to freedom of expression, and sent the broader message to journalists that the confidentiality of their sources was no longer protected.

Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be heard.⁷² In fact, it is an “indispensable requirement for the very existence of a democratic society.”⁷³ The Commission has further defined, in Principle 4 of its Declaration of Principles on Freedom of Expression, that given the importance of freedom of expression, the

thus only dealt with in section IV of the present memorandum, concerning the Commission’s request for provisional measures in favor of Mr. Collins.

⁶⁹ IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of Nov. 13, 1985, para. 46.

⁷⁰ *Id.* para. 39.

⁷¹ IACHR, Report No. 11/96, Case 11.230, *Martorell, Chile, Annual Report of the IACHR 1996*, at para. 55.

⁷² IACtHR, *OC-5/85, supra*, para. 42.

⁷³ IACHR, Declaration of Principles on Freedom of Expression, principle 1.

broad principle of access to information “allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”

As the Declaration of Chapultepec expresses: “No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant, it is an inalienable right of the people.”⁷⁴ In this sense, journalists serve as the front-line of protection of the right to impart and receive information and ideas of all kinds, and journalism is a “primary and principal manifestation of freedom of expression of thought.”⁷⁵

The measures taken against Teodoro Collins by the State fail under each and every one of the criteria set forth to evaluate a measure tending to restrict freedom of expression. Pursuant to the established case law of the system, the first two criteria for any valid restriction require the existence of previously established grounds for liability, and that these grounds be expressly and precisely defined. In the present case, the judicial measures applied to coerce Mr. Collins to reveal his source were taken pursuant to the courts’ interpretations of the norms of Buenaventura concerning public security.⁷⁶ This application of general measures lacks the precision required under these criteria. In fact, it flies in the face of the Constitution of Buenaventura, which establishes that: “The Congress shall not pass laws abridging the freedom of the press. A member of the press has the right to keep his or her source of information, notes and professional files confidential.”⁷⁷

The second two criteria set forth in the case law require that the ends sought by a restrictive measure be legitimate, and that the means employed be necessary to ensure those ends. While the Commission does not dispute that the protection of the rights of others, namely the security of the members of EJM, constitutes a valid State interest in general terms, it considers that the coercive measures applied in the instant case did not properly correspond to that interest, and were not necessary to ensure it.

The information published by Teodoro Collins provided the basis for the authorities of Buenaventura to pursue a number of alternative measures which could have aided in protecting members of the EJM and clarifying the killings of Alberta Jones and Elena Williams, and which in no way required coercing him to reveal his confidential source. For example, the published information indicated that the source was linked to the police, and that she had been in a quiet back office of the Central Police Station when she overheard the threatening and incriminating conversation.⁷⁸ The authorities accordingly had the basis to carry out interviews to question all personnel with access to such areas as to what they knew about the facts in question. Rather

⁷⁴ The Chapultepec Declaration, drafted by the Inter-American Press Association, and adopted by the Hemispheric Conference on Free Speech, Mexico City, March 11, 1994, sets forth 10 fundamental principles for the protection of freedom of expression in the hemisphere. It has been signed by numerous heads of State and Government as well as by many prominent individuals.

⁷⁵ IACtHR, OC-5/85, *supra*, para. 71.

⁷⁶ See hypothetical case questions, answer 29.

⁷⁷ See hypothetical, para. 26.

⁷⁸ See *id.* para. 24.

than taking action, however, the authorities opted to utilize their efforts to coerce Mr. Collins as an excuse for their inaction and lack of results.

The Commission notes that the imposition of this restriction bears certain hallmarks of attempts to restrict or punish expression on the basis of content. In this regard, it will be recalled that a high ranking officer of the Cambacropolis Police Department publicly expressed frustration with the “interference” by and “pressure of the media” on the police and the judiciary.⁷⁹ It must also be noted that the Free Press has suffered certain indirect consequences as a result of the measures taken against Mr. Collins. Namely, several public agencies and several private companies have cancelled their advertising contracts with the newspaper.⁸⁰

The measures taken were, furthermore, extreme and disproportionate to the ends sought. The ability to maintain the confidentiality of sources is an integral part of the exercise of the right to freedom of expression for a journalist. In this regard, it must be emphasized that the Commission broadly opposes the application of measures to coerce journalists to reveal confidential sources. In articulating the role and scope of freedom of expression in a democratic society, the Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights sets forth in principle 8 that “Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.”⁸¹ The Declaration of Chapultepec likewise sets forth, in principle 3, that: “No journalist may be forced to reveal his or her sources of information.”

The European Court of Human Rights has indicated that the:

[p]rotection of journalistic sources is one of the basic conditions for press freedom Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that

⁷⁹ *Id.* para. 17.

⁸⁰ *See id.* para. 28.

⁸¹ The Office of the Rapporteur on Freedom of Expression of the IACHR has indicated that:

The principal rationale underlying the right to confidentiality is that, in the scope of his or her work to supply the public with information necessary to satisfy the right to inform, the journalist is providing an important public service when he or she collects and disseminates information that would not be made known without protecting the confidentiality of the sources. Professional confidentiality consists of “observing discretion about the identity of the source to ensure the right to information; it has to do with granting legal guarantees to ensure anonymity and preventing possible reprisals that may result from having disclosed certain information.”

