

Limits and potentials of precautionary measures as a remedy for violations of international human rights – The case of the Inter-American Human Rights System

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Precautionary measures issued by international supervisory bodies are an important instrument for the protection of human rights. However, their basis and legal effects are a matter of controversy. Especially, the Inter-American Commission on Human Rights' progressive approach is criticized by OAS Member States. The Commission's arguments in favor of a binding effect of its precautionary measures have to be rejected since they are not supported by international law, i.e. the rules of treaty interpretation and the consent of the States.

I. INTRODUCTION

Remedies for violations of international human rights and precautionary rulings issued by international judicial bodies form an inextricable bond. Precautionary rulings, also referred to as provisional, interim or preventive measures, are those actions which international tribunals direct to States to take (or refrain from taking) in order to prevent or stop human rights violations in serious and urgent situations. They constitute a useful tool to protect human rights by preserving the object of a pending complaint procedure. Such measures are based on the idea that it is essential for the victims of human rights violations to seek immediate protection from an imminent risk of irreparable damage. In fact, precautionary measures aim to ensure a coherent and effective judicial protection of human rights.

Under the three major regional human rights systems – the European System of Human Rights under the European Convention on Human Rights ('ECHR'), the African Human Rights System under the African Charter on Human and Peoples' Rights¹ and the Inter-American Human Rights System under the Charter of the Organization of American States ('OAS'), the American Declaration of the Rights and Duties of Man ('Declaration') and the American Convention on

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¹ African Charter on Human and Peoples' Rights, adopted June 27, 1981, 21 I.L.M. 58, O.A.U. Doc. CAB/LEG/67/3 rev. 5.

Human Rights ('ACHR'), provisional measures have been issued by the regional human rights bodies.²

Despite their potential for the protection of human rights, some of the legal aspects of precautionary measures, such as their legal basis, prerequisites and effects, remain controversial. This is mainly because not all human rights treaties explicitly authorize the human rights organs to issue precautionary measures. For example, the ECHR contains no provision governing the indication of provisional measures by the European Court of Human Rights ('ECtHR'), whereas the Inter-American and African Human Rights Systems explicitly provide for such a competence of their respective human rights court.³ However, neither the African Commission nor the Inter-American Commission are explicitly authorized to issue precautionary measures under treaty law. Only their respective (non-binding) Rules of Procedures provide for such a competence.⁴ The same can be stated regarding the former European Commission on Human Rights under the European Human Rights System prior to the entry into force of the 8th Protocol in 1998.

This has led to controversies regarding the legality of such rulings and the obligations for the State Parties arising therefrom. Precautionary measures differ from ordinary rulings of international bodies both in respect of their admissibility requirements (which require, among others, a situation of urgency)⁵ and their merits (leading only to a summary procedure). Provisional measures, moreover, do not constitute a prejudgement on the merits of the subject matter (no *res iudicata*).

Legal controversies also arise from the fact that the use of precautionary measures does not follow a congruent approach, but differs dependent on the body that issues them.⁶ Additionally, only few tribunals publish their decisions

2 Regarding the African Human Rights System see generally: Dan Juma, 'Provisional Measures under the African Human Rights System: The African Court's Order against Libya' (2012) 30 *Wisconsin International Law Journal* 344. Regarding the European Human Rights System see generally: R. St. J. Macdonald, 'Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights' (1992) 52 *Heidelberg Journal of International Law* 703; Regarding the Inter-American Human Rights System see generally: Diego Rodríguez-Pinzón, 'Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance.' (2013) 20 *Human Rights Brief* 13.

3 See Article 27 para 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and Article 63 of the American Convention on Human Rights respectively.

4 Rule 98(1) of the Rules of the African Commission and Article 25 of the Rules of Procedures of the Inter-American Commission on Human Rights.

5 This aspect will be discussed later on.

6 See for example: Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication*, (Intersentia, Antwerp, 2010), 1091 finding that the Inter-American Court of Human Rights uses precautionary measures more extensively than the European Court of Human Rights and the UN Human Rights Committee which have been more conservative in their use of provisional measures.

on provisional measures and those that do may not include a reasoning and/or reference to supporting international law. This fact not only makes it difficult to analyze and systematize the concept of precautionary measures regarding coherence and consistency. It also raises questions of transparency and legal certainty, making it difficult for the States to define their precise legal obligations.

This paper focuses on the Inter-American System of Human Rights, consisting of the OAS-Charter, the American Declaration of the Rights and Duties of Man ('Declaration') and the American Convention on Human Rights ('ACHR'). The Inter-American System, as will be shown below, is distinct from the European and African Human Rights Systems both in its underlying human rights instruments as well as in major procedural aspects. With its unique and complex legal structure the Inter-American Human Rights System provides a legal platform on which some fundamental problems relating to the most controversial aspects of precautionary measures under international law can be discussed.

II. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM IN BRIEF

The (modern) Inter-American Human Rights System was created in 1948 at the the Ninth International Conference of American States. There, the participating States founded the OAS, the legal successor of the Pan American Union and a regional international organization within the meaning of Chapter VIII of the UN-Charter. The OAS-Charter entered into force in 1951. Today, the OAS-Charter-System encompasses nearly all South- and Central American States, the independent Caribbean States as well as the USA and Canada.⁷ The OAS was established to achieve among its member states - as stipulated in Article 1 of the Charter - "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." The OAS-Charter also mentions human rights in Articles 3 lit. 1 and 17, but in a very general form without specifying them. In 1948 the American States also adopted the American Declaration of the Rights and Duties of Man ('Declaration').⁸ The Declaration contains in Chapter I (Articles 1 through 28) both classical civil and political rights as well as economic, social and cultural rights. However, upon adopting the Declaration the OAS Member States made it clear that this text was only intended to be a non-binding declaration and, moreover, that it does not define the human rights provisions of the OAS-Charter.⁹ Because of that and the lack of will of many Member States, the protection of human rights in the Americas was more aspiration than reality during the first decades of the OAS. This situation changed in 1959 when the OAS States created the Inter-

7 The OAS currently has 35 Member States. Even though Cuba's right of participation has been suspended in 1962, it remains a (non-active) Member State.

8 Res. XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948 (PAU 1948), at 38.

9 Dept. of State, Report of the Delegation of the United States of America to the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948, at 35-36 (Publ. No. 3263, 1948).

American Commission on Human Rights ('IACHR') based in Washington, D.C. as a body for the promotion of the observance of Human Rights.¹⁰ The Statute of the Commission declared that the Human Rights applicable for the work of the Commission were those of the Declaration.¹¹ The IACHR construes its mission to include monitoring states through on-site visits and publishing country reports on the general situation of human rights. Moreover, since the revision of the Statute of the IACHR in 1965 this body is authorized to receive and examine individual petitions against a Member State of the OAS claiming a violation of the human rights listed in the Declaration.¹²

Although the IACHR's reports are mere non-binding recommendations the act of publicizing them and thereby drawing public attention on a negative human rights record of a OAS Member State has played an important role for the development of human rights in the region. Particularly during the 1960s and 1970s the IACHR emerged as an authoritative counterpoint to military dictatorships in the OAS Member States who were engaged in gross human rights violations such as the practices of „enforced disappearances“, torture and extra-judicial killings.

In 1969 the OAS States adopted the American Convention on Human Rights ('ACHR'), the first legally binding human rights treaty in the Inter-American System. The Convention entered into force in 1978. It contains a catalogue of civil and political rights with its main supervisory bodies designated as the IACHR and the new-established Inter-American Court of Human Rights ('IACtHR'), holding advisory and contentious jurisdiction.

Individual petitions cannot be filed directly with the IACtHR, but must first go through the IACHR. The IACHR investigates individual claims and guides the petitioner and state towards a friendly settlement. If that fails, the IACHR issues a report in which it advises the state to take certain actions. If the state does not comply, the Commission refers the case to the Court.¹³ The Court's judgements in contentious cases (individual complaints as well as inter-state complaints) are

10 Article 1 of the Commission's original Statute (1960): „The Inter-American Commission on Human Rights, created by the Fifth Meeting of Consultation of Ministers of Foreign Affairs, is an autonomous entity of the Organization of American States, the function of which is to promote respect for human rights.”

11 Article 2 of the Commission's original Statute (1960) states: „For the purpose of this Statute, human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man.”

12 Res. XXII “Expanded Functions of the Inter-American Commission on Human Rights”, Second Special Inter-American Conference, Rio de Janeiro, Brazil, November 17-30, 1965, Final Act, OAS Off. Rec., OEA/Ser.C/I.13 at 32-34 (1965). The new function was implemented in Article 9 bis lit. b): “to examine communications submitted to it and any other available information; to address the government of any American state for information deemed pertinent by the Commission; and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights”. This provision corresponds to Article 20 of the Commission's actual Statute.

13 Article 45 of the Commission's Rules of Procedures (2013).

final and binding upon the Parties who have accepted the Court's jurisdiction.¹⁴

The American Convention is open to all OAS member states, but, in contrast to the system of the Council of Europe, there is no obligation to ratify it. To date it has not been ratified by Canada and several of the independent Caribbean States. The United States signed the Convention in 1977 but has not proceeded with ratification since that time.

Ever since the entry-into force of the Convention, the IACHR obtains a double role, both as a main OAS-organ that is competent for individual complaints against any OAS-Member States alleging a breach of the Declaration and as a Convention organ competent for receiving individual complaints alleging a violation of the rights listed in the ACHR. Since not all OAS Member States are parties to the ACHR, the Declaration remains for them the only applicable human rights instrument within the Inter-American System. Despite the Declaration's original non-binding nature, the Commission, supported by the Court, is of the view that the Declaration has become legally binding upon the Member States of the OAS and now constitutes a „source of legal obligations“¹⁵ for them.¹⁶

III. THE COMMISSION'S PRACTICE IN ISSUING PRECAUTIONARY MEASURES

Both the Commission and the Court have contributed to positively shape state behavior regarding the respect of human rights in the Americas. They both have issued a large number of precautionary measures.¹⁷ For the purpose of the present analysis, only the practice of the Commission will be analysed. In contrast to the Court, whose authority to issue precautionary measures is explicitly contained in Article 63 of the ACHR¹⁸, the authority of the Commission to issue such measures has no explicit treaty basis and its practice, therefore, is highly controversial.

