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Interim Measures in International Human Rights: Evolution and Harmonization

Jo M. Pasqualucci

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Interim Measures in International Human Rights: Evolution and Harmonization

*Jo M. Pasqualucci**

ABSTRACT

In this Article, the Author undertakes a comprehensive study of interim measures ordered in human rights cases before six international enforcement bodies—the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the United Nations Human Rights Committee, the United Nations Committee against Torture, and the Inter-American Commission on Human Rights. An order of interim measures may require that the State take positive action, such as providing protection for human rights activists or journalists, or it may call upon the State to refrain from taking action, such as not extraditing a person or delaying the execution of prisoners until their cases have been resolved before the international body. The purpose of interim measures in international human rights law is most often to protect persons involved in a case from urgent danger of

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grave and irreparable injury. The Author concludes that the multiple jurisdictions charged with the enforcement of international norms are successfully harmonizing and evolving their treatment of interim measures. In general, States have accepted the decisions of international courts that interim measures are binding on the States that are parties to the applicable treaties. Many States have not yet accepted the view that interim measures specified by international quasi-judicial bodies also are binding on States. The Author argues inter alia that States that have accepted the right of individuals to petition international human rights bodies are bound to respect that petition process by refraining from interfering with the process and by protecting the lives and rights of those involved in the case. Thus, interim measures are implied in the constituent documents that provide for the right of individual petition and must be considered to be binding on States that are parties.

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I. INTRODUCTION

When the well-known Guatemalan newspaper *El Periódico* published articles critical of the government, several of the newspaper's investigative reporters and staff received death threats.¹ The president of the paper was forced to leave Guatemala after his home was taken over and his family harassed by armed persons who identified themselves as National Police agents.² Two armed men entered the newspaper facilities, opened fire, and wounded a security agent.³ In response to a complaint of human rights abuse filed with the Inter-American Commission on Human Rights, the Commission ordered the government of Guatemala to take interim measures to protect the director and the technical and administrative staff of the newspaper.⁴ This immediate step protected the persons in danger during the time-consuming international proceedings.

The overriding importance of interim measures in human rights cases arises from their potential to terminate abuse rather than primarily to compensate the victim or the victim's family after the fact. International proceedings, which typically are not resolved for years, are inadequate in urgent circumstances to protect persons from imminent danger or death. There is, however, one procedural weapon

1. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L/V/II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 42 (Dec. 29, 2003), available at <http://www.cidh.org> (describing *El Periodico v. Guatemala*).

2. *Id.*

3. *Id.*

4. Interim measures are termed "precautionary measures" when issued by the Inter-American Commission on Human Rights.

in the arsenal of international tribunals and other quasi-judicial enforcement bodies that has been effective in saving lives and avoiding irreparable injury: an order to a State to take interim measures.

An order of interim measures may require that the State take positive action, such as providing protection for human rights activists, journalists, or judges who have offended those in power. Conversely, interim measures may call for the State to refrain from taking action, such as not extraditing a person or delaying the execution of prisoners until their cases have been resolved. The purpose of interim measures in international human rights law is most often to protect persons involved in a case from grave and irreparable injury. Thus, in human rights cases, interim measures are not only preventive but are also protective of human rights.⁵ The authority to order a State to take interim measures is potentially one of the most valuable powers possessed by international tribunals and other enforcement bodies that deal with human rights issues. Their protective function is more important than the compensatory function of a final judgment.

The multiple jurisdictions charged with the enforcement of international norms are successfully harmonizing and evolving their treatment of interim measures. International norms must be interpreted consistently, and procedures must be applied in a similar manner by the various enforcement bodies. Inter-system harmonization may come about when enforcement bodies, although under no obligation to do so, choose to apply the reasoning or holdings of other international bodies or to emulate the practice of other systems. An excellent example is set forth in *Mamatkulov and Abdurasulovic v. Turkey*, in which the European Court of Human Rights, in determining that interim measures are binding on the parties to the European Convention, made reference to the jurisprudence and rules of the International Court of Justice (ICJ), the Inter-American Court of Human Rights, the United Nations Human Rights Committee (U.N. Human Rights Committee), and the United Nations Committee against Torture (U.N. Committee against Torture).⁶ The European Court stated in this regard that “the [European] Convention must be interpreted so far as possible

5. See, e.g., Peace Community of San José de Apartadó (Colombia), Provisional Measures, Order of June 18, 2002, Inter-Am. Ct. H.R. (ser. E), ¶ 4 (2002), available at <http://www.corteidh.or.cr>; La Nación Newspaper (Costa Rica), Provisional Measures, Order of Dec. 6, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 4 (2001), available at <http://www.corteidh.or.cr>; Gallardo Rodríguez (Mexico), Provisional Measures, Order of Dec. 6, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 4 (2001), available at <http://www.corteidh.or.cr>.

6. *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶¶ 39-51, available at <http://www.echr.coe.int>.

consistently with the other principles of International Law of which it forms a part"⁷—an interpretation that advances the goal of interstate harmonization of international law.

The treatment of interim measures has been harmonized recently by the principal international and regional courts. In well-reasoned decisions, the ICJ,⁸ the European Court of Human Rights,⁹ and the Inter-American Court of Human Rights¹⁰ have held that interim measures are necessary to the effective functioning of the tribunals and, thus, are binding. These decisions largely put to rest a lengthy controversy as to whether an international tribunal's order that a State take interim measures was binding or a mere suggestion to be followed if the State chose to comply. Consensus has not yet been reached on the equally important issue of whether interim measures specified by international quasi-judicial treaty bodies, such as the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights also are binding on States. This Article argues that States that have accepted the right of individuals to petition international human rights bodies are bound to respect that petition process by refraining from interfering with the process and by protecting the lives and rights of those involved in the case. Thus, interim measures are implied in the constituent documents that provide for the right of individual petition and must be considered to be binding on the states parties to the treaties.

The increasing harmonization of the treatment of interim measures in international law may minimize the concerns of some commentators that the growing multiplicity of international fora could result in inconsistent pronouncements on basic concepts and potentially hamper international law's continuing evolution into a coherent and harmonious body.¹¹ Were the enforcement organs to work in a vacuum without reciprocally recognizing and relying on developments in the other bodies, international law could become splintered and conflicting, and the law would not be truly "international." It is essential that the multiple international organs make an effort to harmonize not only their holdings but also their

7. *Id.* ¶ 99 (citing *Al-Adsani v. U.K.*, [GC], App. No. 35763/97 (Eur. Ct. H.R. 2001-XI), § 60).

8. *See* *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), *available at* <http://www.icj-cij.org>.

9. *See* *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶¶ 39-51.

10. *See* *Constitutional Court (Peru), Provisional Measures*, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), ¶ 14 (2000), *available at* <http://www.corteidh.or.cr>.

11. *See* YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 79 (2003). The goal of harmonization could become more elusive because of the proliferation of international tribunals and other enforcement bodies with overlapping jurisdiction.

practice and procedures. As demonstrated by the harmonized inter-system rulings on interim measures, the multiplicity of international fora can have a positive effect on international law. In a world-wide system in which the tribunals and enforcement bodies look to the interpretations of other fora, the most advanced, well-reasoned decisions are finding acceptance and being adopted by other international bodies, which spurs developing concepts and procedures.¹² In this way the important pillars of evolution and harmonization of international law are both being served.

The growing consensus that interim measures must be followed by a State—not solely out of the State's goodwill but rather out of a legal obligation—makes an inroad into the classical theory of international law. The classical or positivist view holds that international law is derived from the voluntary will of the State.¹³ The State, in most cases, is only bound by international law when it has ceded a particular aspect of its sovereignty by ratifying a treaty or failing to object persistently to an evolving principle of international law.¹⁴ If the State ratifies a treaty, the positivist theory provides that the State is only bound to the explicit provisions of the treaty, and that it cannot be held to greater obligations than it has expressly accepted. If the State also accepted the jurisdiction of an international body with the authority to enforce the treaty, the enforcement body must not infringe on any procedural protections afforded the State or assert against it any rights to which the State

12. See Christina Cerna, *Do Multiple International Jurisdictions Strengthen or Weaken International Law?: How the Inter-American System for the Protection of Human Rights has Contributed to the Development of International Law*, in JURISDICTIONS INTERNATIONALES; COMPLEMENTARITE OU CONCURRENCE? (éditions Bruylant, 2004) (arguing convincingly that the proliferation of bodies with overlapping jurisdictions has resulted in the cross-fertilization of human rights norms and practices). Cerna states that “a multiplicity of jurisdictions serves as a kind of peer pressure among international adjudicatory human rights bodies. It is an engine for the advancement of the international human rights movement. The more innovative forum tends to push the more conservative forum forward by adopting more aggressive tactics.” *Id.* Cerna's argument is epitomized in the international treatment of interim measures.

13. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). The Permanent Court of International Justice held in the *Lotus* Case that:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Id.

14. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 10 (1991) (stating that international law is dependent on “voluntarism” or “consensualism”).

has not agreed. In this vein, States have argued that interim measures are not binding on States when the authority to order such measures is not included in the constituent document or when the wording of the constituent document does not appear to be mandatory.¹⁵ Nonetheless, the major international tribunals have held that interim measures are essential to the functioning of the tribunal and that States have a legal obligation to comply with interim measures regardless of whether the authority to order them is expressed, inherent, or implied.¹⁶

This development is especially important in human rights law which, comparatively, has only recently been established as a separate branch of international law. International human rights law is an offshoot of traditional international law, which is based on the principle of State sovereignty.¹⁷ Human rights law, however, undercuts certain foundational concepts of international law and establishes the supremacy of human rights over the will of the State. The purpose of international human rights law is to protect individuals from the misuse of power by the State or from the State's failure to curb the misuse of power by entities or persons within the State.¹⁸ Publicly ordered interim measures by an international body bring attention to bear on abuses as they are happening and often have the effect of curtailing those abuses. In this regard, interim measures have been unexpectedly successful in the limited number of cases in which they have been applied and may have a chilling effect on similar abuses.

This Article represents a comprehensive study of interim measures in multiple international fora including the ICJ, the Inter-American Court of Human Rights, the European Court of Human Rights, the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights.¹⁹ Although these international bodies may use different

15. See *TPS v. Canada*, Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 24th Sess., Annex, U.N. Doc. CAT/C/24/D/99/1997 (2000).

16. See *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003); see also *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27); *Constitutional Court (Peru)*, Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), ¶ 14 (2000), available at <http://www.corteidh.or.cr>.

17. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

18. To the extent that international cases heighten awareness of abuses that have already taken place, they may deter similar abuses in the future.

19. Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex 54 U.N. GAOR Supp. (No. 49), art. 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force Dec. 22, 2000 (providing for interim measures). Article 5 of the Protocol provides in part that:

terminology to signify interim measures, the concept remains the same. Interim measures may also be designated as "provisional measures," "precautionary measures," "emergency measures," and "conservatory measures." The term "interim measures" will be used in this Article except when the source discussed employs an alternative term. This multi-forum study of interim measures in international human rights law argues that interim measures ordered by any international body to which States have granted the right to receive individual complaints must be considered to be binding. This study will provide governments, non-governmental organizations, and others litigating before international bodies with an understanding of the application of interim measures in appropriate circumstances. It will also inform the enforcement bodies on the treatment of interim measures by the other international tribunals and quasi-judicial bodies. Furthermore, it may encourage the development and harmonization of other substantive rights and procedures in international human rights law.

Part II of this Article discusses interim measures in general. Part III evaluates the authority to order interim measures, including express, inherent, and implied authority. The Author argues that judicial organs have the inherent authority to order interim measures and that quasi-judicial human rights bodies granted the competence to review individual human rights complaints have the implied authority to order interim measures. Part IV delineates the international standards for an order of interim measures: urgency, gravity, and the likelihood of irreparable injury. Part V analyzes whether interim measures should be binding when issued by all international fora that have the right to consider individual petitions. Part VI describes situations in which interim measures are most commonly ordered, including pending State-sponsored executions; extradition; protection of petitioners, witnesses, and human rights activists; protection to allow displaced persons to return home; and medical care for prisoners. Part VII compares the procedures applied by the international bodies when considering provisional measure requests. Part VIII discusses methods of implementation of interim measures, and Part IX evaluates State compliance with interim measures.

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- 1) 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.

Id. art. 5.

II. INTERIM MEASURES IN GENERAL

Interim measures traditionally have been ordered to preserve the subject matter of a dispute and, thus, maintain the status quo until a tribunal reaches a judgment on the merits.²⁰ Their primary purpose has been the preservation of the parties' rights pending a court decision.²¹ Thus, a party may be barred from logging a forest that is the source of contention. On the international plane, interim measures may be ordered by international courts, quasi-judicial bodies, or arbitral bodies.²² The International Court of Justice has stated that the power of the Court to indicate provisional measures "has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings."²³ The Permanent Court of International Justice earlier stated that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."²⁴

In addition to the traditionally preventive role of interim measures, these measures are fundamentally protective of human rights.²⁵ Although a State has an obligation, *erga omnes*, to protect

20. When interim measures are ordered by domestic courts, the orders generally are directed to the defendant to ensure that the property that is the subject of the dispute is not disposed of prior to the court's decision. In U.S. courts, the approximate equivalent of an order of interim measures is an interlocutory injunction or a preliminary injunction. In Germany, orders to protect assets to allow future writs of execution to be enforced are called "einstweilige Verfügung." Catherine Kessedjian, Note on Provisional and Protective Measures in Private International Law and Comparative Law, Hague Conference on Private International Law Enforcement of Judgments (Oct. 1998), Prel. Doc. No. 10, at 24. See also CODIGO PROCESAL CIVIL Y COMERCIAL DE LA NACION, arts. 195-210 (1987) (Arg.); CODIGO DE PROCEDIMIENTOS CIVILES DE CHILE, art. 280 (1983) (Chile); CODIGO DE PROCEDIMIENTOS CIVILES DE COSTA RICA, arts. 449-64 (1987) (Costa Rica); JEROME B. ELKIND, INTERIM PROTECTION, A FUNCTIONAL APPROACH 26-28 (1981). Interim measures exist in most civil and common law states.