IACHR, “Report of the Office of the Special Rapporteur,” *Annual Report of the IACHR 2000*, vol. III, para. 37, citing Marc Carrillo. *La clausura de conciencia y el secreto profesional de los periodistas*. Civitas y Centro de Investigación, Barcelona. 1993, p. 170.

freedom, such a measure cannot be compatible with [the right to freedom of expression] unless it is justified by an overriding requirement in the public interest.⁸²

Further in this regard, the European Court has specified that “news reporting based on interviews ... constitutes one of the most important means whereby the press is able to play its vital role of `public watchdog.” “The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”⁸³

In the face of Mr. Collins’ determination to demand respect for his rights under the American Convention and Constitution of Buenaventura, the courts ordered that he be subjected to a disproportionately high fine, and in view of his nonpayment, imprisoned for 48 days.⁸⁴ The arbitrary deprivation of the liberty of any person is an illegitimate use of State power. In the case of a journalist, there are wider-reaching implications in terms of the chilling effect on the freedom of expression of the individual, and on other members of the profession. For this reason, the Declaration of Chapultepec expressly condemns the “[u]njust imprisonment of journalists as a severe limitation on freedom of expression.”⁸⁵ The ultimate implication of the measures applied in this case is that the State is effectively restricting Collins and other journalists in their means and methods of reporting.

3. Arguments of the State

Buenaventura is required to respect and ensure all rights protected under the American Convention. Accordingly, the State upholds the principle of freedom of expression set forth in Article 13(1) of the Convention, with due regard for the legitimate restrictions set forth in Article 13(2). It is equally required to ensure the rights to life and personal integrity. In the present case, the right to life and personal integrity of members of EJA have been and remain at risk in evident connection with their work on the investigation of abuses by the police.

In accordance with the terms of the Convention, as well as the jurisprudence of the system, freedom of expression cannot be considered an absolute right. Rather, like other rights, it is properly subject to the terms of Article 32(2) of the Convention, which provides that: “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” Moreover:

[t]he American Convention recognizes that restrictions may exist when the different rights protected therein are in conflict. Furthermore, the text of Article 13 recognizes that the right to freedom of expression is subject to restrictions in order to ensure “respect for the rights and reputations of others.”⁸⁶

⁸² Eur.Ct.H.R., *Case of Goodwin v. the United Kingdom*, Judgment of 27 March 1996, in *Reports 1996-II*, para. 39.

⁸³ Eur.Ct.H.R., *Case of Jersild v. Denmark*, Judgment of 23 Sept. 1994, Ser. A No. 298, para. 35.

⁸⁴ See hypothetical, paras. 26-27.

⁸⁵ Declaration of Chapultepec, principle 4.

⁸⁶ IACHR, *Martorell*, *supra*, para. 62.

In this sense, Buenaventura shares the Commission's view that "the zone of legitimate State intervention begins at the point where the expression of an opinion or idea interferes directly with the rights of others or constitutes a direct and obvious threat to life in society."⁸⁷

The measures taken to impel Teodoro Collins to reveal the identity of his source pursued the imperative and very narrowly drawn objective of ensuring the security of the members of EJM, and the closely related goal of clarifying responsibility for the killings of Alberta Jones and Elena Williams. In this sense, the measures taken in no way constitute a form of prior censorship, a limitation strictly forbidden by the terms of Article 13. This was neither the intention nor the effect, as demonstrated by the fact that Mr. Collins subsequently published a second article citing the same confidential source. Rather, the State considers that, strictly speaking, it was applying interim or protective measures aimed at ensuring the protection of EJM and others involved in the investigation. It was holding Mr. Collins responsible for the consequences of the information he published only insofar as necessary to identify his source so as to protect these persons.

In terms of the first two criteria that flow from Article 13 and the related case law -- that any subsequent imposition of responsibility flow from previously established law, and that the grounds be expressly and precisely defined -- every legal system necessarily provides for the protection of public security.⁸⁸ The legal system of Buenaventura is no exception, and the national courts are vested with full competence to interpret and apply that law, as they did in this case. Measures of the type taken in this case could have been taken in the context of virtually any legal system, and in fact are periodically taken in countries throughout the hemisphere.

Reference may be made in this regard to the criteria set forth in the European human rights system, which has indicated that valid limitations must be "necessary in a democratic society," i.e., necessary to meet a "pressing social need" and "proportionate to the legitimate aim pursued."⁸⁹ Whether there is such a pressing social need is necessarily, at first instance, a question for the competent authorities to determine within their margin of appreciation.⁹⁰ The State wishes to emphasize in this regard the importance it attributes to the protection of human rights defenders, who play a crucial role in holding the State to account. It is for this reason that the pertinent authorities have worked very closely with EJM in pursuing greater police accountability. This collaboration has included EJM's involvement in the follow up to a number of investigations of police shootings and its participation in the establishment of the Cambacropolis Civilian Review Board which provides oversight of the Office of Professional Responsibility of the police department.⁹¹ It is also for this reason that Buenaventura has responded to the threats received by EJM with the utmost seriousness.

⁸⁷ IACHR, "Report on the Compatibility of 'Desacato' Laws with the American Convention on Human Rights," in *Annual Report of the IACHR 1994*, at ch. V, section V.

⁸⁸ See hypothetical case questions, answer 29 (specifying that the measures applied to impel Collins to reveal his source were based on judicial interpretations of norms concerning public security).

⁸⁹ See, e.g., Eur.Ct.H.R., *Incal v. Turkey*, Judgment of 9 June 1988, *Reports 1998-IV*, para. 54.

⁹⁰ See Eur.Ct.H.R., *Goodwin*, *supra*, para. 40.

⁹¹ See hypothetical, para. 6.

Events in this case demonstrate conclusively that lives may be at risk. Given that the key witness, and one of the most instrumental advocates in the investigation have already been killed, the State is obliged to adopt all the measures reasonable and necessary to prevent any further violations. It is clear that Mr. Collins can identify his source, and that the source, as a police “insider” could provide critical information about the identity of the individuals she overheard implicating themselves in the threats and killings. Under these circumstances, it would be unreasonable for the State to fail to pursue the clarification of the identity of these perpetrators. As long as the identity of the source and the two individuals she overheard remain concealed, the members of EJM and other remain at risk.