14 Articles 67, 68 American Convention of Human Rights.

15 See for example: IACCommHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106 Doc. 40 rev. February 28, 2000, para. 30.

16 IACHR, Baby Boy vs. USA, Resolution 23/81, Case 2141, OEA/Ser.L/V/II.54 doc. 9 rev. 1 (1981); IACHR, Mary and Carrie Dann vs. USA, Case 11.140, Report No. 75/02, OEA/Ser.L/V/ II. 117 Doc. 1, rev. 1 (2002). This position is strongly objected by the United States, who is not a party to the Convention, but is - according to the view of the IACCommHR - nevertheless legally bound by the human rights obligations arising from the American Declaration and the OAS-Charter. See, e.g. IACHR, Mary and Carrie Dann vs. USA, Case 11.140, Report No. 75/02, OEA/Ser.L/V/ II. 117 Doc. 1, rev. 1 (2002), Rn. 163.

17 For a comprehensive study on the Practice of the Inter-American Court of Human Rights: Antonio Augusto Cançado-Trindade, 'The Evolution of Provisional Measures Under the Case-Law of the Inter-American Court of Human Rights (1987-2002)' (2003) 24 *Human Rights Law Journal*, 162.

18 Article 63 para 1 American Convention on Human Rights 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.“

Ever since its creation in 1962 the Commission has requested the OAS Member States to adopt protective measures to avoid irreparable harm to human rights in urgent situations. The Commission adopted these measures by issuing recommendations to the OAS Member States both in the framework of pending individual complaint as well as in the absence of cases pending before it. This practice was formally incorporated in the Commission's Rules of Procedures in 1980. Precautionary measures are published in the Commission's Annual Report to the OAS General Assembly and can be found online.¹⁹ Furthermore, the hearings in the proceedings before the Commission are made public.²⁰

Most of the cases concerning precautionary measures aimed at the protection of the right to life, liberty and personal integrity²¹ as well as the prohibition of torture, cruel and inhumane treatment.²² Regarding these rights, the IACHR's practice is in line with the practice of other international human rights bodies who have issued such measures in similar cases.²³ However, the Commission's practice is more progressive, affecting other human rights, such as the due-process of law and fair trial guarantees²⁴, the right of access to public information²⁵ and the right to freedom of expression²⁶. The Commission has also issued measures to protect the right to access to healthcare treatment and testing²⁷, the right to health when

19 A list of the precautionary measures can be found online: <http://www.cidh.oas.org/medidas.eng.htm> (last visited: 4th March 2014).

20 Online at <http://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=23> (last visited: 4th March 2014).

21 See e.g. the death penalty cases against the USA: IACHR, Res. 1/2013, Precautionary Measure No. 255-13, Robert Gene Garza v. United States of America, August 16, 2013; IACHR, Res. 14/2013, Precautionary Measure No. 8-13, Persons Deprived of Liberty at the Porto Alegre Central Prison v. Brazil, December 30, 2013.

22 See cases concerning the situation of the detainees at Guantanamo Bay since 2002: Brian Tittlemore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism' (2006) 6 *Human Rights Law Review* 378; Israel de Jesus Butler, 'The US and Brazil before the Inter-American Commission on Human Rights: Recent Cases' (2004) 4 *Human Rights Law Review* 295. All Resolutions of the IACHR on Guantanamo can be found online at: <http://www.oas.org/en/iachr/pdl/decisions/Guantanamo.asp> (last visited: 4th March 2014).

23 Jo Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 *Vanderbilt Journal of Transnational Law* 1.

24 See IACHR, Res. No. 2-11, Regarding the Situation of the Detainees at Guantanamo Bay, United States, July 22, 2011.

25 IACHR, Petition 492/08, Precautionary Measure No. 102-08, Rodriguez Castañeda v. Mexico, July 3, 2008, prohibiting the destruction of electoral ballots for the Presidential elections in Mexico.

26 IACHR, Trabajadores de la Radio Calenda v. Mexico, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007), para. 37.

