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Provisional Measures: How International Human Rights Law is Changing International Law (Inspired by Gambia v. Myanmar)

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Provisional Measures: How International Human Rights Law is Changing International Law (Inspired by *Gambia v. Myanmar*)

Cover Page Footnote

Retired Principal Specialist of the Inter-American Commission on Human Rights, Organization of American States (1979-2012). Adjunct Professor at Georgetown U. Law Centre (2005 - present); Co-Chair of the "Human Rights in Times of Emergency" Committee of the International Law Association; Member of the Board of Directors of Amnesty International USA. This paper is a more extensive version of a presentation made at the U. of Notre Dame Law School on February 21, 2020

PROVISIONAL MEASURES: HOW INTERNATIONAL HUMAN RIGHTS LAW IS CHANGING INTERNATIONAL LAW (INSPIRED BY *GAMBIA V. MYANMAR*)

CHRISTINA M. CERNA*

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The argument of this paper is that international courts, when pressured to act quickly on behalf of a victim whose human rights may have been infringed, will tend to disregard the requirements of international law in order to provide some immediate assistance to the victim. “Provisional measures,” which require the international court or the human rights body to act quickly to avoid serious, imminent, irreparable damage to persons, tend to be the chosen legal instrument for such action. Provisional measures are normally granted within weeks or sometimes in as short as one day, whereas the decision on a case can take years, or even decades.¹ As one commentator noted, “[W]hen there is a possibility of imminent and irreparable harm to persons, the protective aspect of provisional measures may be of more value than the compensatory function of a final judgment.”²

BACKGROUND

In 1979, when I first started to work as a staff lawyer at the Inter-American Commission on Human Rights (Inter-American Commission or Commission), when we received a new petition, we determined whether the Commission had jurisdiction over the potential case and whether the petition was prima facie admissible in order to begin to process it. That meant that the respondent State against which the petition was filed had to be a member state of the Organization

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1 See Nelson C. Sanchez & Laura L. Cerón, *The Elephant in the Room: The Procedural Delay in the Individual Petitions System of the Inter-American System*, in *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, CHANGING TIMES, ONGOING CHALLENGES* (Due Process of Law Foundation, 2016).

2 JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN CT. OF HUMAN RIGHTS* 253 (Cambridge U. Press, 2d ed. 2013).

of American States, that the petitioner had to have alleged a violation of a human right set forth in either the American Declaration of the Rights and Duties of Man (American Declaration)³ or the American Convention of Human Rights (ACHR),⁴ that the petitioner had to have attempted to exhaust domestic remedies (i.e., attempted to secure redress through the national court system, having taken the case to the highest court in the system), that the petitioner had come to the Inter-American Commission within six months from the date of notification of the judgment of the highest court in the national system, and that the subject of the petition was not pending in another international proceeding.⁵ These are all jurisdictional and admissibility requirements. Of course, there were exceptions to the admissibility requirements.⁶ If the domestic legal system did not provide for remedies for the alleged violation, then the exhaustion of domestic remedies rule could not and did not apply, or if there was an unwarranted delay in rendering a final judgment or if the petitioner had been denied access to the remedies under domestic law, then exhaustion of domestic remedies was inapplicable.⁷ Similarly, if the petition was substantially the same as one previously processed by the Inter-American Commission or by another international organization, then it should be considered inadmissible, although this rule was breached more often than observed both by the Inter-American Commission and other international organizations.

The respondent State may contest the petitioner's argument in favor of jurisdiction and admissibility and may present preliminary objections thereto. Once the preliminary objections are taken into consideration along with the petitioner's defense of jurisdiction and admissibility, the case is declared admissible or inadmissible. These details give the reader an impression of the hoops the petitioner had to jump through for the international human rights body to open a case.

Processing individual petitions did not begin to take on importance in the inter-American system until after 1991, when the governments of the OAS member states, except Cuba, celebrated, in Santiago, Chile, the fact that they were all democratically elected governments.⁸ The admissibility of a petition

3 See Nature and Purposes (Art. 1), Inter-Am. Ct. H.R. (Approved by Resolution No. 447 of the OAS General Assembly at its ninth regular session, La Paz, Bolivia, October 1979), <http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp> (last visited Dec. 1, 2020); See also American Declaration of the Rights and Duties of Man (1948); OAS Res. XXX, adopted by the Ninth International Conference of American States, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System (Updated to September 30, 2014), OEA/Ser L/V/1.4 rev.13 (2014), <http://www.cidh.oas.org>.

4 See generally Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 at 1 [hereinafter ACHR]; reprinted in Basic Documents, *supra* note 3, at 25-46; see also 1144 U.N.T.S. 1, No. 17955 (1979).

5 See ACHR *supra* note 4, at art. 46.

6 If the State against which the petition was presented was not a member state of the Organization of American States, or if a violation of a right was alleged that was not included in the ACHR or the American Declaration on the Rights and Duties of Man, or one of the other Inter-American human rights treaties, then the Commission would not have jurisdiction over the case or the country.

7 See ACHR *supra* note 4, at arts. 46(2) and 47.

8 See The Santiago Commitment to Democracy and the Renewal of the Inter-American System, OAS GA. 3d plenary sess., June 4, 1991, OEA/Ser.P, AG/RES. (XXI-O/91), <http://www.oas.org/en/sla/docs/ag03805E01.pdf> (last visited Dec. 1, 2020). Cuba is a founding member state of the Organization of American States, which was suspended from participation in OAS activities from 1962-2009. After the lifting of the suspension in 2009, Cuba expressed no interest in returning to the Organization.

before the Inter-American Commission only made sense in a democratic State, where impartial and independent courts functioned and domestic remedies could be exhausted. Under the numerous military regimes in the region in the 1970s and 80s, military courts had replaced ordinary courts and their lack of independence and impartiality prevented them from affording due process and fair trial guarantees.

I. THE SUPERVISORY HUMAN RIGHTS SYSTEMS

The individual petition procedure was invented in 1950 by the Europeans when they adopted the European Convention of Human Rights (ECHR) under the aegis of the Council of Europe.⁹ The ECHR created two organs, a Human Rights Commission and a Human Rights Court, based in Strasbourg, France, and there would be a member of the Commission and a judge on the Court for every State party to the ECHR. To prevent a recurrence of the atrocities suffered during World War II, and especially the Holocaust, the Europeans were the first to accept legally binding obligations and the establishment of an international body to which people could apply when their rights were endangered or violated by their own governments. This unprecedented granting of standing to individuals under international law was considered revolutionary at the time, as prior thereto only States had standing under international law.

Both organs of the European system were part-time bodies and from the *travaux préparatoires*, we know that the drafters believed that recourse to the Court would be a rare occurrence. States, it was thought, would comply with the recommendations of the European Commission and recourse to the European Court would be infrequent.

The Inter-American Commission was created in 1959, without the benefit of the prior adoption of a legally binding human rights treaty.¹⁰ The inter-American system, in 1948, had adopted the American Declaration, a declaration that pre-dated the adoption of the UDHR by seven months, but it was a declaration and not intended to be legally binding. The Inter-American Commission, however, and the Inter-American Court, take the position that despite having been adopted as a declaration and not as a treaty, today the American Declaration constitutes a source of international obligations for the member states of the OAS.¹¹ The Commission maintains that the American Declaration creates legal obligations, or in other words, is legally binding on all

⁹ See [European] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953.

¹⁰ The OAS created the Inter-American Commission in 1959 by a Resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, eleven years after the adoption of the American Declaration and approximately eight months after the triumph of the Cuban Revolution. The Fifth Meeting of Consultation of Ministers of Foreign Affairs took place in Santiago, Chile from Aug. 12-18, 1959. See Final Act, Doc. OEA/Ser.C/II.5, <http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/minutes.asp> (last visited July 28, 2020).

¹¹ See Resolution No. 3/87, Case 9647, Inter-Am. Comm'n H.R. at 12-13 (1987); Rafael Ferrer-Mazorra et al., Case 9903, Inter-Am. Comm'n H.R., Report No. 51/01 ¶ 46-49 (2001); Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 35-45 (July 14, 1989).

OAS member states.¹² It is important to note in this context, however, that the United States, for example, considers the American Declaration “a nonbinding instrument” that does “not create legal rights or impose legal duties on member states of the Organization of American States.”¹³ In addition, the US considers the Commission’s precautionary measures to constitute a “nonbinding recommendation.”¹⁴

Following the end of World War II, there was no consensus in the international community in favor of the elaboration and adoption of an international human rights treaty. The Universal Declaration of Human Rights (UDHR), the consensus document, was a declaration, not a treaty. Eleanor Roosevelt, Chair of the first UN Human Rights Commission that adopted the UDHR, characterized the UDHR as “a standard of achievement.”¹⁵

The Cold War prevented the adoption of a single legally binding treaty to give force to the rights set forth in the UDHR. The UN International Covenant on Civil and Political Rights (ICCPR)¹⁶ and the UN International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷ were both adopted in 1966 and split the rights protected in the UDHR in two, with the West supporting the ICCPR and the East (USSR, etc.) supporting the ICESCR. Both treaties entered into force ten years later, in 1976. The US did not ratify the ICCPR until 1992, and it has never ratified the ICESCR. Republican party politicians in the US, in general, do not recognize economic, social, and cultural rights as human rights. The right to file an individual petition before the UN Human Rights Committee was not included in the text of the ICCPR but was added by the first Optional Protocol. The US has not become a party to the first Optional Protocol; consequently, if a person wishes to file a complaint at the international level about human rights violations in the US, the only available option is to do so before the Inter-American Commission on Human Rights.

12 According to the Inter-American Commission the legal status of the American Declaration is: “[T]he American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the Member States of the OAS.” Russell Bucklew, Case 12.958, Inter-Am. Comm’n H.R., Report No. 71/18, OEA/Ser.L/V/II.168, doc. 81 ¶ 60, (2018), <http://www.oas.org/en/iachr/decisions/merits.asp?Year=2018> (last visited July 28, 2020).