In this sense, the present case is readily distinguishable from European precedents such as *Goodwin*, where it was determined that the State had other measures at its disposal to address the threatened harm to third parties, and that the nature of the commercial and legal interests at stake did not overrule the interest of a democratic society in securing a free press.⁹² It is also readily distinguishable from European precedents such as *Bladet Tromsø*, where the right to free expression in a democratic society was balanced against possible harm to the reputation of third parties due to published allegations of potentially criminal wrongdoing, or the inter-American precedent of *Martorell*, where that right was balanced against the interest of individuals potentially defamed by allegations of misconduct.⁹³

Nor is this a situation where the State has sought to restrict the expression of views on the basis of their content. Buenaventura understands Article 13 to apply to the expression of ideas deemed politically inconvenient, unpopular or offensive.⁹⁴ The State notes that the reporting of the Free Press has long played a role in increasing pressure on the police to clarify reports of unjustified or excessive force by its officers.⁹⁵ More specifically with respect to the facts under study, the Free Press has published a series of related articles, concerning the filing of EJM’s complaint, the killing of Alberta Jones and the two reports by Teodoro Collins.⁹⁶ The State accepts and welcomes this form of accountability, and the present case is no exception.

Rather, as the Inter-American Court indicated in the *Ivcher Case*, the measure in question should be examined in light of the facts as a whole, including their circumstances and context.⁹⁷ The measure at issue was narrowly drawn to achieve clarification of the identity of the informant. It has not restricted Mr. Collins’ ability to exercise his right of expression, and has in no way impeded the ability of the public to have unfettered access to diverse information and opinions. However, the key fact to be taken into account is that the interests at stake in the present case concern the protection of lives that remain at evident risk.

⁹² Eur.Ct.H.R., *Goodwin*, *supra*, paras. 42-45.

⁹³ See generally, Eur.Ct.H.R., *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999, *Reports 1999-III*; IACHR, *Martorell*, *supra*.

⁹⁴ See IACTHR, *The “Last Temptation of Christ Case,” supra*, para. 69, *citing, inter alia*, Eur.Ct.H.R., *Handyside v. the United Kingdom*, Judgment of 7 Dec. 1976, Ser. A No. 24, at para. 49.

⁹⁵ See hypothetical, para. 15.

⁹⁶ *Id.* paras. 15, 22, 24, 35.

⁹⁷ IACTHR, *Ivcher Case*, *supra*, para. 154.

The exercise of freedom of expression carries with it duties and responsibilities that also apply to members of the press. These duties and responsibilities assume significance when the exercise of freedom of expression has consequences vis-à-vis the rights of others.⁹⁸ “The media and journalists should neither be discriminated against or favored because of what they write or say.”⁹⁹ Buenaventura considers that the position of the Commission in this case justifies exceptional treatment for Collins that would not be justified for an ordinary citizen. Were a citizen to possess information crucial to attributing responsibility for two homicides, as well as for the protection of others involved in the investigation, it would be clear that the State had the right, and indeed the duty, to pursue that information to the fullest extent of the law.

C. The rights to judicial protection and guarantees in conjunction with the obligation of the State to respect and ensure protected rights

1. General considerations and applicable law

In its report of October 10, 2001 on the merits of this case, the Commission found the State of Buenaventura responsible for violations of Articles 25 (judicial protection) and 8 (judicial guarantees), in conjunction with the general obligation of the State under Article 1(1) to respect and ensure the rights protected under the Convention, with respect first and foremost to the State’s response to the killing of Alberta Jones and Elena Williams.¹⁰⁰

Article 25(1) of the American Convention provides: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention....” Article 8(1) in turn sets forth that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature ... or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

In accordance with Article 1(1) of the Convention, the State is obliged 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....”

As the Inter-American Court has explained, these Articles are mutually reinforcing:

Article 25, read in conjunction with Article 1(1) of the American Convention, requires the State to guarantee to all persons access to the administration of justice and, in particular, to prompt and simple recourse for, among other results, having the persons responsible for human rights violations judged, and to obtain reparations for the harm suffered.... Article 25 “is one of the basic pillars, not only of the American Convention, but of the very rule of law in a democratic society....”

⁹⁸ See Eur.Ct.H.R., *Bladet Tromso*, *supra*, para. 65.

⁹⁹ Declaration of Chapultepec, principle 6.

¹⁰⁰ See *generally*, hypothetical, para. 33.

That Article is directly related to Article 8(1) ... which enshrines the right of all persons to be heard with due guarantees ... for the determination of their rights, whatever their nature.¹⁰¹

The analysis that follows relates to the investigation into the killings of Alberta Jones and Elena Williams. While the application of these Articles would also have a bearing on the evaluation of the judicial proceedings carried out with respect to Teodoro Collins, the issues raised with respect to those proceedings are ancillary to the principal question as to whether the measures employed by the State constituted an undue restriction on his right to freedom of expression. In relation to their arguments concerning freedom of expression, teams could validly raise the issue of the efficacy of the *habeas corpus* proceedings in the face of an allegedly arbitrary deprivation of liberty, or that his appeal from the denial of that writ was rejected on the basis that the law provided no recourse against a "sentence" of less than six months, or that his final appeal to the Supreme Court was rejected without reasons. While the hypothetical provides a basis to raise these issues, they are not developed in detail, and how they would be addressed would largely depend on the analysis as to the legitimacy of the State's interest in compelling him to reveal his source. Accordingly, these issues will not be developed further in this section, and reference should be made to the arguments set forth in section III.B above.