27 IACHR, Jorge Odir Miranda Cortez y otros v. El Salvador, OEA/Ser.L/V/II.111, doc. 20 rev.1 (2000), para. 30; IACHR, "Amelia" v. Nicaragua, OEA/Ser.L/V/II, doc. 5 rev. 1 (2010), para. 71; IACHR, X – Argentina, OEA/Ser.L/V/II. doc. 69 rev. 1 (2011), para. 29.

endangered by high levels of pollution²⁸, the rights of the child²⁹, and collective or community rights, such as the right to indigenous property³⁰. When ordering precautionary measures, the Commission asks the state to suspend all activity that could result in a violation of the human rights of the party on whose behalf it is requesting those measures, until such time as the organs of the inter-American system have had an opportunity to address the merits of the matter in question. Both the lack of explicit legal authority of the Commission to issue precautionary measures and its progressive approach in expanding its jurisdiction to collective and environmental rights has fueled a wave of discontent among the OAS Member States.³¹

IV. THE IACHR'S LEGAL BASIS TO ISSUE PRECAUTIONARY MEASURES

Precautionary measures issued by the IACHR are not provided for in any of the constitutive instruments of the Inter-American System. Article 19 lit. c of the Commission's Statute, a binding international treaty, gives only authorization with respect to the States Parties to the American Convention on Human Rights „to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons”. Article 63 para 2 ACHR gives the Court the authority to order precautionary measures to prevent irreparable harm to the complainant while the case is pending before the Court.³² Precautionary orders by

28 IACHR, Report No. 43-10, Petition 242-05, *Mossville Environmental Action Now v. United States* (admissibility decision), March 17, 2010, complaining that the Mossville residents suffer or are put at risk of various health problems caused by toxic pollution released from chemical-producing industrial facilities that have been granted permits to operate in and around that city; IACHR, *Comunidad de la Oroya v. Peru*, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007), para. 46.

29 IACHR, *AW v. Guyana*, PM 254/07, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008), para. 22.

30 IACHR, *Sarayacu v. Ecuador*, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003), para. 34; IACHR, *Comunidades Indigenas Mayas v. Belice*, Case 12.053, OEA/Ser.L/V/II.111, doc. 20 rev. (2000), para. 11; IACHR, *Comunidad Yaxye Axa del Pueblo Enxet-Lengua v. Paraguay*, Case 12.313, OEA/Ser.L/V/II.114, doc. 5 rev. (2001), para. 53; IACHR, *Doce Clanes Saramaka v. Surinam*, Case 12.338, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002), para. 89; IACHR, *Comunidad Garifuna Triunfo de la Cruz v. Honduras*, Case 12.548, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006), para. 34; IACHR, *Comunidades Indigenas Ngobe y Otras v. Panama*, Precautionary Measure No 56-08, OEA/Ser.L/V/II, doc. 51 rev. 1 (2009), para. 43.

31 See, e.g. the US response to the Mossville case: IACHR, Report No. 43-10, Petition 242-05, *Mossville Environmental Action Now v. United States* (admissibility decision), March 17, 2010, available at: <http://www.ehumanrights.org/docs/US-Response-to-Mossville-Petition-09-06.pdf> (last visited: 4th March 2014); Regarding the reactions of other States see: Manuela Picq, 'Is the Inter-American Commission of Human Rights too progressive?', Al Jazeera online (9th June 2012) available at: <http://www.aljazeera.com/indepth/opinion/2012/06/2012658344220937.html> (last visited 4th March 2014).

32 Art. 63 para 2 ACHR provides 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.“

the Court are legally binding upon the States.³³

Nevertheless, the IACHR has claimed a competence to issue precautionary measures as an inherent power of its adjudicatory function. Furthermore, the IACHR has repeatedly stated that the OAS Member States are legally bound to comply with the precautionary measures and that non-compliance with these measures constitutes a breach to fulfill their international obligations. The Commission argues that the “OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission’s Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission’s mandate.”³⁴ In fact, the Commission has implemented precautionary measures in its Rules of Procedures (last modification 2013).³⁵ Article 25 para 1 of the Rules of Procedures provides that „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 the subject matter of a pending petition or case before the organs of the inter-American system.“ It is important to note that this provision authorizes the Commission to adopt precautionary measures even in the absence of a pending petition. This grants the Inter-American Commission a broader scope to issue precautionary measure than other international human rights bodies, who can only adopt such measures within the framework of a pending petition.³⁶ Article 25 shows that precautionary measures adopted by the Commission serve two functions: First, to preserve a pending legal situation brought to the Commission’s attention by way of an individual petition when it is alleged that otherwise this situation could render the Commission’s eventual decision on an individual petition moot. Second, to protect or preserve the exercise of human rights as such, even if there is no pending procedure before the Commission.

Even though the Rules of Procedures - being legally non-binding for the OAS Member States - cannot constitute a legal basis for the Commission’s work, the authority of the Commission to request such measures can be based on the Commission’s general mandate to promote the observance and defense of human rights, to act with respect to the petitions and other communications submitted to it, and to make recommendations to the OAS Member States in

33 Article 68 provides that the „States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.“ If the State Party to the ACHR executes the victim before the IACtHR has the opportunity to render its binding decision, then any decision or judgment would be rendered moot. The subject matter of the complaint procedure would be irreparably lost.

34 IACHR, *Garza v. United States*, Case 12.243, Report No. 1255 (2001), at 117.

35 The IACHR’s Rules of Procedures can be found online: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> (last visited: 4th March 2014).