13 *Id.* at ¶ 14.

14 *Id.* Commentators such as Antkowiak and Gonza, similarly consider the Commission’s decisions under both the Declaration and the ACHR to have the force of recommendations that are not legally binding. See Thomas M. Antkowiak & Alejandra Gonza, *THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS* 9 (2017).

15 MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

16 See *International Covenant on Civil and Political Rights*, UNITED NATIONS HUMAN RIGHTS, 999 U.N.T.S. 171, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>. (last visited Dec. 1, 2020).

17 See *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS HUMAN RIGHTS, 993 U.N.T.S. 3, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (last visited July 28, 2020).

After the adoption of the two UN Covenants, the OAS, in 1969, adopted the ACHR, which gave a treaty basis to the Inter-American Commission and created the Inter-American Court of Human Rights. Today, all Spanish-speaking countries in the OAS are state parties to the ACHR and have accepted the compulsory jurisdiction of the Inter-American Court, whereas most English-speaking countries are not parties to the ACHR.¹⁸ The ACHR entered into force in 1978, 42 years ago. The US is the only founding member of the OAS that is not a party to the ACHR but is considered subject to the Inter-American Commission's jurisdiction under the American Declaration.

Today, as a condition of membership in the Council of Europe, every State must also become a party to the ECHR, and all 47 member states are. This same requirement does not exist in the inter-American system and deprives the system of the necessary universality of participation that the European system enjoys. The Inter-American Commission's Statute was drafted by the OAS member states and sets forth the structure, membership, general functions, and powers of the Commission.¹⁹ The Statute can only be amended by the OAS member states. The Inter-American Commission's Rules of Procedure, on the other hand, are drafted by the members of the Commission and set forth more precise functions and can be amended by the Inter-American Commission at will.²⁰

The ACHR requires that the procedure before the Inter-American Commission be completed before a case can be brought to the Inter-American Court. The Commission procedure ends with a decision on the merits, a friendly settlement, or the case is filed (archived) if the petitioner fails to continue to participate in the case or some other reason calls for it to be ended. Under the treaty, only the Inter-American Commission or a state party to the ACHR may submit a case to the Inter-American Court, and given the infrequency of the latter, the Commission effectively controls the Court's workload. For the Commission to submit a case to the Court, the respondent state must be a state party to the ACHR and the state must have accepted the compulsory jurisdiction of the Court.

In the European system, in 1998, the European Commission and the European Court were merged into a single entity—a full-time European Court; the European Commission was eliminated and the individual was granted direct

18 The 24 states parties to the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. The 11 countries that are not states parties to the American Convention and to which the Inter-American Commission applies the American Declaration are: Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and the United States. Trinidad and Tobago acceded to the American Convention on May 28, 1991. On May 26, 1998, Trinidad and Tobago became the first country to notify its intention to denounce the American Convention, pursuant to Article 78(1) thereof. The denunciation came into effect one year following the date of notification. There is no reason to enter into an analysis here of the representative government of Venezuela in the OAS.

19 See Statute of the Inter-American Commission on Human Rights, OAS G.A. Res. 447, 9th Sess., art. 1 (Nature and Purposes) (1979).

20 See generally Rules of Procedure of the Inter-American Commission on Human Rights (Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from March 8 to 22, 2013, for entry into force on Aug. 1, 2013.), Inter-Am. Comm'n H.R., <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> (last visited Dec. 1, 2020).

access to the Court.²¹ Individual victims in the inter-American system do not have the right of direct access to the Inter-American Court, but must first go through the procedure before the Inter-American Commission. In addition, both the Inter-American Commission and the Inter-American Court are part-time, not full-time, bodies. The ACHR also requires that the Inter-American Commission appear in all cases before the Inter-American Court.²²

II. PROVISIONAL MEASURES

Of the three major international human rights treaties, the UN's ICCPR, the Council of Europe's ECHR, and the Organization of American States' ACHR, only the American Convention explicitly provides for "provisional measures."

All three supervisory international human rights bodies, the UN Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights issue "urgent," "interim," or "provisional" measures and consider them legally binding, as does the Inter-American Commission, although the latter calls them "precautionary" measures, not to confuse them with the Inter-American Court's "provisional" measures under Article 63 ACHR.²³ The European Court calls them "interim" measures under Rule 39 of the Rules of Court.²⁴

Provisional measures consist of an urgent action, taken by the international court or human rights body, to safeguard the rights of the purported victim until the adjudicatory body has taken a final decision in the case. In the Inter-American system, provisional measures, as part of International Human Rights Law, have, by necessity, also taken on a second, "protective" (tutelar) function, effectively to protect fundamental rights.²⁵ The provisional measures are particularly necessary when the imminent and serious situation would cause irreparable harm to persons, such as execution, torture, or forced disappearance.

21 As mentioned, upon becoming parties to the ECHR, a state was entitled to have a national as a member of the Commission and another as a judge on the Court. Since there are 47 member states in the Council of Europe that would have meant 47 Commissioners and 47 judges, which was considered duplicative and unwieldy. In the Inter-American system, there are seven Commissioners who serve as the Commission and seven judges who serve as the Court, and they represent geographical areas, not their states of origin.

22 See ACHR *supra* note 4, at art. 57.

23 Vienna Convention on Consular Relations, Apr. 24, 1963, 23 U.S.T. 3277, 500 U.N.T.S. 95; LaGrand Case (Ger. v. U.S.), 2001 I.C.J., No. 104, ¶ 22-28 (June 27); Dante Piandiong et al. v. Phil., Communication No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999 (Oct. 19, 2000).

24 Although this study is limited to the practice under the ICCPR, ACHR and ECHR, it is worth noting that the UN Committee on Torture (CAT) and the Committee on the Elimination of Racial Discrimination (CERD) have included provisional measures in their Rules of Procedure. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on Enforced Disappearances (CED) include explicit articles on provisional measures. See e.g., Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Oct. 6, 1999, 2131 U.N.T.S. 97, Art. 5 (entered into force Dec. 22, 2000) ("At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation."), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx> (last visited Dec. 1, 2020).

25 See Antonio A. Cançado Trindade, President of the Inter-American Court, *Prologue*, 2 June 2000, in Corte I.D.H., *Medidas Provisionales*, Julio 1996-Junio 2000, Serie E No 2, p.x.

Historically, the earliest requests for interim or provisional measures involved cases where the petitioner was condemned to death and awaiting the imminent imposition of the death penalty, which was a classic subject matter for provisional measures both at the International Court of Justice (ICJ) and before human rights bodies. The petitioner requested the ICJ or the human rights body to issue provisional measures requesting the state to stay the execution of the person whose execution date had been set so that the ICJ or the human rights body would have the time to complete its consideration of the merits of the case.²⁶ Were the state to execute the prisoner, the death of the person would moot whatever eventual decision was issued. In this way, provisional measures became a kind of reality check on the formalities of the rule of law. An eventual decision in favor of the applicant from the ICJ or from a human rights body would be meaningless if the beneficiary could reap no benefit from it. The provisional measures provided an immediate response, whereas a decision on the merits could take years.

The Inter-American Commission considered the Inter-American Court's "provisional measures" legally binding because they were set forth in the ACHR, but it also considered its own "precautionary measures" legally binding, despite the fact that they were not included in the ACHR but were created by the Inter-American Commission, and only expressly set forth in its Rules of Procedure, which it adopts for itself.²⁷ This caused conflict with the Inter-American Court, since the Court was of the view that it had a legal monopoly on the granting of provisional measures, since only the Court is mentioned in the ACHR in this context.²⁸ It goes without saying, however, that if the victim had

26 See Jeffrey Timothy Landrigan v. United States, Case 12.776, Inter-Am. Comm'n H.R., Report No. 81/11 (2011); Ramírez Cardenas & Leal García v. United States, Case 12.644, Inter-Am. Comm'n H.R., Report No. 90/09 (2009); Javier Suarez Medina v. United States, Case 12.421, Inter-Am. Comm'n H.R., Report No. 91/05 (2005); Toronto Markkey Patterson v. United States, Case 12.439, Inter-Am. Comm'n H.R., Report No. 25/05 (2005); Roberto Moreno Ramos v. United States, Case 12.430, Inter-Am. Comm'n H.R., Report No. 1/05 (2005); Douglas Christopher Thomas v. United States, Case 12.240, Inter-Am. Comm'n H.R., Report No. 100/03 (2003); Cesar Fierro v. United States, Case 11.331, Inter-Am. Comm'n H.R., Report No. 99/03 (2003); Gary Graham/Shaka Sankofa v. United States, Case 11.193, Inter-Am. Comm'n H.R., Report No. 97/03 (2003); Michael Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02 (2002); Case 11.753, Inter-Am. Comm'n H.R., Report No. 52/02; Juan Raul Garza v. United States, Case 12.243, Inter-Am. Comm'n H.R., Report No. 52/01 (2001); William Andrews v. United States, Case 11.139, Inter-Am. Comm'n H.R., Report No. 57/96 (1996).

27 See Kevin Cooper v. United States, Case 12.831, Inter-Am. Comm'n H.R., Report No. 78/15, OEA/Ser.L/V/II.156, doc. 31 ¶ 157 (2015) ("Kevin Cooper is the beneficiary of precautionary measures adopted by the Inter-American Commission under Article 25 of its Rules of Procedure. The Inter-American Commission must remind the State that carrying out a death sentence in such circumstances would not only cause irreparable harm to the person but would also deny his right to petition the inter-American human rights system and to obtain an effective result, and that such a measure is contrary to the fundamental human rights obligations of an OAS member state pursuant to the Charter of the Organization and the instruments deriving from it."). See Jeffrey Timothy Landrigan v. United States, Case 12.776, Inter-Am. Comm'n H.R., Report No. 81/11 ¶ 66 (2011); Juan Raúl Garza v. United States, Case No. 12.243, Inter-Am. Comm'n H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20, rev. (2000); Annual Report of the IACHR 2000, Inter-Am. Comm'n H.R., ¶ 117; Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, doc. 21 rev. ¶ 71, 72 (2001).