21. See *Nuclear Tests (Austl. v. Fr.)* 1973 I.C.J. 99, 103 (1973).

22. See Rules of Procedure for Arbitration Proceedings, International Centre for Settlement of Investment Disputes (ICSID), R. 39. The study of interim measures in arbitral or other trade-related proceedings is beyond the scope of this article.

23. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yugo.*), Order of Sept. 1993, ¶ 35.

24. See *Electricity Company of Sofia & Bulgaria, 1939 P.C.I.J. (ser. A/B) No. 79*, at 199 (Dec. 5).

25. See, e.g., *Peace Community of San José de Apartadó (Colombia), Provisional Measures, Order of June 18, 2002, Inter-Am. Ct. of H.R. (ser. E), ¶ 4 (2002)*; *Gallardo Rodriguez (Mexico), Provisional Measures, Order of Feb. 14, 2002, Inter-Am.*

all persons subject to its jurisdiction, international tribunals may order States to take special measures to protect persons who are in immediate danger of suffering irreparable injury.²⁶ A unique aspect of international human rights cases is that individuals involved in the case or even individuals related to those persons may be in danger and, therefore, in need of the protection that can be offered through interim measures. This need results from threats and attempts to intimidate or eliminate complainants, their attorneys, family members, and witnesses who have testified or have been called to testify. Such threats and acts of aggression are intended to interfere with the competence of the enforcement organ to hear all evidence and may be meant to dissuade future complainants from filing cases. The protection of all persons involved preserves the court's ability to consider every aspect of the case and to reach a conclusion based on all the evidence. The enforcement body must have the authority to ensure that physical evidence or subject matter not be injured or destroyed, as well as that same authority with respect to those giving testimonial evidence. In this sense, as in traditional cases, interim measures "prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved."²⁷

An order that a State take interim measures does not prejudice a decision on the merits.²⁸ After ordering interim measures, the international entity considers the evidence and determines whether the State is liable for a human rights violation. When the U.N. Human Rights Committee requests that a State take interim measures, for instance, it informs the State that its request does not imply that the Committee has made a determination as to the merits of the petition.²⁹ Interim measures simply protect those involved in the pending case.

Ct. H.R. (ser. E) (2002) ¶ 5; *La Nación Newspaper (Costa Rica)*, Provisional Measures, Order of Dec. 6, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 4 (2001). At the drafting conference of the American Convention, Costa Rica proposed that the Court be given the power, common to all world tribunals, to act in serious and urgent situations. Minutes of the Sixth Session of Committee II, Summary Version, November 20, 1969, in THOMAS BUERGENTHAL AND ROBERT NORRIS, 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 214 (1993).

26. See *Peace Community of San José de Apartadó (Colombia)*, Provisional Measures, Order of June 18, 2002, Inter-Am. Ct. of H.R. (ser. E), ¶ 11 (2002).

27. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, ¶ 102 (June 27).

28. See Rules of Procedure of the Human Rights Committee, U.N. Human Rights Committee, R. 86, U.N. Doc. CCPR/C/3/Rev.6 (2001) [hereinafter UNHRC Rules of Procedure]; see also Rules of Procedure, Committee against Torture, R. 108(2), U.N. Doc. CAT/C/3/Rev.4 [hereinafter Committee against Torture, Rules of Procedure]; The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 19, art. 5(2).

29. UNHRC Rules of Procedure, *supra* note 28, R. 86.

III. AUTHORITY TO ORDER INTERIM MEASURES

An international enforcement body, whether judicial or quasi-judicial, that is empowered to consider individual complaints of human rights abuse must have the authority to order a State to take interim measures. This authority is essential to fulfill the purpose of human rights treaties: the protection of persons.³⁰ A goal of the enforcement bodies established by the treaties is to afford individual complainants the procedural capability to enforce their rights. Especially in human rights law, “[t]he final result of the international procedure must have some practical relevance for the person concerned.”³¹ To accomplish this goal, the tribunal must have the legal authority to order provisional measures in any case in which there will be immediate and irreparable damage to those involved in the case in any capacity. This power is necessary for the effective functioning of international human rights systems.

A. *Express Authority*

The authority to order interim measures may be expressly provided for in the treaty, the constituent document that established the tribunal or enforcement body. When authorization is set forth in the constituent document, there is no question as to the organ’s competence to order interim measures. Treaties, such as the Statute of the International Court of Justice,³² the American Convention on Human Rights,³³ and the Protocol to the African Charter³⁴ expressly provide for interim measures. The Statute of the ICJ provides that “[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be

30. The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75) Advisory Opinion No. OC-2/82, Sept. 24, 1982, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 29 (1982), available at <http://www.corteidh.or.cr>.

31. Rudolf Bernhardt, *Interim Measures of Protection under the European Convention on Human Rights*, in INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 102 (Rudolf Bernhardt ed., 1994).

32. Statute of the International Court of Justice, art. 41, June 26, 1945, 59 Stat. 1055 [hereinafter Statute of the ICJ].

33. American Convention on Human Rights, OEA/Ser.K/XVII/I.1, doc. 65 rev. 1, corr. 1, art. 63(2) (Nov. 22, 1969), available at <http://www.oas.org> [hereinafter American Convention].

34. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), art. 27(2) (June 9, 1998), available at <http://www1.umn.edu/humanrts/africa/> (last visited Oct. 1, 2004) [hereinafter Protocol to the African Charter].

taken to preserve the respective rights of either party.”³⁵ The Inter-American Court’s authority to order provisional measures, which is provided for in the American Convention on Human Rights, is the broadest in that it not only empowers the Court in particular circumstances to “adopt such provisional measures as it deems pertinent in matters it has under consideration”³⁶ but also authorizes the Court to act at the request of the Inter-American Commission even when a case has not yet been submitted to the Court.³⁷ As such, the Inter-American system of human rights expanded the application of provisional measures and adapted the doctrine and practice of their use to the two-tiered system in the Americas. Likewise, the Protocol to the African Charter on Human and Peoples’ Rights, which establishes the African Court, provides that “in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”³⁸ This provision partially echoes the American Convention.

Most enforcement bodies delineated their authority to order interim measures in their self-drafted rules of procedure, either to remedy the lack of a provision in the underlying treaty or to supplement the broad terms of the treaty. For example, the European Rules of Court contain the sole authority for the adoption of provisional measures in the European human rights system.³⁹ The European Rules provide that a chamber of the Court may “indicate to the party any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.”⁴⁰ The wording of the Rules of Procedure of the U.N. Human Rights Committee is less forceful in that it authorizes the Commission to inform the State of the Commission’s “views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation.”⁴¹ Since States do not

35. Statute of the ICJ, *supra* note 32, art. 41. Article 41(2) provides that “[p]ending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.” *Id.* art. 41(2).

36. American Convention, *supra* note 33, art. 63(2).

37. *Id.* See JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 293-325 (2003).

38. Protocol to the African Charter, *supra* note 34, art. 27(a); see also VINCENT O. ORLU NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 299-300 (2001) (supporting the notion that the Court may order provisional measures in extreme circumstances).

39. Rules of Court, European Court of Human Rights, Nov. 2003, R. 39, available at <http://www.echr.coe.int> [hereinafter European Rules of Court].

40. *Id.* R. 39(1).

41. UNHRC Rules of Procedure, *supra* note 28, R. 86. The Rules of Procedure of the Committee against Torture provide that the Committee may request that the State party “take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.” Committee

have the right of approval over the rules of procedure drafted by the enforcement organ, they have argued that they should not be bound by interim measures authorized solely by rules of procedure.⁴² In this vein, Canada argued before the U.N. Committee against Torture that

[i]t must be observed that Rule 36 [regarding interim measures] has only the status of a rule of procedure drawn up by the Commission. . . . In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties.⁴³

B. *Inherent Authority*

The inherent authority of international tribunals to order States to take interim measures is essential to the effective protection of human rights. This inherent authority necessarily derives from the powers accorded an international tribunal. Interim measures are necessary if the tribunal is to exercise its competence effectively.⁴⁴

Whether an adjudicatory body has inherent authority to order the State to take interim measures has been a subject of dispute. In relation to the power of the Permanent Court of International Justice, and subsequently the ICJ, experts argued that “[t]he judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, this power to indicate provisional measures which ought to be taken.”⁴⁵ Scholars consider this authority to be a general principle of international law and an inherent part of the judicial function.⁴⁶ Although inherent power may not be essential if there is a broadly worded provision granting interim measures in the constituent document, such express authorization may not cover all instances in which measures are

against Torture, Rules of Procedure, *supra* note 28, R. 108(1). Finally, the Rules of the Inter-American Commission on Human Rights provide that “[i]n 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.” Rules of Procedure of the Inter-American Commission on Human Rights, entered into force on May 1, 2001, amended at its 188th regular period of session, held from Oct. 7-24, 2003, art. 25 [hereinafter Rules of Procedure Inter-Am. Comm’n H.R.].

42. See *TPS v. Canada*, Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 24th Sess., Annex, U.N. Doc. CAT/C/24/D/99/1997, ¶ 8.2 (2000).

43. *Id.*

44. See BLACK’S LAW DICTIONARY 782 (6th ed. 1990). “Inherent powers” are defined in *Black’s Law Dictionary* as “powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants. . . .” *Id.*

45. ELKIND, *supra* note 20, at 162 (quoting MANLEY HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942; A TREATISE 426 (1943)).

46. *Id.* (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 267-76 (1953)).

necessary. The organ should not be unduly hampered by the wording of the empowering document; rather, it must have the inherent power to order interim measures whenever they are warranted by the circumstances.

The Inter-American Court decreed its inherent authority to order provisional measures in its first contentious cases. In the *Honduran Disappearance* cases, the Court based this authority not only on the American Convention, but also on its "character as a judicial body and the powers that derive there from."⁴⁷ Buergenthal explained that it may have been reliance on its inherited powers that permitted the Inter-American Court to order Honduras to adopt measures to clarify that every person enjoys the right to appear before the Inter-American Commission and Inter-American Court, an instruction which went beyond the strict parameters of the Convention provision.⁴⁸

International recognition of the inherent authority of an international tribunal to order interim measures is particularly necessary when interim measures are not authorized in the constituent document that established the enforcement entity. When interim measures are authorized solely by a tribunal's rules of procedure, their inherent nature is essential if the measures are to have force. Thus, for instance, the European Court of Human Rights⁴⁹ must rely on its inherent authority.

C. Implied Authority

Although there may be no express provision in the constituent document authorizing interim measures, if such measures are necessary for the fulfilment of the object and purpose of the treaty, the authority to issue interim measures is implied in the treaty.⁵⁰ State parties to a treaty, like parties to a contractual obligation, make a choice of forum when they accept the competence of an international tribunal or quasi-judicial body to adjudicate disputes. If the parties have neglected to include a term in the treaty or contract

47. *Godínez Cruz v. Honduras* (Merits), Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R., (Ser. C) No. 5, ¶ 47 (1989); *Velásquez Rodríguez v. Honduras* (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 45 (1988).

48. See Thomas Buergenthal, *Interim Measures in the Inter-American Court of Human Rights*, in INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 69, 83-84 (Rudolph Bernhardt ed., 1994) (quoting *Velásquez Rodríguez v. Honduras* (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 45(2) (1988)).

49. European Rules of Court, *supra* note 39, R. 39.

50. See, e.g., UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 1994, arts. 5.1, 5.2 (stating that contractual obligations may be express or implied and that implied obligations arise from "(1) the nature and purpose of the contract; (2) practices established between the parties and usages; (3) good faith and fair dealing; (4) reasonableness").

that is necessary to its nature and purpose, the forum chosen to settle disputes relating to that agreement shall infer the necessary term.⁵¹ Both express and implied terms are obligatory and binding on the parties.

Quasi-judicial bodies such as the U.N. Human Rights Committee,⁵² the U.N. Committee against Torture,⁵³ and the Inter-American Commission on Human Rights, whose express authority to order interim measures is provided for only in their rules of procedure, must rely on implied authority to order States to take interim measures. The individual complaint procedure authorized by States allows quasi-judicial organs to fulfil the object and purpose of the treaty by considering individual human rights complaints alleging State human rights violations. The right of individuals to file human rights petitions with international bodies is defeated if the petitioner is irreparably harmed before the merits of the petition can be decided. The Inter-American Commission stated in this regard that “in the Commission’s view, 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.”⁵⁴ The U.N. Human Rights Committee explained that interim measures “are essential to the Committee’s role under the Protocol.”⁵⁵ The Committee went on to explain that “[f]louting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.”⁵⁶ The U.N. Committee against Torture has also stated that “[c]ompliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.”⁵⁷ The argument that interim measures are essential to

51. See, e.g., RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 204 (1981) (stating that an omitted term “essential to a determination of their rights and duties” will be supplied by the court).

52. UNHRC Rules of Procedure, *supra* note 28, R. 86.

53. Committee against Torture, Rules of Procedure, *supra* note 28, R. 108.

54. Annual Report Case 12.243, Report No. 52/01, Inter-Am. C.H.R., OEA/ser.L/V/II.111, doc. 25, rev. 1255 (2000), ¶ 117 (describing Juan Raul Garza (United States)).

