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ABSTRACT

In this Article, Professor Pasqualucci examines the developing jurisprudence of provisional measures in the Inter-American human rights system. Through the adoption of provisional measures, a human rights court may order a state to protect persons who are in danger of imminent death or torture. The author first provides an overview of the Inter-American system of human rights. She then describes the historical background of the jurisprudence of provisional measures in the International Court of Justice and the European human rights system, which served as models for provisional measures in the developing Inter-American system. Finally, she analyzes the use of provisional measures in the unique economic, social, and cultural context of the Inter-American system. The author determines that Inter-American Court orders of provisional measures are binding on parties to the American Convention. The author also finds the Court is introducing prerequisites to the adoption of provisional measures that may curtail their use in cases in which they would be essential to protect persons in danger. Finally, the author argues that if the Court is to continue to adopt provisional measures and adequately enforce human rights in the Americas, the Organization of American

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States must reevaluate its priorities and provide adequate funding to the human rights enforcement organs.

TABLE OF CONTENTS

I. INTRODUCTION

In the highlands of Guatemala, near the village of Chunima, four Guatemalan human rights activists were murdered and one was seriously wounded in separate attacks over a five month period. The victims belonged to a local Indian group that reported human rights abuses in the area.[1] Two leaders of the Civil Defense Patrol,[2] which the Guatemalan Military had organized, publicly threatened some of the victims and subsequently bragged about the murders. The army, in a nearby installation, did not come to the assistance of the villagers, and the police could not act. Even the two local judges who investigated the murders and issued arrest warrants for the Civil Patrol leaders received death threats and were forced to go into hiding. Several remaining group members and their families also went into hiding; despite these precautions, another

1. "Several hundred villagers from Quiche province, founded the Council of Ethnic Communities Runujel Juman (CERJ), the first organization established to defend the rights of Guatemala's Maya population" and to increase the Indian community's awareness of its rights under the Guatemalan Constitution. Inter-Am. C.H.R. 444, 447-48, OEA/ser.L/V/II.79, doc. 12 rev. 1 (1990-91).

2. The Civil Defense Patrols, also known as the Civil Defense Guard, were established by the Guatemalan government in 1982 ostensibly to protect the highland villages from guerrillas. The Civil Patrols "are military structures established by the military." *Id.* at 446.

member was murdered.[3]

Under traditional human rights law, little can be done formally to provide immediate assistance to those whose lives are in imminent danger. Human rights treaties rest on the principle that governments basically respect the rule of law and act in good faith.[4] Therefore, governments accused of violations receive ample time to respond to complaints filed against them.[5] Even when a government repeatedly fails to acknowledge requests for information, the government still must be allowed the statutorily allotted period to respond.[6] Many states, although adhering to human rights treaties so as not to appear less civilized than others, hesitate to limit their state sovereignty[7] by granting the power to effectively supervise their domestic behavior to an international body.[8] This time-consuming approach to justice is inadequate in urgent situations that may result in the death or torture of the victim.[9] This approach is especially inadequate and unacceptable when a government undertakes the gross and systematic violation of human rights to perpetuate its power. Governments may perpetrate gross and systematic violations of human rights in such number and manner as to threaten the lives, safety, and liberty of a particular group of people;[10] in the

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3. Request for Provisional Measures in Case 10.674 (from the Inter-American Commission on Human Rights [hereinafter Inter-Am. C.H.R.] to the Inter-American Court of Human Rights [hereinafter Inter-Am. Court]) Inter-Am. Court 42, 42-43, OAS/ser.L/V/III.25, doc. 7 (1991) [hereinafter Request for Provisional Measures-Chunima Case].

4. CECILIA M. QUIROGA, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM 316 (1988) [hereinafter QUIROGA].

5. *Id.*

6. *See infra* note 39, for an example of extensions granted despite a government's repeated failure to cooperate.

7. International law is based on the concept of state sovereignty, which holds that states have almost complete freedom to act within their domestic jurisdiction and forbids external interference into a state's "domestic" affairs. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287-97 (1990). The influence of human rights law is slowly modifying the principle of sovereignty. *See generally*, PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 11 (1983).

8. QUIROGA, *supra* note 4, at 2.

9. *See* Order of the Court in the Chunima Case, Aug. 1, 1991, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991) [hereinafter Order of the Court-Chunima Case].

10. QUIROGA, *supra* note 4, at 16. *See* Van Boven Report *in* United Nations E/CN.4/Sub.2/1991/7 (No one definition exists as to what constitutes a gross violation of human rights.); Thomas Buergenthal, *Codification and Implementation of International Human Rights, in* HUMAN DIGNITY, THE INTERNATIONALIZATION OF HUMAN RIGHTS 15-21 (Alice H. Henkin ed., 1979) (A general consensus is forming that at least genocide, apartheid, torture, mass killings, and massive arbitrary deprivations of liberty

Chunima case, it was directed against Indian human rights activists.[11] In these cases, the government has an interest in continuing its course of conduct and in defeating any attempts to curtail its abuses.[12] Gross and systematic human rights violations have been and are still prevalent in certain countries of Latin America, and immediate action is necessary to protect the victims. Conversely, the government in these instances has an interest in delaying and manipulating the system.