2. Arguments of the Commission

The omissions and errors in the investigation of the killings of Alberta Jones and Elena Williams demonstrate that the process was effectuated in a manner so lacking in due diligence as to deny their families substantive justice and due process. Under the American Convention, in case of an infringement of a right or freedom protected, "[t]he State has a legal duty ... to use the means at its disposal ... to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."¹⁰² The investigation "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests ... without an effective search for the truth by the government."¹⁰³

The "Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions," adopted by the Economic and Social Council of the United Nations by Resolution 1989/65, provide basic guidelines on what is required in the case of a suspicious death.¹⁰⁴ The purpose of the investigation should be to determine the cause, form, and moment of the death, the person responsible, and the procedure or practice that may have provoked it.

¹⁰¹IACtHR, *Case of Loayza Tamayo*, Reparations, Judgment of November 27, 1998, para. 169 (citations omitted). See also *Velásquez Rodríguez, Fairén Garbi and Solís Corrales*, and *Godínez Cruz*, Judgments on Preliminary Objections, paras 91, 90, and 93, respectively.

¹⁰² IACtHR, *Velásquez Rodríguez*, *Merits*, *supra*, para. 174.

¹⁰³ *Id.*, para. 177.

¹⁰⁴ These guidelines have been cited in, *inter alia*, IACHR, Report No. 10/95, Case 10.580, *Manuel Stalin Bolaños*, Ecuador, *Annual Report of the IACHR 1995*, OEA/Ser.L/V/II.91, Doc. 7, rev. 3, April 3, 1996, paras. 32-34; Report No. 55/97, Case 11.137, *Juan Carlos Abella et al.*, Argentina, paras. 413-24 and Report No. 48/97, Case 11.411, "*Ejido Morelia*," Mexico, paras. 109-112, *Annual Report of the IACHR 1997*, OEA/Ser.L/V/II.98, Doc. 7 rev., April 13, 1998.

In addition, the authorities must perform an adequate autopsy, compile and analyze all the material and documentary proof, and take the statements of witnesses. In the instant case, among the serious deficiencies in the State's investigation, the bullets disappeared from the scenes of both killings. In the case of Alberta Jones, the forensic pathologists were unable to find any hair, or fibers or similar evidence, and failed to take scrapings from under her fingernails, notwithstanding that there was evidence that she had resisted her assailants. In the case of Elena Williams, the police only partially canvassed the area around the scene of the crime for witnesses at the time of the shooting.¹⁰⁵ These errors and omissions, so basic in nature, demonstrate that the State was not applying due diligence in its investigation.

Moreover, the fact that the police have been entrusted with this investigation, which implicates officers of the Central Police Station, raises serious doubts about its independence and impartiality. Nor have any safeguards been put in place to protect against the potential for abuse in this regard. "Where the State allows investigations to be conducted by the organs potentially implicated, independence and impartiality are clearly compromised. The [potential] consequence ... is insulation of those presumably responsible from the normal operation of the legal system."¹⁰⁶ In this regard, the Commission emphasizes that the bullets disappeared from both crime scenes during the period of the initial police investigation. Further, it must be recalled that the basis for EJA's involvement in this matter was that the police and other authorities had failed to respond to five police shootings with adequate investigation.¹⁰⁷

While the State maintains an open file with respect to the killings of Jones and Williams, notwithstanding the passage of over two and a half years, it has reported few specific measures of investigation, and even fewer results. The matter remains in its initial stage, and no one has ever been charged. The Commission has clarified that the duty to investigate is not breached merely because no one has been convicted in the case, or because, despite the efforts made, it is impossible to clearly establish the facts. Nonetheless, to establish convincingly and credibly that this result has not been the product of running mechanically through certain procedural formalities without the State effectively seeking the truth, the State must show that it has carried out an immediate, exhaustive, serious, and impartial investigation.¹⁰⁸ In the present cases, the State has failed to meet that burden of proof.

The victims' families have the right to know the truth about what happened to their loved ones.¹⁰⁹ In addition, as the victims' successors, they have the right to use that information to exercise their right to redress from the State. "The rights of victims or their families to receive

¹⁰⁵ See hypothetical, para. 30.

¹⁰⁶ IACHR, *Manuel Stalin Bolaños Case*, *supra*, at para. 48.

¹⁰⁷ The Office of Professional Responsibility of the Police Department had investigated each of the five shootings, and recommended that the matters be archived due to lack of evidence indicating the need for further action. See hypothetical, para. 11.

¹⁰⁸ IACHR, *Case of Juan Carlos Abella*, Argentina, *supra*, para. 412.

¹⁰⁹ See, e.g., IACHR, Report N° 40/00, Cases 10.588 et al., *Velásquez et al.*, Guatemala, Apr. 13, 2000, para. 80, and Report N° 39/00, Cases 10.586 et al., "Extrajudicial Executions," Guatemala, Apr. 13, 2000, para. 269, both in *Annual Report of the IACHR 1999*; *Annual Report of the IACHR 1985-1986*, September 26, 1986, "Areas in which steps need to be taken...", p. 193.

adequate compensation is both a recognition of the State's responsibility for the acts committed by its personnel and an expression of respect for the human being."¹¹⁰

Impunity is the "total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of rights protected by the American Convention."¹¹¹ Pursuant to the interrelated guarantees established in Articles 25, 8, and 1(1) of the American Convention, the State has the duty to use "all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives."¹¹² As the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has emphasized, "impunity continues to be the principal cause of the perpetuation and encouragement of violations of human rights, and particularly extrajudicial, summary or arbitrary executions."¹¹³

With respect to the present case, the record reflects that the State failed to utilize the means at its disposal to carry out the effective investigation required to provide the foundation for the prosecution and punishment of those responsible. As a consequence, these killings remain cloaked in impunity, for which the State bears responsibility under Articles 25, 8 and 1(1) of the Convention.