55. Piandiong et al., The Philippines, U.N. Human Rights Committee, 17th Sess., Comm. No. 869/1999, ¶ 5.4, U.N. Doc. CCPR/C/70/D/869/1999 (2000). See Gine Naldi, *Interim Measures in the UN Human Rights Committee*, 53 ICLQ 445 (2004) (analyzing the binding force of interim measures issued by the UNHRC).

56. *Id.*

57. *Views of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment*,

the competence granted to quasi-judicial enforcement bodies by the States and that such measures are, therefore, implied in the underlying treaty is compelling and necessary to the fabric of international law.

IV. INTERNATIONAL STANDARDS FOR ORDERING INTERIM MEASURES

The standard necessary for an international tribunal or other body to order a State to take interim measures may vary depending on the wording of the instrument authorizing the measures or the jurisprudence of the enforcement body ordering them. In general, the party requesting interim measures must demonstrate urgency and the likelihood of irreparable injury. The Statute of the ICJ is general, empowering the Court to indicate provisional measures "if it considers that circumstances so require."⁵⁸ The ICJ interprets the phrase "circumstances so require" to mean that there must be urgency and the likelihood of irreparable damage.⁵⁹ The American Convention authorizes the Court to order provisional measures "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons."⁶⁰ The practice of the European Court is to order interim measures when there is "imminent danger to the applicant's life or of torture, or inhuman or degrading treatment or punishment."⁶¹ If an enforcement body denies a request for provisional measures because the requesting party cannot meet the standards of gravity, urgency, and the likelihood of irreparable damage, that party may make a subsequent request if the circumstances of the case change.⁶²

A. Urgency and Gravity

The underlying situation must be sufficiently serious to satisfy the requirement of gravity. The situation must also be urgent in that

U.N. Committee Against Torture, 21st Sess., Comm. No. 110/1998, ¶ 8, U.N. Doc. CAT/C/21/D/110/1998 (1998).

58. Statute of the ICJ, *supra* note 32, art. 41; Leo Gross, *The Case Concerning United States Diplomatic Consular Staff in Tehran: Phase of Provisional Measures*, 74 AM. J. INT'L L. 395, 406 (1980); see also JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT: AN ATTEMPT AT SCRUTINY 61 (1983).

59. Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2000 I.C.J. 182, 201 (Dec. 8).

60. American Convention, *supra* note 33, art. 63(2).

61. See *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶ 55.

62. Rules of Court, International Court of Justice, art. 75(3) (1973) (amended 2003) [hereinafter I.C.J. Rules of the Court]; *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1976 I.C.J. 3, 13 (Sept. 11).

the likelihood of irreparable injury is imminent. The ICJ found sufficient gravity and urgency in the *Nuclear Tests Cases*, in which Australia and New Zealand requested as interim measures that the ICJ order France to cease atmospheric nuclear tests until the Court had issued a judgment.⁶³ Although France had not revealed a date for further nuclear testing, there were reports that it intended to start testing again that year.⁶⁴ France stated in this regard that it would not agree to stop nuclear testing in the Pacific and that it would continue the testing despite the protests of other States.⁶⁵ The Court found that there was “an immediate possibility of a further atmospheric test” resulting in urgency and, therefore, ordered the French government to avoid atmospheric nuclear tests that could result in radioactive fallout in Australia and New Zealand.⁶⁶

The international body must refuse to order interim measures when the requisite urgency is not demonstrated. In the case *Concerning the Arrest Warrant*, the ICJ declined to order provisional measures and nullify an arrest warrant because the requesting State, the Congo, had not established that the situation was urgent.⁶⁷ A domestic Belgian Court had issued an arrest warrant for the Congolese Minister of Foreign Affairs, who was charged with inciting ethnic violence through radio messages.⁶⁸ The Congo requested provisional measures arguing that it was necessary and urgent that its Minister of Foreign Affairs be free to travel abroad without fear of arrest. When the Congo restructured its government, however, and shifted the person subject to the arrest warrant to a position that did not require external travel, the Court did not find sufficient urgency to order provisional measures.⁶⁹

The Inter-American Court did not find sufficient urgency to order provisional measures to protect a Peruvian human rights activist when Peru had not yet issued a warrant for his arrest.⁷⁰ In the *Chipoco* case, the Inter-American Commission requested that the Court order Peru to adopt provisional measures to protect a Peruvian human rights activist, Carlos Chipoco, who had cooperated with the

63. See *Nuclear Tests (Austl. v. Fr.)* 1973 I.C.J. 99 (1973); *Nuclear Tests (N.Z. v. Fr.)* 1973 I.C.J. 135 (1973).

64. *Nuclear Tests (Austl. v. Fr.)* 1973 I.C.J. 99, 104.

65. See *id.*

66. *Id.* The ICJ did not find sufficient urgency in non-human-rights cases, when Switzerland requested that the Court order the United States not to sell shares in a company, and the United States had responded that it was not taking action on the shares. *Interhandel Case (Switz. v. U.S.)*, 1957 I.C.J. 122 (Oct. 24).

67. *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2000 I.C.J. 182, 201-02 (Dec. 8).

68. *Id.* at 183.

69. *Id.* at 201-02.

70. *Chipoco (Peru)*, Jan. 27, 1993, Inter-Am. Ct. H.R. (ser. E) res. 1 (1993).

Commission.⁷¹ Following Chipoco's involvement with the Commission, Peru had charged him with the crime of "justification of terrorism against the state," which could result in the loss of Peruvian nationality and twenty years in prison.⁷² Although Chipoco was in the United States when he was indicted, he could have been tried *in absentia*.⁷³ The Inter-American Court refused to adopt provisional measures finding that, since an arrest warrant for the alleged victim had not been issued, the conditions did not exist to justify the adoption of the requested measures.⁷⁴

In death penalty cases, when the date of execution is set and approaching, the international body will find that the requisites of gravity, urgency, and the likelihood of irreparable injury have been met. If the date of execution has not been set, the adjudicating body will look at the specific circumstances of the case to determine if execution may be imminent. According to the International Court of Justice, the lack of an execution date "is not *per se* a circumstance that should preclude the Court from indicating provisional measures."⁷⁵ The ICJ did order provisional measures to protect some prisoners in the United States, finding that they were "at a risk of execution in the coming months, or possibly even weeks," even though the date of execution had not been set.⁷⁶ In some States, imminent danger may exist when a person has been tried and sentenced to death, even though the date of the execution is unknown. In *Staselovich v. Belarus*, counsel for the petitioner explained to the U.N. Human Rights Committee that in Belarus, death sentences are carried out in secret without informing the prisoner or the family in advance of the date.⁷⁷ In such cases the international human rights body must order interim measures, if called for, when the sentence is handed down.

B. Likelihood of Irreparable Injury

Interim measures are only appropriate when there is a likelihood of irreparable injury. An injury is irreparable when there is no remedy available at law that will adequately compensate for the injury. The ICJ found that there was a likelihood of irreparable injury and, therefore, ordered Iran to take provisional measures in

71. *Id.* ¶ 1.

72. *Id.* ¶¶ 1-2.

73. *Id.* ¶ 3.

74. *Id.* res. 1.

75. *Avena and other Mexican nationals, (Mex. v. U.S.)*, 2003 I.C.J. 128, ¶ 54 (Feb. 5).

76. *Id.* ¶ 55.

77. *Staselovich v. Belarus*, U.N. Human Rights Committee, 77th Sess., Comm. No. 887/1999, ¶ 5.1, U.N. Doc. CCPR/C/77/D/887/1999.

the case *Concerning United States Diplomatic and Consular Staff in Tehran*⁷⁸ after the U.S. Embassy in Tehran had been invaded and U.S. citizens were being held hostage.⁷⁹ The Court found that the situation “expose[d] the human beings concerned to privation, hardship, anguish, and even danger to life and health and thus to a serious possibility of irreparable harm.”⁸⁰ Likewise, the ICJ found the likelihood of irreparable injury in *The Nuclear Test Cases* even though there was a lack of ascertainable damage attributable to atmospheric nuclear testing.⁸¹ The Court relied on a United Nations study that did not exclude the possibility that radioactive fallout on Australia and New Zealand could cause irreparable damage.⁸² Conversely, the ICJ declined to order provisional measures in the case *Concerning the Arrest Warrant*, holding that there was no possibility of irreparable damage.⁸³ The Congo had requested that the ICJ order Belgium to annul the warrant issued for the arrest of its Minister of Foreign Affairs as a provisional measure because it inflicted irreparable damage on the Congo.⁸⁴ The arrest warrant, which had been transmitted to other states, could have subjected the Congolese Minister of Foreign Affairs to extradition to Belgium to stand trial when he travelled while representing the Congo. When the person in question became the Congolese Minister of Education, the ICJ determined that the position did not require frequent travel and that, therefore, the Congo would not suffer irreparable damage if the arrest warrant was not immediately annulled.⁸⁵

If the potential injury can be compensated by other means, interim measures are not necessary. In the *Aegean Sea* case, the ICJ refused to order Turkey to cease exploration and scientific research in a continental shelf area that was claimed by both Greece and Turkey.⁸⁶ The Court reasoned that reparations could be made “by appropriate means” for the potential harm cited in the Greek application.⁸⁷

78. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 20-21 (Order of Dec. 15).

79. *Id.* at 17-18.

80. *Id.* at 20.

81. *See Nuclear Tests (Austl. v. Fr.)* 1973 I.C.J. 105; *Nuclear Tests (N.Z. v. Fr.)* 1973 I.C.J. 141.

82. *Nuclear Tests (Austl. V. Fr.)* 1973 I.C.J. 105; *Nuclear Tests (N.Z. v. Fr.)* 1973 I.C.J. 135, 141.

83. *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2000 I.C.J. 182, 201 (Dec. 8).

84. *Id.*

85. *Id.*

86. *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1976 I.C.J. 3, 11 (Sept. 11).

87. *Id.*

V. BINDING NATURE OF INTERIM MEASURES

The inter-system harmonization of interim measures can be observed in recent international tribunal holdings that interim measures are binding on States. Decisions by the European Court of Human Rights, the ICJ, and the Inter-American Court of Human Rights resolved the long-standing debate of whether interim measures ordered by international tribunals are binding on States or mere suggestions that States could follow out of goodwill. There is currently, however, no international concurrence that interim measures ordered by quasi-judicial bodies are binding.

A. *International and Regional Tribunals*

It follows that if interim measures are authorized by the treaty and inherent to the judicial duties of international courts, then they must be binding on the parties that have accepted the Court's jurisdiction. The European Court of Human Rights held in *Mamatkulov and Abdurasulovic v. Turkey* that States must comply with Court-ordered interim measures "and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment."⁸⁸ In *Mamatkulov* the European Court informed Turkey that as interim measures it should delay extradition of the applicants pending the Court's decision in the case.⁸⁹ The applicants, who were members of an Uzbek opposition party, were arrested in Turkey pursuant to international arrest warrants charging them with homicide and a terrorist attack against the President of Uzbekistan.⁹⁰ The Republic of Uzbekistan requested their extradition.⁹¹ The applicants denied the charges and countered that they were political dissidents working for the democratization of their country and that political dissidents were being arrested and subjected to torture in prison in Uzbekistan.⁹² Although most States voluntarily complied with European Court indications of interim measures, Turkey did not. It extradited the applicants to Uzbekistan, where they were imprisoned and denied access to the attorneys who were representing them before the European Court.⁹³ The European Court, relying on general principles of law and citing the jurisprudence of several international courts and enforcement bodies, held that Turkey's failure to comply with the Court's indication of

88. See *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶ 110.

89. *Id.* ¶ 109.

90. *Id.* ¶¶ 13, 19.

91. *Id.* ¶¶ 14, 19.

92. *Id.* ¶¶ 17, 23.

93. *Id.* ¶¶ 26, 28, 32.

interim measures resulted in a breach of its obligations under the European Convention.⁹⁴ The Court stated that a State Party must comply with interim measures.⁹⁵ The Court clarified that when a State ratifies a treaty and accepts the competence or jurisdiction of the tribunal charged with the enforcement of the rights protected in the treaty, the State must comply in good faith not only with the substantive provisions of the treaty but also with its procedural and regulatory provisions.⁹⁶

The International Court of Justice held in the *LaGrand Case* that its order of provisional measures was “binding in character and created a legal obligation” and was “not a mere exhortation.”⁹⁷ In *LaGrand*, the ICJ held that the United States had not complied with the Court’s order of provisional measures when the State did not take adequate steps to delay the execution of a German national.⁹⁸ The ICJ had ordered the United States to “take all measures at its disposal to ensure that Walter LaGrand [was] not executed pending the final decision” of the ICJ. The United States merely transmitted the ICJ’s order to the Governor of Arizona without comment, explanation, or a plea for a temporary stay of execution.⁹⁹ Moreover, when Germany brought suit in the U.S. Supreme Court to enforce the ICJ order, the U.S. Solicitor General informed the Supreme Court in a brief letter that “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.”¹⁰⁰ The execution went forward as planned. The ICJ then, for the first time, stated unequivocally that provisional measures are binding on the State.¹⁰¹ In doing so the Court reasoned that the object and purpose of the ICJ Statute and the terms of the article on provisional measures when read in context reveal 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

94. *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶ 111. The European Court had previously held in the *Cruz Varas* case that interim measures ordered by the European Commission were not binding on the parties when there was no specific treaty provision granting such powers. The Court reasoned that the power to order binding interim measures could not be inferred from the Commission’s Rules of Procedure. *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A), at 36 (1991).