The immediate referral of a case to an international court would focus international attention on the situation, and the resulting publicity could curtail some abuses even before the court reaches a judgment. Adverse international publicity often has proven to be an effective tool in limiting human rights violations.[13] Most states are surprisingly sensitive about their international reputations and world image. According to a former United States representative to the United Nations Commission on Human Rights, "Despite the harsh realities of power politics, world opinion *is* a force to be reckoned with. Governments *do* devote much time and energy, both in and out of the U.N., to defending and embellishing their own human-rights image and demeaning that of others."[14] During the "dirty war" in Argentina, when agents of the Argentinean government reportedly caused approximately nine thousand people to disappear,[15] Argentina hired a high-powered public relations firm in New York to improve its international image.[16] "Embarrassment, and the threat of embarrassment," are the principal tools currently in use to prevent human rights abuses.[17] The threat of negative publicity is a per-

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qualify as gross human rights violations).

11. Request for Provisional Measures-Chunima Case, Inter-Am. Court 42, 42, OAS/ser.L/V/III.25, doc. 7 (1991).

12. QUIROGA, *supra* note 4, at 2.

13. Tom J. Farer, *The OAS at the Crossroads: Human Rights*, 72 IOWA L. REV. 401, 403 (1987). "Exposure, or the threat thereof, has accomplished a mitigation of barbarity in many identifiable instances throughout the Western Hemisphere." *Id.*

14. Morris B. Abram, *The U.N. and Human Rights*, 47 FOREIGN AFF. 363, 371 (1969).

15. *Commission Nacional Sobre la Desaparicion de Personas, Nunca Mas* [*National Commission on the Disappearance of Persons, Never Again*], 479 (Editorial Universitaria de Buenos Aires 14a. ed., 1986). For a complete documentation of Argentina's dirty war, see IAIN GUEST, BEHIND THE DISAPPEARANCES, ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS (1990).

16. David Weissbrodt & Maria L. Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina*, 1976-1983, 75 MINN. L. REV. 1009, 1030 (1991).

17. David Weissbrodt & Teresa O'Toole, *The Development of International Human Rights Law, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-

suasive force which often compels governments to comply with international human rights norms.[18]

Adverse publicity has proven most effective when regional or international organs, such as the Organization of American States (OAS) General Assembly or the United Nations General Assembly, condemn the violator state.[19] Political reality, however, makes states hesitant to point the finger, for fear that their own practices will be condemned in the future.[20] Therefore, international courts, which are less susceptible to politics and which also generate widespread publicity, are an avenue of relief when a case can be timely referred.[21] Normally, however, the procedures which must be undertaken before an international human rights court will consider a case are excessively time-consuming, and thus there is a significant delay before the case can be submitted to a court.

Fortuitously, the Inter-American human rights system did provide timely assistance in the *Chunima* case. Upon receiving the human rights complaint, the Inter-American Commission on Human Rights (Inter-American Commission) relied on an innovative provision of the Ameri-

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1988: HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL 17, 25 (Amnesty Int'l ed., 1988).

18. *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 52 (1990); Nanette Dumas, Note, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. REV. 585, 607 (1990).

19. QUIROGA, *supra* note 4, at 321-22. The case of Nicaragua serves as an example. After the OAS Meeting of Consultation of Ministers of Foreign Affairs passed a resolution condemning the Somoza government's inhumane treatment of its people, Somoza resigned. In doing so, he stated, "What role do I play when I have the OAS down my neck?" For a description and analysis of these events, see Cerna, *Human Rights in Conflict with the Principle of Non-Intervention: The Case of Nicaragua Before the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs, in* DERECHOS HUMANOS, DIREITOS HUMANOS, HUMAN RIGHTS EN LAS AMERICAS, HOMAGE TO THE MEMORY OF CARLOS A. DUNSHEE DE ABRANCHES, OAS (1984).

20. *See* Weissbrodt & Bartolomei, *supra* note 16, at 1030.

21. An example of such relief occurred in 1983, when the Inter-American Commission requested that the Inter-American Court issue an advisory opinion as to whether Guatemala was in violation of the American Convention when it reinstated the death penalty. The American Convention prohibits the reestablishment of the death penalty in states that have abolished it. Restrictions to the Death Penalty, Advisory Opinion No. OC-3/83 of Sept. 8, 1983, Inter-Am. C.H.R., ser. A; Judgement and Opinions, No. 3 (1983). Guatemala was, at that time, engaging in summary executions and even the Pope's request that Guatemala stop the executions had gone unheeded. In response to the case, however, the Government of Guatemala attended the public hearing of the Court and read a decree suspending the death penalty. Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Images*, 14 HUM. RTS. Q. 192-93 (1992).

can Convention on Human Rights (American Convention),[22] which is unique to the Inter-American system. This provision authorizes the Inter-American Commission in "cases of extreme gravity and urgency" to circumvent its time-consuming intermediary procedures and to immediately request that the Inter-American Court of Human Rights (Inter-American Court) adopt provisional measures.[23] In adopting provisional measures, the Court orders the state to take or to refrain from taking certain actions. In *Chunima*, the Court ordered the Guatemalan government to protect the lives and personal safety of those who were threatened.[24] The immediate referral of the case to the Court resulted in the focus of international publicity on the impending human rights violations. The government of Guatemala arguably complied with the Court's demands. None of the persons for whom the Court required protection were physically harmed, and the Guatemalan government arrested the Civil Patrol leaders. The adoption of provisional measures in the *Chunima* case successfully avoided the threatened abuses. Subsequent to this case, however, the Court appears to be introducing additional prerequisites to the adoption of provisional measures. Although provisional measures were probably not appropriate in the two cases following *Chunima*, the prerequisites on which the Court based its decisions could curtail the use of provisional measures when they would be essential to protect the lives and safety of those in danger.