28 Judge Antonio Cançado Trindade argued that the Commission should always refer requests for provisional measures to the Court, without first using its own precautionary measures. He considered that the latter "lack[s] conventional force." Matter of the Persons imprisoned in the "Dr. Sebastiao Martins Silveira" Penitentiary in Araraquara, Sao Paulo (Brazil), Order of the Court (Inter-Am. Ct.

been executed while the case was pending before the Inter-American Commission, then the case would have been mooted and would never have reached the Inter-American Court.

But wait, you might say, the ACHR allows the Inter-American Commission to request provisional measures from the Inter-American Court, even if the case has not yet reached the Court, why doesn't the Commission do that? Well, part of the answer is that the Inter-American Commission was created in 1959, twenty years before the creation of the Inter-American Court, and it alone had been issuing precautionary measures for years and was not ready to stop doing so. If the state failed to comply with the measures, the Inter-American Commission began to request measures from the Court to ramp up the pressure on the state to comply. This was a tacit recognition on the part of the Commission that the Inter-American Court's measures carried more weight than its own, a generally unwise proposition for two purportedly equal bodies.²⁹

Provisional measures are defined in Article 41 of the Statute of the International Court of Justice (ICJ): "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."³⁰ Only States may be parties in cases before the ICJ and the Court exists, as the principal legal organ of the United Nations, to resolve disputes between states.

III. ICJ: THE LAGRAND CASE

Historically, the ICJ's power to order provisional measures was to preserve the rights of the parties, the status quo ante, pending international adjudication.

The ICJ and the other international human rights bodies (the UN and Europe) issued provisional measures but did not consider them legally binding—until they did. The transformation began with the ICJ's June 2001 judgment in the famous *LaGrand* case (*Ger. v. U.S.*), a death penalty case involving two brothers in Arizona.³¹ Germany presented the case on the eve of Walter LaGrand's execution and asked the Court to declare that the US, "in arresting, detaining, trying, convicting and sentencing" the LaGrand brothers, violated its "international legal obligations to Germany, in its own right and in its right of

H.R. Sept. 30, 2006). Separate Opinion Judge Cançado Trindade. Similarly, Judge Hector Fix-Zamudio, wrote in 1996: "Como la doctrina lo ha puesto de relieve, como esta facultad de la Comisión no tiene su apoyo en la Convención Americana, la solicitud de medidas cautelares a los Gobiernos involucrados no tiene carácter obligatorio, por lo que en ocasiones no es atendida de manera diligente por los mismos Gobiernos, y por ello la Comisión, cuando las medidas que pide no se han realizado, o lo han sido parcialmente, acude entonces ante la Corte para que esta ordene en forma imperativa las medidas, calificadas como "provisionales" por el referido artículo 63.2 e la Convención Americana." *Medidas provisionales: Compendio: 1987-1996*, Corte I.D.H, Serie E No. 1, p. vii.

²⁹ This may be perceived as a controversial statement by some. It should be recognized, however, that the Commission is not required to follow the Court's jurisprudence and routinely reiterates its interpretations of provisions of the ACHR in litigation until the Court accepts them. The acceptance of the Commission's approach to "interim" measures is an appropriate example.

³⁰ Statute of the International Court of Justice art. 41 ¶ 1, June 26, 1945, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

³¹ See *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J., No. 104, 466 (June 27) [hereinafter *LaGrand*].

diplomatic protection of its nationals,” under the Vienna Convention on Consular Relations (VCCR).³²

The first brother, Karl LaGrand, had been executed on February 24, 1999, and the second, Walter, was to be executed on March 3, 1999. On March 2, 1999, Germany instituted proceedings against the US accompanied by a request for provisional measures. The ICJ granted the Order: “The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in the implementation of this Order.”³³ The wording was the same as the Order in the earlier *Breard* case, involving the US imposition of the death penalty on a Paraguayan national who allegedly had been denied his VCCR rights.³⁴

The Order in *LaGrand* was issued on March 3, and Germany immediately instituted proceedings in the US Supreme Court to enforce compliance. The US Solicitor General took the position that “an order of the ICJ indicating provisional measures is not binding and does not furnish a basis for judicial relief.”³⁵ The US Supreme Court dismissed the motion filed by Germany, and on the same day, Walter LaGrand was executed.

Although the Order in *Breard* was identical in wording to the Order in *LaGrand*, the fact that Germany considered the Order binding and the US did not, led the Court to examine the issue and, for the first time, to declare that its provisional measures were legally binding.³⁶

While the *LaGrand* case was pending before the ICJ, Mexico requested an Advisory Opinion of the Inter-American Court querying whether the failure to notify an alien of his rights under the VCCR violated his human rights. The Inter-American Court, in its opinion dated October 1, 1999, found that the right to seek consular assistance is “part of the body of international human rights law,” and failure to provide such information to the alien is prejudicial to due process. Consequently, the imposition of the death penalty constitutes an “arbitrary” deprivation of his life.³⁷

The public hearing on the *LaGrand* case took place one year and one month later (13-17 November 2000). Germany, at the hearing, armed with the Inter-American Court’s Advisory Opinion, no longer only argued that the US had violated international legal obligations to Germany in its own right and in the right of diplomatic protection of its nationals, but that the US had violated the individual rights of the LaGrand brothers as well and had deprived them of their

³² *Id.* at 471.

³³ *Id.* at 479.

³⁴ See Vienna Convention on Consular Relations, (Para. v. U.S.), Order, 1998, I.C.J. 248 at 249, 258 (April 9).

³⁵ *LaGrand* at 479.

³⁶ *Id.* at ¶ 102. (“It follows from the object and purpose of this Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question *is based on the necessity*, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.” (emphasis added)).

³⁷ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. Series (ser. A) No. 16, ¶ 141. (Oct. 1, 1999).

human rights.³⁸ The ICJ agreed that the US had violated the individual rights of the LaGrand brothers, but held that it did not have to determine whether these rights were “human” rights.³⁹

The interesting dissent in the *LaGrand* case of ICJ Vice-President Judge Oda should be noted. Judge Oda publicly regretted having voted for the provisional measures since they were not issued to preserve the rights of states exposed to an imminent breach, which is irreparable: “The rights of States in question must be those to be considered at the merits stage of the case and must constitute the subject matter of the application instituting proceedings or be directly related to it.”⁴⁰ The provisional measures ordered by the Court to preserve, at least temporarily, the life of Walter LaGrand, were not directly related to the rights of states under the Vienna Convention on Consular Relations, Judge Oda declared, and the Court made a “significant error” in issuing the Order in this case.

Yet, even though Judge Oda declared that the Court should not have issued the Order, and he regretted voting for it, he added that “This error was, however, quite understandable, as a human life hung in the balance and the Court was given very little time to decide upon the request for an order.”⁴¹ This is a good example for my argument that the formalities of law are neglected before the Court’s desire to do something when confronted by a human rights emergency – the world is watching, do something to help the victim, then look at the law later!

IV. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention does not include an explicit provision granting the European Court the power to order provisional measures; as with the Inter-American Commission, the authority of the European Court to grant interim measures is found in the Rules of Court.⁴²

Historically, the European Commission and Court granted interim measures in only serious cases, when the following circumstances were present: 1) when the judgment of the national court would result in irreparable harm if it were carried out (typically cases of extradition or expulsion); 2) the applicant had to demonstrate a strong probability of a violation of a provision of the ECHR (for example extradition to a country where the death penalty would be imposed); and 3) the applicant did not have access at the national level to a domestic remedy that would suspend the action (if such a remedy existed then the principle of subsidiarity would impede the European Court from acting).⁴³

38 *Id.* at 32.

39 *Id.* at 52.

40 *Id.* at 70. (Oda, J., dissenting).

41 *Id.*

42 Eur. Ct. H.R. Rules of Court. Rule 39(1) provides: “1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.”

43 Eudes, M., *LA PRATIQUE JUDICIAIRE INTERNE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME*, (Ed. A. Pedone, Paris, 2005) at 137 et seq.

Following the ICJ decision in the LaGrand case, the Grand Chamber of the European Court of Human Rights, in the 2005 *Mamatkulov v. Turkey* judgment, surveyed the provisional measures practice of the ICJ and the major human rights bodies and followed them. The Grand Chamber declared that its own “interim” measures were legally binding, overturning the European system’s earlier jurisprudence established in the *Cruz Varas and Others* case.⁴⁴ The case concerned two Uzbek nationals who faced extradition from Turkey to Uzbekistan where they were charged with various crimes including the attempted assassination of the president of the Republic. Despite the issuance of the interim measures, the two men were sent back to Uzbekistan and the Grand Chamber found no violation of the substantive rights to torture or fair trial.

The European Court reviewed the practice of the UN Human Rights Committee, the UN Committee against Torture, the International Court of Justice, the provisions of the ACHR, the practice of the Inter-American Court of Human Rights, the Rules of Procedure of the Inter-American Commission, and the Rules of Procedure of the European Court of Human Rights and determined that Turkey’s extradition of the purported victims, in disregard of the European Court’s provisional measures, “rendered nugatory the applicants’ right to individual application,” a procedural right, under Article 34 of the ECHR.⁴⁵

Curiously, however, the European Court emphasized that the European Commission, which had issued the *Cruz Varas* decision (that was being overturned), “was not empowered to issue a binding decision,” even though the European Commission was no longer in existence. Were the European Commission still functioning in 2003, and were the purported victims extradited despite interim measures issued by the European Commission instead of the European Court, the right of individual application also would apparently have been violated.