36 See generally: Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge University Press, 2003), 295.

order to strengthen due respect for human rights.³⁷ A mandate to protect implicitly authorizes the issuing of precautionary measures. If these measures are issued outside a pending petition, the competence of the IACHR derives from Art. 18 lit. b of its Statute “to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights“. This includes, of course, recommendations in urgent cases dealing with extremely grave and pressing situations. Within the procedure of a pending individual complaint, Article 20 lit. b of its Statute authorizes the IACHR “to examine communications (...) and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights“. This implicitly includes the authority to issue precautionary measures as a preliminary means before rendering a final recommendation. Accordingly, precautionary measures serve to protect the status quo at the time of a pending individual complaint. They protect the procedural mandate of the Commission to consider and adjudicate an individual complaint.³⁸

The OAS General Assembly, in which all OAS Member States are represented, has repeatedly welcomed the practice of the IACHR to issue precautionary measures and has urged the Member States „to follow up on the recommendations of the IACHR, including, inter alia, precautionary measures“.³⁹ Moreover, some OAS Member States acknowledge in their national law precautionary measures issued by the IACHR. For example, since 2003 the Colombian Constitutional Court has published a series of judicial decisions imposing sanctions on public officials for not complying with precautionary or provisional measures by the IACHR.⁴⁰

Finally, the Commission’s practice to request precautionary measures is in line with the practice of other international bodies and reflects a common practice and *opinio iuris* among the States. Notably, the European Court of Human Rights, the UN Committee Against Torture and the Human Rights Committee derive implicit authority to issue precautionary measures from their founding documents by interpreting these documents in light of their mandate to effectively protect human rights.⁴¹ These bodies have also codified their authority to issue precautionary

37 Article 106 of the OAS-Charter, Article 41 of the American Convention of Human Rights, and Articles 1, 18.b, 19.a, and 20.b of the Statute of the Inter-American Commission on Human Rights.

38 The Commission argues that precautionary measures „serve a „precautionary“ function by preserving a legal situation brought to the Commission’s attention by way of cases or petitions.“ IACHR, Annual Report 2011, ch. 3, para. 11.

39 AG/RES. 2290 (XXXVII-O/07) Observations and Recommendations on the Annual Report of the Inter-American Commission on Human Rights, Adopted at the fourth plenary session, held on June 5, 2007.

40 Constitutional Court of Colombia, Decision T-558/03, 07 July 2003, Decision T-558/03, July 10, 2003, case T-719935, July 10, 2003.

41 ECtHR, *Mamatkulov and Askarov v. Turkey*, Grand Chamber, nos. 46827/99 and 46951/99, April 2, 2005, para. 125; Committee Against Torture, Cecilia Rosana Núñez

measures in their corresponding rules of procedure.⁴²

V. CRITERIA FOR GRANTING OF PRECAUTIONARY MEASURES APPLIED BY THE IACOMMHR

Demands for transparency and legal certainty from OAS-Member States and Human Rights agencies have led to the incorporation of general criteria for granting precautionary measures into the IACHR's Rules of Procedure in 2009, which were again amended in 2013.⁴³

Article 25 para 2 of the current version of the Commission's Rules of Procedure lists and defines three main criteria – serious situation, urgent situation and irreparable harm to human rights - which the Commission has to look for before adopting precautionary measures.⁴⁴ The Commission has stressed that the decision to issue precautionary measures must be taken “with due consideration of the particularities of each specific situation. The analysis cannot be subject to strict or generalized criteria, instead, it has to attend to the nature of the risk and of the

Chipana v. Venezuela, No. 110/1998, para. 8, U.N. Doc. CAT/C/21/D/110/1998 (Nov. 10, 1998); Kalinichenko v. Morocco, Committee Against Torture, No. 428/2010, U.N. Doc. CAT/C/47/D/428/2010 (2010), para. 13.1; UNHRC, *Piandiong et al. v. Philippines*, Comm. No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999, paras. 5.1-5.4 (2000); Ahani v. Canada, U.N. Doc. CCPR/C/80/D/1051/2002, para. 8.1-8.2 (2004). See generally: Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Intersentia, Antwerp, 2010); Jo Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 *Vanderbilt Journal of Transnational Law* 1; Clara Burbano-Herrera, 'Interim Measures before the Inter-American and African Human Rights Commissions: Strengths and Weaknesses' (2013) 30 *IUS Gentium* 157.

42 Rule 39 of the Rules of Procedures of the ECtHR; Rule 114 of the Rules of Procedure of the CAT; Rule 92 of the Rules of Procedures of the HRC.

43 See for example: Presentation by the Delegation of Mexico on the topics “Challenges and Medium- and Long-Term objectives of the IAHR” and “Precautionary Measures”, Working Group meeting of September 12, 2011, GT/SIDH/inf. 4/11; Presentations by the Delegation of Argentina on “Procedural Matters in Processing Cases and Individual Petitions before the IACHR” and “Precautionary Measures.”, Meeting of the Working Group on September 20, 2011, GT/SIDH/inf. 6/11; Presentation of the Delegation of the Costa Rica on the “Medium and Long-Term Challenges and Objectives,” “Precautionary Measures,” “Procedural Matters in the Processing of the Individual Cases and Petitioners,” “Friendly Settlements,” and “Promotion of Human Rights” (Phase for diagnosis of the topic: September 12 to October 11, 2011) GT/SIDH/INF. 29/11, available at: <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp> (last visited: 4th March 2014).