This Article will focus on the developing jurisprudence of provisional measures in the Inter-American system of human rights (Inter-American system). It first will provide an overview of the Inter-American system and explain the problem of delay in the system. This Article then will describe the historical background of the jurisprudence of provisional measures in the International Court of Justice and in the European human rights system, which served as models for provisional measures in the developing Inter-American system.[25] Finally, this Article will describe and analyze the use of provisional measures in the unique eco-

22. American Convention on Human Rights, Nov. 22, 1969 (entered into force July 18, 1978), OEA/Ser.K/XVI/I.1, doc. 65 rev. 1 corr. 1 (1970) [hereinafter American Convention], *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, 48 OAS/ser.L/V/II.71, doc. 6 rev. 1 (1988) [hereinafter BASIC DOCUMENTS].

23. *Id.* art. 63(2).

24. Order of the Court-Chunima Case, Inter-Am. Court 52, 53, 56, OAS/ser. L/V/III.25, doc. 7 (1991).

25. The African Banjul Charter on Human and Peoples' Rights does not provide for the use of provisional measures. Banjual Charter on Human and Peoples Rights, *reprinted in* 21 I.L.M. 58 (1982).

nomic, social, and cultural context of the Inter-American system. This Article will argue that: 1) provisional measures are binding in the Inter-American system; 2) the Inter-American Commission is not currently complying with the American Convention in that it does not refer provisional measures cases to the Court if a friendly settlement is not reached; 3) as a result of this malfunctioning in the system, the Court is introducing prerequisites to the adoption of provisional measures which are not statutorily required and which interfere with the adoption of such measures when they are most needed; and 4) if the Court is to continue to adopt provisional measures and to adequately enforce human rights in the Americas, the Organization of American States must reevaluate its priorities and, if necessary, eliminate certain programs and studies to provide adequate funding to the human rights enforcement organs.

II. THE STRUCTURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The states of the Western Hemisphere have developed a regional system to promote and protect human rights in the Americas.[26] The system centers around a regional treaty, the American Convention on Human Rights,[27] drafted by the member states of the Organization of American States (OAS).[28] The American Convention recognizes and defines those human rights to be protected in the Americas. Twenty-four American states have ratified the American Convention and thereby are obligated to respect human rights in their domestic jurisdictions.[29] The American Convention also establishes a two-tiered system to enforce human rights, the Inter-American Commission and the Inter-American Court.[30]

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26. For an excellent description and analysis of the jurisprudence of the Inter-American Court, see SCOTT DAVIDSON, THE INTER-AMERICAN COURT OF HUMAN RIGHTS (1992).

27. *See* American Convention, *supra* note 22.

28. The OAS is composed of all the nations in the Western Hemisphere except Belize, Guyana, and Cuba. Cuba was expelled from the OAS in 1962 for adopting a Marxist-Lenninist form of government. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 237 (1991).

29. The twenty-four nations include: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraquay, Peru, the Dominican Republic, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. The United States has signed but has not ratified the American Convention. *See* General Information about the Inter-American Court of Human Rights, disseminated by the Court [hereinafter General Court Information] (on file with the author).

30. American Convention, *supra* note 22, art. 33. *See* Carlos A. de Abranches, *The Inter-American Court of Human Rights*, 30 AM. U. L. REV. 80, 85-90 (1980-81) (pro-

Individuals or organizations alleging human rights abuses must first direct all complaints to the Inter-American Commission.[31] The Commission then determines whether the complaint meets the statutory requisites of admissibility.[32] If it does, the Commission informs the government involved of the relevant portions of the complaint and requests corresponding information from the government.[33] Even if the government does not provide the information, the Commission often grants repeated extensions.[34] Only after complainants have exhausted the procedures before the Commission can the Commission refer the case to the Court, and then only if the state involved has recognized the jurisdiction of the Court.[35] The Court is the only judicial organ established by the Convention. To date, sixteen state parties to the American Convention have recognized the jurisdiction of the Court.[36] Procedures before the Court are also time-consuming. As a former member of the Inter-American Commission explained, "Long before all of these procedures have been completed, however, the patience of the complainant, although not his injury, may have come to an end, and in many cases it may be the end of the endurance or the life of the person tortured."[37]

Delay is a problem in the effectiveness of the Inter-American human rights system.[38] It is often years before the Commission's procedures are

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viding a brief background on "the Court within the framework of the [American] Convention and the Charter of the OAS"). For a Spanish version of this article, see LA CORTE INTERAMERICANA DE DERECHOS HUMANOS IN LA CONVENCION AMERICANA SOBRE DERECHOS HUMANOS 91, 125 OAS ISBN-O-8270-1222-5 (1980).

31. The Commission is composed of seven individuals, chosen from the Member States of the OAS, who must be of recognized competence in the field of human rights. American Convention, *supra* note 22, art. 34. No two Commission members may be nationals of the same State. *Id.* art. 37.

32. *Id.* art. 48(1)(a)

33. *Id.*

34. *See infra* note 39 for an example of extensions allowed in the Velasquez Rodriguez Case.

