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Glenda Mezarobba

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The Difficult Break with the Legacy of the Dictatorship in Brazil

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By Borislav Petranov



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PRESENTATION



We are very pleased to present the 13th issue of *Sur Journal*, which addresses the subject of regional human rights protection mechanisms. The purpose of this issue is to examine the development of these regional systems, their drawbacks and potentials, and to discuss the possibility of cooperation and integration between them and the international human rights system. The journal's first article, titled **Urgent Measures in the Inter-American Human Rights System**, by Felipe González, reviews the treatment given urgent measures by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (precautionary measures, in the case of the Commission, and provisional measures, in the case of the Court).

Juan Carlos Gutiérrez and Silvano Cantú, in **The Restriction of Military Jurisdiction in International Human Rights Protection Systems**, examine cases from the Universal, Inter-American, African and European human rights protection systems in order to place the matter of military jurisdiction in a comparative perspective, particularly when this jurisdiction applies to civilians, whether they are passive or active subjects.

Addressing the African system specifically, Debra Long and Lukas Muntingh, in their article titled **The Special Rapporteur on Prisons and Conditions of**

Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?, analyze the mandates of these two special mechanisms and consider the potential for conflict generated by two mandates being held by a single member.

This edition of the journal also contains an article by Lucyline Nkatha Murungi and Jacqui Gallinetti on the role of the courts of Africa's Regional Economic Communities regarding the protection of human rights on the continent, in **The Role of Sub-Regional Courts in the African Human Rights System**.

Magnus Killander, in **Interpreting Regional Human Rights Treaties**, illustrates how regional human rights courts have, for the purposes of interpreting international treaties on the subject, followed the rules established by the Vienna Convention on the Law of Treaties.

Antonio M. Cisneros de Alencar, in **Cooperation Between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism**, makes the claim that despite new opportunities for cooperation between the global and regional human rights systems, a great deal more can still be done to make the Inter-American system benefit from the UN Human Rights Council's Universal Periodic Review Mechanism.

We hope that this issue of Sur Journal will draw the attention of human rights activists, civil society organizations and academics to the possibility of a greater cooperation and integration between the regional and the international human rights systems.

We have also included in this issue the article **Strong Link in the Chain**, by Borislav Petranov, a homage to Professor Kevin Boyle, an exceptional academic and human rights defender, and a tireless partner of Sur Journal and the other initiatives of Conectas Human Rights. His life will remain a major source of inspiration for us. This issue includes another two articles, both dealing with the topic of transitional justice in post-dictatorship Latin America. The article by Glenda Mezarobba, titled **Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil**, reconstructs and analyzes the process developed by the Brazilian State for making amends with victims of the dictatorship and with society. It also looks at what has already been done and what still needs to be done in terms of truth and justice and in relation to reforming the country's institutions.

The article by Gerardo Alberto Arce Arce, meanwhile, discusses the process of establishing a Truth and Reconciliation Commission in Peru, and the judicialization of the human rights violations that occurred dur-

ing the country's armed conflict in light of the relations between the Peruvian armed forces and the political and civil spheres of its society, in **Armed Forces, Truth Commission and Transitional Justice in Peru**.

This is the second issue released with the collaboration of the Carlos Chagas Foundation (FCC), which started supporting Sur Journal in 2010. We would like to thank the FCC once again for its support, which has guaranteed the continued production of the print version of this journal. Similarly, we are grateful to the MacArthur Foundation and to the East East: Partnership Beyond Borders Program (Open Society Foundations) for their support for this issue.

We would also like to thank the Centre for Human Rights, of the University of Pretoria (South Africa), and the Center for Legal and Social Studies (CELS, Argentina) for their involvement in the call for papers and the selection for this 13th issue.

Exceptionally, the present issue, dated December of 2010, was printed in the first semester of 2011.

Finally, we would like to remind everyone that the next issue of Sur Journal will address the UN Convention on the Rights of Persons with Disabilities and the importance of tackling this issue within the realm of human rights.

The editors.



FELIPE GONZÁLEZ

Felipe González is Professor of Public International Law and Constitutional Law at Diego Portales University, in Santiago de Chile, where he was founder and director of the Human Rights Center and director of the Center for Legal Research. He is currently Commissioner and Chair of the Inter-American Commission on Human Rights. He was founder and director of a Latin American Network of Human Rights

Legal Clinics and Representative of Global Rights in Latin America. He has conducted research and has been visiting professor at several universities in Latin America, Europe and the United States. The opinions expressed herein are those of the author and do not represent the views of the institutions in which he serves.

E-mail: felipe.gonzalez@udp.cl

ABSTRACT

This work reviews the way in which the Inter-American System of Human Rights addresses, through its bodies –the Inter-American Commission and Court on Human Rights– urgent measures (precautionary at the Commission and provisional at the Court), and the recent reforms they have been object of. To this end, issues such as the general aspects of these measures, the grounds for their concession, the rights susceptible of being protected and urgent measures of a collective nature, among others, will be analyzed.

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URGENT MEASURES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Felipe González

1 Introduction

The Inter-American Commission (hereinafter referred to as the “Commission”, the “Inter-American Commission”, or the “IACHR”) and Court (hereinafter referred to as the “Court” or the “Inter-American Court”) of Human Rights, as international bodies for the general protection of such rights,¹ possess a system of urgent measures, known as precautionary and provisional measures, respectively. The former derive from the broad powers of the Commission, which extend beyond the sphere of its case system; the latter expressly derive from the American Convention on Human Rights (hereinafter referred to as the “American Convention”).

Even though urgent measures in the Inter-American System are usually related to cases pending before the Commission or Court, this is not necessarily always the case, given that they are not, *stricto sensu*, part of the contentious jurisdiction of the organs in charge of protecting rights within that system. As we will see, this is particularly characteristic with the precautionary measures of the Inter-American Commission on Human Rights. Hence, it is convenient to process urgent measures separately from the case system.

Successively, we will analyze some general aspects of the precautionary measures, the grounds for their concession, provisional measures in general, the rights that may be protected through urgent measures in the Inter-American System, measures of a collective nature, as well as issues relating to the implementation and follow-up of such measures. Finally, we will try to provide an answer to the question of whether urgent measures in this regional system could represent a sort of international *Amparo* action (protection of constitutional guarantees and rights).

Notes to this text start on page 70.

2 General aspects of precautionary measures

Although the American Convention does not expressly refer to precautionary measures, they are adopted by the Commission by virtue of the broad powers for the protection of human rights conferred to it by this instrument. Since the beginning of the period of transitions towards democracy, the IACHR has continuously expanded the use of precautionary measures, and has increasingly requested the Court to order provisional measures for the same purpose (PASQUALUCCI, 2005).