44 Article 25 para 2: “For the purpose of taking the decision referred to in paragraph 1, the Commission shall consider that: a. “serious situation” refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system; b. “urgent situation” refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and c. “irreparable harm” refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.”

damage that is to be prevented.”⁴⁵ The Commission has indicated that on weighing the seriousness of a request it takes into account its contextual aspects, like the nature of the threats received, a history of acts of aggression against persons in similar situations, any direct acts of aggression committed against the potential beneficiary, an increase in the threats indicative of a need for preventive action, and factors such as apology of and incitement to violence against a person or group of persons.⁴⁶ As regards urgency, the Commission has clarified that the risk or threat involved must be imminent, which means that the timing and duration of the precautionary intervention has been taken into consideration. Concerning the criteria of irreparable harm, the Commission has clarified that the circumstances of the case must suggest that there is a reasonable probability that the harm will materialize and the request must not rely on legal rights or interests that can be remedied.⁴⁷

In conclusion, the IACHR both in its Rules of Procedure and in public documents has made an effort to concretize the criteria it considers when weighing requests for precautionary measures. By this means the Commission on the one hand has paid due respect to the principle of legal certainty and predictability. On the other hand these criteria grant the Commission a sufficient level of discretion when analyzing the situation allowing the Commission to adapt its practice to changing realities and to respond adequately.

VI. THE BINDING NATURE OF PRECAUTIONARY MEASURES ORDERED BY THE COMMISSION

The question whether the IACHR is competent to issue precautionary measures has to be distinguished from the question whether these orders are legally binding for the States that are addressed by them in the sense that failure of the OAS States to comply with them constitutes a breach of an international legal obligation.⁴⁸ Under its Statute the Commission is only authorized to issue legally non-binding “recommendations” both in the framework of country reports about the general situation of human rights in a specific OAS Member State as well as in the framework of a pending individual petition.⁴⁹

45 IACHR, Second Report on the Situation of Human Rights Defenders, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paras. 422-431. Available at: <http://www.oas.org/es/cidh/defensores/docs/pdf/defensores2011.pdf> (last visited: 4th March 2014).

46 Ibid para. 424.

47 Ibid para. 425.

48 The binding nature of the Commission’s precautionary measures is highly disputed. See e.g. IACHR Res. 01/05, and Separate opinion of judge Cançado Trindade in *Matter of the persons imprisoned in the «Dr. Sebastiao Silveira» Penitentiary in Araraquara v. Brazil*, Order of the Inter-American Court of Human Rights of September 30, 2006, para. 33. For arguments of the US: IACHR, Case 12.243, *Juan Raul Garza v. United States* Report No. 52/01 (2000) para 11; Diego Rodríguez-Pinzón, ‘Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance’ (2013) 20 *Human Rights Brief* 13, 14.

49 Articles 18 lit. b and 20 lit. b Statute of the IACHR.

However, the IACHR is of the view that the OAS Member States are legally bound to comply with its precautionary measures.⁵⁰ In a case against the US in regard to the pending death penalty of the petitioner, for example, the Commission has stated that „OAS member states, by creating the Commission and mandating it through the OAS Charter and its Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving that mandate. (...) (I)t is beyond question that the failure of an OAS member state to preserve a condemned prisoner's life pending review of his or her complaint undermines the efficacy of the Commission's process, deprives condemned persons of their right to petition in the inter-American human rights system, and results in serious and irreparable harm to those individuals. For these reasons, the Commission has determined that a member state disregards its fundamental human rights obligations under the OAS Charter and related instruments when it fails to implement precautionary measures issued by the Commission in these circumstances.“⁵¹

The IACHR justifies its position not primarily with the danger of an irreparable harm of the human right in question, but with functional and procedural reasons: Firstly, the Commission points out its broad mandate to protect and promote human rights of which its authority to receive and grant requests for precautionary measures under its Rules of Procedure is a necessary component.⁵² Secondly, the IACHR has, in cases of a pending death penalty, reiterated that “its ability to effectively investigate and determine capital cases has frequently been undermined when states have scheduled and proceeded with the execution of condemned prisoners despite the fact that those prisoners have proceedings

50 See e.g. IACHR, Res. No. 1/05 (8 March 2005): „THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RESOLVES: (...) To reaffirm the international obligation that member States have to comply with precautionary measures issued by the Inter-American Commission on Human Rights.“