95. *See Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶ 110.

96. *Id.* ¶ 109.

97. *See LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, ¶ 110 (June 27).

98. *Id.* ¶ 115.

99. *Id.* ¶ 111.

100. *Id.* ¶ 112. These responses on the part of the United States were held to be insufficient even considering the limited time in which the government had to act. *Id.* ¶¶ 110-12.

101. *Id.* ¶ 112.

prejudice to the rights of the parties as determined by the final judgment of the Court.¹⁰²

The ICJ went on to explain that “[t]he contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.”¹⁰³

The wording of the ICJ Statute that the Court has the power to “indicate” provisional measures that “ought to be taken” was at one time argued to imply that the Court’s adoption of interim measures was a mere suggestion to be complied with out of the goodwill of the State.¹⁰⁴ The ICJ clarified that the Statute’s preparatory work shows that the French word for “indicate” was chosen rather than the word for “order” because the ICJ had no means to enforce its decisions.¹⁰⁵ In *LaGrand* the Court specified that “the lack of means of execution and the lack of binding force are two different matters.”¹⁰⁶ The ICJ found that the U.N. Charter requirement that every U.N. member “undertakes to comply with the decision” of the ICJ should be understood to refer to any decision rendered by the Court, including an order that the State take provisional measures.¹⁰⁷ The Court further stated that even if the word “decision” were to be interpreted to refer solely to an ICJ judgment in the context of the article, it would not preclude the binding nature of provisional measures.¹⁰⁸

The Inter-American Court of Human Rights was the first of the international tribunals explicitly to hold that its provisional measures orders are binding and mandatory.¹⁰⁹ In the *Constitutional Court* case, in which judges of the Peruvian Constitutional Court had been illegally removed from office, the Inter-American Court held that the American Convention provision “makes it mandatory for the state to adopt the provisional measures ordered by this Tribunal.”¹¹⁰ It grounded its decision in “a basic principle of the law of international state responsibility, supported by international jurisprudence, according to which States must fulfil their conventional international obligations in good faith (*pacta sunt servanda*).”¹¹¹ In earlier orders

102. *Id.*

103. *LaGrand Case* (F.R.G. v. U.S.), 2000 I.C.J. 466, ¶ 112 (June 27).

104. *See* Statute of the I.C.J., *supra* note 32, art. 41; *see also* European Rules of Court, *supra* note 39, R. 39(1); ELKIND, *supra* note 20, at 153-66 (noting different approaches as to whether interim protection is binding).

105. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, ¶ 107 (June 27).

106. *Id.*

107. *Id.* at 505-06.

108. *Id.* at 506.

109. *See* Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), ¶ 14 (2000).

110. *Id.*

111. *Id.* The principle of *pacta sunt servanda* has been codified in the Vienna Convention on the Law of Treaties, art. 26, U.N. Doc. A/CONF. 39/27 (1969), *entered into force* Jan. 27, 1980.

the Inter-American Court had merely implied that its orders of provisional measures were mandatory, stating that “[s]tate parties must not take any action that may frustrate the *restitutio in integrum* of the rights of the alleged victims.”¹¹² That statement, although forceful, did not definitively resolve the issue of whether provisional measures were binding in the Inter-American system. The Court’s pronouncement in the *Constitutional Court* case is unequivocal, permitting no measure of doubt as to the Court’s resolution of this question.¹¹³

B. International Quasi-Judicial Bodies

The binding force of interim measures must not be limited solely to tribunals. Even if a quasi-judicial body’s decision on the merits of a complaint arguably may not be binding on States, an interim measures order must still have that effect. When contracting States have authorized quasi-judicial treaty bodies to consider individual applications, the States have obligated themselves implicitly not to interfere with the processing of complaints. It would be incompatible with the obligations voluntarily undertaken by the State for it to act or refrain from acting in such a way as to frustrate the consideration of an individual petition.¹¹⁴

An order that a State take interim measures does not prejudice a decision on the merits.¹¹⁵ It merely prevents destruction of the subject matter of the dispute and protects those involved in bringing the case before an international body. States must comply with orders of interim measures to ensure the effectiveness of final decisions on the merits of the case.¹¹⁶ In many cases, especially those

112. James et al. (Trinidad and Tobago), Provisional Measures, Order of May 27, 1999, Inter-Am. Ct. H.R. (ser. E), ¶ 9 (1999); James et al. (Trinidad and Tobago), Provisional Measures, Order of Aug. 29, 1998, Inter-Am. Ct. H.R. (ser. E), ¶ 7 (1998).

113. Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), ¶ 14 (2000). The Inter-American Court’s decision that provisional measures are binding is further supported by the wording and location in the American Convention of the provision authorizing provisional measures. The wording of the provisional measures article in the American Convention avoids the controversial term “indicate.” It states that the Court “shall adopt” the measures that it deems pertinent—more forceful phrasing that goes beyond mere suggestion. American Convention, *supra* note 23, art. 63(2). Article 63(2) of the American Convention is located in the chapter titled “Jurisdiction and Functions,” thus eliminating what was once a potent argument in the ICJ for the nonbinding nature of the measures.

114. See Piandiong et al. v. Philippines, UNHRC, Decision of Oct. 19, 2000, Comm. No. 869/1999, ¶ 5.1, U.N. Doc. CCPR/C/70/D/869/1999.

115. See UNHRC Rules of Procedure, *supra* note 28, R. 86 (noting that the Committee should inform the state party that its view on interim measures does not imply a determination on the merits of the communication).

116. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Yuge), Order of Sept. 1993, ¶ 35.

cases involving the imminent execution of a prisoner, a final judgment that the prisoner's due process rights had been violated and that the prisoner should, therefore, receive a new trial would be meaningless if the prisoner had already been executed.

The State breaches its commitment under the treaty if it ignores an order of interim measures and, thereby, prevents or frustrates the enforcement body from effectively considering an application or complaint.¹¹⁷ The Inter-American Commission on Human Rights, when requesting that the United States take "the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal,"¹¹⁸ stated "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."¹¹⁹ When the Philippines executed prisoners despite the U.N. Human Rights Committee's order of interim measures to delay the executions, the Committee stated that "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

117. See *Piandiong et al. v. Philippines*, UNHRC, Decision of Oct. 19, 2000, Comm. No. 869/1999, ¶¶ 5.1-5.2, U.N. Doc. CCPR/C/70/D/869/1999.

118. *Detainees at Guantanamo Bay, Cuba v. U.S.*, Decision of Mar. 12, 2002, Inter-Am. Comm. H.R., available at <http://www.cidh.oas.org>.

119. *Id.* (citing Report No. 52/01, Case 55, 12.243, Juan Raul Garza (United States), April 4, 2001, Inter-Am. C.H.R.). In *Garza*, the Commission stated:

With respect to the State's submissions on the non-binding nature of the Commission's precautionary measures, the Commission previously expressed in this Report its profound concern regarding the fact 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 persons, despite the fact that those individuals have proceedings pending before the Commission. It is for this reason that in capital cases the Commission requests precautionary measures from states to stay a condemned prisoner's execution until the Commission has had an opportunity to investigate his or her claims. Moreover, in the Commission's view, 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. Particularly in capital cases, the failure of a member state to preserve a condemned prisoner's life pending review by the Commission of his or her complaint emasculates 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, and accordingly is inconsistent with the state's human rights obligations.

Report No. 52/01, Case 55, 12.243, Juan Raul Garza (United States), April 4, 2001, Inter-Am. C.H.R.

Covenant, or to render examination by the Committee moot and the expression of its views nugatory and futile.”¹²⁰ The U.N. Human Rights Committee also has stated that interim measure orders “are essential to the Committee’s rule under the Protocol” and that a State’s failure to comply with interim measures is a separate breach of its treaty obligations.¹²¹ The U.N. Committee against Torture cited the State party’s obligation to “cooperate with it in good faith” in following orders of provisional measures. It reasoned that “[c]ompliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.”¹²²

It is necessary to the functioning of quasi-judicial bodies charged with the enforcement of human rights treaties that their orders of interim measures be treated as binding.¹²³ When quasi-judicial organs have responsibility for enforcement, there is often no further recourse to protect the rights of the applicants. For example, there is no tribunal that will reconsider a decision by the U.N. Human Rights Committee or the U.N. Committee against Torture. Even in the Inter-American system, which is two-tiered, recourse to the Court is limited to cases against States that have expressly accepted its jurisdiction.¹²⁴ The Inter-American Court has attempted to give support to precautionary measures ordered by the Inter-American Commission, by instituting a presumption that Court-ordered provisional measures are necessary when the Commission previously has ordered precautionary measures on its own authority that were

120. *Piandiong et al. v. Philippines*, UNHRC, Decision of Oct. 19, 2000, Comm. No. 869/1999, ¶ 5.2, U.N. Doc. CCPR/C/70/D/869/1999. In another instance, the Human Rights Committee stated that “[t]he State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee’s requests for interim measures of protection will be respected.” *Weiss v. Austria*, U.N. Human Rights Committee, 77th Sess., Comm. No. 1086/2002, ¶ 11.1.7, U.N. Doc. CCPR/C/77/D/1086/2002 (2002).

121. *See Piandiong et al. v. Philippines*, UNHRC Decision of Oct. 19, 2000, Comm. No. 869/1999, ¶ 5.4, U.N. Doc. CCPR/C/70/D/869/1999.

122. *Cecilia Rosana Núñez Chipana v. Venezuela*, Decision of Nov. 10, 1998, Committee against Torture, Comm. No. 110/1998, ¶ 8, U.N. Doc. CAT/C/21/D/110/1998.

123. The U.N. Committee on Human Rights, which is charged under the Optional Protocol to the International Covenant on Civil and Political Rights, the U.N. Committee against Torture, charged with enforcement of the rights enshrined in the Convention against Torture and Other Cruel, Inhuman or Other Degrading Treatment or Punishment, and the Inter-American Commission on Human Rights are quasi-judicial organs.

124. *See Piandiong et al. v. Philippines*, UNHRC, Judgment of Oct. 19, 2000, Comm. No. 869/1999, ¶ 5.2, U.N. Doc. CCPR/C/70/D/869/1999; *Detainees at Guantanamo Bay, Cuba v. U.S.*, Judgment of Mar. 12, 2002, Inter-Am. C. H.R.; *Cecilia Rosana Núñez Chipana v. Venezuela*, Judgment of Nov. 10, 1998, Committee against Torture, Comm. No. 110/1998, ¶ 8, U.N. Doc. CAT/C/21/D/110/1998.

not effective and another threatening event has occurred subsequently.¹²⁵

VI. CIRCUMSTANCES REPEATEDLY GIVING RISE TO INTERIM MEASURES

Certain factual circumstances, because of their urgent nature and potential for irreparable harm, repeatedly give rise to interim measures on the international plane. These circumstances may involve death penalty cases; extradition or deportation cases wherein the person will be extradited to a State in which he or she will likely face cruel and inhuman treatment or death; threats to those who file petitions or testify against the State in international proceedings; threats or attacks against local human rights organizations, activists, and journalists; threats or attacks against local judges or opposition politicians; protection to allow displaced persons to return to their homes; and requests for medical care to ill prisoners.

A. Pending State-Sponsored Executions

When a State has scheduled the execution of a prisoner, irreparable danger to life is imminent. The ICJ, Inter-American Commission and Court, European Court of Human Rights, and the U.N. Human Rights Committee have ordered States, as interim measures, to delay executions until proceedings before the international body have been completed and it could be determined if the prisoners' due process rights had been violated. The European Court of Human Rights requested, as an interim measure, that Turkey refrain from carrying out the death penalty in the case of the leader of the Kurdistan Workers' Party until the Court could examine the merits of the prisoner's case.¹²⁶ Turkey complied with the order and did not execute Abdullah Ocalan.¹²⁷ The Inter-American Court ordered Trinidad and Tobago to delay the executions of several prisoners on death row until their cases could be considered.¹²⁸ Although the State executed two of the prisoners, it stayed the executions of the other beneficiaries of the interim measures.¹²⁹ The ICJ in the *LaGrand Case*, as described above, ordered the United

125. Digna Ochoa y Plácido et al., Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), ¶ 6 (1999), available at <http://www.corteidh.or.cr> (last visited Oct. 1, 2004).

126. Ocalan v. Turkey, App. No. 4622/99 (Eur. Ct. H.R. 2003), ¶ 5, available at <http://www.echr.coe.int/> (last visited September 30, 2004).

127. Turkey Commutes Death Penalty on Ocalan, ISLAM ONLINE (Oct. 3, 2002), at <http://www.islamonline.net/English/News/2002-10/03/article23.shtml> (last visited Sept. 30, 2004).

128. James et al. (Trinidad and Tobago), Provisional Measures, Order of Aug. 16, 2000, Inter-Am. Ct. H.R. (ser. E), operative ¶ 1 (2000).

129. *Id.* ¶¶ 4, 12.