35. American Convention, *supra* note 22, art. 51(1). *See* Abranches, *supra* note 30, at 104-05 for a discussion of State acceptance of the Court's contentious jurisdiction.

36. The following States have accepted the jurisdiction of the Court: Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *See* General Court Information, *supra* note 29; American Convention, *supra* note 22, art. 62 (ratification procedures).

37. Fernando Volio, *The Inter-American Commission on Human Rights*, 30 AM. U.L. REV. 65, 76-77 (1980-81) (requesting amendments to expedite procedures before the Inter-American Commission).

38. Delay is also a problem in the European Human Rights system. *See infra* text accompanying note 76.

completed. In the first contentious case that the Court decided, the period of time from the official petition to the referral of the case to the Court was approximately four and one-half years.[39] If human rights law is to serve a preventive function and not just a compensatory function, delay must be minimized. Thus, the Inter-American Commission's unprecedented use of an immediate request to the Court to mandate provisional measures, and the Court's expedited procedures in such a case, may be a resource in making human rights law a more effective means of combating human rights abuses.

III. Historical Background: The Development of Provisional Measures in the International Court of Justice and the European Human Rights Court

A. *Introduction*

Traditionally, the adoption of provisional measures[40] has been limited to those instances in which the case is before a court or administrative

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39. The facts of the Velasquez Rodriguez case provide an example of delays and continuations in the Inter-American system. Manfredo Velasquez was detained by government agents in Honduras on September 12, 1981, and subsequently disappeared. On October 7, 1981, relatives filed a human rights petition with the Inter-American Commission. The Commission communicated the relevant parts of the petition to the government for a response and tried on several occasions to obtain information, but the government failed to reply. On October 4, 1983, two years after the petition was originally filed, having received no response from Honduras, the Commission applied its regulations and presumed as true the allegations contained in the petition. Only at that point did Honduras reply, requesting reconsideration of the Commission's determination on various grounds. On May 30, 1984, the Commission agreed to reconsider its resolution and again requested information from Honduras. Honduras did not respond to the request. On January 29, 1985, the Commission informed Honduras that it would render a final decision in March, 1985. On March 1, Honduras again requested an extension on the grounds that it had set up an investigatory commission. The Commission granted an additional thirty day extension. On October 17, 1985, Honduras gave the Commission a report of its investigation, in which charges against all officials were dismissed except for the charge against a former general who was in exile and out of favor with the government. Finally, on April 18, 1986, (four and a half years after the petition was filed), the Commission referred the case to the Court. After two more years, final judgement in the case was pronounced by the Inter-American Court on July 29, 1988. Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Court 35, 36-37, OAS/ser. L/V/III.19, doc. 13 (1988) [hereinafter Judgment of the Court-Velasquez Rodriquez Case].

40. Various terms are used to denote the same meaning in international documents: "provisional measures," "interim measures," "interim measures of protection," "precautionary measures," "emergency measures," "urgent measures," and "conservatory measures." The term "provisional measures" will be used in this Article except when the

body.[41] In such cases, provisional measures have been adopted to preserve the rights of the parties[42] and to protect against irreparable damage to the subject matter of the dispute while it is pending.[43] The adoption of provisional measures allows the court to request or to order a party to adopt or refrain from certain actions and to maintain the status quo until final judgment is rendered.[44] For example, the court could order a state to refrain from fishing in certain contested waters or to provide protection to certain persons. In international human rights law, provisional measures are most often adopted to protect a potential victim from torture or death.[45]

The authority to adopt provisional measures has an historical basis in both domestic and international legal systems.[46] In United States domestic courts, the equivalent of an order of provisional measures is an interlocutory injunction, also referred to as a preliminary injunction.[47] Orders of provisional measures also exist in the civil law system.[48] Internationally, the doctrine and practice of the International Court of Justice has been most influential in developing the jurisprudence of provisional mea-

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applicable source used another term.

41. *See* Rules of the ICJ [hereinafter ICJ Rules], *reprinted in* SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT, A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE 149-57 (1983). Article 73 provides that "[a] written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made." *Id.* at 157.

42. JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT: AN ATTEMPT AT A SCRUTINY 70 (1983).

43. A party can incur irreparable damage, physically or to property rights, during time-consuming administrative and judicial procedures. *Id.* at 1; EDWARD DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 28 (1932).

44. *See* JEROME B. ELKIND, INTERIM PROTECTION, A FUNCTIONAL APPROACH 3 (1981): *see also* SZTUCKI, note 42, at 72. It should be noted, however, that the adoption of provisional measures does not prejudice the decision on the merits of the case. Regulations of the Inter-American Commission on Human Rights, June 29, 1987, *reprinted in* BASIC DOCUMENTS, *supra* note 22, art. 29(4).

45. American Convention, *supra* note 22, art. 63(2) (specifying that provisional measures shall be granted when "necessary to avoid irreparable damage to persons").

46. For a compilation of past and present international organs competent to decide on provisional measures, see SZTUCKI, *supra* note 42, at 4-11; DUMBAULD, *supra* note 43, at 33-129 (Most domestic and international juridical and arbitral systems have historically provided for the adoption of provisional measures).