In fact, whether referred to as precautionary measures or otherwise, the Commission had historically implemented the practice of urgently requiring States to adopt measures regarding certain violations. This had occurred particularly in cases of detained persons who could presumably be disappeared.

Hence, even though precautionary measures were only expressly institutionalized in 1980 through their incorporation to the Rules of Procedure of the Commission, the fact is this body had been exercising such function since long before, both in relation to and in the absence of cases pending before it. This institutionalization of precautionary measures originated from the creation of the Inter-American Court, which had, among its powers, the granting of provisional measures. Given that it is the Commission that must request these measures to the Court, formalizing precautionary measures was necessary, as a previous step to the request of the provisional ones.

The use of this mechanism considerably expanded, together with democratization processes, from the nineties onwards, and although it has continued to be generally focused on circumstances of life risk, it has also been extended to the violation of other rights in certain cases.

Only two States have questioned the IACHR's power to order precautionary measures.² However, it is evident that from the broad powers set forth in article 41 of the American Convention derives that of issuing this kind of measures. Henceforth, as already mentioned, several United Nations semi-judicial bodies –analogous, for the same reason, to the Inter-American Commission on Human Rights– adopt precautionary measures based on an interpretation of the treaties that created them, despite the fact that they are not explicitly contemplated in them. These bodies are the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination (MÉNDEZ; DULITZKY, 2005, p.68 ss). The same happens regarding the African Commission on Human and Peoples' Rights and also occurred with the extinct European Commission of Human Rights.

However, a more recent treaty, the Inter American Convention on Forced Disappearance of Persons (ORGANIZACIÓN DE ESTADOS AMERICANOS, 1994),³ does make reference to precautionary measures, establishing that, for the purposes of that instrument,

the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights

and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.

(ORGANIZACIÓN DE ESTADOS AMERICANOS, 1994, art. XIII, emphasis added by the author).

On the other hand, the Inter-American Court has ratified, in several occasions over the last years, the competence of the Commission to issue precautionary measures. For example, in the case of the *Mendoza Prisons* regarding Argentina, the President of the Court, acting on its behalf, stated:

[...] I consider appropriate to point out that, pursuant to the obligations acquired by virtue of the American Convention on Human Rights, States must implement and comply with the resolutions issued by its supervisory bodies: the Inter-American Commission and Court of Human Rights. Therefore, I am convinced that the State will abide by the precautionary measures requested by the Commission pending the Court's decision on this petition for provisional measures [...].

(CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004a, unofficial translation, emphasis added by the author).

Similarly, in the case of the *Forensic Anthropology Foundation* regarding Guatemala, the President of the Inter-American Court stated that:

[t]he information presented by the Commission [...] demonstrates, prima facie, that the precautionary measures have not produced the required effects and that members of the Foundation and relatives of its Executive Director [...] are facing a situation of extreme gravity and urgency, given that their lives and personal integrity continue to be threatened and at serious risk. Therefore, this Presidency considers necessary to protect those persons, by means of urgent measures, in light of the provisions of the American Convention.

(CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2006, unofficial translation, emphasis added by the author).

In turn, the General Assembly of the Organization of American States (hereinafter referred to as the “OAS”) also made reference to this issue in 2006, encouraging Member States to “[f]ollow up on the recommendations of the IACHR, including, *inter alia*, precautionary measures.” (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2006).

In addition, some States have adopted internal measures to recognize the Commission’s precautionary measures and make them operational. Thus, since 2003 the Colombian Constitutional Court has issued a series of judicial decisions imposing sanctions on public officials for not complying with precautionary or provisional measures.⁴ The “*Habeas Corpus and Amparo Law*” of Peru goes in the same direction, which recognizes the right of its inhabitants to turn to the Commission seeking guarantees when constitutional rights are being threatened (PERU, 1982).

The processing of precautionary measures does not imply significant formalities. Similar to the processing of complaints regarding the case system, any person or group of persons can file a request for precautionary measures before the Commission.

Unless the petition is received while it is in session –which occurs only in several periods throughout a year– the Commission decides on the requests *on-line*, based on the background information provided by the Executive Secretariat. It can either immediately respond to the petition or request further information from the petitioner and/or the State concerned. As time passed by, given the growing receptivity that the Commission has found in most of the States regarding precautionary measures, it has increasingly requested them for information as a prior step to deciding on a measure. This is set forth as a general rule in the recent modifications introduced to the Rules of Procedure of the IACHR, establishing that “[p]rior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures.” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.5).⁵

In addition, there are also three procedural aspects taken into account by the Commission. The first one refers to “whether the situation of risk has been brought to the attention of the pertinent authorities or the reasons why it might not have been possible to do so.” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4). Applying the principle of subsidiarity, what is intended with this rule is that States resolve urgent situations internally. However, as established in the text, this is not a rule of an absolute nature; allowing petitioners to turn directly to the Inter-American body if the circumstances so demand it. Anyway, given the urgency of the situations involved in these measures, the Rules of Procedure of the Commission are more flexible in this aspect as compared to the regulation of the case system, which, pursuant to the American Convention, demands exhaustion of domestic remedies as a general rule.

The second aspect refers to “the individual identification of the potential beneficiaries of the precautionary measures or the identification of the group to which they belong.” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4.b). Again, this is not an absolute rule but a factor to be considered by the Commission, given that such identification could, in certain situations, be only an approximation. In relation to the identification of the group to which someone belongs, this has to do with improving efficiency of precautionary measures of a collective nature, which shall be addressed later on.

The third aspect establishes that the Commission shall take into account “the express consent of the potential beneficiaries whenever the request is filed before the Commission by a third party unless the absence of consent is duly justified” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4.c). This could surely occur in situations of forced disappearance, but also in other situations in which the person affected does not have access to the Commission; typically, when the person is deprived of their liberty, but also in other hypotheses.

Other procedural aspects, referring to the follow-up of precautionary measures granted by the Commission, will be analyzed later on, in reference to that specific issue.

3 Grounds for the concession of precautionary measures

Although the practice of the Commission regarding precautionary measures identified several grounds for their concession, these have only recently been expressly regulated with the reforms introduced to its Rules of Procedure, which entered into force on 31 December 2009. Thus, three hypotheses for the granting of these measures can be distinguished: one of a general nature referring to the prevention of irreparable harm to persons in the context of cases pending before the IACHR; one concerning the safeguarding of the subject matter of the proceedings before the Commission; and a third one relative to avoiding irreparable harm outside the scope of the case system. For all these hypotheses, a recent modification to the Rules of Procedure states that the context shall also be taken into consideration.