51 IACHR, Case 12.412, Report No. 101/03, Napoleon Beazley v. United States, 2003, para. 5.

52 IACHR, Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, March 13, 2002: “The Commission notes preliminarily that its authority to receive and grant requests for precautionary measures under Article 25(1) of its Rules of Procedure is, as with the practice of other international decisional bodies, a well-established and necessary component of the Commission's processes. Indeed, where such measures are considered essential to preserving the Commission's very mandate under the OAS Charter, the Commission has ruled that OAS member states are subject to an international legal obligation to comply with a request for such measures. (...) The mandate given to the Commission by OAS member states, including the United States, under Article 106 of the Charter of the Organization of American States and Articles 18, 19 and 20 of the Commission's Statute is in turn central to the Commission's consideration of the matter presently before it. Through the foregoing provisions, OAS member states have charged the Commission with supervising member states' observance of human rights in the Hemisphere. These rights include those prescribed under the American Declaration of the Rights and Duties of Man, which constitutes a source of legal obligation for all OAS member states in respect of persons subject to their authority and control.” Available online: <http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>.

pending before the Commission. It is for this reason that the Commission requests precautionary measures (...) to require a state to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Anything less effectively deprives condemned prisoners of their right to petition in the inter-American human rights system and causes them serious and irreparable harm."⁵³ Accordingly, the main Commission's main argument is that the right of every person subject to the authority of a OAS Member State to file a petition to the IACHR requires that precautionary measures issued by the IACHR are legally binding upon the States in order to make sure that the IACHR is able to effectively consider the pending individual complaint and not to render the complaint procedure moot or ineffective.

Furthermore, the IACHR refers to the practice of other international decisional bodies, such as the IACtHR⁵⁴, the ICJ⁵⁵, the ECtHR⁵⁶ and the Human Rights Committee⁵⁷ who have also considered their interim measures as being obligatory for the States Parties.

However, the question of the binding nature of the Commission's precautionary measures is not as easily answered as the Commission's arguments suggest.

First of all, the Commission's reference to the IACtHR, the ECtHR and the ICJ is misleading since these bodies have the authority to render binding decisions. The IACHR, on the contrary, lacks competence to render binding decisions. It has to be borne in mind that under international law substantive obligation and the competences of organs have to be separated.

International public law is based on the consent of the states. States are free to decide whether the decisions of an international organ authorized to adjudicate juridical functions are legally binding or mere recommendations. However, if the States are not willing to authorize an international body with the competence to

53 IACHR, Case 12.243, Juan Raul Garza v. United States, Report No. 52/01 (2000), para. 66.

54 See, e.g. IACtHR, Case of James et al. (Trinidad and Tobago), Provisional Measures Order of 29 August 1998, IACtHR Series E.

55 ICJ, La Grand, Judgment of 27 June 2001, ICJ Rep. 2001.

56 See generally: Alastair Mowbray, 'A New Strasbourg Approach to the Legal Consequences of Interim Measures' (2005), 5 *Human Rights Law Review* 377.

57 HRC, Dante Piandiong and others v. The Philippines (869/1999), CCPR/C/70/D/869 (1999), para. 5.1-2: "By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (...) Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (...) It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views. (...) Quite apart, then, from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile."

render binding final decisions this strongly suggests that the states are not willing to accept the binding force of decisions on precautionary measures.

Furthermore, the arguments by the ICJ in the *LaGrand Case* in favor of the binding nature of its provisional measures cannot be used for establishing the binding force of the precautionary measures issued by the IACHR. Article 41 ICJ Statute provides the Court with the power to „indicate“ any provisional measures which ought to be taken to preserve the respective rights of either party. In the *LaGrand-Case*⁵⁸ the ICJ had interpreted the word “indicate” as creating a legally binding obligation for the States to comply with these measures. After examining the English and the French equally authentic versions of Article 41 and after reaching the conclusion that the two texts have different meanings and do not help in answering the question, the majority of the ICJ relied on the interpretation rule codified in Article 33 para 4 of the Vienna Convention on the Law of Treaties, which reads “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”. In contrast to the ICJ Statute, the IACHR’s Statute, however, does not contain an explicit provision which can be subject to interpretation. There is no explicit link in the Commission’s Statute between precautionary measures and procedural or institutional rights of the Commission that could be taken as a hint of the consent of the states.

On the contrary, the binding effect of provisional measures is still highly disputed among the states. A relevant body of jurisprudence similar to the IACHR is the former European Commission on Human Rights. For many years, it fulfilled a role in the European System of Human Rights under the ECHR similar to that played by the IACHR in the OAS System. The ECtHR has held in *Cruz Varas and Others v. Sweden* (1991) that, absent a specific provision in the ECHR, the European Commission did not have the power to order legally binding interim measures.⁵⁹ Specifically, the ECtHR addressed the binding nature of a European Commission’s Rule of Procedure that purported to authorize the Commission to request States to carry out provisional measures. The same view was confirmed by the ECtHR on its own provisional measures in the case of *Conka v. Belgium*. In *Mamatkulov and Askarov v. Turkey* the ECtHR, however, has taken a different approach on the issue, but only in regard to the binding force of the Court’s interim measures.⁶⁰

Therefore, with regard to the IACHR’s precautionary measures, a differentiated view must be taken: First of all, it has to be distinguished between precautionary

58 ICJ, *La Grand*, Judgment of 27 June 2001, ICJ Rep. 2001, para. 48 and 117.

59 ECtHR, *Cruz Varas and Others v. Sweden*, Ser. A. No. 46/1990/237/307, at 34-35 (1991). The ECtHR had to decide whether Sweden’s failure to comply with the Commission’s indication had violated the obligation not to hinder the effective exercise of the right to individual application.