In the European system, the object and purpose of interim measures “is to preserve and protect the interests of the parties to the dispute pending the Court’s determination of the compatibility of the impugned decision with the Convention,” or in other words, to preserve the status quo.⁴⁶ Interim measures in the European system are granted to enjoin the state from taking action, such as to stay the removal of a failed asylum seeker back to the country of origin, and to request the state to take action, such as to provide urgent or emergency medical treatment to persons in custody.

In 2010, the European Court granted more than 1,443 requests (mainly regarding expulsions to Iraq and Somalia) out of 3,775 requests.⁴⁷ Concerned that the European Court was becoming a fourth instance appeal body against national immigration tribunals, the President of the Court issued a Practice

44 *Mamatkulov v. Turkey*, Eur. Ct. H.R.App. Nos. 46827/99 and 46951/99, First Section, Judgment 6 February 2003. ECtHR - *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, 4 February 2005. The *Cruz Varas and Others* case was decided by the European Commission of Human Rights, no longer in existence in 2003.

45 *Mamatkulov and Askarov v. Turkey* *supra* note 44, at 32.

46 David Harris et al., *Law of the European Convention on Human Rights*, (3d ed. Oxford University Press, 2014) p. 138, 139.

47 *Id.* at 139.

Statement to ensure that remedies existed under national law and to reduce the number of requests for interim measures coming to the Court.⁴⁸

V. UNLINKING PROVISIONAL MEASURES FROM A PENDING CASE

A. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS – PRECAUTIONARY MEASURES

The Inter-American Commission derives its authority to issue precautionary measures from Article 106 of the OAS Charter, which states that the Commission is “to promote the observance and protection of human rights.”⁴⁹ Article 25 of the Commission’s current Rules of Procedure provides that, 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. Such measures, *whether related to a petition or not*, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to subject matter of a pending petition or case before the organs of the Inter-American system (emphasis added). The measures 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.⁵⁰ The Commission’s authority to request precautionary measures extends to all OAS member States, unlike the provisional measures of the Court.

In one of the earliest examples of a case involving precautionary measures, the existence of a case was crucial. In 1988, in the case of Jorge Blanco, the former President of the Dominican Republic was denied the precautionary measures he requested to protect him from an in-absentia trial when he voluntarily appeared before a Dominican court to file his appeal, which proved that domestic remedies had not been exhausted. The Commission noted in its decision that: “[T]he decision to take preventive measures could not be adopted without reference to the substance [*fondo*] of the complaint, and this would be premature while the case is in progress before the competent judicial authorities of the Dominican Republic.”⁵¹

Beginning in 1996, the Inter-American Commission began to record in its Annual Report the precautionary measures it had requested of States during the

48 *Id.*

49 Charter of the Organization of American States, Apr. 30, 1948, O.A.S.T.S. No. 1, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, O.A.S.T.S. No. 1-A, OEA/Ser. A/2(SEPF)Add., by the Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. No. 66, OEA/Ser.A/41 (SEPF), by the Protocol of Washington, Dec. 14, 1992, 1-E Rev. OEA/Ser.A/2 Add. 3 (SEPF), and by the Protocol of Managua, June 10, 1993, 1-F Rev. OEA/Ser.A/2 Add.4 (SEPF), the integrated text reflecting all four amendments available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp#Chapter_XV (last visited Dec. 1, 2020). [hereinafter OAS Charter]. See Inter-Am. Comm’n H.R. OEA/Ser.L/V/II, doc 69 Ch. III (c)(1) (2011), <http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp>. (last visited Dec. 1, 2020).

50 Precautionary Measures, Inter-American Commission on Human Rights, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

51 Blanco v. Dominican Republic, Case 10.208, Inter-Am. Comm’n H.R., Report No. 15/89, OEA/Ser.L/V/II.76, doc. 10 ¶17 (1989), <http://www.cidh.org/annualrep/88.89eng/Dom.Rep.10.208.htm>. (last visited Dec. 1, 2020).

year.⁵² Given the frustration with the delays in the adjudication of cases, urgent actions known as precautionary-provisional measures became ever more necessary to prevent serious and imminent danger of irreparable harm to persons. Although many of the early precautionary measures, such as the case of Jorge Blanco, were connected to a case, the Inter-American Commission asserted that it was free to take any action it considered necessary for the discharge of its functions either at its own initiative or at the request of a party.⁵³ In its Annual Reports the Commission stated: “[I]n serious and urgent cases, and whenever necessary, according to the information available, the Commission may, on its own initiative or upon request by a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.”⁵⁴

As mentioned earlier, the Inter-American system has interpreted the issuance of interim measures as having a dual function: to preserve the subject matter of the case (e.g. to stay the execution of a person condemned to death until the case has been decided) and to protect (tutelar) the fundamental rights of persons in urgent and imminent danger of irreparable harm. From the earliest precautionary measures issued, the Commission has taken the view that the protection of persons in danger of irreparable harm does not require the existence of, or connection to, a pending case, and the measures have been used to protect human rights defenders, witnesses, or other persons under threat.

In 2001, the Commission’s amended Rules of Procedure entered into force and purportedly clarified “the rules governing precautionary measures . . . in light of current practices.”⁵⁵ This clarification stated that precautionary measures would be issued in serious and urgent cases, whenever necessary, on the Commission’s own initiative or upon request by a party, to prevent irreparable harm to persons.⁵⁶ Since the criteria of seriousness, urgency, and irreparable harm did not explicitly refer to the existence of a pending case or petition, the

52 Inter-Am. Comm’n H.R., AG/RES. 1404 (XXVI-0/96) (1996), <http://www.cidh.org/annualrep/96eng/chap.2.htm> (last visited Dec. 1, 2020).

53 The Commission derives this authority to take whatever action is required from Article 41 ACHR, which provides: “The main functions of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers: b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitution provisions as well as appropriate measures to further the observance of those rights; d) to request the governments of the members states to supply it with information on the measures adopted by them in matters of human rights; and f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention.”

54 Inter-Am. Comm’n H.R., OEA/Ser./L/V/II.114 doc. 5 rev. Ch. III(c)(1) (2001), <https://www.cidh.oas.org/annualrep/2001eng/chap.3a.htm> (last visited Dec. 1, 2020).

55 Inter-Am. Comm’n H.R. OEA/Ser./L/V/II.111 doc. 20 rev. Ch. II ¶26 (2001), <http://www.cidh.org/annualrep/2000eng/chap.2.htm> (last visited Dec. 1, 2020).

56 Article 25(1) of the 2000 Rules of Procedure of the Inter-American Commission provided: “In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.” https://www.oas.org/xxxvga/english/doc_referencia/Reglamento_CIDH.pdf (last visited Dec. 1, 2020).

Commission considered itself competent to issue protective measures without an accompanying case.⁵⁷

What began to happen is that more and more precautionary measures were issued for individuals *independent of a case* and independent of its original function of preserving the subject matter of a case until it had a chance to review the merits. The “protective” mechanism became a kind of fire brigade, attempting to resolve all crises by extinguishing the fires; the rationale being that it was “saving lives.”

As the Inter-American Commission was issuing precautionary measures outside the context of a case, in 2009 it became necessary for the Commission to revise its Rules of Procedure and to explicitly state that in serious and urgent situations, the Commission may request that a state adopt precautionary measures to prevent irreparable harm to persons in connection with a pending case *or independent of a petition or case* (emphasis added).⁵⁸

In the Commission’s 2011 Annual Report, due to general confusion among the OAS member states about its precautionary measures, the Commission set forth a detailed explanation of the system of precautionary measures and the provisions of its 2009 Rules of Procedure.⁵⁹

In 2013, the Rules of Procedure of the Inter-American Commission were revised again on March 18, 2013 in Resolution 1/2013, which entered into force on August 1, 2013.⁶⁰ Since then, the synopsis on the precautionary measures granted is linked to the actual text of the Commission’s resolution, which is published on the Commission’s website.⁶¹ These resolutions explicitly set forth

57 In both the English and Spanish versions of Article 63(2) of the American Convention on Human Rights, the term “matter” or “asunto” is used instead of “case,” leading to this interpretation. (“In cases of extreme gravity and urgency, and where necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration.” But, of course, Article 63(2) goes on to say, “With respect to a case not yet submitted to the Court, it may act at the request of the Commission.” It appears to this observer that the system only provides for the Commission to present “cases” before the Court and not ad hoc requests for measures untethered from cases, and that the second part of Article 63(2) makes that clear. ACHR *supra* note 4, at art. 63(2).

58 Article 25(2) of the 2009 Rules of Procedure of the Inter-American Commission provided: “2. 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.” https://www.oas.org/36ag/english/doc_referencia/Reglamento_CorteIDH.pdf (last visited Dec. 1, 2020).

59 “The system of precautionary measures has been a feature of the Commission’s Rules of Procedure for over 30 years. The most recent amendment of the Rules of Procedure took effect on December 31, 2009. Article 25 describes the procedure for precautionary measures and how a precautionary measure may be related to the subject matter of a petition or case (Article 25.1); the adoption of precautionary measures independently of any pending petition or case (Article 25.2); the individual or collective nature of precautionary measures (Article 25.3); the fact that the IACHR is to request relevant information from the state concerned, unless the urgency of the situation is such that the immediate granting of the measures is warranted (Article 25.5); the procedures for seeking withdrawal of the request for precautionary measures and the grounds for the Commission to withdraw its request for precautionary measures (articles 25.7 and 25.8), and other points. In the amendment process, the Commission gave extensive consideration to the comments and criticisms submitted by many OAS member states, civil society organizations, academics and private citizens from across the hemisphere, in response to the consultations instituted concerning the text of the preliminary draft amendment.” *Id.*

60 Inter-Am. Comm’n H.R., Resolution 1/2013, Reform of the Rules of Procedure, Policies and Practices, <http://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>. (last visited Dec 1, 2020).

61 Inter-Am. Comm’n H.R., Resolution 44/20, <http://www.oas.org/en/iachr/decisions/precautionary.asp>. (last visited Dec 1, 2020).

the rationale for the granting or denial of the measures and facilitated the determination of whether the measures were connected to a case or not.