The first of these hypotheses –referring to the prevention of irreparable harm to persons in the context of cases pending before the IACHR– is the most common, and is in close connection with the regulations set forth by the American Convention on Human Rights for provisional measures of the Inter-American Court. Besides attempting to avoid irreparable harm to persons, it requires the existence of a serious and urgent situation (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.1). This is one of the forms of urgent measures typically adopted by international human rights bodies.

The second hypothesis –only recently expressly incorporated in the Rules of Procedure of the Commission and which stems from prior practice–⁶ refers to the protection of the “subject matter of the proceedings in connection with a pending petition or case.” As can be seen, in this circumstance, it is no longer about avoiding irreparable harm to persons, but about safeguarding the matter itself subject to a decision in a pending case before the Commission. It is in this way that what is trying to be avoided is that the final decision on the case by the IACHR is rendered futile and irrelevant. As with the first, this hypothesis is usually within the scope of the urgent measures adopted by international human rights bodies. Further, as noted by Antonio Cançado Trindade, when analyzing the evolution of urgent measures (to which the author generically refers to as provisional measures) in general Public International Law, they “[always face] the probability or imminence of an ‘irreparable damage’, and the concern or necessity to secure the ‘future realization of a given juridical situation’.” (CANÇADO TRINDADE, 2003).

The third hypothesis consists of the issuing of precautionary measures outside the scope of the case system, that is to say, in the absence of a case pending at the Commission. It will be analyzed in greater detail due to the fact that the Inter-American Commission on Human Rights is the only semi-judicial body of the International System for the Protection of such rights that issues urgent measures in the absence of a petition. Thus, the United Nations Human Rights Committee, the Committee against Torture, the African Commission on Human and Peoples’ Rights, to mention a few, only adopt such measures in the context of cases pending before them. The same happened with the extinct European Commission of Human Rights.

Until recently, the adoption of precautionary measures pursuant to this third hypothesis only derived from a practice of the IACHR –based on the broad

powers conferred to it by the American Convention. Recently, the Commission has reaffirmed its interpretation of that treaty in the sense that it is authorized to issue such measures. In that respect, the reform to its Rules of Procedure, which came into force on 31 December 2009, sets forth in its pertinent section, the following:

In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons under the jurisdiction of the State concerned, independently of any pending petition or case.

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.2, emphasis added by the author).

The fact that the Inter-American Commission grants precautionary measures irrespective of an existing petition has to do with the features of its institutional development and with the general powers conferred to it by several Inter-American instruments. Therefore, since the first years of its existence, it adopted a proactive role that led it, for instance, not to declare the petitions filed inadmissible (although during the first years it did not have the power to process them) but to employ them as input for the elaboration of its Country Reports. Likewise, from the very beginning, the Commission required information from the States regarding the alleged violations; at times, calling upon them to rectify their behavior.

It must be added that certain precautionary measures that, in principle, have no connection to a case, may eventually have it given that, for example, when dealing with measures aimed at the protection of human rights' defenders, the protection of their rights may be essential for the filing of complaints of violations before the Commission.

In addition, this is a consolidated practice accepted by States. In fact, not even the two States (previously mentioned) that question its validity make the distinction between precautionary measures as being related or unrelated to cases. It is worth adding that the compliance of precautionary measures by States is higher than that regarding their observance of decisions on the merits under the Commission's case system.

The issue of precautionary measures not related to the Commission's case system was subject of an internal debate during the elaboration of the 1980 Rules of Procedure, when they were expressly included. In fact, several drafts were written on this matter. In this sense, the first Preliminary Draft that the Executive Secretariat submitted for consideration by the plenary of the Commission proposed the following text regarding this issue (ORGANIZACIÓN DE ESTADOS AMERICANOS, 1980a, p. 13):

The Commission may, at any time during the processing of a petition or communication, request that the State concerned adopt the necessary provisional measures to avoid irreparable harm to the persons referred to in such petition or communication. The recommendation of these provisional measures shall not constitute a prejudgment of the final decision that the Commission may adopt regarding the case under consideration.⁷

As can be observed, that Preliminary draft referred to the Commission's urgent measures as "provisional measures", following the terminology used by the American Convention

when referring to the Court's urgent measures. In addition, it concerned the situation of "persons mentioned in the communication" (victims, witnesses, petitioners) at "any time during the processing of a petition"; therefore, the measures were conceived for a context of a case pending before the IACHR. Furthermore, this provision was included in Chapter II of the Preliminary Draft, entitled "Petitions and Communications referring to State parties to the American Convention on Human Rights".

A few days later, at the request of plenary of the Commission, the Secretariat presented a new version of the Preliminary Draft regarding this matter (ORGANIZACIÓN DE ESTADOS AMERICANOS, 1980b, p. 12), in which the term "precautionary measures" is introduced, together with the notions of "extreme urgency and seriousness", adopting, in this way, the standards set forth by the American Convention for provisional measures; likewise, as in the first Preliminary Draft, urgent measures are linked to the context of pending petitions. Lastly, a temporal limit was established in order to request these measures: it must be before the Commission makes a final decision on the merits.⁸

The issue continued under discussion at the Commission and, finally, a third draft was submitted for its consideration, which would be the definite one included in the new Rules of Procedure. The text read as follows:

1. *The Commission may, on its own initiative or at the request of a party, take any action it deems necessary for the performance of its functions.*
2. *In urgent cases, when it is necessary to avoid irreparable harm to persons, the Commission may request the adoption of precautionary measures to prevent irreparable harm, in case the denounced facts are true.*
3. *If the Commission is not in session, the Chair, or in their absence, one of the Vice-Chairs, shall request the Secretariat to consult with the other members on the application of the aforementioned paragraphs 1 and 2. If this consult was not possible in due time, the Chair shall decide, on behalf of the Commission, and shall immediately communicate it to its members.*
4. *The request for such measures and their adoption do not prejudice the final decision on the subject matter.*

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 1980, art. 26, unofficial translation).

In this way, the concession of a precautionary measure was not subject to the filing of a petition. In fact, the provision in question was moved from the place it had in the preliminary drafts –under the title referring to the processing of cases– to the general provisions of the Commission's Rules of Procedure.