60 ECtHR, *Mamatkulov and Askarov v. Turkey*, 46827/99 and 46951/99, 4 February 2005.

measures issued in the framework of an already pending complaint and precautionary measures outside of a pending complaint. Only in the first case, the functional and procedural arguments in favor of the binding nature of these measure can be brought up. But if no individual complaint has yet been filed with the IACHR, the mandate and function of the IACHR is not endangered, because there is no subject matter of the complaint that can be rendered moot. Another distinction has to be made regarding the States involved:

With respect to a State Party to the American Convention on Human Rights, that also has accepted the (facultative) jurisdiction of the Inter-American Court, it can be argued in line with the ECtHR's judgement in *Mamatkulov and Askarov v. Turkey* that the binding force of precautionary measures by the Commission is necessary to preserve the subject matter of the pending case and the legally binding later decision of the Inter-American Court of Human Rights, to which the case has to be referred by the Commission. With respect to all other, non-Parties of the Convention and jurisdiction of the Court, this argument fails. Here, only the mandate of the Commission – its competence to examine individual complaints and to make recommendations can be used as basis for a legal argument. However, apart from the obligatory nature of the right of individual complaint to the IACHR, at no stage of the procedure before the Commission there is a binding procedural obligation for the States to participate. The crucial question, therefore, is whether the competence to examine individual complaints by individuals necessarily implies that the precautionary measures by the IACHR have binding force. This would be the case if the right of individuals to petition to an international body has emerged so strong and vital under international law that is creates similar force as substantive human rights obligations. It has be demonstrated that there is a corresponding international obligation of the States not to render this right to petition totally ineffective. Whether international law has already evolved so far is doubtful. The Human Rights Committee for its part has held in *Piandiong v. Philippines* that an indication of interim measures is effectively binding on a State Party.⁶¹ Also, the Judicial Committee of the Privy Council in *Lewis v. Attorney General of Jamaica* has stated that individuals must be entitled to a stay of proceedings while a petition is pending for consideration before an international human rights body, even when that body is not a court and does not issue judgments, on the grounds of due process. The non-binding nature of the individual complaints procedure before an international human rights body does not *ipso facto* make the rules governing that procedure to be non-binding. Otherwise, we could ignore

61 HRC, *Piandiong et al v. The Philippines*, Communication No. 869/1999, 19 October 2000, CCPR/C/70/D/869/1999. For further discussion of *Piandiong's* importance: Gino J. Naldi, 'Interim Measures in the UN Human Rights Committee' (2004) 53 *International and Comparative Law Quarterly* 445.

all the procedural rules concerning time limits and replies.⁶²

Admittedly, the binding force of precautionary measures would indeed contribute to the effectiveness of the regional protection of human rights under the authority of the IACHR. States Parties to an international human rights instrument providing for a right of an individual remedy have an obligation under the principle of good faith not to hinder the effective exercise of the right of petition. Moreover, good faith prohibits any action to interfere in the practice of a treaty body in a way that makes the function of that organ or the applicable procedure obsolete. However, under the principle of consent in international law States can generally only be bound by a rule if they have explicitly or tacitly consented to it. Notions of effectiveness when construing the legal meaning of a treaty rule are a dangerous tool since they tend to undermine the strict rule of consent in favor of values and idealistic notions. Consequently, an international body cannot have more powers than those either explicitly established in its constitutive instrument or implicated as being absolutely essential for the fulfillment of its functions. This means that any obligation resulting from precautionary orders by an international human rights monitoring body cannot imply more powers than the those explicitly established in the framework of its procedural functions and its final decisions. It must be recognized that orders of provisional measures are not only just procedural measures. They are more than procedural decisions because they provide for a new level of protection of human rights. Therefore, they cannot be based merely on the principle of effectiveness. It is up on the States to clarify their international legal obligations and to decide whether or not decisions and other measures of international bodies have binding force. In the case of the IACHR this means that the legal effect of precautionary measures cannot go beyond those of mere legally non-binding recommendations.

VII. CONCLUSION

Precautionary measures represent an effective tool to guarantee the protection of human rights and to safeguard legal complaint procedures. Their legal basis derives either explicitly from the constitutive treaty or implicitly from the international body's powers to adjudicate individual complaints. While the competence of such international bodies to issue precautionary measures is widely accepted, the legal effect of these measures remains a matter of controversy and has not been sufficiently clarified by the States. The lack of clear and binding treaty rules for international supervisory bodies has, as the the practice of the IACHR demonstrates, led to a very broad interpretation and a progressive exercise of its functions by the the relevant international body, facing heavy criticism by States. Nevertheless, in the end these disputes can lead to an evolution of international human rights law and bring about a more effective protection of human rights over time.

62 Judicial Committee of the Privy Council, *Lewis v. Attorney General of Jamaica* (2000), [2001] 2 AC 50.