47. FED. R. CIV. P. 65.

48. *See* ELKIND, *supra* note 44, at 26-28 (describing provisional measures in Europe and Japan). *See also, Codigo de Procedimientos Civiles de Costa Rica* arts. 449-64 (1987), *Codigo de Procedimientos Civiles de Chile* art. 280 (1983), *Codigo Procesal Civil y Comercial de la Nacion* arts. 195-210 (Argentina) (1987).

sures. In human rights law, the European human rights system has pioneered their use. Finally, the Inter-American System of Human Rights is adapting the doctrine and practice of provisional measures to the unique conditions of the Americas.

B. *Provisional Measures in the International Court of Justice*

The International Court of Justice (ICJ), the judicial organ of the United Nations, has jurisdiction to settle legal conflicts between the member states of the United Nations when the states have accepted its jurisdiction.[49] The ICJ normally does not take jurisdiction in human rights cases except in exceptional circumstances, when grave violations of human rights threaten to result in an international conflict. In such a case, the ICJ would not base its jurisdiction on the problem of human rights, but on the conflict that the problem had provoked.[50] Although the ICJ only considers cases which involve conflicts between states,[51] its treatment of provisional measures has served as an inspiration in the European and Inter-American human rights systems, in which most complaints are made by individuals against a state.[52] Consequently, there are parallels between the procedures in the three systems.[53]

The Statute of the International Court of Justice authorizes the Court to indicate provisional measures. Article 41 provides in relevant part, "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."[54]

This power of the ICJ is discretionary in that it is fact-specific and granted on an ad hoc basis in the appropriate circumstances.[55] A party

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49. U.N. CHARTER art. 92.

50. Rodolfo Piza, *Coordination of the Mechanisms for the Protection of Human Rights in the American Convention with Those Established by the United Nations*, 30 AM. U. L. REV. 167, 184-5 (1980).

51. *See* SZTUCKI, *supra* note 42, at 17.

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

53. *Id.* at 73.

54. Statute of the International Court of Justice, 59 Stat. 1055 (entered into force Oct. 24, 1945) art. 41(1), *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS 27 (1991).

55. *See* Leo Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AM. J. INT'L L. 395, 406 (1980); *see also* SZTUCKI, *supra* note 42, at 61.

may request the measures[56] or the ICJ may indicate the measures *proprio motu.*[57] The Court has further concluded that, based on its authority to indicate provisional measures *proprio motu,*[58] it has the authority to indicate these measures even if one party fails to appear before the Court, which has become a recurring problem.[59]

The Rules of the ICJ establish the guidelines and procedures for the indication of provisional measures.[60] The ICJ Rules provide that a request for provisional measures must be accorded priority over all other cases.[61] The ICJ treats a decision on the request as a matter of urgency, and the Court, if it is not sitting when the request is made, shall convene to allow the parties to present their observations in oral proceedings before the Court.[62] Pending the oral hearing, the President of the ICJ may call upon the parties to act in a way that will enable a potential order of provisional measures to be effective.[63] The Court's authority to grant provisional measures is not limited to those measures requested by a party. The Court may, in fact, indicate measures that are partially or totally different from those requested, or it may adopt measures which must be taken by the party which made the request.[64] The Court must communicate any measures it indicates to the Secretary-General of the United Nations for communication to the Security Council.[65]

It has become increasingly common in recent cases brought before the

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56. ICJ Rules, *supra* note 41, art. 73. Articles 73-78 of the Regulations of the ICJ regulate provisional measures. The Rules cited are the 1979 Rules of the International Court of Justice. Many cases refer to the 1972 Rules or the 1946 Rules which encompass different articles. *See* ROSENNE, *supra* note 41, at 149-57 for a commentary on changes to the rules.

57. ICJ Rules, *supra* note 41, art. 75.

58. *Id.*

59. See *infra* note 259 concerning failure of States to appear before the Court when provisional measures are requested in a case.

60. *See* ICJ Rules, *supra* note 41. The ICJ Rules served as the basis of the Rules of Procedure of the Inter-American Court of Human Rights. Rules of Procedure of the Inter-American Court of Human Rights, adopted by the Court at its Twenty-Third Regular Session, held on January 9-18, 1991 [hereinafter Inter-American Court Rules], *reprinted in* BASIC DOCUMENTS, *supra* note 22, at 117.

61. ICJ Rules, *supra* note 41, art. 74.

62. *Id.*

63. *Id.*

64. *Id.* art. 75. At any time before final judgment, the Court, at the request of a party, may revoke or modify its decision on provisional measures should there be a relevant change in the situation of the case. In such an instance, all parties must be afforded the opportunity of presenting their observations on the subject. *Id.* art. 76.

65. *Id.* art. 77. In the implementation of the provisional measures, the Court may request relevant information from the parties. *Id.* art. 78.

ICJ for one party to request provisional measures. 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 harbors.[66] 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 Iran crisis.[67] Unfortunately, the defendant did not comply with the measures ordered in either case.

The two main controversies concerning an indication of provisional measures by the ICJ have been whether the Court can indicate provisional measures when the Court has not determined yet that it has jurisdiction on the merits;[68] and whether the provisional measures indicated are binding on the parties.[69] The ICJ recently has resolved the jurisdictional controversy by holding that the Court may indicate interim measures when the party requesting such measures has made a prima facie showing of jurisdiction.[70] The binding nature of the measures has not yet been resolved by the Court.[71]

C. *Provisional Measures in the European Human Rights System*

The European states have a highly evolved system for the promotion and protection of human rights. Predating the Inter-American system, the European human rights system is based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[72] Twenty-three states have ratified this treaty.[73] The

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66. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 23 I.L.M. 468, 473 (I.C.J. 1984).