As had been indicated at the beginning, among the recent modifications introduced to the Rules of Procedure of the Commission there is one that establishes that the Commission shall take into account the context of the situation when deciding whether or not to grant precautionary measures (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.4). The nature of this provision is to make evident that when adopting a decision on a petition of urgent measures, the Commission does not consider the issue concerned in isolation. Given the urgency of the requirements

stated, the IACHR's decision relies partly on the assessment regarding the verisimilitude of the facts presented, which in turn, is partly based on the context in which these facts take place. For example, in relation to the precautionary measures requested by Honduran citizens after the *coup d'état* in 2009, this was a relevant factor considering the precarious situation of the protection of human rights in that context at the police and domestic judicial level (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Patricia Rodas y Otros /Honduras*, 2009a).⁹

4 General aspects of provisional measures

As we have noted, provisional measures are expressly set forth in the American Convention and are only applied to States Party to this instrument. As provided in article 63.2 of that treaty, those measures are advisable “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”. Their inclusion in the treaty leaves no margin for doubt regarding the mandatory nature of provisional measures (CANÇADO TRINDADE, 2003, p. 164).

The same article establishes that, in terms of procedural stages, provisional measures may be granted either in connection with matters under the Court's consideration, or “[w]ith respect to a case not yet submitted to the Court, [in which case] it may act at the request of the Commission.”

Regarding the first hypothesis, during the eighties, the Commission requested the Court to order this kind of measures to the States in the context of the first contentious cases filed before it (CORTE INTERAMERICANA DE DERECHOS HUMANOS, s.d., p. 1-11). In the nineties, in addition to continue to request them in a series of cases pending before the Court, the Commission began to request them in the context of some cases not yet submitted to the Court, but that were pending resolution before the Commission itself. This happened after the cases *Bustíos-Rojas* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1990) and *Chunimá* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 1991).

Applying the logic of the increasing autonomy of the victims once a contentious case has been submitted to the Court,¹⁰ a modification introduced to its Rules of Procedure in 2004 set forth that they could directly file the request for provisional measures. The Court's Rules of Procedure of 2010 state that the measures “must be related to the subject matter of the case.” (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 27.3).¹¹

Considering that in the Inter American System of Human Rights there are, as we have seen, two kinds of urgent measures –precautionary at the Commission and provisional at the Court–, one of the questions that arise is under what circumstances the Commission issues a precautionary measure and disregards requesting a provisional measure to the Court, and in what circumstances it requests the latter. It is worth mentioning that this decision is not final, given that it may occur that the Commission initially grants a petition for precautionary measures and later on decides that the circumstances justify the request for provisional ones before the Court.

In relation to requests for urgent measures that are not related to a contentious case pending before the Court, although there are no express criteria for the

Commission's request for provisional measures to the Court, the logic is the same that currently inspires the filing of contentious cases by the Commission before the Court: when the Commission considers that the State involved will not comply –or has ceased to comply– with the precautionary measure, it files the request for a provisional measure. Further –as we have anticipated– it may happen that, at the beginning, the Commission grants a precautionary measure and after the passing of a significant period of time –and when circumstances so justify it–, decides to ask for a provisional one. This was the case, for instance, of a Chinese citizen, Wong Ho Wing, imprisoned in Peru, who filed a complaint before the Commission for violations to due process and requested a precautionary measure alleging the imminence of his extradition –for the alleged crimes of customs duty evasion, money laundering and bribery– to the People's Republic of China, where he could be sentenced to the death penalty. The Commission granted the precautionary measures in March 2009 (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Wong Ho Wing respecto de Perú*, 2009b) and the process continued in Peru. Almost a year later, the Commission presented a request for provisional measures to the Court, on the grounds that, to a recent decision of the Peruvian Supreme Court granting the extradition, was added the fact that it explicitly stated that precautionary measures were not mandatory; thus, such measures were rendered insufficient to protect the life of the beneficiary, making it necessary to request the Inter-American Court for provisional measures. The latter granted them in May 2010 (CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Wong Ho Wing respecto de Perú*, 2010).

Regarding the assessment made by the Commission, concurring the respective requirements, in order to decide on the adoption of precautionary measures or, instead, directly requesting provisional ones, Héctor Faúndez Ledesma has observed that

sometimes, the Court itself seems to approve the fact that precautionary measures, granted by the Commission, have been used in the first place and that only subsequently, in case they have been insufficient, they resort to the Court; on the other hand, the Court has considered that the fact that the precautionary measures adopted by the Commission have not produced the protection effects required, and that the government has not taken adequate protection measures, constitute 'exceptional circumstances' that make it necessary to order urgent measures –or provisional measures– to avoid irreparable damage to persons.

(FAÚNDEZ LEDESMA, 2004, p. 518, unofficial translation).¹²

In any case, it is the Commission itself that has the power to request or not a provisional measure to the Court (except in pending cases before the tribunal, in which the victim's representatives are involved).

As we have pointed out, the degree of States' compliance with precautionary measures is higher than that of execution of resolutions of the IACHR concerning specific cases, which is why the number of provisional measures requested and granted is considerably lower than that of precautionary ones. Only under highly qualified circumstances, such as situations in which the execution of a death penalty is imminent

or in which the exceptional context of the situation so justifies it, the Commission directly requests for provisional measures, without previously ordering precautionary ones. However, the logic is the same as the aforementioned, with the difference that in these last two hypotheses it is a question of an *ex ante* appreciation by the Commission. It is worth mentioning that even though, as a general rule, the Commission's assessment of potential compliance refers to the specific measure in question, with reference to those States that systematically deny complying with precautionary measures, the Commission directly files a provisional measure request before the Court.

To the aforementioned, it must be added that the criterion maintained by the Commission and the Court is that provisional measures shall only be requested regarding those States that have recognized the contentious jurisdiction of the Court. Faúndez Ledesma has affirmed that this could be applicable to all the States that have ratified the American Convention on Human Rights, irrespective of whether they have recognized or not the aforementioned jurisdiction. In this sense, the author in question highlights the fact that

within the Inter-American System, this institution [provisional measures] is applied not just as an incident within a pending legal process before the tribunal, but that it can also be the result of a request by the Commission on a matter that has not yet been submitted to the Court

(FAÚNDEZ LEDESMA, 2004, p. 520, unofficial translation),

adding that

provisional measures are not part of the Court's contentious jurisdiction, but of its competence as a body for the protection of human rights. In this sense, we cannot lose sight of the fact that the Court has repeatedly stated that, within International Human Rights Law, the purpose of provisional measures, besides their essentially preventive nature, is the effective protection of fundamental rights, in so far as they seek to avoid irreparable damage to persons.

(FAÚNDEZ LEDESMA, 2004, p. 520, unofficial translation).

The argument is not entirely convincing, given that the American Convention contemplates provisional measures in the context of contentious cases pending before the Court or that are susceptible of being presented for its consideration, something which could not take place if the State concerned has not recognized its contentious jurisdiction. The situation is different regarding the Commission's precautionary measures, explicitly conceived in the broadest scope of the different functions of this body and not only within that of its jurisdiction to consider cases.