In practice, the protective function is exercised in order to avoid irreparable harm to the life and personal integrity of the beneficiary as a subject of the international law of human rights. Precautionary measures have, therefore, been ordered for a wide array of situations unrelated to any case pending with the Inter-American human rights system.⁶²

During the past eight years (2012-2019), the Inter-American Commission received 6,902 requests for precautionary measures and granted 420 or 6.7%.⁶³ In the past four years (2016-2019) the requests have doubled what they were in the earlier four years (2012-2015). In 2016, there were 1061 requests, in 2017, 1037 requests, in 2018, 1618 requests and in 2019, 1160 requests. Many precautionary measures have been granted for persons on death row,⁶⁴ unidentified but identifiable groups of persons,⁶⁵ and persons who have suffered reprisals for their protest activities.⁶⁶

Precautionary measures, for example, have been granted to individuals in the following situations, usually without a petition or a case having been filed together with the request for precautionary measures:

62 The beneficiaries cited in the 2011 Annual Report are: “Afro-descendant communities, indigenous peoples, displaced persons, LGTBI communities and persons deprived of their liberty. They have also been used to protect witnesses, officers of the court, persons about to be deported to a country where they might be subjected to torture or other forms of cruel and inhuman treatment, persons sentenced to the death penalty, and others. The IACHR has also ordered precautionary measures to protect the right to health and the right of the family. It has also resorted to precautionary measures in situations involving the environment, where the life or health of persons or the way of life of indigenous peoples in their ancestral territory may be imperiled, and in other situations.” Inter-Am. Comm’n H.R. *supra*, note 49.

63 See Inter-Am. Comm’n H.R., Multimedia Statistics, <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> (last visited Dec. 1, 2020).

64 Inter-Am. Comm’n H.R. Resolution 77/18, PM 82/18 - Ramiro Ibarra Rubi, United States; Resolution 41/17 PM 736-17 - Rubén Ramírez Cárdenas, United States; Resolution 21/17 PM 250/17 - Lezmond Mitchell, United States; Resolution 14/17 PM 241/17 and 304/15 - Víctor Hugo Saldaño, United States; Resolution 9/17 PM 156/17 - William Charles Morva, United States; PM 489/15 - Alfredo Rolando Prieto, United States; PM 304/15 - José Trinidad Loza Ventura, United States; PM 37/14 - Samuel Moreland, United States; PM 204/14 - John Winfield, United States; PM 83/14 - Keron López and Garvin Sookram, Trinidad and Tobago; PM 110/14 - Matter of Ramiro Hernández Llanas, United States; PM 57/14 - Pete Carl Rogovich, United States; PM 255/13 - Robert Gene Garza, United States, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

65 Inter-Am. Comm’n H.R. Resolution 57/19, PM 887/19 - Families of the Nueva Austria del Sira Community, Peru; Resolution 47/19 PM 458/19 - Guyraroká community of the Guarani Kaiowá Indigenous People, Brazil; Resolution 7/19 PM 181/19 - Indigenous persons of the Pemon ethnic group in the San Francisco de Yuruaní or “Kumaracapay” community and one other, Venezuela; Resolution 24/19 PM 1498/18 - Marcelino Díaz Sánchez and others, Mexico; Resolution 36/17 PM 412-17 Residents displaced and the displacement of the Laguna Larga Community, Guatemala; PM 505/15 - Members of the communities “Esperanza, Santa Clara, Wisconsin y Francia Siripi” in the territory of the Miskitu indigenous people; PM 277/13 - Members of the Otomí-Mexica Indigenous Community of San Francisco Xochicuautla, Mexico; PM 54/13 - Matter of communities in voluntary isolation of the Ayoreo Totobiegosode People, Paraguay; PM 321/12 - Teribe and Bribri of Salitre Indigenous People, Costa Rica, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

66 PM 1045-19 - Bayron José Corea Estrada and his family, Nicaragua; Resolution 17/19 PM 250/19 - Luis Carlos Díaz and his family, Venezuela; PM 106/15 - Cruz Sánchez Lagarda and others, México. Inter-Am. Comm’n H.R. Statistics *supra* note 63.

- journalists at risk or subject to death threats;⁶⁷
- an individual and his family kidnapped by an armed group drug involved in drug trafficking;⁶⁸
- threats against a human rights defender;⁶⁹
- persons with disabilities subject to electroshocks;⁷⁰
- death threats or harassment based on sexual orientation;⁷¹
- life or personal integrity at risk in detention or prison;⁷²

67 Inter-Am. Comm'n H.R. Resolution 91/18 PM 1606/18 – Carlos Fernando Chamorro Barrios and others, Nicaragua; Resolution 19/19 PM 1025/18 – Manuel Alejandro León Velázquez, Cuba; Resolution 90/18 PM 873/18 – Miguel Mora Barberena, Leticia Gaitán Hernández and their families, Nicaragua; Resolution 96/18, PM 698/18 – Álvaro Lucio Montalván and his family, Nicaragua; Resolution 43/17 PM 678-17 - Journalists of Factum Magazine, El Salvador; PM 573/15 – X et al., Mexico; PM 458/14 – Members of Kaieteur News Journal, Guyana, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

68 Resolution 95/18 PM 1375/18, Daniel Ramírez Contreras, Mexico, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

69 Resolution 89/18, PM 1358/18 - Joana D'Arc Mendes, Brazil; Resolution 20/17 PM 402/17 - Jair Krischke, Uruguay; Resolution 33/17 PM 331/17 - Francisca Ramírez and Family Members, Nicaragua; PM 705/16 - Esteban Hermelindo Cux Choc and his family, Guatemala; PM 658/16 - Erlendy Cuero Bravo and her family, Colombia; PM 468/16 - Daniel Pascual and his family, Guatemala; PM 359/16 – Américo de Grazia, Venezuela; Resolution 47/17 PM 261-16- Daniel Ernesto Prado Albarracín, Colombia; PM 236/16 – Juana Mora Cedeño et al., Cuba; PM 438/15 – Marino Alvarado, Venezuela; PM 416/15 – Members of the Ensemble des Citoyens Compétents a la Recherche l'Egalité des Droits de l'Homme, Haiti; PM 275/15 – Juders Ysemé and others, Haiti; PM 96/15 - Members of Cubalex, Cuba; PM 77/15 - Defenders E. and K. and their relatives, Mexico; PM 65/15 - Martha Ligia Arnold Dubond and her 5 children, Honduras; Resolution 5/17 PM 522/14 - Alberto Yepes Palacio and his Daughter, Colombia; PM 253/14 - Héctor Orlando Martínez and Family, Honduras; PM 336/14 - Gener Jhonathan Echeverry Ceballos and family, Colombia; PM 218/14 - Y.C.G.M and her Immediate Family, Colombia; PM 161/14 - Pierre Espérance and Members of the Réseau National de Défense des Droits Humains (RNDDH), Haiti; PM 408/13 - Members of the Movimiento "Reconocido," Dominican Republic. PM 382/12 – Members of the Community Action Board of the Village of Rubiales, Colombia, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

70 Inter-Am. Comm'n H.R. Resolution 86/18, PM 1357/18, Judge Rotenberg Educational Center, United States of America, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

71 Inter-Am. Comm'n H.R. Resolution 85/18, PM 1262/18, Jean Wyllys de Matos Santos and his family, Brazil. PM 457/13, Members of "Asociación para una Vida Mejor de Honduras" [Association for a better life in Honduras] (APUVIMEH), <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

72 Inter-Am. Comm'n H.R. Resolution 40/19, PM 379/19, Penitenciaría Evaristo de Moraes, Brasil; Resolution 53/19, PM 289/19, Héctor Armando Hernández Da Costa, Venezuela; Resolution 23/19 PM 81/19, Edilberto Ronal Arzuaga Alcalá, Cuba; Resolution 84/18, PM 1133/18, Amaya Eva Coppens Zamora and others (Deprived of their Liberty at the Penitentiary Center "La Esperanza"); Resolution 48/17, PM 519/17, Eduardo Valencia Castellanos, Mexico; Resolution 50/17 PM 383/17, Santiago José Guevara, Venezuela; Resolution 25/17 PM 184/17, Mohammad Rahim, United States; Resolution 44/17, PM 1098/16, Juan José Barrientos Soto Vargas, Chile; Resolution 67/16, PM 750/16, Braulio Jatar, Venezuela; Resolution 23/17, PM 25/16, Milagro Sala, Argentina; Resolution 45/17, PM 600/15, Angel Omar Vivas Perdomo, Venezuela; Resolution 25/17, PM 46/15, Moath al-Alwi, United States; Resolution 4/15, PM 535/14, Persons in Immigration Detention at Carmichael Road Detention Center, The Bahamas; Resolution 24/15, PM 422/14, Matter of Mustafa Adam Al-Hawsawi, United States of America; Resolution, 12/15, PM 335/14, Leopoldo Lopez and Daniel Ceballos, Venezuela; Resolution 24/14, PM 307/14, Matter of Julio César Cano Molina, Cuba; PM 35/14, Almafuerie and San Felipe Prison Complexes, Argentina; Resolution 2/15, PM 455/13, Nestora Salgado Garcia, Mexico; PM 223/13, Lorent Saleh and Gerardo Carrero, Venezuela; Resolution, 27/14, PM 442/12, William Alberto Pérez Jerez, El Salvador; Resolution 3/15, PM 363/11, José Ángel Parra Bernal, Colombia, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

- inadequate medical care and treatment;⁷³
- residents of a community subject to environmental toxins;⁷⁴
- threats against an environmental rights defender;⁷⁵
- harassment of political opposition leaders;⁷⁶
- deportation to country of origin of someone with a serious illness;⁷⁷
- political opposition leader in incommunicado detention;⁷⁸
- ostensible forced disappearance;⁷⁹
- members of the military detained and mistreated in military installations;⁸⁰

73 Inter-Am. Comm'n H.R. Resolution 13/19, PM 150/19, Concepción Palacios Maternity Hospital, Venezuela; Resolution 48/19 PM, 451/19 - M.A.V.G., Colombia; Resolution 18/19, PM 1286-18, 1287-18, 1288-18 and 1289-18, Inírida Josefina Ramos López, Sara María Olmos Reverón, Miguel Eduardo Perozo González and Carmen Alicia Márquez de D'Jesus, Venezuela; Resolution 83/18, PM 283/18, T.S.G.T., Colombia; Resolution 37/17, PM 309/17, Johonnys Armando Hernández, Venezuela; Resolution 44/20, PM 747/16, Luis, Colombia; Resolution 28/17, PM 440/16, Zaheer Seepersad, Trinidad and Tobago; Resolution 28/18, PM 617/15, Gomez Murillo and others, Costa Rica; Resolution 44/20, PM 376/15, Irene, Argentina; Resolution 42/15, PM 445/14, Jessica Liliana Ramírez Gaviria, Colombia; Resolution 44/20, PM 215/15, Alejandro and others, Mexico, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

74 Inter-Am. Comm'n H.R. Resolution 52/17, PM 120-16 Residents of the Community of Cuninico et al., Peru; Resolution 38/17 PM, 113/16, "Tres Islas" Native Community of Madre de Dios, Peru, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited July 29, 2020).