3. Arguments of the State

The American Convention requires the application of due diligence in response to human rights violations, mandating a prompt, thorough investigation, regardless of whether the perpetrators were State agents or private actors. This obligation of due diligence is necessarily one of means rather than results. It is not the specific result of a State's efforts which are conclusive in this regard; rather, it is the seriousness and effectiveness with which those efforts are carried out.

In the instant case, the State responded to the events at issue with immediate investigation. With respect to the killings of Alberta Jones and Elena Williams, the police were at the scene of the crime right away, and carried out the measures required by law. The investigation subsequently included the work of forensic pathologists, and other members of the police investigative team.¹¹⁴ In fact, the Commission doesn't contend that the State failed to investigate, or to comply with the principal steps required by domestic law. Rather, the Commission essentially questions the results obtained.

¹¹⁰ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye, E/CN.4/1997/60, December 24, 1996, para. 47.

¹¹¹ IACtHR, *Paniagua Morales et al. Case*, *supra*, para. 173; *Bámaca Velásquez Case*, Merits, Judgment of Nov. 25, 2000, para. 211.

¹¹² IACtHR, *The "Street Children Case" Reparaciones*, *supra*, para. 100, citing *Case of Paniagua Morales et al.*, Merits, *supra*, para. 173.

¹¹³ *Report of the Special Rapporteur*, Mr. Bacre Waly Ndiaye, *supra*, paras. 46, 94.

¹¹⁴ *See generally*, hypothetical, paras. 20, 23, 30.

For example, the Commission questions that the forensic pathologist failed to find certain kinds of physical evidence on the body of Alberta Jones. However, in some cases that kind of evidence simply isn't present. The Commission similarly argues that the police didn't complete their canvassing of the area where Elena Williams's body was found. These allegations are decontextualized, and base themselves on desired results as opposed to the diligent pursuit of available evidence. In this sense, the Commission concludes that the disappearance of the bullets used to kill Alberta Jones and Elena Williams from the respective scenes is directly attributable to the investigating officers. As a practical matter, there was a gap in time between those shootings and the notification to the police, during which time the perpetrator(s) could have removed those bullets.

As the Inter-American Court recently confirmed in the case of *Las Palmeras*,

[w]hile in some cases, the failure to investigate may be construed as an attempt to protect the authors of the crime of murder,[] this reasoning cannot be postulated as a generic rule applicable across the board. Apart from the question of the legitimacy of [such] a rule ..., the fact is that it would be applicable only if no serious investigation had been conducted.¹¹⁵

The record in this case reflects that Buenaventura has mounted an extensive investigation involving the police, forensics personal and the Office of the Prosecutor. While the Commission has called into question the ability of the police to investigate these killings with impartiality and independence, because of the possibility that police officers may have been involved, the prompt and effective investigation carried out in response to EJM's complaint concerning police abuses demonstrates that this is not the case. As indicated above, between August of 1999 and March of 2000, following an effective investigation, all the officers implicated in those abuses were suspended, arrested, detained, tried and sentenced at first instance, five of the officers to five year sentences and three to 30 year sentences. The Special Prosecutor responsible for the investigation of the EJM complaint and the killings of Jones and Williams has utilized the same methods and procedures in each instance.

IV. THE REQUEST FOR PROVISIONAL MEASURES

A. General considerations and applicable law

Provisional measures are the mechanism through which the Inter-American Court requires a state to protect persons at imminent risk of irreparable harm, independent of any determination as to the merits of the underlying situation. While such measures remain exceptional, in recent years the Court's practice in this area has become more dynamic.¹¹⁶ The

¹¹⁵ IACtHR, *Las Palmeras Case*, Merits, *supra*, para. 42.

¹¹⁶ To give a quick comparison, in its Annual Report for 2001, the Court reported on 18 orders for provisional measures, 13 of which remained active through the reporting period and 5 of which had been lifted during that period. In its Annual Report for 1996, the Court reported on 9 orders for provisional measures, and in its Annual Report for 1991, on 2 such situations.

Court is increasingly addressing situations requiring it to reconsider the contours of such measures.¹¹⁷

Provisional measures are provided for in Article 63(2) of the American Convention:

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.¹¹⁸

Accordingly, the elements necessary to justify such measures are (1) extreme gravity, (2) urgency, and (3) the necessity to avoid irreparable damage to persons. The essential purpose of such measures is the protection of “fundamental rights, as long as [the measures] seek to prevent irreparable harm to persons.”¹¹⁹

It was on the basis of events subsequent to the filing of the application in the case of *Williams et al. v. Buenaventura*, that the Commission addressed the Court to request provisional measures to (1) protect the lives and personal integrity of 18 named staff members of the EJM office in Cambacropolis, and (2) protect the right of Teodoro Collins to freedom of expression, and to that end, his personal liberty.¹²⁰

The Commission’s request was based on the fact that Collins had, on January 17, 2002, published an article reporting on the lack of progress in the investigation of the killings of Williams and Jones, and the presentation of the case before the Inter-American Court. Most importantly, he reported having again spoken with his anonymous source, who told him that, notwithstanding that eight police officers had been convicted in connection with the case EJM had put together about police abuses, she remained concerned about the safety of EJM personnel. She declined to explain further, but stated that it would be “better for everyone not to

¹¹⁷ For example, with respect to the situation of the Peace Community of San José de Apartadó, the Court ordered the State of Colombia to take the measures necessary to protect the lives and physical integrity of all of the approximately 1200 members of the community. The Court indicated that the nature of the situation required an approach distinct from its traditional requirement that all those for whom protection is sought be named, and that the collectivity was sufficiently identifiable. See IACtHR, *Peace Community of San José de Apartadó Case*, Order of the Inter-American Court of November 24, 2000. Contrast with, IACtHR, *Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic*, Provisional Measures, Order of the Inter-American Court of August 18, 2000.