As regards the request for provisional measures before the Inter-American Court, this process has undergone several transformations. The first Rules of Procedure of this tribunal provided that if the Court was not in session at the moment of the request, its President had to convene it as soon as possible. The only alternative it considered was that the President required the parties to act so as to facilitate the effectiveness of any measure that could eventually be adopted. This was to be carried out by the President consulting with the Court's Permanent Commission or, if possible, with all the judges.

This resulted in delays in situations that are urgent by nature. Therefore, the Court amended its Rules of Procedure in 1993, establishing that if the Court was not in session, the President could request the State concerned to take urgent measures, decision which was subject to ratification by the tribunal in its following period of sessions.

Subsequently, and as described by former judge and President of the Inter-American Court, Antonio Cançado Trindade, progress was made in this respect that

has strengthened the position of individuals searching for protection. In the case of the Constitutional Court, magistrate Delia Revoredo Marsano de Mur, dismissed from the Constitutional Court of Peru, directly submitted to the Inter-American Court, on 03 April 2000, a request for a provisional measure of protection. This being a case pending before the Inter-American Court and the latter not being in session at that moment, the President of the Court, for the first time in the history of this tribunal, adopted urgent measures, ex officio, through Resolution of 07 April 2000, given the elements of extreme seriousness and urgency, and in order to avoid irreparable harm to the petitioner.

(CANÇADO TRINDADE, 2004, p. 83, unofficial translation).

Later on, the plenary of the Court ratified the decision of its President.

The same happened in the case of *Loayza Tamayo* when, in December 2000, having already received an adverse judgment on the merits and being at the stage of compliance supervision by the Court, a third party, together with the sister of the victim, filed a request for provisional measures, which was granted by the President of the Court and later on ratified by the tribunal.

5 Rights that may be protected through precautionary and provisional measures

A key aspect of the issue being analyzed refers to which are the rights that may be protected through the mechanism of urgent measures of the Inter-American System. Both the American Convention on Human Rights and the Rules of Procedure of the Commission –instruments that, as we have noted, contemplate provisional and precautionary measures, respectively– establish for their concession, among others, the requirement of being situations of imminent irreparable harm to persons. This has meant, in practice, that a very high percentage of the urgent measures granted are in relation to the right to life and the right to humane treatment (personal integrity). In the case of the former, it is typically the case of people at serious risk, caused either by State agencies or by paramilitary or analogous groups, but it can also be the case of people at serious risk within their family nucleus. Such is the case especially in contexts of violence against women or children.¹³ As regards those urgent measures aimed at safeguarding personal integrity, as well as other similar situations –*mutatis mutandi*– to the ones previously described, there are a series of measures that have been granted by the Commission and the Court regarding especially serious prison conditions.¹⁴

Nonetheless, in a series of urgent measures, other rights have been protected either by precautionary or provisional measures. Some emblematic situations have been the protection of the right to indigenous property by means of provisional

measures in the context of the *Awás Tingni* case (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2002a),¹⁵ as well as through a series of precautionary measures issued by the Commission;¹⁶ provisional measures aimed at protecting the right to freedom of expression in the cases of *Herrera Ulloa* (Costa Rica) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001);¹⁷ “*El Nacional*” and “*Así es la Noticia*” Newspapers *Noticia* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004c)¹⁸ and “*Globovisión*” Television Station *Globovisión* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004d),¹⁹ the last two in Venezuela; and the provisional measures aimed at safeguarding, besides life and personal integrity, the special protection of children in the family and the right to freedom of movement and residence of persons, as expressly mentioned in the Resolution of the Court in the *Case of the Girls Yean and Bosico* (case of Haitians and Dominicans of Haitian Origin in the Dominican Republic) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2000).²⁰

Another right that has been subject of the protection of a precautionary measure was that of access to public information. This occurred with the measures that prohibited the destruction of electoral ballots for the Presidential elections in Mexico (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Rafael Rodríguez Castañeda /México*, 2008b). With the precautionary measure, besides safeguarding the aforementioned right, the preservation of the subject matter of the litigation before the Commission was also sought, given that the question of whether citizens could access electoral ballots or not constitutes the central issue of a case pending before the IACHR (RODRÍGUEZ MANZO; LÓPEZ CANO, 2008). The Mexican State adopted the precautionary measure and avoided the destruction of the electoral ballots.

It is difficult to establish, precisely, which percentage of urgent measures corresponds to the protection of life and personal integrity and which to other rights. Graciela Rodríguez and Luis Miguel Cano made an estimate in that respect, noting that

if an analysis is done regarding the precautionary measures granted by the Inter-American Commission of Human Rights between 1996 and 2007, we can conclude that of the total 597 measures issued in that period, 478 are mainly related to the protection of life and personal integrity of persons and the remaining 119 are related to other issues.

(RODRÍGUEZ MANZO; CANO LÓPEZ, 2008, p. 5).²¹

This results in percentages close to 80% and 20%, respectively. In my opinion, however, elaborating this kind of estimates may lead to misleading results considering that, frequently, precautionary measures do not explicitly mention the rights to be protected, different conclusions may be extracted from a single measure. Indeed, some of the examples mentioned above, as divided by the authors, could be redirected into measures aimed at safeguarding personal integrity, for example, depending on the specific circumstances of the case, situations affecting due process, personal liberty, suspending the expulsion from a country, among others. This does not imply disregarding of the fact that urgent measures involving rights different from those of life and personal integrity, are effectively granted, but rather that their

precise determination is difficult to achieve (FAÚNDEZ LEDESMA, 2004, p. 544ss; PASQUALUCCI, 2003, p. 304-305).²² In any case, they represent a small percentage of the precautionary measures granted by the Inter-American Commission.

6 Urgent measures of a collective nature

The jurisprudential evolution regarding precautionary and provisional measures has included the issue of those of a collective nature. Although the case system of the Commission and the Court has experienced significant diversity in the last two decades, and it is no longer focused, almost exclusively, on massive and systematic human rights violations –as it did during periods of predominance of authoritarian regimes in the region–, given that most of the urgent measures granted refer to situations of serious risk to life and integrity of persons, in not few opportunities, they have made reference to situations of a collective nature. As regards precautionary measures issued by the Commission, the recent modifications to its Rules of Procedure expressly refer to those of a collective nature, by the inclusion of a provision that establishes that

the measures referred to in paragraphs 1 and 2 above [precautionary according to the different grounds] may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members.

(COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.3).