States to take provisional measures to protect the life of Walter LaGrand, a German citizen, who was scheduled to be executed in Arizona on the same day that Germany filed the request with the Court.¹³⁰ The United States did not comply with the ICJ's order of provisional measures. The majority of cases in which the U.N. Human Rights Committee has requested interim measures have involved petitioners who had been sentenced to death.¹³¹

B. *Extradition or Deportment*

An international body may order interim measures to delay extradition or deportment when the applicant could be subject to the death penalty or cruel and inhumane treatment in the country to which he is to be deported or in the State that has requested his extradition.¹³² The European Court of Human Rights,¹³³ the U.N. Human Rights Committee,¹³⁴ and the U.N. Committee against Torture¹³⁵ have ordered interim measures to delay extradition or deportation. The greatest number of requests for interim measures in the European system have arisen in attempts to block extradition.¹³⁶ In the *Soering* case, the applicant, a German national, faced charges of capital murder in Virginia, and the European Commission requested that the Court indicate as interim measures that the United Kingdom delay the extradition of *Soering* to the United States while the proceedings were pending before the

130. *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 104, ¶¶ 8-9 (Mar. 3), available at <http://www.icj-cij.org> (last visited October 1, 2004).

131. Report by Martin Scheinin, *Summary Record of the First Part (public) of the 487th meeting*, U.N. Committee Against Torture, 27th Sess., ¶ 2, U.N. Doc. CAT/C/SR.487 (2003). See generally *Staselovich v. Belarus*, U.N. Human Rights Committee, 77th Sess., Comm. No. 887/1999 (2003).

132. See *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99, 46951/99 (Eur. Ct. H.R. Feb. 6, 2003), ¶ 55 (noting that requests for interim measures generally concern a person's deportation or extradition to his or her country).

133. See generally *Soering v. U.K.*, App. No. 14038/88 (Eur. Ct. H.R. July 7, 1989), ¶ 24, available at <http://www.echr.coe.int/> (holding that the United Kingdom would violate its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms if it extradited the applicant); *Cruz Varas & others v. Sweden*, App. No. 15576/89 (Eur. Ct. H.R. Mar. 20, 1991), ¶ 55, available at <http://www.echr.coe.int/> (noting that the court granted requests for interim measures in expulsion and extradition cases).

134. *Weiss v. Austria*, U.N. Human Rights Committee, 77th Sess., Comm. No. 1086/2002, ¶ 1.2, U.N. Doc. CCPR/C/77/D/1086/2002 (2002).

135. *Cecilia Rosana Núñez Chipana v. Venezuela*, Decision of Nov. 10, 1998, Committee against Torture, Comm. No. 110/1998, § 8, U.N. Doc. CAT/C/21/D/110/1998.

136. See generally *Thampibillai v. Netherlands*, App. No. 61350/00 (Eur. Ct. H.R. Feb. 27, 2004), available at <http://www.echr.coe.int/> (noting that the applicants should not be expelled to Sri Lanka pending the Court's decision); *Venkadajalararma v. Netherlands*, App. No. 58510/00 (Eur. Ct. H.R. Feb. 17, 2004), available at <http://www.echr.coe.int/> (noting that the applicants should not be expelled to Sri Lanka pending the Court's decision).

European Court.¹³⁷ Although the Virginia prosecutor intended to seek the death penalty, he assured the United Kingdom that at the time of sentencing the appropriate Virginia authorities would inform the court of the United Kingdom's concern that the death penalty not be imposed or carried out.¹³⁸ The prosecutor offered no further assurances.¹³⁹ The United Kingdom complied with the European Court's indication of interim measures and did not extradite the applicant.¹⁴⁰ Conversely, Austria extradited a petitioner to the United States before the U.N. Human Rights Committee could address the petitioner's allegation that he would suffer irreparable harm if extradited. The Committee held that in doing so, Austria had breached its obligations under the Optional Protocol.¹⁴¹

C. *Protection of Petitioners, Witnesses, and National Attorneys*

Petitioners who file complaints with international bodies alleging State responsibility for human rights abuses and the witnesses and attorneys in those cases are often particularly vulnerable to retaliatory measures by the State. Those who testify about government-sponsored human rights abuses may be labelled "enemies of the State" because their testimony sullies the State's international reputation. In addition, local attorneys who take human rights cases may be as vulnerable to retaliation as their clients.¹⁴² Interim measures may be the only effective means of protecting victims, their family members, their attorneys, and witnesses in international human rights cases.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have been in the forefront in ordering provisional measures to protect those who petition or testify before international bodies. The Inter-American Court has stated in this regard that "it is the responsibility of the State to adopt security measures to protect all those who are subject to its jurisdiction; this obligation is even more evident as regards those who are involved in proceedings before the supervisory organs of the American

137. Soering v. U.K., App. No. 14038/88 (Eur. Ct. H.R. July 7, 1989), ¶¶ 3, 4.

138. *Id.* ¶ 20.

139. *Id.*

140. *Id.* ¶ 111.

141. Weiss v. Austria, U.N. Human Rights Committee, 77th Sess., Comm. No. 1086/2002, ¶ 10.1, U.N. Doc. CCPR/C/77/D/1086/2002 (2002).

142. See *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion No. OC-11/90, Aug. 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11, ¶ 32 (1990) (noting that complainants have alleged that they were unable to obtain legal help because of a general fear in the legal community).

Convention.”¹⁴³ After witnesses in the *Honduran Disappearance Cases* had been murdered, the Inter-American Court ordered the Honduran government to take provisional measures to protect all those who had testified or who had been summoned to testify.¹⁴⁴ The Court ordered Honduras to

adopt concrete measures to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights, under conditions authorized by the American Convention and by the rules of procedure of both bodies, is a right enjoyed by every individual and is recognized as such by Honduras as a party to the Convention.¹⁴⁵

The Inter-American Commission granted precautionary measures ordering Colombia to protect the lives of the executive director and attorney of a Colombian human rights organization that had filed several petitions and requests for precautionary measures with the Inter-American Commission.¹⁴⁶ The beneficiaries of the measures had received anonymous death threats.¹⁴⁷ Likewise, the Commission granted precautionary measures to protect the members of the *Comisión Intereclesial de Justicia y Paz*, a prominent Colombian human rights organization that had filed petitions of human rights abuses before the Commission.¹⁴⁸

Situations in which the complainants or witnesses are in danger of death or injury may also become problematic in the European system with the influx of additional States, many of which had not been governed by the rule of law. The African Court, when active, will likely confront similar problems.

143. See Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), ¶ 9 (2000); Digna Ochoa y Plácido et al. (Mexico), Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), ¶ 7 (1999).

144. Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 1, ¶ 45; Godínez Cruz (Merits), Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5, ¶ 45 (1989).

145. Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 1, ¶ 45; Godínez Cruz (Merits), Judgment of Jan. 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5, ¶ 45 (1989).

146. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 23 (Dec. 29, 2003), available at <http://www.cidh.org> (describing Flórez Schneider et al. v. Colombia).

147. *Id.*

148. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 24 (Dec. 29, 2003), available at <http://www.cidh.org> (describing *Comisión Intereclesial de Justicia y Paz v. Colombia*).

D. Protection of Human Rights Organizations, Activists, and Journalists

Human rights activists may be threatened or persecuted locally because of their human rights advocacy, and national courts may not have the power to provide adequate protection.¹⁴⁹ These cases have been particularly prevalent in the Inter-American human rights system. The Inter-American Commission stated in its 2003 Annual Report that the situation of human rights defenders in Guatemala

has progressively worsened. In recent years there has been an increase in the number of threats, acts of harassment, searches of headquarters of human rights organizations and homes of human rights defenders, and assaults and assassinations targeting defenders. These actions are part of a pattern of intimidation of human rights defenders, identifiable by the profile of the victims, the methods of intimidation, and the motives behind them. The main goal of this pattern of intimidation against human rights defenders is to prevent effective action by the judicial branch in cases of human rights violations committed during the armed conflict.¹⁵⁰

Guatemala is not the only state in which human rights activists are targeted and in need of the protection that interim measures can offer. In Colombia, the president and attorney for a Colombian human rights organization was assassinated even though the Inter-American Commission had ordered the government to provide him with protection as a precautionary measure.¹⁵¹ The Inter-American Court then ordered Colombia to take provisional measures to protect the other human rights workers in the organization.¹⁵² In Mexico, the Inter-American Court ordered provisional measures after Digna Ochoa, a human rights activist and attorney for a Mexican nongovernmental organization, was kidnapped; other members were threatened; and the office of the organization was ransacked.¹⁵³ The Court ordered Mexico to adopt provisional measures to protect those

149. Álvarez et al. (Colombia), Provisional Measures, Order of July 22, 1997, Inter-Am. Court H.R. (ser. E) (1997); Giraldo Cardona et al. (Colombia), Order of Oct. 28, 1996, Inter-Am. Ct. H.R. (ser. E) (1996); Digna Ochoa y Plácido et al. (Mexico), Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E) (1999).

150. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. IV, Guatemala, ¶ 37 (Dec. 29, 2003), available at <http://www.cidh.org>.

151. Giraldo Cardona et al. (Colombia), Provisional Measures, Order of Nov. 27, 1998, Inter-Am. Ct. H.R. (ser. E), res. 1-2 (1998).

152. Giraldo Cardona et al. (Colombia), Order of Oct. 28, 1996, Inter-Am. Ct. H.R. (ser. E) (1996).

153. Digna Ochoa y Plácido et al. (Mexico), Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), ¶ 2 (1999).

working in or visiting the human rights center.¹⁵⁴ Although provisional measures have not been consistently successful, in many cases they have been instrumental in ending death threats and preventing future harm to human rights advocates.

Newspapers, journalists, and television stations that report on official transgressions or that are otherwise critical of the government may be threatened and require interim measures. The Inter-American Commission noted in its 2003 Annual Report that there was an “alarming increase in intimidations against the media” in Guatemala.¹⁵⁵ For instance, Guatemalan journalist María de los Ángeles Monzón Paredes and her family were threatened because of her writing on crucial human rights issues.¹⁵⁶ As a result the Inter-American Commission ordered the Guatemalan government to take precautionary measures to protect her.¹⁵⁷ The Inter-American Court also issued provisional measures to protect the lives and safety of journalists who worked for the Venezuelan television station Radio Caracas Televisión after one journalist was murdered and others had been shot, beaten, or threatened.¹⁵⁸ The Inter-American Commission likewise granted precautionary measures and ordered the government of Haiti to protect a journalist and a radio correspondent who had been subjected to death threats.¹⁵⁹ Freedom of the press is essential to the protection of human rights, and interim measures may provide one means to protect the lives of journalists who put themselves at risk by writing accounts of human rights abuse.

154. *Id.* res. 1-2; see also Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 11 (Dec. 29, 2003) (describing Jorge Custodio et al. v. Brazil, in which the coordinator of a human rights NGO and his family had been subject to threats because of a report on the torture of prison inmates that resulted in the replacement of prison officials); Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 12 (Dec. 29, 2003) (discussing Gomes da Silva et al. v. Brazil, in which a member of an NGO against torture had been kidnapped, held for several hours and threatened).

155. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. IV, Guatemala, ¶ 41 (Dec. 29, 2003).

156. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 39 (Dec. 29, 2003) (describing María de los Ángeles Monzón Paredes v. Guatemala).

157. *Id.*

158. Luisiana Ríos et al. v. Venezuela, Provisional Measures, Order of Nov. 27, 2002, Inter-Am. Ct. H.R. (ser. E), ¶ 2, operative ¶ 1.

159. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 52 (Dec. 29, 2003) (describing Liliane Pierre-Paul et al. v. Haiti).

E. *Protection for Local Judges and Opposition Politicians*

Local judges who rule against the government or against powerful political factions may have need of the temporary protection offered by internationally mandated interim measures. In the *Chunimá Case*, two Guatemalan judges who investigated the murders of human rights activists and then issued arrest warrants for the alleged perpetrators were threatened and forced into hiding.¹⁶⁰ The Inter-American Court ordered Guatemala to protect the judges as well as the members of the human rights group.¹⁶¹ Likewise, the Inter-American Court ordered provisional measures orders to protect a member of the Peruvian Constitutional Court who had been dismissed and harassed after holding that a law allowing President Fujimori to run for a third term of office was unconstitutional.¹⁶² Those measures were lifted when the beneficiary was subsequently reinstated on the Court.¹⁶³ Similarly, the Inter-American Commission ordered Guatemala to provide protection to the members of the Constitutional Court who received death threats when they were considering the registration of Rios Montt as a presidential candidate.¹⁶⁴ In that case, one of the judges had to be airlifted from his home when his building was taken over by Rios Montt sympathizers.¹⁶⁵ Intimidation of the judiciary cannot be allowed if human rights are to receive judicial protection. Interim measures may protect judges and also provide negative publicity to curtail the abuses.

Opposition political candidates may also be threatened or murdered, thereby jeopardizing the political process. In the *Aleman Lacayo Case*, the Inter-American Court originally ordered provisional measures to protect a presidential candidate in Nicaragua whose motorcade had been attacked by heavily armed men.¹⁶⁶ The measures were lifted when the beneficiary of the measures was

160. *Chunimá Case* (Guatemala), Provisional Measures, Order of the President July 15, 1991, Inter-Am. Ct. H.R. (ser. E), ¶ 6 (1991).

161. *Chunimá Case* (Guatemala), Provisional Measures, Order of Aug. 1, 1991, Inter-Am. Ct. H.R. (ser. E), ¶¶ 1, 2 (1991).

162. Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), ¶ 2, operative ¶ 1 (2001).

163. Constitutional Court (Peru), Provisional Measures, Order of Mar. 14, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 3 (2001).

164. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L./V./II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 43 (Dec. 29, 2003) (describing Rodolfo Rohrmorser et al.).

165. *Id.*

166. *Aleman Lacayo Case* (Nicaragua), Provisional Measures, Order of Feb. 2, 1996, Inter-Am. Ct. H.R. (ser. E), ¶ 3 (1996)

elected President of Nicaragua.¹⁶⁷ Protection of human rights is directly linked to a functioning democracy. Interim measures may be a last resort to end the attempted subversion of the democratic process.