67. United States Diplomatic and Consuler Staff of Tehran (U.S. v. Iran), 74 AM. J. INT'L L. 258, 266 (I.C.J. 1980) (Order of the Court on the Request for Provisional Measures).

68. For a complete discussion of this controversy, see SZTUCKI, *supra* note 42, at 221-259; M. H. Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction,* 46 BRIT. Y.B. INT'L L. 259 (1972-73).

69. For a detailed discussion of this subject, see SZTUCKI, *supra* note 42, at 260-94; ELKIND, *supra* note 44, at 153-66.

70. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 23 I.L.M. 468, 473 (I.C.J. 1984).

71. *See* discussion *infra* part VI.A.

72. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (entered into force Sept. 3, 1953); *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 326 (Ian Brownlie ed., 1992). *See generally* Rosalyn Higgins, *The European Convention on Human Rights, in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 495 (Theodore Meron ed., 1984).

enforcement organs for the protection of the rights in the European Convention are the European Commission on Human Rights (European Commission) and the European Court of Human Rights (European Court).[74] As in the Inter-American system, complaints of human rights abuses are first processed by the European Commission before they can be referred to the European Court.[75] It takes an average of five years for a case to reach final judgment in the European human rights system.[76]

In general, the European human rights system confronts isolated instances of human rights abuse rather than gross and systematic violations.[77] Most of the cases that the European system processes relate to "arrest and detention guarantees and fair administration of justice, and not the chilling and harrowing violations in other parts of the world."[78] Provisional measures in the European system are most often indicated when a petitioner faces expulsion or extradition to a state in which he claims he will be subject to torture or inhumane and degrading punishment.[79] In these cases, when it is highly probable that the petitioner will suffer irreparable damage in the receiving country,[80] the European Commission may request that the European state threatening expulsion or extradition refrain from taking action and allow the petitioner to remain until the European Commission and Court have examined the case.[81]

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73. The States which have ratified the European Convention are: Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *See* CARTER & TRIMBLE, *supra* note 54, at 429.

74. European Convention, *supra* note 72, art. 19. *See generally*, J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1988).

75. European Convention, *supra* note 72, arts. 32, 48.

76. Heribert Golsong, *On the Reform Of the Supervisory System of the European Convention On Human Rights*, 13 HUM. RTS. L.J. 265, 265 (1992) (citing Council of Europe Document MDH (85) 1, 5); *see* INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW AND POLICY 549 (Richard Lillich & Frank Newman eds., 1979).

77. Rolv Ryssdal, The Future of the European Court of Human Rights, ECOUR90296.AB, 4 (1990).

78. E.V.O. Dankwa, *Conference on Regional Systems of Human Rights Protection in Africa, the Americas and Europe*, 13 HUM. RTS. L.J. 314, 316 (1992); *see also* , Ryssdal, *supra* note 77, at 4.

79. Carl A. Norgaard & Hans C. 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).

80. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 35 (1991). *See also* Norgaard & Kruger, *supra* note 79, at 112.

81. *See, e.g.*, Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 35 (1991).

The European Commission will indicate this interim measure only when a party presents evidence which demonstrates a probability that irreparable damage would result from the expulsion.[82]

There is no statutory authority in the European system to provide for the adoption of provisional measures by either the European Court or the European Commission.[83] The European Convention does not contain a provision authorizing the adoption of provisional measures.[84] In the early years of the system, when a need for provisional measures was perceived, the Secretary, on behalf of the European Commission, asked state parties unofficially to refrain from taking certain actions.[85] Most states voluntarily complied with these requests.[86] Subsequently, the European Commission incorporated a Rule of Procedure authorizing it to indicate provisional measures.[87] At present, the authority for the adoption of provisional measures lies in the Rules of Procedure of the European Commission [88] and the European Court.[89]

The European Commission rule on interim measures provides that the Commission "may indicate" interim measures which seem "desirable."[90] The rule also authorizes the President of the Commission to indicate interim measures when the Commission is not in session.[91] The European Court rule is similar and provides that the Court, or the President of the Court, may, at the request of any party concerned, or *proprio motu*, indicate any interim measure which is advisable.[92] Furthermore any interim measure indicated by the European Commission during its

82. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 25 (1991). In addition, the indication of provisional measures will only be given if the petitioner has exhausted all domestic remedies which would have the effect of suspending the decision to expel. Norgaard & Kruger, *supra* note 79, at 113.

83. *See* Norgaard & Kruger, *supra* note 79, at 109.

84. This lack of provision in the European Convention is in contrast to Article 41 of the Statute of the ICJ and Article 63(2) of the American Convention which do provide the enforcement tribunals with statutory authority.

85. *See* Norgaard & Kruger, *supra* note 79, at 111; P. VAN DIJK AND G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 65-66 (1990).

86. *Id.*

87. *Id.*

88. Rules of Procedure of the European Commission on Human Rights, rule 36 [hereinafter European Commission Rules].

89. Rules of Procedure of the European Court of Human Rights, rule 36 (as amended by the Court on 26 January 1989), ECOUR91156.EW, 36 (1991) [hereinafter European Court Rules].