Thus, some of the provisional measures issued by the Inter-American Court in the paradigmatic cases mentioned in the previous paragraphs, such as that of *Awas Tingni* –among others referring to indigenous peoples–²³ and that of *the Girls Yean and Bosico* (case of Haitians and Dominicans of Haitian Origin in the Dominican Republic) precisely refer to situations of a collective nature.

Urgent measures of a collective nature have also been granted in relation to extreme imprisonment conditions, such as those already mentioned of *Urso Branco Prison* (Brazil), *Uribana Prison* (Venezuela) and *Mendoza Prisons* (Argentina), besides others related to seclusion conditions of children and adolescents (*FEBEM* – Brazil) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2005) or of people with mental disability (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Pacientes del Hospital Neuropsiquiátrico IParaguay*, 2007).

The same occurred in several situations of a similar nature in the context of the armed conflict in Colombia, for instance, the provisional measures ordered by the Inter-American Court in the case of the *Peace Community of San José de Apartadó* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2002b) and those of the afro-descendent *Communities of Jiguamiandó and Curbaradó* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2003), not to mention the numerous precautionary measures issued by the Commission.

More recently, stemming from the *coup d'état* in Honduras in June 2009, a collective precautionary measure was adopted (COMISIÓN INTERAMERICANA DE

DERECHOS HUMANOS, *Patricia Rodas y Otros / Honduras*, 2009a), which progressively encompassed more beneficiaries, covering several hundreds of people. Most of the situations covered by this precautionary measure refer to the protection of life and personal integrity, although some of them involve serious risks for the exercise of freedom of expression.

7 Implementation and follow-up of urgent measures

Without prejudice to the fact that, in principle, urgent measures may provide for a wide range of issues, such as halting an act of censorship, suspending a specific action or freeing someone, the fact is that, in most cases, what is being ordered is that the State provide for the protection of life and personal integrity. Usually, this is to be carried out through police protection, either with permanent custody or with some other means of protection, like periodic inspection visits to the residence or workplace of the beneficiary.

Police protection may sometimes be problematic for the beneficiaries, particularly when the imminent risk that led them to request the measure derived, precisely, from police forces or other State agents or bodies closely linked to them. In fact, sometimes petitioners seeking precautionary measures are not aware that, in case they are granted, they are likely to consist of police protection. For example, this is exactly what happened with the precautionary measures issued by the Inter-American Commission after the *coup d'état* in Honduras –to which we have already made reference– given that a significant number of beneficiaries did not expect the precautionary measure to consist of police protection and not few of them refused it.

A relevant factor of what happened with the implementation of precautionary measures in Honduras seems to have been that, prior to the *coup d'état*, precautionary measures were not frequent regarding that country, which is why the population had scarce information about them and the way they operated in practice. On the other hand, in countries such as Colombia, Guatemala or Mexico –which are the three that have registered the highest number of precautionary measures granted within the last ten years–, civil society has more information on the way such measures are implemented and, therefore, problematic situations, derived from the fact that such implementation usually consists of police protection, are less frequent.

It is worth mentioning that, in practice, even in contexts in which police bodies may have been with those who intimidated the beneficiaries, in most cases, these bodies comply with their protection role. The reason for this seems to be none other than the closer supervision of the police carried out by other State agencies that are not interested in being internationally exposed in case the beneficiary is the subject of an aggression that the precautionary measure is precisely trying to avoid; all of this, in a context of greater visibility of the urgent situation. This is why it is unusual –although it does, unfortunately, happen sometimes– that beneficiaries of precautionary measures are victims of mortal aggressions.

Regarding the follow-up of precautionary and provisional measures, such as in the case system, it is the Commission and the Court, themselves, that follow-up on them, without any backing or initiatives to that effect, from the political bodies of the OAS. This follow-up is carried out both, by means of written

communications between these bodies, the beneficiaries and the State concerned, and also through hearings. The latter are more frequent at the Court than at the Commission –given the large number of hearings that it holds on other matters such as cases, countries and issues–, although they occasionally do take place, for instance, in situations of serious issues of non-compliance. Thus, for example, the Commission has held several public hearings to follow-up on the precautionary measures issued with respect to persons deprived of their liberty by the United States in Guantanamo (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, *Detenidos en Guantánamo /Estados Unidos*, 2002).²⁴

A frequent problem in the follow-up of urgent measures issued by the Commission and the Court consists of their long duration. When these bodies grant a precautionary or provisional measure, they do not set a time limit for it. In practice, a significant number of urgent measures within the Inter-American System have been in force for many years.

The reforms introduced to the Rules of Procedure of the Commission make reference to several aspects pertaining to the follow-up of precautionary measures, also taking into account the duration they often reach, indicating the roles for the Commission and the States, as well as for the participation of beneficiaries. In this sense, it is initially set forth that the Commission “shall evaluate periodically whether it is pertinent to maintain any precautionary measures granted” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.6), as a way of avoiding their prolongation for longer than necessary. As far as the State’s initiative is concerned, the Rules of Procedure provide that “[a]t any time, the State may file a duly grounded petition that the Commission withdraw its request for the adoption of precautionary measures”. Prior to the adoption of a decision, “the Commission shall request observations from the beneficiaries or their representatives” assuring that “the submission of such a petition shall not suspend the enforcement of the precautionary measures granted” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.7).

While a precautionary measure is in force, the Commission may request the information it deems relevant from the State and the beneficiaries regarding its observance. The modification of its Rules of Procedure establishes that “[m]aterial non-compliance by the beneficiaries or their representatives with such a request may be considered a ground for the Commission to withdraw a request that the State adopt precautionary measures” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2009, art. 25.8).

8 In conclusion: are urgent measures an international *amparo* action?

Given that through precautionary measures it is possible to obtain an urgent decision from the Inter-American Commission on Human Rights, the question that sometimes arises is whether this request could constitute some sort of *Amparo* action to protect rights at the international level. As we have mentioned, such a request may take place, either in the context of a pending petition before the Commission

or in its absence, due to the Commission's jurisdiction and its broad powers for the protection of human rights. Thus, considering that through the urgent measures' mechanism it is possible to obtain a quick decision from the international body, this could be assimilated, in principle, to the *Amparo* at the national level. This is not a minor issue, considering that in some countries, as it is well known, the *Amparo* action has become an expedited way to "skip" the usual process, especially in the context of internal judicial systems collapsed with work overloads. Given the delays in the processing of cases before the Inter American System of Human Rights, an analogous phenomenon to the one occurring at the local level, could eventually take place at the regional level.