In another recent example, which will be referred to further below, the Commission requested provisional measures to require Costa Rica to suspend the execution of a criminal conviction issued against a journalist, suspend the entry of his name in the registry of convicted offenders, and refrain from other measures affecting his freedom of expression. Citing the importance of freedom of expression, both in terms of the need to give as well as to receive information, and the irreparable impact certain threatened actions would have on the ability of the journalist to express himself through his profession, the Court required Costa Rica to suspend the entry of his name in the registry of felons, and suspend the order requiring the newspaper to publish the operative portion of the sentence of conviction. IACtHR, *La Nación Case*, Provisional Measures, Order of the Inter-American Court, September 7, 2001.

¹¹⁸ See also, Rules of Procedure of the Inter-American Court, Article 25.

¹¹⁹ IACtHR, *Peace Community of San José de Apartadó Case*, Provisional Measures, *supra*, *considerandum* 12, *citing Case of the Constitutional Court*, Provisional Measures, Order of the President of the Inter-American Court of April 7, 2000, *considerandum* 11.

¹²⁰ See hypothetical, para. 36.

insist with the investigation and leave things as they are.” Collins was summoned to appear in court on January 22, 2002. Because he refused to identify his source, he was again fined, and because he refused to pay the fine, he was again jailed for contempt of court.¹²¹ He continues to be jailed.¹²²

B. Arguments of the Commission

1. With respect to the EJM Members

The information before the Court establishes *prima facie* the existence of threats against the lives and personal integrity of the members of EJM. It is this *prima facie* standard that has served as the basis for the application of provisional measures by the Court in previous situations.¹²³ The current situation of risk represents an escalation of the threats first manifested in August of 1999, with the anonymous note found in EJM’s offices, and the anonymous phone call received by Elena Williams.¹²⁴ The seriousness of those threats was heightened in light of the killing of Jones and Williams in September of 1999.¹²⁵ The gravity of the situation was reaffirmed later that month when Teodoro Collins reported that an anonymous source with evident links to the police had told him that unidentified individuals present in the local police station had threatened to “take care of” members of the EJM if they did not drop their efforts to investigate police abuses.¹²⁶

This accumulation of grave threats has taken on a new urgency because that same anonymous source indicated immediately after the filing of the application in *Williams et al. v. Buenaventura* before the Inter-American Court that, notwithstanding the conviction of the police officers evidently responsible for the abuses brought to light by EJM, the source considered that EJM members remained under threat and should cease pushing for further investigation.¹²⁷ The seriousness of the current situation is compounded by the fact that the State failed to apply due diligence in clarifying the previous threats against members of the EJM. Due investigation, clarification, and the prosecution and punishment of those responsible for the previous threats would have constituted the best measures of protection and prevention of future threats.¹²⁸

¹²¹ *Id.* para. 35.

¹²² This is suggested in the hypothetical, see *id.* paras. 35-36, and affirmed in hypothetical case questions, answers 33 – 35.

¹²³ See e.g., IACtHR, *Digna Ochoa y Plácido et al. Case*, Provisional Measures, Order of the Inter-American Court of November 17, 1999, *considerandum* 5; *Cesti-Hurtado Case*, Provisional Measures, Order of the Inter-American Court of June 3, 1999, *considerandum* 4.

¹²⁴ See hypothetical, paras. 18-19.

¹²⁵ *Id.* paras. 20, 23.

¹²⁶ *Id.* para. 24.

¹²⁷ *Id.* para. 35.

¹²⁸ See, *inter alia*, IACtHR, *Miguel Agustín Pro Juárez Human Rights Center et al. Case*, Provisional Measures, Order of the Inter-American Court of November 30, 2001, *considerandum* 11.

It should be emphasized that the members of EJN have acted as the petitioners in the proceedings before the Commission and Court in the case of *Williams et al. v. Buenaventura*,¹²⁹ and that the Inter-American Court has accorded special consideration for the need to protect petitioners in contentious cases before it who fear for their personal integrity.¹³⁰

Thus, all the elements that justify the need for provisional measures have been demonstrated: (1) extreme gravity, (2) urgency, and (3) the necessity to avoid irreparable damage to persons.

2. With respect to Teodoro Collins

All the elements necessary to justify the issuance of provisional measures are also present with respect to the situation of Teodoro Collins, presently deprived of his liberty as a reprisal for exercising his freedom of expression and refusing to reveal the identity of a confidential source, in violation of his rights as a journalist under both the American Convention and the Constitution of Buenaventura. The situation is extremely grave: first, because this reprisal impedes his exercise of his profession as a journalist; second, because it sends a message to other journalists that the identity of their sources is no longer considered protected information, thereby having a chilling effect on the exercise of their freedom of expression; and third, because the eventual effect is to limit the access of the public to information.

The Court has indicated that freedom of expression has a very high value in the regional system, including within the context of provisional measures:

[F]reedom of expression ... is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed.¹³¹

As the Commission and Court have emphasized, freedom of expression has two aspects, it protects the right of every person to impart information and ideas, and the right of every person and society as a whole to receive them.

[F]reedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to others, but it also implies everyone's right to know opinions, reports and news. For the ordinary citizen, the knowledge of other people's opinions and information is as important as the right to impart their own.¹³²

¹²⁹ See hypothetical, para. 31.