90. European Commission Rules, *supra* note 88, rule 36.

91. *Id.*

92. European Court Rules, *supra* note 89, rule 36.

consideration of a complaint remains recommended after the case has been brought before the European Court, pending further consideration by the Court.[93] As the wording of both rules implies, the authority to adopt provisional measures is discretionary.[94] Also, the use of the term "indicate" implies that the measures are mere suggestions to be complied with in good faith, rather than binding orders.

The European Court has held, in *Cruz Varas v. Sweden,* that a rule on interim measures not included in the Convention is merely procedural and therefore does not create a binding obligation on the contracting parties.[95] In *Cruz Varas*, a Chilean National who had been denied political asylum in Sweden petitioned the European Commission to consider his case. He alleged that expulsion to Chile, where he was likely to be tortured, amounted to inhuman treatment in violation of Article 3 of the European Convention, which prohibits torture and inhuman or degrading treatment or punishment.[96] The European Commission requested that Sweden, pursuant to Commission Rule 36 on interim measures, delay the expulsion of Cruz until the Commission could hear his case and reach a decision. Sweden failed to honor the Commission's request for interim measures and carried out the expulsion. The European Commission then found that Sweden had violated the Convention.[97] Sweden referred the case to the European Court, which held that, in the absence of a specific provision in the Convention, the European Commission did not have the power to order interim measures.[98]

Cruz Varas dealt only with the European Commission's power to indicate interim measures, not with the European Court's power. The European Court's reasoning, however, that interim measures are not binding when there is no specific provision in the Convention granting such power would apply also to provisional measures indicated by the Court. The Court specifically stated that the power to order binding interim measures could not be inferred from the article in question "or from

93. *Id.* rule 36(3).

94. *Compare id. with* European Commission Rules, *supra* note 88, rule 36.

95. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 34-35 (1991).

96. European Convention, *supra* note 72, art. 3.

97. The Commission held that Sweden had violated Article 25(1) of the European Convention which provides: "Those of the High Contracting Parties who have made such a declaration [to allow the Commission to examine individual petitions] undertake not to hinder in any way the effective exercise of this right." In doing so, the Commission concluded that by deporting the petitioner, Sweden hindered his effective exercise of the right to petition the Commission, in violation of the Convention. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 46-47 (1991).

98. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 38 (1991).

other sources."[99] Rather, the Court reasoned that the contracting parties to the European Convention should determine if they would remedy the situation by adopting a new provision to the Convention.[100]

This lack of power is not as debilitating to the European System as it first might appear. Those states incorporated into the European human rights system are governed by the rule of law. Politically, the states of Europe are democratic and stable. Economically, they are developed states, without extremes of poverty and wealth. Socially, literacy rates are high, and most Europeans have access to the media.[101] European nations provide a safety net of social programs, including old age social security and health care. These states in general protect human rights and have accepted, for the greater part, the decisions of the European Human Rights Commission[102] and the judgments of the European Court.[103]

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99. *Id.* at 36.

100. *Id.*

101. Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 616 (1987).

102. In the thirty-one instances prior to the Cruz Varas Case, where the Commission had indicated provisional measures in expulsion cases, no State Party had failed to comply. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 51 (1991). However, the Court also stated that in several cases concerning extradition, the Contracting-States had not complied with Rule 36 indications. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 25 (1991).

An interesting example of provisional measures in an extradition case in the European system is the Soering Case, 161 Eur. Ct. H.R. (ser. A) at 1 (1989). In Soering, the United Kingdom complied with a European Court indication of provisional measures and refused to allow a prisoner to be extradited to the U.S. pending the outcome of proceedings before the Court. According to the facts of the case, Soering, who was charged with murder in the State of Virginia, was arrested in England and ordered extradited to the United States. The prosecutor in Virginia expressed his intention to seek the death penalty in the case. *Id.* at 12. Soering petitioned the European Commission to halt the extradition on the grounds that the extradition would violate the European Convention's prohibition of inhuman or degrading treatment or punishment. *Id.* at 32. Soering did not claim that the death penalty per se was inhuman or degrading punishment. He claimed rather that he was likely to be condemned to death, and the "death row phenomenon," whereby a prisoner over a period of years suffers increasing stress and anguish while awaiting execution, was itself cruel and inhuman punishment. *Id.*

As a provisional measure, the Court indicated to the Government of the United Kingdom that it would be advisable not to extradite Soering to the U.S. pending the outcome of the proceedings before the Court. The Government complied with this request. *Id.* at 9.

103. *See* MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW xliii (1990).

Voluntary compliance may not be so forthcoming in the future, however. The potential influx of additional states into the European system, many of which have histories of egregious human rights violations and little experience with democracy, may alter the functioning of the system.[104] As a result, European human rights scholars and functionaries have discussed changes, which may include an additional protocol to the Convention or a redrafting of the Convention.[105] Should changes be made, the European system should include a statutory provision with more definite wording to make it clear that provisional measures are binding on the parties.[106]

IV. Provisional Measures in the Inter-American System

A. *Introduction: The Social, Economic, and Political Context of the Inter-American System*

It is necessary to contrast briefly the social realities of the developed states of Europe with the underdeveloped states of Latin America[107] to understand the important distinctions between the two areas, in types of human rights violations, and, consequently, in the jurisprudence of provisional measures. Human rights violations, perhaps because of the different contexts, take on a distinct character in the two regions.