However, both in theory and in practice, this is far from happening. Regarding the first aspect, the requirements for the concession of precautionary and provisional measures are more stringent than those usually considered for the granting of an *Amparo* at the internal level. Such requirements refer to the peremptory condition of urgency of the measures as well as the irreparability of the situation in case they are not granted. Thus, as we have seen, regarding precautionary measures, the Rules of Procedure of the Commission provide that they must be aimed at the prevention of "irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case", whereas the American Convention regulates provisional measures for "cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons."

In practice, the jurisprudential development of the Inter-American Commission and Court regarding precautionary and provisional measures also shows that they are treated very differently from the way *Amparo* actions are treated in internal judicial systems. Thus, even though the subject matter of requests for precautionary and provisional measures covers a wide spectrum of issues, such as, among many others, sustenance of children and adolescents, alleged violations to due process, migration matters, issues relative to the right to property, imprisonment conditions, etc., the fact is that most of the precautionary and provisional measures granted refer to life and personal integrity. Concerning the health conditions of persons deprived of their liberty, it must be said that what the IACHR does is determine whether the particular illness or disease is sufficiently serious that, in case it is not adequately and timely treated, the intended beneficiary could suffer irreparable harm.²⁵

In this sense, and to mention just a few illustrative examples, among the aspects that are usually subject to requests for urgent measures, and which are almost invariably –although not absolutely– excluded from concession within the Inter-American System are disputes regarding sustenance of children which do not purport harm to their life or personal integrity, delays in internal judicial proceedings, allegedly arbitrary judgments, real estate expropriation, etc.

If the number of precautionary measures granted is considered in relation to the total number of requests filed, the conclusion is that their concession is far from being the general rule. In this respect, in the five-year period spanning from 2005 to 2009 inclusive, the figures are as follows:

Year	Precautionary requested	Precautionary granted
2005	265	33
2006	314	37
2007	250	40
2008	301	28
2009	324	34

Source: Inter-American Commission on Human Rights. *Annual Reports*. <www.cidh.org>. Last visited on 23 June 2010.

As it can be observed from the figures above, the usual percentage of precautionary measures granted is slightly over 10% of the filed requests. These figures are similar to those of previous years from the last decade, except for 2002 in which the number of precautionary measures granted was higher. The percentage of provisional measures granted in relation to those requested is higher, but this is fundamentally due to the fact that most of them have previously passed through the “filter” of the Commission. As previously mentioned, the IACHR uses requests for provisional measures as a sort of “last resort” when it cannot resolve the situation by itself. We say that most of the urgent measures requested to the Court have previously passed through the filter of Commission because some of them –the least– are filed directly in relation to cases pending before the Court itself.

Considering this background variety, there do not seem to be grounds for assimilating the urgent measures of the Inter-American System of Human Rights and the *Amparo* action in Comparative Law. The possibility that persons who consider that their rights have been violated turning, *per saltum*, to the Inter-American Commission through precautionary measures, circumventing the case system, would not work out unless the requirements for those measures –different and, in certain aspects, more stringent than those required for the admissibility of a petition– are met.

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NOTES

1. Thus, for instance, the Human Rights Committee and the Committee against Torture of the United Nations and the African Commission on Human and Peoples’ Rights, among the semi-judicial bodies (the same happened with the extinct European Commission of Human Rights); and the European Court of Human Rights and the African Court of Human and Peoples’ Rights, among the judicial bodies. Sources are listed below.

2. This is the case of the United States and Venezuela. Regarding the latter, this has led to the fact that the IACHR, when it considers the circumstances so demand it, files a request for provisional measures before the Court instead of adopting precautionary ones. In turn, in relation to the USA, the Commission issues precautionary measures, given that the Court lacks jurisdiction to hear contentious cases and, consequently,

provisional measures.

3. Inter-American Convention on Forced Disappearance of Persons, adopted on June 9, 1994, at the XXIV Regular Session of the OAS General Assembly

4. Starting with Decision T-558/03, from 07 July 2003.

5. Entered into force on 31 December 2009.

6. Through reform to its art. 25.1.

7. This text was initially included in art. 37. Unofficial translation.

8. The full text of the preliminary draft on this issue was the following:

“1. The Commission may, on its own initiative or at the request of a party, take any action it deems necessary for the performance of its duties.

2. In case of *extreme* urgency and seriousness, when it is necessary to prevent irreparable harm to persons, the Commission, when requesting information from the State concerned on the alleged violations mentioned in a petition, may request the adoption of precautionary measures to avoid consummation of irreparable harm, in case the denounced facts are true.
3. If the Commission is not in session, the Chair, one of the Vice Chairs, or the Executive Secretary by his/her instructions, will consult with the members on the application of the provisions set forth in paragraph 1. If this was not possible in due time, the Chair will take the decision, on behalf of the Commission and shall communicate it to its members.
4. The measures provided for in this Article may be requested at any time during the processing of the petition, before the final decision on the merits. The request of such measures and their adoption shall not prejudice the subject matter of the final decision." (Unofficial translation)
9. Inter-American Commission on Human Rights, Precautionary Measure 196-09, initially adopted on 28 June 2009 and expanded with a series of subsequent decisions by the Commission. See, to that respect, a description in the Report of the Inter-American Commission on Human Rights, Honduras: Human Rights and *coup d'état*, paragraphs 37ss. (2009).
10. Pursuant to which representatives of the victims went from acting as advisors to the Commission in proceedings before the Court, to acquiring autonomy at the reparation stage (1996), and, subsequently, since the beginning of the proceedings before the Court (with the Rules of Procedure of the Court, 2001).
11. Entered into force on 01 January 2010.
12. Two references from the original text have been removed, in which the corresponding case-law sources are mentioned; cases *Vogt and Cemente Teherán and Others* for the first assertion of the author and case *Serech and Saquic* for the second one.
13. See, for example, MC 265/07 *Ms. X et al / Mexico* (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2008a).
14. See, among others, the provisional measures adopted by the Inter-American Court on the matter of *Mendoza Prisons* (Argentina) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004b); *Uribana Prison* (Venezuela) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2007); *Urso Branco Prison* (Brazil) (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2008); etc.
15. *Case of the Mayagna (Sumo) Awas Tingni Community*. The Court decided, among other issues, "[t]o order the State to adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awas Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it, until the definitive delimitation, demarcation and titling ordered by the Court are carried out." (operative paragraph 1).
16. Inter-American Commission on Human Rights, PM 253-05: Case 12.548 (*Garifuna Community of Triunfo de la Cruz / Honduras*); PM 304-05: Petition 674-06 (*Case Garifuna Community of San Juan / Honduras*); PM 402-02: Petition 4617-02 (*Case of Mercedes Julia Huenteao and others / Chile*); PM 155-02: Case 12.338 (*Twelve Saramaka Clans / Suriname*); PM 204-01: Case 12.313 (*Yakye Axa Indigenous Community of the Enxet-Lengua People / Paraguay*); PM 124-00: Case 12.053 (*Maya Indigenous Communities / Belize*).
17. Order of the Inter-American Court of 7 September 2001, *Case Mauricio Herrera Ulloa*. The Court established:
- "That freedom of expression, recognized in Article 13 of the Convention, is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *condition sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free." (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001, para. 6).
- "That an order must be given to suspend *La Nación's* publication of the operative paragraphs of the judgment of conviction that the San José First Circuit Criminal Trial Court delivered on November 12, 1999 and its creation of a "link" at the *La Nación Digital* website between the contested newspaper articles and the operative paragraphs of that judgment, since such a publication and such a link would cause irreparable harm to Mauricio Herrera Ulloa. No irreparable harm would be done, however, if the other operative paragraphs of that judgment were enforced. Execution of those paragraphs should be suspended until the case is finally settled by the organs of the inter-American system for the protection of human rights." (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2001, para. 7).
- A footnote from the original text of the judgment has been removed.
18. References to the right to freedom of expression can be found in paragraphs 9 and subsequent. The