¹³⁰ See e.g., IACtHR, *Cesti Hurtado Case*, Provisional Measures, Order of the Inter-American Court, June 3, 1999, *consideranda* 5-6, referring to the State's duty to protect alleged victims in cases before it, as well as their families; *Digna Ochoa y Plácido Case*, Provisional Measures, Order of the Inter-American Court of November 17, 1999, *considerandum* 7; *Constitutional Court Case*, Provisional Measures, Order of the President of the Inter-American Court, April 7, 2000, *consideranda* 8-9.

¹³¹ IACtHR, *La Nación Case*, Provisional Measures, Order of the Inter-American Court, September 7, 2001, *considerandum* 6.

¹³² IACtHR, *The Last Temptation of Christ Case*, *supra*, para. 66. It may be noted that the Commission based itself on both of these aspects of freedom of expression when it requested provisional measures in the *La Nación Case*, and in the *Case of General Gallardo*. With respect to the latter, see Order of the Inter-American Court

Where the measure in question, namely the deprivation of Mr. Collins' liberty, impedes his very ability to practice his profession as a journalist, this constitutes an infringement on his right to freedom of expression which is irreparable in nature, "as opposed to other damages that are essentially monetary in nature."¹³³ The situation is urgent both for the foregoing reasons, and because, with the passage of time, the undue burden this deprivation of liberty imposes on Mr. Collins' professional and personal life becomes increasingly arbitrary and disproportionate.

Moreover, because Mr. Collins remains imprisoned, Buenaventuran society is deprived of access to his investigative reporting, and the information he imparts as a journalistic "watchdog."¹³⁴ Further, the disproportionate reprisal imposed on Mr. Collins sends the message to other journalists that they use information gathered from confidential sources at their peril.¹³⁵ This situation constitutes a clear and present infringement on freedom of expression in Buenaventura that is causing irreparable harm.

B. Arguments of the State

1. With respect to EJM members

The State has never challenged the claims of members of the EJM that their security may be at risk in relation to their work concerning abuses by members of the police. To the contrary, when faced with any evidence of credible threats, the State has offered all possible measures at its disposal to ensure their security. It is principally for this reason that Buenaventura considers there is no basis for the Inter-American Court to intervene in this regard.

The competent authorities have established a positive record of immediate response in every instance that EJM approached them concerning credible threats. Immediately upon notification of the threats received in August of 1999, the police initiated measures of investigation, and the Special Prosecutor offered to provide police security, and later to place a trace on their phone line. These measures, which would have contributed both to security and the effective investigation of the source of the threats, were declined.¹³⁶ When the killing of Alberta Jones prompted the members of the EJM to request that the State provide security for the office through private guards, the State accepted the request the same day.¹³⁷ There is no instance in which the State failed to offer effective means of protection, or in which the State

of Feb. 18, 2002, background para. 1. *Again, it should be noted that some participants will not have had access to very recent decisions, such as this order.

¹³³ *Id. considerandum* 11 (contrasting the threatened entry of a journalist's name in a registry of convicted felons, and the corresponding impact on his credibility and ability to practice his profession, with other types of damage that are essentially monetary, and therefore not irreparable).

¹³⁴ See Eur.Ct.H.R., *Goodwin, supra*, para. 39 (referring to the "vital public-watchdog role of the press").

¹³⁵ See Eur.Ct.H.R., *Jersild, supra*, para. 35 (emphasizing the importance of protection of journalistic sources in the ability of the press to fulfill their role as "public watchdog").

¹³⁶ See hypothetical, paras. 18-19.

¹³⁷ *Id.* para. 21.

refused any security-related request by EJN. Nor has the Commission alleged a failure in this regard on the part of the State as part of its justification for the requested measures.¹³⁸

As a factual matter, the information presented by the Commission reveals no new or special urgency, given that the initial threats date back to 1999, and the article published by Mr. Collins on January 17, 2002 provides no clear evidence of new elements or circumstances. In fact, the information included in that article is vague, and because Mr. Collins has refused to cooperate with the competent authorities, it remains unsubstantiated.

The State continues to be engaged in active efforts to address the situation of possible risk. In this regard, given that the information which prompted the Commission's request for provisional measures derives exclusively from the anonymous source cited by Mr. Collins in his article, the State has applied all the measures provided by law to locate that source. In the first place, it is imperative that the State assess the veracity of the source's information. Further, it is evident from the nature of the comments reported that the source has additional information that could be crucial to protecting the members of EJN. Gathering that information is a function of Buenaventura's internal legal system, and the State is pursuing all available legal means to discharge its responsibilities.

It is precisely because Buenaventura values the role of human rights defenders, and considers it a goal of a democratic society that they be able to carry out their work of ensuring transparency and accountability in government that the State considers the pursuit of the information held by the confidential source to be so essential. That information could well hold the key to ensuring the protection of the members of the EJN, and the clarification of the killings of Jones and Williams.

2. With respect to Teodoro Collins

The Commission's request for provisional measures in the case of Teodoro Collins is inadmissible because: (1) it is, in effect, a disguised effort to have the Court decide on the merits of his current situation before the courts in Buenaventura; (2) it demonstrates no special urgency; and (3), it demonstrates no threat of irreparable harm.