F. Protection to Allow Displaced Persons to Return to Their Homes

Individuals and their families who have received death threats are sometimes forced to flee their homes or even their countries. Human rights bodies have ordered interim measures to allow these people to return safely. The Inter-American Commission and the Inter-American Court have issued orders requiring States to take measures to protect certain persons returning to the State or, when internally displaced, to their homes within a State. In the *Peace Community of San Jose de Apartadó* case, the Court ordered Colombia to take provisional measures to protect the residents of a community that was being targeted for attempting to maintain its neutrality in the midst of civil conflict.¹⁶⁸ Forty-seven of the approximately twelve hundred community members had been murdered in a nine month period.¹⁶⁹ The Court not only ordered that the State protect the community but also that it provide the necessary conditions for those who had been forced to leave to be able to return to their homes.¹⁷⁰ Also, in the *Loayza Tamayo Case*, in which Peru had incarcerated and tortured a university professor, the victim sought asylum in Chile when she was released from a Peruvian prison.¹⁷¹ In response to a request on her behalf, the Inter-American Court ordered Peru to take provisional measures to “guarantee to Mrs. Loayza Tamayo the necessary conditions of security for her to be able to return to the country without fear of suffering negative consequences to her physical safety, mental health and moral integrity.”¹⁷²

In other cases, individuals have been expelled from their countries of residence without due process. In the *Haitians and*

167. *Aleman Lacayo Case* (Nicaragua), Provisional Measures, Order of Feb. 6, 1997, Inter-Am. Ct. H.R. (ser. E), ¶¶ 2, 3 (1997).

168. *Peace Community of San José de Apartadó* (Colombia), Provisional Measures, Order of Nov. 24, 2000, Inter-Am. Ct. of H.R. (ser. E), ¶ 9(c) (2000), available at <http://www.corteidh.or.cr>.

169. *Id.* ¶ 2.

170. *Id.* ¶ 16; see also *Giraldo Cardona*. (Colombia), Provisional Measures, Order of Feb. 5, 1997, Inter-Am. Ct. H.R. (ser. E), ¶ 5 (1997), available at www.corteidh.or.cr.

171. *Loayza Tamayo Case* (Peru), Provisional Measures, Order of Feb. 3, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 1(c) (2001) available at www.corteidh.or.cr.

172. *Id.* ¶ 10.

Dominicans of Haitian Descent in the Dominican Republic case,¹⁷³ the Dominican Republic was accused of engaging in mass expulsions of persons to Haiti on the basis of skin color.¹⁷⁴ The Court ordered the Dominican Republic to permit the immediate return to its territory of certain persons who had been deported to Haiti.¹⁷⁵ These orders are more easily administered when the beneficiary is a single person or family rather than a large group.

G. Medical Assistance to Prisoners

Prisoners or their family members, who have filed individual complaints with international enforcement bodies, sometimes ask the international organ to order that the prisoner receive needed medical attention. One of the most common scenarios giving rise to U.N. Human Rights Committee interim measures concerns the alleged victim's health.¹⁷⁶ In an early case, the Committee ordered Uruguay to provide medical treatment to a prisoner who had a heart condition.¹⁷⁷ The State complied and subsequently reported that the prisoner had undergone surgery.¹⁷⁸ In the *Cesti Hurtado Case*, the Inter-American Court ratified the order of its President that Peru take urgent measures to ensure the physical, psychological, and moral health of the prisoner Cesti Hurtado and provide "adequate medical treatment for his heart problems."¹⁷⁹ The Inter-American Commission requested that Mexico take precautionary measures to provide medical care for a seventy-one-year-old diabetic prisoner who was suffering the effects of inadequate treatment.¹⁸⁰ Mexico responded that the prisoner was receiving medical care at a hospital

173. *Haitians & Dominicans of Haitian Descent in the Dominican Republic* (Dominican Republic), Provisional Measures, Order of Aug. 18, 2000, Inter-Am. Ct. H.R., available at www.corteid.or.cr.

174. *Id.* ¶¶ 1-2.

175. *Id.* resolution ¶ 4.

176. P.R. GHANDHI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION* 58 (1998). Alternately, as explained by Martin Scheinin, a member of the Human Rights Committee and Special Rapporteur for New Communications, the Committee may send "a note verbale to the State party [under Rule 91] asking it to provide information; in some cases, the Committee was concerned about a particular fact, for example the state of health of the incarcerated author of a communication, when it would ask the State party to see to it that the person received proper care." *Summary Record of the First Part (public) of the 487th meeting*, U.N. Committee Against Torture, 27th Sess., ¶ 2, U.N. Doc. CAT/C/SR.487 (2003).

177. U.N. Human Rights Committee, 15th Sess., Comm. No. 10/1977, ¶¶ 1.4, 2, U.N. Doc. CCPR/C/15/D/10/1977 (1982) (describing *Alberto Altersor v. Uruguay*).

178. *Id.* ¶ 5.2.

179. *Cesti Hurtado Case* (Peru), Provisional Measures, Order of Sept. 11, 1997, Inter-Am. Ct. H.R. (ser. E), 6, available at <http://www.corteid.or.cr>.

180. Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L/V/II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 57 (Dec. 29, 2003) (describing *Mariano Bernal Fragoso v. Mexico*).

and that the State was studying the possibility of release from prison because of his physical health and age.¹⁸¹ Maintenance of the health of prisoners whose cases are before international tribunals is essential if any remedy granted by that organ is to be meaningful.

VII. COMPARATIVE PROCEDURES

The rules of each enforcement body set forth the procedures that must be followed by the petitioner in requesting interim measures and by the enforcement body in granting them. The Statute, Rules of Procedure, and practice of the ICJ have served as a model for interim measures for other tribunals and enforcement bodies.¹⁸²

The urgent nature of requests for interim measures mandates that international bodies have expedited procedures to deal with requests. The U.N. Human Rights Committee realized the need for expedited procedures when its request that Belarus not execute a petitioner was not issued until months after the execution had been carried out.¹⁸³ The Committee noted

with regret that, by the time it was in a position to submit its Rule 86 request, the death sentence had already been carried out. The Committee understands and will ensure that cases susceptible of being subject to Rule 86 requests will be processed with the expedition necessary to enable its requests to be complied with.¹⁸⁴

In all instances, the plenary tribunal or committee is the primary body authorized to order a State to take interim measures. If the plenary body is not in session when the request is received, however, a representative—usually the President, the designated Rapporteur, or the other judges—may order the measures. For example, the Rules of the European Court authorize a chamber of the Court or the Court's President to indicate interim measures.¹⁸⁵ The Rules of the Inter-American Court specify that

[i]f the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible, with the other judges, shall call upon the government concerned to adopt urgent measures as may

181. *Id.*

182. See Hector Gros Espiell, *El Procedimiento Contencioso Ante la Corte Interamericana de Derechos Humanos* [Contentious Procedure Before the Inter-American Court of Human Rights], in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS [THE INTER-AMERICAN COURT OF HUMAN RIGHTS] 67, 73, 83 (Inter-American Institute of Human Rights, n.d.).

183. U.N. Human Rights Committee, 77th Sess., Comm. No. 887/1999, ¶ 1.2, U.N. Doc. CCPR/C/77/D/887/1999 (2003) (describing Staselovich v. Belarus).

184. *Id.* ¶ 1.3.

185. European Rules of Court, *supra* note 39, R. 39(1).

be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court at its next session.¹⁸⁶

The Rules of the Inter-American Commission, a body which also sits only part-time, provides that its President or, if he or she is not available, one of the Vice-Presidents, shall consult with the other members of the Commission to make the decision.¹⁸⁷ The American Convention also authorizes the Commission to request that the Court order a State to take provisional measures even before the Court is seised of a case.¹⁸⁸ The Rules of Procedure of the U.N. Committee against Torture more broadly authorize that the Committee, a working group of the Committee, or the Rapporteur for new complaints and interim measures may request that the State take steps to avoid irreparable damage to the victims.¹⁸⁹ If the request to the State is not made by the plenary Committee, all Committee members must be informed.¹⁹⁰ Provision for immediate consideration of requests for interim measures is essential to their effectiveness in saving lives.

A. *Parties Authorized to Petition an International Body to Order Interim Measures*

Interim measures can be requested unilaterally by any party to the case or may be ordered by the enforcement body on its own motion.¹⁹¹ Broad access to request interim measures is in keeping with the understanding that few obstacles should be placed in the path of the international body when it is called upon to order interim measures.¹⁹² The Rules of the European Court permit parties to the case and “any other person concerned” to request such measures.¹⁹³ This expansion of the provision could be important when the request is made by a witness who is not also a party to the case. The Inter-American Court has recently expanded its Rules of Procedure to

186. Rules of Procedure of the Inter-American Court of Human Rights, Nov. 24, 2000 partially reformed during its LXI Ordinary Period of Nov. 20-Dec. 4, 2003, art. 25(5), available at www.corteidh.or.cr [hereinafter Rules of Procedure Inter-Am. Ct.].

187. Rules of Procedure of the Inter-American Court of Human Rights, art. 25(2).

188. American Convention, *supra* note 33, art. 63(2).

189. Committee Against Torture, Rules of Procedure, *supra* note 28, R. 108(1).

190. *Id.* R. 108(3).

191. See I.C.J. Rules of the Court, *supra* note 62, arts. 73-75. The beneficiaries of interim measures are generally the individuals who are threatened. Before the ICJ, the official beneficiary of provisional measures is the state that requested them, although the actual beneficiary would be the individual on whose behalf the State acted.

192. See *id.* art. 74 (treating a decision on a request for interim measures as a matter of urgency and providing that a request for provisional measures must be accorded priority over all other cases).

193. European Rules of Court, *supra* note 39, R. 39(1).

provide that “[i]n contentious cases already submitted to the Court, the victims or alleged victims, their next of kin, or their duly accredited representatives, may present a request for provisional measures directly to the Court.”¹⁹⁴ Parties to the case usually request such measures when they themselves or their family members are in danger.

Most international enforcement bodies are authorized to order interim measures *proprio motu* without a formal request, thus, in appropriate circumstances, avoiding unnecessary delays. The Rules of the European Court of Human Rights specify that the Court may “of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.”¹⁹⁵ The Rules of the ICJ provide that the Court may indicate provisional measures *proprio motu*.¹⁹⁶ The ICJ has concluded that based on this authority it is authorized to indicate provisional measures even should one party fail to appear before the Court.¹⁹⁷ The ICJ holds that “the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures.”¹⁹⁸ In the Inter-American system, when the case is before the Inter-American Court, the Court is authorized to order provisional measures on its own motion at any stage of the proceedings.¹⁹⁹ If the case is before the Commission and has not yet been referred to the Court, the Court may order provisional measures upon the request of the

194. Rules of Procedure Inter-Am. Ct., *supra* note 186, art. 25(3).

195. European Rules of Court, *supra* note 39, R. 39(1). Rule 39 states:

(1) The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. (2). Notice of these measures shall be given to the Committee of Ministers. (3). The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

Id. R. 39.

196. I.C.J. Rules of the Court, *supra* note 62, art. 75(1). In the *LaGrand Case*, although Germany requested provisional measures, the ICJ stated that it ordered provisional measures *proprio motu*. *LaGrand Case* (F.R.G. v. U.S.), 1999 I.C.J. 104, ¶¶ 5, 22, 29 (Mar. 3).

197. *Nuclear Tests (Austl. v. Fr.)* 1973 I.C.J. 99; *Nuclear Tests (N.Z. v. Fr.)* 1973 I.C.J. 135, 137 (1973); *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1976 I.C.J. 3, 6 (Sept. 11); *Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 13 (Dec. 15).

198. *Aegean Sea Continental Shelf (Greece v. Turk.)*, 1976 I.C.J. 3, 6 (Sept. 11).

199. American Convention, *supra* note 33, art. 63(2); Rules of Procedure Inter-Am. Ct., *supra* note 186, art. 25(1).

Commission.²⁰⁰ The Inter-American Commission can also, on its own initiative, order a State to take precautionary measures.²⁰¹

B. *Prima Facie Jurisdiction*

A court must have jurisdiction over the parties in order to rule on a request for provisional measures. Because of the urgent nature of a request, the ICJ does not require a full hearing that will allow it to fully determine whether it has jurisdiction on the merits. Rather, it will order measures when the applicant establishes a *prima facie* case for jurisdiction.²⁰² The ICJ has stated in this regard that

[w]hereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.²⁰³

The U.N. Committee against Torture's Special Rapporteur for New Communications and Interim Measures may request that a State take interim measures even before the Committee has made a decision on admissibility.²⁰⁴

C. *Discretion to Order Interim Measures*

International enforcement organs have discretion as to whether to order a State to take interim measures. Requests for interim measures are granted on an *ad hoc* basis considering all the facts and circumstances of each case. The European Rules of Court provide that the Court "may . . . indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it."²⁰⁵ The Inter-American Court's Rules of Procedure further support this discretionary nature by providing that the Court may order any provisional measures that it "deems pertinent."²⁰⁶ Thus, the courts

200. American Convention, *supra* note 33, art. 63(2); Rules of Procedure Inter-Am. Ct., *supra* note 186, art. 25(2).

201. Rules of Procedure Inter-Am. Comm. H.R., *supra* note 41, art. 25(1).

202. Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99, 101, *reprinted in* 12 I.L.M. 749, 750; Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135, 137.

203. Nuclear Tests (Austl. v. Fr.) 1973 I.C.J. 99, 101, *reprinted in* 12 I.L.M. 749, 750; Nuclear Tests (N.Z. v. Fr.) 1973 I.C.J. 135, 137; *see also* Fisheries Jurisdiction (F.R.G. v. Ice.), 1972 I.C.J. 30, 33 (Aug. 17).