75 Inter-Am. Comm'n H.R. Resolution 82/18, PM 1165/18, Sergio López Cantera, Mexico; PM 112/16 – Members of COPINH, Berta Cáceres' relatives and other, Honduras; PM 589/15, Ana Miran Romero and Others, Honduras, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

76 Resolution 58/19, PM 938/19, Paola Pabón and others, Ecuador; Resolution 22/19 PM 125/19, María Corina Machado Parisca, Venezuela; Resolution 1/19 PM 70/19, Juan Gerardo Guaidó Márquez and his family, Venezuela; Resolution 21/19, PM 566/18, Jennifer Brown Bracket and George Henríquez Cayasso, Nicaragua; Resolution 35/17, PM 533/17, Williams Dávila, Venezuela; Resolution 27/17 PM 449/17, Luisa Ortega Díaz and Family, Venezuela; Resolution 15/17, PM 248/17, Henrique Capriles Radonski, Venezuela; Resolution 12/17, PM 616/16, Luis Florido, Venezuela; Resolution 1/17, PM 475/15, Members of the Voluntad Popular Political Party, Venezuela; PM 121/16, Carlos Humberto Bonilla Alfaro and others, Nicaragua, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

77 Inter-Am. Comm'n H.R. Resolution 81/18, PM 490/18, M.B.B.P., Panama; PM 347/13, Carl E. Vincent, United States of America, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

78 Inter-Am. Comm'n H.R. Resolution 79/18, PM 1039/18, Juan Carlos Requesens Martínez, Venezuela; Resolution 24/17, PM 403/17, Julio Borges et al., Venezuela, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

79 Inter-Am. Comm'n H.R. Resolution 54/19, PM 918/19, Hugo Enrique Marino Salas, Venezuela; Resolution 51/19, PM 870/19, Aaron Casimiro Méndez Ruíz y Alfredo Castillo, México; Resolution 26/19, PM 426/19, Gilbert Alexander Caro Alfonso, Venezuela; Resolution 12/19, PM 265/19, Carla Valpeoz, Peru; Resolution 32/17, PM 564/17, Santiago Maldonado, Argentina; Resolution 31/17, PM 209/17, Francisco Javier Barraza Gómez, Mexico; Resolution 30/17, PM 178/17, Julio César Vélez Restrepo et al., Colombia; PM 29/16, Margarita Marín Yan and others, Mexico; PM 5/15, José Moisés Sánchez Cerezo, Mexico; PM 455/14, Duban Celiano Cristancho Diaz, Colombia; PM 453/13, Daniel Ramos Alfaro, Mexico, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

80 Inter-Am. Comm'n H.R. Resolution 3/19 PM 115/19, Oswaldo García Palomo and others, Venezuela; Resolution 10/19, PM 102/19, Luis Alejandro Mogollón Velásquez, Venezuela; Resolution 8/19, PM 83/19, Luis Alexander Bandres Figueroa, Venezuela; Resolution 9/19, PM 1302/18, Isbert José Marín Chaparro, Venezuela, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

- at risk of deportation to country of origin (non-refoulement).⁸¹

This is not an exhaustive list. Precautionary measures have been granted for other reasons as well, as a review of the Inter-American Commission's website on precautionary measures will reveal.⁸² The Commission's activity regarding precautionary measures spans granting measures, expanding them and lifting them. The relevant point here is that most of the precautionary measures granted by the Inter-American Commission today are granted independent of a case. Consequently, when the Commission grants measures in the context of a case, it has become unique enough for it to point out that a case also has been presented.⁸³

B. INTER-AMERICAN COURT OF HUMAN RIGHTS—PROVISIONAL MEASURES

As mentioned earlier, of the three major international human rights treaties, only the American Convention specifically includes a provision on the granting of provisional measures: Article 63(2) ACHR provides: "In cases of extreme gravity and urgency, and where 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."⁸⁴ Unlike the Commission's "precautionary" measures which may be adopted with regard to all OAS member states, the Court's "provisional" measures may only be adopted with regard to the States party to the ACHR that also have recognized the compulsory jurisdiction of the Inter-American Court. In addition, the granting of the Inter-American Court's provisional measures normally requires an adversarial public hearing, similar to the public hearing before the ICJ, whereas such a hearing is not required for the issuance of the Commission's precautionary measures.

The Inter-American Court, for its part, has issued a maximum of twenty-two orders for provisional measures per year in the recent period 2015-2019. For the purposes of this study it is useful to look at how the Inter-American Court's practice has evolved.

In June 1996, Hector Fix Zamudio wrote a preface to the first compilation of provisional measures ordered by the Inter-American Court during the period 1987-1996 from which he derived three principles: (1) the provisional measures that the Commission seeks in matters that have not yet been introduced before

81 Inter-Am. Comm'n H.R. PM 297/16, E.G.S. and A.E.S.G., United States of America; PM 152/16, D.S., United States of America; PM 141/14, Manuel Escalona Sánchez, Wilfredo Matos Gutiérrez, and Ortelio Abrahante Bacallao, the Bahamas, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

82 Inter-Am. Comm'n H.R., Precautionary Measures, <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Dec. 1, 2020).

83 For example, the precautionary measures granted in the death penalty case for Samuel Moreland (PM 37/14 - Samuel Moreland, United States of America) were granted within the context of case P610/14. Similarly, the precautionary measures granted in the case of Fernando Villavicencio (PM 30/14 - Fernando Alcibíades Villavicencio Valencia et al., Ecuador) were granted in the context of case P107/14.

84 ACHR *supra* note 4 at art. 63(2).

the Court should be considered “extraordinary”; (2) in urgent cases, when it is necessary to avoid irreparable harm to persons, the Commission can request precautionary measures in order to avoid the consummation of the irreparable damage, when the facts denounced are true; (3) when the Commission seeks precautionary measures, it must present information to the Tribunal that, *prima facie*, permits it to adopt such measures, which require that the Commission has gathered, albeit in a preliminary manner, the elements which let it presume the truth of the denounced facts and the existence of a situation of extreme gravity and urgency that can cause irreparable harm to persons.⁸⁵

In 1993, in one of the earliest provisional measures granted, the Inter-American Court noted that Case 10.959 had not (yet) been presented but that the physical integrity of two minors was in question and that: “[d]espite the fact that the Commission had not yet submitted the case to the Court, the mental integrity of the two minors is at stake and it is important to prevent them from suffering irreparable damage as a result of the situation alleged in the request for provisional measures. This situation is characterized by the gravity and urgency necessary for the request to be acted upon.”⁸⁶

It is clear that the Inter-American Court, given the precise language of Article 63(2), presumed that matters brought to the Court for provisional measures by the Inter-American Commission, involved cases pending before the Commission that had not yet been brought to the Court.⁸⁷ Judge Antonio Cançado Trindade, in an article published in 1998, noted that the Court has ordered provisional measures “both to cases pending before it and, upon the request of the Commission, with respect to cases before the Commission which have not yet been submitted to it.”⁸⁸ With regard to the latter he noted: “In such instances of requests by the Commission in cases not pending before the Court, the Court applied a presumption that such measures of protection are necessary.”⁸⁹

Hector Faundez, an astute commentator, already in the 1999 version of his book, noticed that the Commission had explicitly requested precautionary measures in 1997, despite not having opened these cases:⁹⁰

“Although the precautionary measures suppose a legal procedure is underway, on some occasions the Commission has expressly indicated that such measures were adopted “without opening [the] case,” a practice which certainly is at odds with the Convention, which in none of its provisions

85 Hector Fix-Zamudio, President of the Inter-American Court of Human Rights, Prolog, in Corte I.D.H., *Medidas Provisionales- Compendio: 1987-1996*, Serie E No 1, p. ix.

86 Inter-Am. Ct. H.R., Resolution of the President of the Inter-American Court of Human Rights, Order of 19 November 1993. Provisional Measures requested by the Inter-American Commission on Human Rights relating to Argentina. (Case of Reggiardo Toloso). See also, Inter-Am. Ct. H.R., Annual Report 1993, http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_1993.pdf (last visited Dec. 1, 2020).

87 It is not clear to me whether all the judges on the Court were aware that the Commission was bringing “matters” to the attention of the Court that were not linked to cases. It appears that Judge Fix-Zamudio was probably aware of the Commission’s practice but that Judge Cançado Trindade was not.

88 ANTONIO CANÇADO TRINDADE, *THE OPERATION OF THE COURT, 1979-1996* IN HARRIS & LIVINGSTONE at 145 (Clarendon Press, 1998).