First, what the Commission's request for provisional measures essential seeks is a declaration by the Inter-American Court that the judicial proceedings currently underway against Mr. Collins violate the American Convention, specifically the right to freedom of expression. The issue of the legitimacy of the judicial proceedings initiated against Mr. Collins in 1999 in relation to the publication of his first article citing the confidential source is currently pending before the Inter-American Court in the case of *Williams et al. v. Buenaventura*. The Commission's attempt

¹³⁸ It may be noted in this regard that, in assessing the necessity to order provisional measures, the Inter-American Court has taken into account the reaction of the state concerned to the situation denounced, as well as to any precautionary measures previously issued in the matter by the Commission. Noncompliance with previously issued precautionary measures weighs in favor of the need for the issuance of provisional measures. See, e.g., IACtHR, *Digna Ochoa Plácido Case*, *supra*, *considerandum* 6. In the present case, in contrast, Buenaventura has provided prompt and effective responses to the situations denounced, and the Commission accordingly never saw the need to issue precautionary measures.

to raise Mr. Collins' current juridical situation in relation to the second such article through the procedure of provisional measures is a disguised attempt to retroactively include that situation within the scope of the larger contentious case.¹³⁹ It must be noted that Mr. Collins evidently has yet to exhaust domestic remedies with respect to his current detention, and these latest events and claims have not been processed by the Commission in accordance with Articles 48 through 50 of the American Convention, all necessary prerequisites for the Court to exercise its contentious jurisdiction.

Further, as a procedural matter, the decision as to whether to adopt provisional measures is taken through an abbreviated process that does not have the objective, or even the possibility of litigating the merits of the situation denounced. Accordingly, were the Court to respond to the Commission's attempt to place this merits issue before it, the State would be placed at a disadvantage vis-à-vis the principle of equality of arms.

It should be emphasized that Mr. Collins has not been deprived of his liberty as the result of expressing himself freely, a right he has been able to fully exercise, or for having failed to reveal his source. Rather, he has been deprived of his liberty for having refused to pay a fine imposed by a competent court pursuant to the law of Buenaventura.¹⁴⁰ That deprivation of liberty is the consequence of a series of choices made by Mr. Collins himself. In that regard, he is free to choose to comply with the law and reveal his source or pay the fine, in which case he would be promptly released. As his articles demonstrate, Mr. Collins has been able to freely exercise his right to freedom of expression, and the Commission has made no showing to the contrary.

Second, the situation denounced with respect to Mr. Collins reveals no special urgency. The Commission and Court process a great number of claims concerning individuals who feel they have been unjustly deprived of their liberty without issuing provisional measures seeking their release. In fact, the Commission requested no such measures when Mr. Collins was detained for 48 days in the late fall of 1999 for having failed to pay a fine imposed by a competent court pursuant to law, essentially the same situation for which the Commission is now requesting measures.

Third, the Commission's request reveals no necessity to prevent "irreparable harm to persons." The facts reveal no threat against Mr. Collins' life or physical integrity, the classic basis for demonstrating the risk of irreparable harm. Even assuming for the sake of argument that the Commission were to process these facts through a case, and the Court were to eventually determine that Mr. Collins was unjustly deprived of his liberty, such a violation would be compensable through monetary damages. In fact, most legal systems reflect the principal

¹³⁹ See generally, IACtHR, *Cesti Hurtado Case*, Provisional Measures, Order of the Inter-American Court of September 11, 1997. While granting provisional measures to protect the physical, mental and moral integrity of Gustavo Cesti Hurtado, whose case was then being processed by the Commission, the Court declined to expressly order his release within the terms of the provisional measures requested, finding that to do so "would mean the Court could advance criteria on the merits of a case that is not yet before it." See also, *La Nación Case*, Provisional Measures, *considerandum* 8, declining to rule on one aspect of the Commission's request because it "goes to the merits of the petition now before the Inter-American Commission, and is not material to provisional measures."

¹⁴⁰ See hypothetical, para. 35.

that the unjust deprivation of liberty is an infringement of rights subject to monetary damages, and this very principle is in fact reflected in Article 10 of the American Convention.¹⁴¹ Buenaventura considers that the text of Article 63(2) of the Convention, as well as the object and purpose of provisional measures allow for their application only where necessary to prevent irreparable harm to persons, which, in principle, means to protect life and physical integrity.¹⁴²

V. CONCLUSION

This year's hypothetical case is constructed to highlight certain issues of pressing current interest within the system. In particular, it raises the crucial role of human rights defenders and the press in a democratic society. It calls for an analysis of the extent to which exceptional circumstances may justify limitations on freedom of expression, and more specifically, freedom of the press. Further, the hypothetical requires an examination of the object, purpose and scope of application of the mechanism of provisional measures as a tool for preventing irreparable harm to persons. These issues are placed within the context of a situation involving the right to life, including both presumed violations and the imminent threat of additional violations, in order to most graphically illustrate the interests at stake for those affected and the corresponding obligations of the State. The issues highlighted have the further common theme of focussing on the quest to ensure the efficacy of the guarantees of the inter-American human rights system.

¹⁴¹ *But see*, IACtHR, *La Nación Case*, Provisional Measures, *supra*, suggesting that the analytical approach to a measure presumptively restricting freedom of expression might well be different.

¹⁴² Accepting for the sake of argument that a restriction on freedom of expression may in exceptional circumstances provide the basis for provisional measures to avoid irreparable harm to persons, Buenaventura sustains that the present situation is like that raised in the *Case of General Gallardo*, where the Commission requested measures aimed, *inter alia*, at ensuring the rights to life, physical integrity and freedom of expression. It would appear that the required *prima facie* showing of a threat of irreparable harm to the victim in relation to his freedom of expression was not met, because the measures ordered by the Court refer only to the right to life and physical integrity. See IACtHR, Order of the Inter-American Court of February 18, 2002, operative para. 1, *see also*, *consideranda* 4, 6. In the present case, the Commission has made no showing that Mr. Collins' present juridical situation has actually interfered with his right to free expression.