204. See Committee Against Torture, Rules of Procedure, *supra* note 28, R. 108(1); *Summary Record of the First Part (public) of the 487th meeting*, U.N. Committee Against Torture, 27th Sess., ¶ 4, U.N. Doc. CAT/C/SR.487 (2003).

205. European Rules of Court, *supra* note 39, R. 39(1).

206. Rules of Procedure Inter-Am. Ct., *supra* note 186, art. 25(1).

have discretion to determine whether they will order interim measures, and if so, what type of measures are justified in a particular situation. The authority to grant interim measures is not limited to those measures requested by a party. The enforcement body may indicate measures that are partially or totally different from those requested, or it may adopt measures which must be taken by the party that made the request.²⁰⁷

International organs do not order interim measures *de rigour*. The Inter-American Court has stated that this power of the Court is "an extraordinary instrument, one which becomes necessary in exceptional circumstances."²⁰⁸ It holds that exceptional circumstances are present when there is a *prima facie* situation of grave and urgent danger.²⁰⁹ The Inter-American Court applies a presumption that provisional measures are called for in cases in which the Inter-American Commission has independently requested that the State take such measures, and the Commission-requested measures have been ineffective.²¹⁰ The Commission's measures are usually deemed to have been ineffective when there has been another incident in which the beneficiaries of the measures have been further threatened or harmed.²¹¹ The ICJ has also characterized its authority to order provisional measures as an "exceptional power."²¹²

D. Prior Hearing

Some controversy exists as to whether an international body must hold a hearing to consider the views of the State before the issuance of interim measures. Although ordering interim measures without a prior hearing is an extraordinary procedure, international bodies must be authorized to dispense with a hearing when there are overwhelming and compelling reasons for so doing. Historically, the ICJ did not order a State to take provisional measures without first

207. I.C.J. Rules of the Court, *supra* note 62, art. 75(2).

At the request of a party, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification. . . . [T]he Court shall afford the parties an opportunity of presenting their subject.

Id. art. 76(1).

208. Chunimá Case, (Guatemala), Provisional Measures, Order of Aug. 1, 1991, Inter-Am. Ct. H.R. (ser. E), ¶ 6(b) (1991), available at www.corteidh.or.cr.

209. Digna Ochoa y Plácido et al. (Mexico), Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), ¶ 5 (1999), available at www.corteidh.or.cr.

210. *Id.* ¶ 6.

211. *See id.*

212. Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, 11 (Sept. 11).

hearing the arguments of the parties.²¹³ If the Court was not sitting when the request was made, it was convened to allow the parties to present their observations.²¹⁴ Pending the oral hearing, the President of the Court could call upon the parties to act in such a way as would enable a potential order of provisional measures to be effective.²¹⁵ In the *LaGrand Case*, however, in which the beneficiary of the measures was to be executed on the day the ICJ ordered the measures, the ICJ for the first time ordered provisional measures without holding a hearing.²¹⁶ Judge Schwebel, in a separate opinion, questioned whether the failure to hold a hearing was “consistent with the fundamental rules of the procedural equality of the parties.”²¹⁷

Especially when courts or enforcement bodies meet on a part-time basis, irreparable damage could be done between sessions. Moreover, it is expensive and time-consuming to immediately convene a tribunal or enforcement body whose members reside in different States. Therefore, some international monitoring bodies have, when necessary, dispensed with a prior hearing or have developed procedures whereby a hearing can take place after the initial order of interim measures. For example, the Rules of the Inter-American Court provide that the Court “may” hold a public hearing but is not obligated to do so.²¹⁸

Although there is a valid argument that there is no equality of arms if the monitoring body does not hold a prior hearing to consider a request for interim measures, the problem will only temporarily inconvenience the State and is for the greater good of the individuals involved in the case. Interim measures by their nature must be ordered quickly if they are to be beneficial in most cases. A hearing can be held after provisional measures are ordered to determine if the measures should be revoked.

E. *The Period of Effectiveness of Interim Measures*

The period of effectiveness of interim measures is specific to the facts and circumstances of each case. While the basic requirements that led to the adoption of interim measures continue to exist, the

213. See *La Grand Case* (F.R.G. v. U.S.), 1999 I.C.J. 104, ¶ 1 (Mar. 3) (separate opinion of President Schwebel).

214. I.C.J. Rules of the Court, *supra* note 62, art. 74(3).

215. *Id.* art. 74(4). The term “equality of arms” refers to the procedural equality of the parties.

216. *La Grand Case* (F.R.G. v. U.S.), 1999 I.C.J. 104, ¶ 21 (Mar. 3).

217. *Id.* ¶ 1 (separate opinion of President Schwebel); see also Michael K. Addo, *Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations*, 10 EUR. J. INT’L. L. 713, 718-20 (1999) (“The principle of equality of arms is an inherent part of the right to a fair hearing in any litigation, including incidental proceedings before the ICJ.”).

218. Rules of Procedure Inter-Am. Ct., *supra* note 186, art 25(7).

measures must be maintained in effect.²¹⁹ The international body may extend its orders of interim measures when the threat continues to be grave and urgent. The situation calling for interim measures may last for years and, thus, require repeated extensions of interim measures. An example is the *Colotenango* case in the Inter-American system in which the Inter-American Court initially ordered provisional measures in 1994 to protect persons who had witnessed an attack by Guatemalan civil patrols against unarmed participants in a human rights demonstration.²²⁰ The measures were periodically expanded to cover the relatives and attorneys of those witnesses who were also at risk.²²¹ The provisional measures were in effect for over seven years.²²²

Orders of interim measures are made for a set period of time. If, during that period or at its conclusion, the international body is convinced that the requirements of extreme gravity and urgency no longer exist, it will lift or refuse to renew the measures.²²³ In this regard, the Rules of the ICJ provide that upon a party's request for the revocation or modification of provisional measures, the Court will consider the observations of the parties before determining whether a change in the situation justifies the requested revocation or modification of the measures.²²⁴ Although the rules of some international judicial and quasi-judicial bodies do not address the termination of interim measure, their jurisprudence may establish the principle. It is in the interest of judicial efficiency that measures that are no longer necessary be withdrawn. Moreover, States are more likely to comply with Court-ordered provisional measures if those measures are terminated when they are no longer warranted.

A court or tribunal will lift interim measures when the circumstances that resulted in the adoption of measures no longer exist or are found never to have existed. In *Einhorn v. France*, the European Court lifted its order to France to delay the extradition of

219. Constitutional Court (Peru), Provisional Measures, Order of Mar. 14, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 3 (2001), available at <http://www.corteidh.or.cr> (n.d.).

220. *Colotenango* (Guatemala), Provisional Measures, Order of June 24, 1994, Inter-Am. Ct. H.R. (ser. E), ¶ 3, operative ¶ 1 (1994), available at <http://www.corteidh.or.cr>.

221. *Colotenango* (Guatemala), Provisional Measures, Orders of Dec. 1, 1994, Sept. 19, 1997, Feb. 2, 2000, Inter-Am. Ct. H.R. (ser. E), available at <http://www.corteidh.or.cr> (expanding interim protection to Mrs. Francisca Sales-Martin).

222. See Annual Report of the Inter-American Court of Human Rights, Inter-Am. Ct. H.R., OEA/Ser.L/V/III.54, doc. 4, ¶ 42 (Feb. 18, 2000), available at <http://www.corteidh.or.cr>.

223. Committee against Torture, Rules of Procedure, *supra* note 28, R. 108(6)-(7). Rules 108(6) and (7) provide that "[t]he State party may inform the Committee that the reasons for the interim measures have lapsed or present argument why the request for interim measures should be lifted. The Rapporteur, the Committee or the Working Group may withdraw the request for interim measures." *Id.*

224. I.C.J. Rules of the Court, *supra* note 62, art. 76.

Einhorn to the United States upon the assurance that he would receive a new trial in the U.S. and that he would not be subject to the death penalty.²²⁵ In *Shamayev and 12 Others v. Georgia and Russia*, the European Court was persuaded by assurances of the authorities of Georgia and Russia that when the Chechen prisoners were extradited to Russia they would be guaranteed unhindered access to medical treatment, legal counsel, and the European Court.²²⁶ The Court, therefore, refused to renew the measures that had required a delay of extradition.²²⁷

The Inter-American Court has lifted provisional measures in a range of circumstances. It lifted provisional measures in the *Ivcher Bronstein Case* subsequent to Peru's cancellation of arrest warrants, annulment of court proceedings against the victim, and restoration of the alleged victim's Peruvian nationality and shareholder status in a television station.²²⁸ In the *Suárez Rosero* case against Ecuador, the urgent measures initially ordered by the Court's President were lifted by the plenary Court when the beneficiary of the measures was released from prison.²²⁹ In the *Vogt* case, the Court lifted provisional measures protecting a priest in Guatemala because the threat and other acts of harassment had abated and the priest was able to conduct his pastoral activities unhindered.²³⁰ In some instances, provisional measures will be lifted for one or more beneficiaries who declare that they are no longer in need of protection, while they are maintained for the other beneficiaries of the measures.²³¹

225. Einhorn v. France, App. No. 71555/01 (Eur. Ct. H.R. 2001), ¶¶ 9-10, 26, available at <http://www.echr.coe.int/eng>.

226. Shamayev & 12 Others v. Georgia & Russia, App. No. 36378/02 (Eur. Ct. H.R. 2003), available at <http://www.echr.coe.int/eng>.

227. *Id.*

228. Ivcher Bronstein Case (Peru), Provisional Measures, Order of Mar. 14, 2001, Inter-Am. Ct. H.R. (ser. E), ¶ 4 (2001), available at <http://www.corteidh.or.cr>.

229. Suárez Rosero Case (Ecuador), Provisional Measures, Order of June 28, 1996, Inter-Am. Ct. H.R. (ser. E), ¶ 2, res. (1996), available at <http://www.corteidh.or.cr>.

230. Vogt Case (Guatemala), Provisional Measures, Order of Nov. 11, 1997, Inter-Am. Ct. H.R. (ser. E), ¶ 4 (1997), available at <http://www.corteidh.or.cr> (quoting the Commission's brief of October 27, 1997); see also Serech & Saquic Case (Guatemala), Provisional Measures, Order of Sept. 19, 1997, Inter-Am. Ct. of H.R. (ser. E), ¶ 4, res. 1 (1997), available at <http://www.corteidh.or.cr> (provisional measures lifted because harassment of protected persons abated); Cesti Hurtado Case (Peru) Provisional Measures, Order of Aug. 14, 2000, Inter-Am Ct. H.R. (ser. E), ¶¶ 8-9, res. 1 (2000), available at <http://www.corteidh.or.cr> (provisional measures lifted because individual was released from prison); Paniagua Morales et al. & Vásquez et al. (Guatemala), Provisional Measures, Order of Nov. 27, 1998, Inter-Am. Ct. H.R. (ser. E) (1998), available at <http://www.corteidh.or.cr>.

231. See Giraldo Cardona Case (Colombia), Provisional Measures, Order of June 19, 1998, Inter-Am. Ct. H.R. (ser. E), ¶ 2, res. 1 (1998), available at <http://www.corteidh.or.cr> (Court lifted provisional measures for two protected persons because one stated that he had received no threats and the other stated that she was out of the country); see also Caballero Delgado & Santana Case (Colombia), Provisional

The conclusion of a case will not necessarily result in the lifting of interim measures when the victims and witnesses are still in danger. For example, after the Inter-American Court issued its judgment on reparations in the *Caballero Delgado and Santana Case*, it lifted the provisional measures ordered to protect the witnesses.²³² Only days later, the beneficiaries of the measures petitioned the Court to reinstate them at least until the domestic proceedings and investigations ended.²³³ All parties involved, including the Commission and the State, concurred that the measures should be reinstated, and the Court complied.²³⁴ Witnesses in cases before human rights organs may continue to be targeted long after the case has been closed.

The enforcement body may refuse to lift provisional measures when it cannot be verified that the situation that precipitated the request has improved. In the *Clemente Teherán et al. Case*, the Inter-American Commission lost contact with the members of the indigenous community in Colombia that had initially reported the human rights violations.²³⁵ After a prolonged period, the Commission and the State asked the Inter-American Court to terminate the provisional measures.²³⁶ The Court refused the request, stating that it did not have sufficient information that the situation that had triggered the initial order of provisional measures had ceased.²³⁷ Therefore, the Court stated that “the lifting of the provisional measures is not justified.”²³⁸ A refusal to lift the measures when the petitioners fail to communicate may minimize State attempts to intimidate petitioners into abandoning their petitions. Conversely, if, as it appears, interim measure requests continue to increase and the duration of provisional measure orders extends for several years, the burden on the enforcement organs, each with a limited staff, threatens to overwhelm human rights systems.

Measures, Order of June 3, 1999, Inter-Am. Ct. H.R. (ser. E), ¶ 4, res. 1 (1999), available at <http://www.corteidh.or.cr> (provisional measures lifted for two protected persons because neither had received any threats).

232. *Caballero Delgado & Santana Case* (Colombia), Provisional Measures, Order of Jan. 31, 1997, Inter-Am. Ct. H.R. (ser. E), ¶¶ 1-2, res. 1 (1997), available at <http://www.corteidh.or.cr>.

233. *Caballero Delgado & Santana Case* (Colombia), Provisional Measures, Order of Apr. 16, 1997, Inter-Am. Ct. H.R. (ser. E), ¶¶ 4-6 (1997), available at <http://www.corteidh.or.cr>.