89 *Id.* at 146.

90 Faundez Ledesma, H., *El Sistema Interamericano de protección de los Derechos Humanos, Aspectos Institucionales y Procesales*, at 274, 2 ed. (IIDH, 1999). Free translation from the original.

permits the Commission to decide whether to open or not a case that is submitted to it. Nevertheless, one cannot rule out, that after receiving a petition and adopting precautionary measures, the Commission decides that said petition is inadmissible.”⁹¹

In 2001, in the “La Nacion” newspaper case, the Inter-American Court distinguished the two functions of provisional measures: the preventive function and the protective function. The language of these provisions has been reiterated by the Court innumerable times.⁹²

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

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

3. That, in this regard, Article 25(1) of the Rules of Procedure of the Court stipulates that:

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

4. That, in international human rights law, the nature of provisional measures is not only preventive in the sense that they preserve a juridical situation, but fundamentally protective, because they protect human rights. Provided the basic requirements of extreme gravity and urgency and the prevention of irreparable damage to persons are met, provisional measures become a genuine jurisdictional guarantee of a preventive nature.⁹³

In 2004, the Inter-American Court elaborated on the distinction between the preventive and protective nature of provisional measures:

6. That, in general, under domestic legal systems (internal procedural law), the purpose of provisional measures is to protect the rights of the parties in dispute, ensuring that the

91 The references are to the cases of Ana Maria Lopez, or Leonor La Rosa Bustamante, both against Peru, in the Commission’s 1997 Annual Report Ms. Lopez was dying of cancer, and the Commission opened a case after requesting the measures, and she was pardoned. The Commission also opened the case of Ms. La Rosa Bustamante after requesting the measures, but she had failed to exhaust domestic remedies.

92 Inter-Am. Ct. H.R., Order of the Court of June 18, 2002, Provisional Measures requested by the Inter-American Commission on Human Rights with respect to Colombia, Case of the Peace Community of San Jose de Apartadó, “considering” ¶2-4.

93 Inter-Am. Ct. H.R., Order of the Court of December 6, 2001, Provisional Measures in the Matter of the Republic of Costa Rica, the La Nación Newspaper case.

judgment on merits is not prejudiced by their actions *pendente lite*.

7. That, under international human rights law, the purpose of urgent and provisional measures goes further because, in addition to their essentially preventive nature, they protect fundamental rights, since they seek to avoid irreparable damage to persons.⁹⁴

That in International Human Rights Law, urgent and provisional measures are not only of a precautionary nature, in the sense that they preserve a legal situation, but also, and mainly, of a protective nature, in the sense that they safeguard human rights, to the extent that they seek to avoid irreparable damage to persons. Provided the basic requirements of extreme gravity and urgency and prevention of irreparable damage to persons are met, urgent and provisional measures become a true judicial guarantee of a preventive nature.⁹⁵

On February 2, 2006, the Court issued an Order concerning a request for provisional measures presented by the Inter-American Commission on Human Rights, in which it decided *not* to process the request until a petition had been lodged with the Commission.⁹⁶

Under Article 27 of the 2009 Court's Rules of Procedure, provisional measures could be issued by the Court, *ex officio*, on its own initiative, or with respect to a case not yet submitted to the Court, at the request of the Inter-American Commission, pursuant to Article 63(2) of the ACHR, or at the request of the representatives of the purported victim, once the case has been presented to the Court. The Court very rarely issued provisional measures *ex officio*.⁹⁷ In the case of provisional measures, Article 27 indicated that when such measures are requested within the framework of a contentious case before the Court, they must be related to the purpose of the case. There was no indication in the 2009 Rules that provisional measures could be granted if there were no case or petition presented to the Commission or Court, despite the fact that the 2009 Rules of Procedure of the Commission expressly stated that the Commission could request that a State adopt precautionary measures to prevent irreparable harm to persons in connection with a pending case or independent of a petition or case.⁹⁸

94 Inter-Am. Ct. H.R., Order of the Court of August 30, 2004 Provisional Measures regarding Guatemala Case of Raxcacó et al.

95 Inter-Am. Ct. H.R., Order of the Court of February 2, 2006 Provisional Measures regarding the Dominican Republic. Matter of Haitians and Dominicans of Haitian-Origin in the Dominican Republic.

96 Inter-Am. Ct. H.R., Order of February 2, 2006, Request for Provisional Measures submitted by the Inter-American Commission on Human Rights regarding the United Mexican States, Matter of Garcia-Uribe et al., http://www.corteidh.or.cr/corteidh/cf/Jurisprudencia2/busqueda_medidas_provisionales.cfm?lang=en (last visited Dec. 1, 2020).

97 Judge Antonio Cançado Trindade mentioned five cases. See Prologue of Antonio Cançado Trindade, President of the Inter-American Court, 28 August 2001, in Corte I.D.H., Medidas Provisionales, Julio 2000–Junio 2001, Series E, No. 3, ¶19, p. xiii.

98 See Inter-Am. Ct. H.R., Resolution of November 17, 2009, Provisional Measures relating to Venezuela, In the matter of Guerrero Larez, “considering” ¶6-8; Resolution of the Inter-American Court of Human Rights of September 21, 2009, Provisional Measures relating to Haiti, in the matter of A.J. and Others, “considering” ¶5.

In 2012, the Inter-American Court still linked the granting of provisional measures to the existence of a contentious case that had been submitted to it, or one that was pending submission by the Commission. However, the Court's 2012 Annual Report stated that the Commission could submit a request for provisional measures, "even if the case had not been submitted to the jurisdiction of the Court," clearly assuming that a case existed:

The provisional measures can be requested by the Inter-American Commission at any time, even if the case has not been submitted to the jurisdiction of the Court, and by the representatives of the alleged victims, provided they relate to a case that the Court is examining. The Court may also issue such measures *ex officio*.

Despite the above, however, in granting provisional measures in the case of Wong Ho Wing, the Court referred to "matters not yet submitted to its consideration, at the request of the Commission" rather than "a case not yet submitted to its consideration":

Article 63(2) of the American Convention stipulates that in "cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons," the Court may, in matters not yet submitted to its consideration, at the request of the Commission, order the provisional measures that it deems pertinent. This provision is, in turn, regulated in Article 27 of the Court's Rules of Procedure.⁹⁹

In 2013, when the Commission's Rules of Procedure explicitly indicated that the Commission could adopt precautionary measures whether the request was related to a petition or not, the Commission had limited its analysis to the seriousness, urgency and danger of irreparable harm to the victim.

In 2013, the Inter-American Court received a request for provisional measures from the Commission regarding a young woman whose continued pregnancy seriously endangered her life in a country where abortion was prohibited by law and punishable by prison.¹⁰⁰ The request for provisional measures was not part of a case presented to the Inter-American Court, nor was a petition presented to the Inter-American Commission substantiating the merits of the case in the request for provisional measures. The Court, however, justified its action and established a new test, by noting that pursuant to the protective character of provisional measures, it was possible for the Court to grant them, on an exceptional basis, even when there was no contentious case before the Inter-American system, in situations where, *prima facie*, there would be serious, imminent and irreparable harm to human rights.¹⁰¹

⁹⁹ Inter-Am. Ct. H.R., Order of June 26, 2012 Provisional Measures with regard to the Republic of Peru, Matter of Wong Ho Wing, https://www.corteidh.or.cr/docs/medidas/wong_se_08_ing.pdf (last visited Dec. 1, 2020).

¹⁰⁰ Inter-Am. Ct. H.R., Resolution of May 29, 2013, Provisional Measures relating to El Salvador, In the Matter of B.

¹⁰¹ *Id.* "considering" ¶4.

In this context, the Inter-American Court indicated that it must take into account the requirements established in Article 63 of the American Convention, the problem at issue, the efficacy of the State's actions regarding the situation described and the seriousness of the lack of protection in which the potential beneficiaries of the measures find themselves if they are not adopted.¹⁰²

The Court reiterated that in such cases, the Inter-American Commission must present a rationale that adequately addresses the above-mentioned criteria and that the State does not demonstrate in a clear and sufficient manner the efficacy of the measures that have been adopted at the national level.¹⁰³

In distinguishing again between preventive and protective measures, the Court noted that in the International Law of Human Rights, when the basic requisites are complied with, they are transformed into an authentic jurisdictional guarantee of preventive character because they protect human rights in so far as they avoid irreparable damage to persons.¹⁰⁴

The three conditions required by Article 63(2) of the American Convention in order to enable the granting of all provisional measures are: extreme seriousness, urgency and necessity of avoiding irreparable harm to persons. No other fact is relevant since any other fact or argument could be analyzed and resolved during the consideration of the merits in a contentious case.¹⁰⁵

Since 2013, the Inter-American Court has routinely granted provisional measures that were not based on a petition before the Commission or a case presented to the Court.¹⁰⁶ In this delinking of the provisional measures from the

102 In an earlier 2009 Resolution involving conditions in prisons and detention centers in Venezuela, the Inter-American Court stated that in granting "provisional measures the Court, in principle, does not require proof of the facts that prima facie appeared to comply with the requisites of Article 63." This sentence was not repeated in later reiterations of the requirements for issuing provisional measures. Inter-Am. Ct. H.R., Resolution of the Inter-American Court of Human Rights of November 24, 2009, Provisional Measures relating to Bolivarian Republic of Venezuela, in the matter of Internado Judicial de Monagas ("La Pica"); Centro Penitenciario Región Capital Yare I y Yare II (Cárcel de Yare); Centro Penitenciario de la Región Centro Occidental (Cárcel de Uribana), and Internado Judicial Capital El Rodeo I y el Rodeo II, "considering" ¶4.

103 Inter-Am. Ct. H.R., Resolution of May 29, 2013, *supra* note 100, "considering" ¶4.

104 *Id.* ¶5.

105 *Id.* ¶6.