operative paragraphs include requesting that the State “adopt forthwith the necessary measures to provide perimeter protection at the offices of the “*El Nacional*” and “*Así es la Noticia*” newspapers.”

19. It is expressly mentioned that the rights protected are life, physical integrity and freedom of expression, besides the protection of the facilities of the broadcasting station (paragraph 18).

20. *Case of Haitians and Dominicans of Haitian Descent in the Dominican Republic*, Considering N° 9, in which it is established “[t]hat the events presented by the Commission in its request show *prima facie* a situation of extreme gravity and urgency as to the rights to life, personal integrity, special protection for children in the family, and to residence and movement, of the persons identified in the June 13, 2000, *Addendum* of the Commission (*supra*, Having Seen N° 3), and specified in the operative part of this Order of the Court (*infra* operative paragraphs 1, 3, 4, 5, 6, and 7).”

21. Two footnote references from the original text have been removed. The authors add that among these other issues are “personal freedom; the investigation of persons’ whereabouts; allowing for the return to the country of origin; the return of identity documents, suspension of orders of expulsion, deportation or extradition; cancellation of arrest warrants and ending of persecutions, and ceasing with threats to persons; the suspension of concessions affecting the environment; the protection of property rights; prevention of confiscation of goods, guarantees of due process; investigation and review of extrajudicial proceedings; allowing for free access to judicial remedies; compliance with *habeas corpus* orders; determination of the legal situation of detainees; suspension of the execution of decisions different from those imposing the death penalty; regularization of the conditions in detention centers; the rights to freedom of assembly, association and political rights; the rights to residence and circulation; the right to a name, to protection of the family, the rights of the children; international adoption of children; guarantee the right to education; protection of indigenous peoples from third parties; freedom of thought, offices protection; protection of archeological centers; protection of radio station facilities, the guarantee to freedom of expression and the right to information.” (RODRÍGUEZ MANZO; LÓPEZ CANO, 2008, p. 5-6).

22. Although not expressly mentioned –except in relation to the right to property, which is expressly mentioned–, Faúndez Ledesma seems to support the fact that provisional measures could only be issued to safeguard the right to life and the right to personal integrity. However, based on the arguments

and jurisprudence presented here, it seems to be clear that those measures can, in fact, be adopted in relation to other rights. The reference to the right to property can be found in Faúndez Ledesma (2004, p. 547). In turn, Jo M. Pasqualucci appreciates an evolution to that respect, stating that “in more recent cases, the Court appears to have broadened its interpretation of irreparable damage to include any type of irreparable damage to persons. For example, a person or community of persons can suffer irreparable damage if their ancestral grounds are logged and denuded of trees. Persons may also suffer irreparable damage in certain cases if their personal possessions or livelihood are taken from them. The Court should be concerned as to whether the threatened action will damage a person in such a way that a monetary judgment in the case will not compensate him or her for the loss. If that be the case, and the injury is serious, the Court should order provisional measures.” (PASQUALUCCI, 2003).

23. See also to this respect, among others, *Matter of Pueblo indígena de Sarayaku* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004e); *Matter of Pueblo indígena de Kankuamo* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004f).

24. Pursuant to those measures, issued approximately two months after the USA began to transfer detainees to Guantanamo, the IACHR requested that the State adopt the necessary urgent measures to have the legal status of the beneficiaries determined by a competent tribunal. In 2005 the Commission expanded the precautionary measures, requesting the United States “to conduct an in-depth and impartial investigation into all instances of torture and other cruel, inhuman, or degrading treatment, and to prosecute and punish those responsible.” Then the IACHR issued Resolution No 2/06, “urging the United States to close the Guantánamo detention facility without delay, transfer the detainees in full compliance with international humanitarian law and international human rights law, and to take the necessary measures to ensure detainees a fair and transparent judicial process before a competent, independent, and impartial decision-maker.” The quotes are from the Press Release 02/09 of the Inter-American Commission on Human Rights, of 27 January 2009.

25. Thus, the Inter-American Commission has granted precautionary measures to persons deprived of their liberty who suffered from tuberculosis, diabetes, complete occlusion of the aorta and gangrene of the lower limbs, tumors in the back, respiratory difficulties, chronic ear infection and duodenal ulcer, prostate problems, etc.

RESUMO

Este trabalho revisa o tratamento dado pelo Sistema Interamericano de Direitos Humanos por meio de seus órgãos na matéria, a Comissão e a Corte Interamericana de Direitos Humanos, às medidas de urgência (cautelares na Comissão e provisórias na Corte), matéria que foi objeto de reformas recentes, por meio de alterações dos regulamentos de ambos os órgãos. Para isso se analisam, entre outros aspectos, questões gerais de tais medidas, suas causas de concessão, os direitos passíveis de proteção, e as medidas de urgência de natureza coletiva.

PALAVRAS-CHAVE

Medidas Cautelares – Medidas Provisórias – Sistema Interamericano de Direitos Humanos

RESUMEN

Este trabajo revisa el tratamiento dado por el Sistema Interamericano de Derechos Humanos a través de la Comisión y la Corte Interamericana de Derechos Humanos, a las medidas urgentes (cautelares en la Comisión y provisionales en la Corte), y las recientes reformas que se les han hecho. Para ello se analizan, entre otros aspectos, cuestiones generales de tales medidas, sus causales de concesión, los derechos susceptibles de protección, y las medidas urgentes de naturaleza colectiva.

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