234. *Id.* res. 1.

235. *Clemente Teherán et al. Case* (Colombia), Provisional Measures, Order of June 19, 1998, Inter-Am. Ct. H.R. (ser. E), ¶ 3 (1998), available at <http://www.corteidh.or.cr>.

236. *Clemente Teherán et al. Case* (Colombia), Provisional Measures, Order of Aug. 12, 2000, Inter-Am. Ct. H.R. (ser. E), ¶¶ 3, 11 (2000), available at <http://www.corteidh.or.cr>.

237. *Id.* ¶ 7.

238. *Id.*

VIII. OVERSIGHT OF STATE IMPLEMENTATION OF INTERIM MEASURES

The court or other enforcement body that orders a State to take interim measures will normally oversee State compliance.²³⁹ In doing so, it may require that the State and beneficiaries periodically provide information on the effects of the measures taken by the State. In the alternative, the court or enforcement body may request information on the effectiveness of the measures. To this end, the Rules of the ICJ provide that the Court may request relevant information from the parties on any aspect of the implementation of the provisional measures it has ordered.²⁴⁰ Likewise, the European Court "may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."²⁴¹ Even after the measures are lifted, the situation may require periodic oversight. When the Inter-American Commission petitions the Inter-American Court to lift provisional measures, it generally volunteers to continue to oversee the situation for any future problems.²⁴² Monitoring the effects of interim measures protects the beneficiaries and allows the monitoring body to fine tune both the measures in that case and those that it will order in future cases, so that they will be most effective.

When a State fails to comply with an order of interim measures, some international systems provide for recourse to a political organ. In the United Nations system, any measures indicated by the ICJ must be communicated to the Secretary-General of the United Nations for transmission to the Security Council.²⁴³ The Secretary General also maintains a list of the U.N. Committee against Torture's requests for interim measures.²⁴⁴ In the European system, notice that the Court has indicated interim measures is given to the Committee of Ministers.²⁴⁵ Under the European human rights system, the Committee of Ministers follows up decisions of the Court

239. See Committee Against Torture, Rules of Procedure, *supra* note 28, R. 108(5) (requiring the CAT Rapporteur for new complaints and interim measures to monitor compliance with the Committee's requests to States). The Inter-American Court generally requests that the Inter-American Commission monitor compliance and report periodically to the Court. See Digna Ochoa y Plácido et al. Case (Mexico) Provisional Measures, Order of Nov. 17, 1999, Inter-Am. Ct. H.R. (ser. E), operative ¶ 5 (1999), available at <http://www.corteidh.or.cr>; Aleman Lacayo Case (Nicaragua), Provisional Measures, Order of Feb. 6, 1997, Inter-Am. Ct. H.R. (ser. E), operative ¶ 3 (1997), available at <http://www.corteidh.or.cr>.

240. I.C.J. Rules of the Court, *supra* note 62, art. 78.

241. European Rules of Court, *supra* note 39, R. 39(3).

242. Serech & Saquic Case (Guatemala), Provisional Measures, Order of Sept. 19, 1997, Inter-Am. Ct. of H.R. (ser. E), ¶ 6 (1997), available at <http://www.corteidh.or.cr>.

243. I.C.J. Rules of the Court, *supra* note 62, art. 77.

244. Committee against Torture, Rules of Procedure, *supra* note 28, R. 108(4).

245. European Rules of Court, *supra* note 39, R. 39(2).

to ensure State compliance. The Inter-American Court includes a statement in its annual report to the OAS General Assembly concerning the provisional measures it has ordered in the preceding year and its recommendations as to the appropriate action to be taken when the State has failed to implement the measures.²⁴⁶ Recourse to the OAS General Assembly has not been particularly useful to date because the General Assembly has not had the political will to sanction a State that has not complied with Court-ordered provisional measures. Most recently, the Inter-American Court also has posted information regarding State compliance with provisional measures on its website.

IX. STATE COMPLIANCE WITH INTERIM MEASURES

State compliance with internationally ordered interim measures varies depending on the type of case, the international body that ordered them, and the State that is subject to the order. States have complied most consistently with interim measures to delay extradition or to protect individuals who have been threatened. Most European Court-ordered interim measures have involved orders to delay extradition or deportation to States where the person could be subject to torture or the death penalty.²⁴⁷ With certain notable exceptions, European States have complied and delayed the extradition or deportation until the case has been resolved in the European human rights system.

State compliance with interim measure orders is sometimes quickly forthcoming. On December 17, 2003, the Inter-American Commission on Human Rights requested that the State of Paraguay take measures to protect the patients at the state neuro-psychiatric hospital. Reliable information submitted to the Commission described the sanitary and security conditions in which the patients lived to be inhuman and degrading; female patients had been raped, children were confined with adults, youths were kept naked in solitary confinement for years without access to bathrooms, and often there was no medical diagnosis of patient conditions.²⁴⁸ The Commission asked the Paraguayan authorities to take precautionary

246. Rules of Procedure Inter-Am. Ct., *supra* note 186, art. 25(8).

247. See Jo M. Pasqualucci, *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L. L. 803, 820 (1993) (citing Carl A. Norgaard & Hans Christian Kruger, *Interim and Conservatory Measures Under the European System of Protection of Human Rights*, in PROGRESS IN THE SPIRIT OF HUMAN RIGHTS 109, 112 (1988)).

248. Case 60, Inter-Am. C.H.R. 14, OEA/ser. L./V./II.118, doc. 5 rev. 2, CH III, § C.1, ¶ 60 (2003) (describing Jorge Bernal, Julio Cezar Rotely and the patients at the Hospital Neuropsiquiátrico).

measures to protect the mental and physical health of the patients and to establish conditions that complied with international standards.²⁴⁹ In response to the Commission's request, the President of Paraguay and the Minister of Public Health and Social Welfare visited the hospital two weeks later on December 31.²⁵⁰ Following their visit, the director of the hospital was replaced, and an audit and other actions were taken to improve the living conditions of the patients.²⁵¹

States may take action to correct a problem before a public hearing on a request for interim measures is held. A positive example arose in the *Gallardo Rodríguez Case* in which a Mexican general who had criticized abuses of power in the Mexican army had been imprisoned for several years.²⁵² The Inter-American Commission on Human Rights and the United Nations Working Group on Arbitrary Detention had studied the case and had declared his detention to be illegal.²⁵³ The President of the Inter-American Court, in conjunction with the other judges, ordered urgent measures to protect General Gallardo Rodríguez and called for a public hearing to be held before the plenary Court. Mexico released the long-time prisoner before the hearing took place.²⁵⁴

Another impressive instance of government compliance in the Inter-American system occurred at the public hearing on provisional measures in the *Chunimá Case*.²⁵⁵ Several members of a Guatemalan highland indigenous human rights group had been murdered, but the alleged perpetrators who had bragged about the killings remained free.²⁵⁶ At the public hearing on provisional measures before the Inter-American Court, the Guatemalan government made the surprising announcement that it had arrested the civil patrol leaders, who were allegedly responsible for the assassinations.²⁵⁷

Although it is difficult to prove that persons were not harmed because a government complied with interim measures ordered for their protection, it is interesting to note the occurrences in the *Honduran Disappearance Cases*. When two witnesses who had

249. *Id.*

250. *Id.*

251. *Id.*

252. *Gallardo Rodríguez Case (Mexico)*, Urgent Measures, Resolution of President of Feb. 14, 2002, Inter-Am. Ct. H.R. (ser. E), ¶ 1.

253. *Id.*

254. *See* Jorge G. Castañeda, Statements During The Joint Conference With The Secretary of The Interior in Mexico City (Feb. 7, 2002).

255. *Chunimá Case*, (Guatemala), Provisional Measures, Order of Aug. 1, 1991, Inter-Am. Ct. H.R. (ser. E) (1991), available at <http://www.corteidh.or.cr>

256. *Id.* ¶ 1.

257. *Id.* ¶ 8.

appeared before the Inter-American Court received death threats,²⁵⁸ the President of the Court requested that the government of Honduras protect those particular witnesses. The government duly informed the Court that it would guarantee their safety as requested.²⁵⁹ Although those named witnesses were not harmed, three other witnesses who had appeared before the Court or who were scheduled to give evidence were subsequently murdered.²⁶⁰

Compliance with ICJ orders of provisional measures has not been uniform. In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, the Court granted Nicaragua's request for provisional measures to prevent the United States from continuing to mine Nicaraguan harbours.²⁶¹ The United States did not comply with the request for provisional measures. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the ICJ granted the United States request for provisional measures to effect the release of the hostages during the Iranian crisis.²⁶² Iran did not comply with the Court order. A State that does not comply with requests that it take interim measures may risk acquiring the reputation of being a rogue state or a State that considers itself above international law.

In general, States have complied with interim measures requested by the U.N. Human Rights Committee and the U.N. Committee against Torture.²⁶³ State parties had complied with more than 100 requests for an interim measures formulated by the U.N. Human Rights Committee before Trinidad and Tobago ignored its order and executed the beneficiary of an interim measures request.²⁶⁴ A Committee member of the U.N. Committee against Torture suggested to the plenary committee, however, that action be taken to combat the "increasing tendency of States to disregard its requests for interim measures during the consideration of cases."²⁶⁵

258. Velásquez Rodríguez v. Honduras (Merits), Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 45 (1988), available at <http://www.corteidh.or.cr> (discussing two witnesses before the Inter-American Court who had received threats).

259. *Id.*

260. *Id.* ¶¶ 40-41.

261. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 500 (May 1984).

262. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Request for Provisional Measures, 1979 I.C.J. 7 (Dec. 15).

263. *Summary Record of the First Part (public) of the 487th meeting*, U.N. Committee Against Torture, 27th Sess., ¶ 5 U.N. Doc. CAT/C/SR.487 (2003).

264. *Summary Record of the 1352nd meeting: Trinidad and Tobago*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/SR.1352 (1996).

265. *Summary Record of the 435th meeting*, U.N. Committee Against Torture, U.N. Doc. CAT/C/SR.435 (2000) (noting that El Masry suggested that the States' disregard of the Committee's request was because interim measures are provided for only in the Committee's Rules of Procedure and not in the Convention and, thus, were not binding on the States).

The most common circumstance in which States have failed to comply is when a tribunal issues a measure mandating the delay of the death penalty while the case is being considered by the international forum. In general, the United States and certain Caribbean nations have ignored interim orders in death penalty cases. Trinidad and Tobago executed two prisoners who were covered by Inter-American Court-ordered provisional measures.²⁶⁶ The State did not, however, execute the other beneficiaries of the measures. The United States has not complied with interim measures ordering it to halt executions of prisoners until their cases could be studied by the ICJ or the Inter-American Commission.²⁶⁷

X. CONCLUSION

Interim measures are particularly important in international human rights cases in that they provide for the protection of persons who are in imminent danger of irreparable harm. Those persons may be at risk because they are judges who have ruled against the government, human rights activists who are bringing to light governmental human rights abuses, opposition party leaders, prisoners in need of medical care, persons facing the death penalty who allege that their right to due process was violated, or those who petition for international human rights relief—including their families, attorneys, and witnesses to the case. An international tribunal or enforcement body can order a State as interim measures to take action to protect the persons at risk.

The major international tribunals have harmonized the status of interim measures by declaring that their orders of interim measures are binding on States regardless of whether the authority to order the measures is expressly set forth in the constituent document or is provided for in the self-drafted rules of procedure. Quasi-judicial organs such as the U.N. Human Rights Committee, the U.N. Committee against Torture, and the Inter-American Commission on Human Rights have stated that compliance with their orders of

266. *James et al.* (Trinidad and Tobago), Provisional Measures, Order of Aug. 16, 2000, Inter-Am. Ct. H.R. (ser. E), ¶¶ 4, 12 (2000). The order required that the State “take all measures to preserve [their] lives” “so as not to hinder the processing of their cases before the Inter-American system.” *Id.*

267. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, ¶ 34 (Merits) (Judgment June 27); Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L/V/II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 62 (Dec. 29, 2003) (describing *Larry Eugene Moon v. United States*); Annual Report of the Inter-American Commission on Human Rights 2003, Inter-Am. C.H.R., OEA/ser.L/V/II.118, doc. 5 rev. 2, ch. III, § C.1, ¶ 63 (Dec. 29, 2003) (describing *John Elliot v. United States*). Both these prisoners were executed despite the order of precautionary measures.

interim measures is essential to the individual petition process, and therefore, failure to comply is a separate violation of the relevant treaty. States have not, however, necessarily accepted that interim measures ordered by quasi-judicial human rights bodies are binding.

Interim measures must be considered to be binding when issued by both international judicial and quasi-judicial bodies. The right of individuals to petition international enforcement organs is a revolutionary step in international human rights law. When States accept the competence of an international enforcement organ to consider individual petitions, they commit themselves to support the petition procedure. The *de jure* right to petition international bodies must not be nullified by the State's *de facto* act or failure to act. The right to individual petition is a nullity if the participants in the proceedings have died or can be intimidated into withdrawing a complaint. A State that has accepted the right of individual petition by ratifying the constituent instrument or that has filed a separate declaration of acceptance of competence has bound itself to support that process by complying with any interim measures ordered. It would be incompatible with the obligations voluntarily undertaken by the State for the State to act or refrain from acting in a way that frustrates the consideration of an individual petition.²⁶⁸

268. See Piandiong et al. v. Philippines, Judgment of Oct. 19, 2000, Comm. No. 869/1999, ¶ 5.1, U.N. Doc. CCPR/C/70/D/869/1999.