106 Asunto Integrantes Del Centro Nicaragüense de Derechos Humanos (CENIDH) y de la Comisión Permanente de Derechos Humanos (CPDH), Provisional Measures, Resolución del Presidente de la Corte, "considering" ¶ 6 (Inter-Am. Ct. H.R. July 12, 2019), <https://www.refworld.org/es/pdfid/5d434e074.pdf>. See also Asunto Integrantes de la Comunidad Indígena de Choréachi, Provisional Measures, Resolución de la Corte, "Considerando que," ¶ 8 (Inter-Am. Ct. H.R. Mar. 25, 2017), https://www.corteidh.or.cr/docs/medidas/choreachi_se_01.pdf; Asunto Pobladores de las Comunidades del Pueblo Indígena Miskitu de la Región Costa Caribe Norte, Provisional Measures, Resolución de la Corte, "Considerando que," ¶ 6-8 (Inter-Am. Ct. H.R. Sept. 1, 2016), <https://www.refworld.org/es/pdfid/5ba272ef0.pdf>; Asunto del Complejo Penitenciario de Pedrinhas, Provisional Measures, Resolución de la Corte, "Visito," ¶ 5 (Inter-Am. Ct. H.R. Nov. 14, 2014), www.corteidh.or.cr/docs/medidas/pedrinhas_se_02.pdf; Matter of Danilo Rueda, Provisional Measures, Order of the Court, "Having Seen," considering" ¶ 5 (Inter-Am. Ct. H.R. May 28, 2014), www.corteidh.or.cr/docs/medidas/rueda_se_01_ing.pdf; Matter Involving Two Girls from the Indigenous People Taromenane in Voluntary Isolation, Provisional Measures, Order of the Court, "Having Seen," ¶ 4-7 (Inter-Am. Ct. H.R. Mar. 31, 2014), www.corteidh.or.cr/docs/medidas/taromenane_se_01_ing.pdf; Matter of Castro Rodríguez, Provisional Measures, Order of the Court, "Having Seen," ¶ 7 (Inter-Am. Ct. H.R. Feb. 13, 2013), www.corteidh.or.cr/docs/medidas/castrorodriguez_se_02_ing.pdf; Matter of Guerrero-Larez, Provisional Measures, Order of the Court, "Considering" ¶ 6-8 (Inter-Am. Ct. H.R. Nov. 17, 2009), www.corteidh.or.cr/docs/medidas/larez_se_01_ing.pdf; Matter of A.J. *et al.*, Provisional Measures, Order of the Court, "Having Seen," ¶ 5 (Inter-Am. Ct. H.R. Sept. 21, 2009), www.corteidh.or.cr/docs/medidas/aj_se_03_ing.pdf.

substance (*fondo*) of a case, the Inter-American Court, in a sense, has rewritten the American Convention. The Court is no longer limited to decisions on cases, but a prima facie showing of a serious and urgent violation of human rights that will inflict irreparable harm to a person is sufficient for provisional measures to be granted.¹⁰⁷ As of July 2011, the Court ordered provisional measures in ninety-one different instances that included approximately 25,000 beneficiaries.¹⁰⁸ Both the Inter-American Commission and the Inter-American Court explicitly order these interim measures and justify doing so in order to “save lives.” This delinking of measures from the substance of cases has also occurred at the International Court of Justice, which we will return to now.

VI. ICJ: GAMBIA V. MYANMAR

As mentioned earlier, the International Court of Justice exists to resolve disputes between and among States that are subject to the Court’s jurisdiction. Pursuant to the ICJ Statute, the Court has no specific powers to protect the rights of any individuals. Article 41 of the ICJ Statute empowers the Court to order “any provisional measures which ought to be taken to preserve the respective rights of either party.”¹⁰⁹ The Rules of Court indicate that a request for provisional measures shall have priority over all other cases and that a hearing “shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.”¹¹⁰

Like the Inter-American system, the ICJ provisions require a finding of gravity and urgency and the danger of irreparable harm.

In an order issued in *Gambia v. Myanmar*, on January 23, 2020, the ICJ found “that there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia.” In determining the risk of irreparable harm, the ICJ stated that it did not consider that the exceptional gravity of the allegations warrant the determination, at this stage of the proceedings, of the existence of a genocidal intent. In the Court’s view, all the facts and circumstances presented were sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection, namely the right of the Rohingya in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention, are “plausible.”

According to Shabtai Rosenne, “the Court requires the party making the request to establish the existence of a case in which the Court has prima facie

¹⁰⁷ Article 63(2) ACHR contemplates the existence of a case to enable the granting of provisional measures. It provides that the Court shall adopt provisional measures “in matters it has under consideration” and then goes on to explain that if the case is either before the Court, or the case has not yet been submitted to the Court, it may act at the request of the Commission, which is expected to submit the case to the Court. *See* American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), Nov. 22, 1969, O.A.S.T.S. No. 36.

¹⁰⁸ Pasqualucci, *supra* note 2, at 298.

¹⁰⁹ ICJ Statute *supra* note 30, at art 41.

¹¹⁰ Rules of Court, 1978 I.C.J., Acts & Docs., at art. 74(2), <https://www.icj-cij.org/en/rules>.

jurisdiction over the merits of the claim that the party is advancing.”¹¹¹ This should be compared to Pasqualucci, who wrote that:

The ICJ need not satisfy itself that it has jurisdiction on the merits of the case. A prima facie basis of jurisdiction would accord with the Inter-American Court’s holding that, when the case has not yet been submitted to the Court, it is not necessary that a petition even be filed before the Inter-American system for the Commission to request that the Court has issued provisional measures. It is only necessary that a prima facie possibility of a grave and urgent violation of human rights is shown.¹¹²

Since the crime of genocide requires “genocidal intent,” and the Gambia failed to specify that any number of Rohingya had been killed, or that Gambia exhibited “genocidal intent,” it is difficult to understand why members of the Rohingya in Myanmar need to be protected from acts of genocide.¹¹³ If anything, it appears that the Rohingya were victims of ethnic cleansing, but not genocide.

Gambia instituted proceedings against Myanmar in the International Court of Justice in November 2019 and requested provisional measures on behalf of some 600,000 Rohingya who are still in Myanmar and did not flee to Bangladesh (*Gambia v. Myanmar* case). In 2016-2017 approximately 740,000 members of the Rohingya minority were brutally chased out of Myanmar by the Myanmar military and security forces, who began systematic “clearance operations” during the course of which they committed mass murder, rape and other forms of sexual violence and engaged in the systematic destruction by fire of Rohingya villages, often with inhabitants locked inside. The Gambia charged that Myanmar’s actions constituted a violation of its obligations under the Genocide Convention, which Myanmar denied, arguing the absence of any genocidal intent. Myanmar pointed out that it was engaged in repatriation initiatives through UNHCR and was ready to take back thousands of Rohingya. The Rohingya, for their part, are unwilling to return. How this can be a UNHCR initiative is beyond comprehension, for if the ICJ determines that these “clearance” acts constituted genocide; it would be like repatriating Nazi concentration camp survivors back to Nazi Germany.

The ICJ granted Gambia’s request and noted in its Order that for the purposes of provisional measures it is not called upon to establish whether Myanmar violated the Genocide Convention, but simply to decide whether the circumstances exist to require the issuance of provisional measures. The ICJ’s Order unanimously called on Myanmar to “take all measures” to prevent the

111 Shabtai Rosenne, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005*, 1382 (4th ed. 2006).

112 Pasqualucci, *supra* note 2, at 255.

113 The Genocide Convention defines “genocide” as: “any of the following acts committed *with intent* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group.” *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

commission of all acts defined as genocide by the Genocide Convention, without determining that the acts that Myanmar had committed during the “clearance operation” constituted genocide.

Again, in this case I believe the separate opinion of ICJ Vice-President Xue supports my argument. Judge Xue does not think the subject matter of the case is genocide because of the lack of genocidal intent, the decisive element in proving genocide. She argued that in order to find jurisdiction under the Genocide Convention, the Court must determine *prima facie* that the subject-matter of the dispute could possibly concern genocide. Although the violations are appalling, she continued, the fact that Bangladesh is seeking “a durable solution” in cooperation with Myanmar indicated that the present case could not possibly suggest a case of genocide. Yet Judge Xue’s doubts about the Court’s jurisdiction, the standing of the applicant and the admissibility of the case did not inhibit her from voting in favor of the Court’s unanimously approved Order because “there were serious violations of human rights and international humanitarian law against the Rohingya” and considering the gravity and scale of the offenses, measures to ensure that Myanmar observe its obligations under the Genocide Convention “should not be deemed unwarranted.” Judge Xue’s explanation of voting in favor of the Order, despite her belief that the ICJ lacks jurisdiction because the subject matter of the case is not genocide, echoes Judge Oda’s explanation in voting in favor of the Order for provisional measures in the *LaGrand* case.

CONCLUSION

As a result of COVID-19, the ICJ published an Order dated May 18, 2020, which pushed back the due dates for the submission of the respective Memorials on the pending case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*) to October 23, 2020 for the Gambia, and July 23, 2021 for Myanmar. This delay means that we will not have the ICJ’s judgment in this case until well into 2021 at the earliest.

This paper has argued that international human rights bodies, such as the Inter-American Commission, the Inter-American Court and the International Court of Justice, have neglected the formal requirements of international law when confronted with situations of necessity in which individuals find themselves facing urgent and serious risk of irreparable harm. Rather than concede the lack of jurisdiction because the requests for urgent measures are not within the context of a case, or not within the jurisdiction of the overarching treaty, these bodies have issued urgent measures in order to do something and hopefully, to save lives.

This product of necessity and practice places the individual at the center—as the overriding concern of international human rights law. Necessity and practice have rewritten the procedures on the granting of urgent measures and focused solely on the urgency, seriousness and irreparability of the harm caused to persons, and they have managed to save thousands of lives. Who can complain that they rewrote the law in doing so?