Whereas Europe has historically been governed by the rule of law,[108]

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104. With the political changes in Eastern Europe, countries including Czechoslovakia, Hungary, Poland, and Bulgaria have joined the Council of Europe and have ratified or are preparing to ratify the European Convention. The inclusion into the European system of these new countries, which have little recent experience in democracy, may result in multiple problems for the European human rights institutions. Golsong, *supra* note 76, at 265-66; Ryssdal, *supra* note 77, at 9-11.

105. *Id.* (discussing possible changes to the European system including a permanent, full-time Court and Commission).

106. Such a provision was considered and rejected under a less compelling situation. In 1971, the Committee of Ministers, on being asked to draft a Protocol to the European Convention which would empower the Commission and Court to order interim measures, determined that a Protocol was unnecessary as Contracting Parties complied with the requests of the Commission. The Committee did, however, adopt a formal recommendation to the States in which it recommended that States comply with Commission requests for interim measures. *See* Golsong, *supra* note 76; Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 34-35 (1991); Norgaard & Kruger, *supra* note 79, at 115.

107. Although the U.S. and Canada are members of the OAS and, therefore, are a part of the Inter-American system, neither has ratified the American Convention of Human Rights, and neither arguably engages in the gross and systematic human rights abuses which are widespread in certain Latin American countries.

108. Article 3 of the Statute of the Council of Europe provides that "every Member

the reality of most Latin American states is more somber.[109] Politically, much of the area is still unstable. Although several states recently returned to democracy after years of military dictatorships, the future of these fledgling democracies is still precarious. Internal conflicts continue, and the military and death squads retain varying amounts of power. Furthermore, most states of Latin American are economically underdeveloped and confront serious financial problems, from repayment of their international debts to widespread poverty for significant portions of the population.[110] These grave extremes of poverty and wealth further contribute to the political instability of the region. Population pressures continue to mount, literacy rates are low,[111] access to education is limited, and many people face misery, injustice, and exploitation.[112]

The existence of social and economic oppression, in many cases, gives rise to political oppression and to the ruthless and continuous violations of human rights.[113] The Inter-American system often confronts gross and systematic human rights violations,[114] rather than the individual violations of Europe.[115] As Professor Thomas Buergenthal, former President of the Inter-American Court, stated, "The political and economic realities of the Americas, where non-democratic regimes and large-scale poverty persist, make enforcement of human rights in this region much more difficult than in Western Europe."[116] As a result of the differences be-

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of the Council of Europe must accept the principles of the rule of law . . . ." Statute of the Council of Europe, art. 3, *reprinted in* COUNCIL OF EUROPE, STATUTES OF THE COUNCIL OF EUROPE 9 (1968).

109. *See generally*, JOHN H. MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS (1978).

110. INTERNATIONAL COMMISSION FOR CENTRAL AMERICA RECOVERY AND DEVELOPMENT, POVERTY, CONFLICT AND HOPE: A TURNING POINT IN LATIN AMERICA (1989) (report for the use of the Committee on Foreign Relations, U.S. Senate) [hereinafter INTERNATIONAL COMMISSION].

111. See Weston et al., *supra* note 101, at 227-28 (arguing that the repressive socio-economic and political conditions, low levels of literacy, unavailability of the media, and arbitrary denial of the protection of law inhibit individual access to the human rights system).

112. Hector Gros Espiell, *La Convencion Americana y La Convencion Europea de Derechos Humanos, Analisis Comparativa* [*The American Convention and the European Convention, A Comparative Analysis*] 35, EDITORIAL JURIDICA DE CHILE (1991); *see generally*, INTERNATIONAL COMMISSION, *supra* note 110.

113. Volio, *supra* note 37, at 72-73. *See* Angela Cornell & Kenneth Roberts, *Democracy, Counterinsurgency, and Human Rights: The Case of Peru*, 12 HUM. RTS. Q. 529, 533-35 (1990).

114. *See* DAVIDSON, *supra* note 26, at 4-5.

115. *See* Ryssdal, *supra* note 77, at 4

116. Thomas Buergenthal, *The American And European Conventions on Human*

tween the regions, the Inter-American human rights system, which has benefited immeasurably from the experience of the European system, must modify these lessons.[117] "For better or for worse, the problems of our Hemisphere are more unique to the Americas than they are universal or European. They can only be solved within the framework of our own legal, cultural, political, and social traditions."[118] Even the European experience with provisional measures in human rights law must be adapted to the Inter-American system.[119]

Provisional measures potentially have a significant role to play in the Inter-American system owing to the urgent character of many of the human rights claims which are brought before the Inter-American Commission. The potential for irreparable damage to persons in these cases often requires an immediacy of response which may result from the implementation of provisional measures.[120] This preventive function of provisional measures, when the lives and physical security of persons are concerned, is far more valuable than the compensatory function of a final judgment.

B. *The Statutory Basis of the Court's Authority to Order Provisional Measures*

Article 63(2) of the American Convention expressly provides for the Inter-American Court's authority to adopt provisional measures. This provision reads: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."[121] The adoption of provisional measures is discretionary, as in the ICJ and European system. The Court must make an ad hoc determination as to whether such measures are called for under the circumstances of each case. This power of the Court, however, is not to be exercised lightly. The Court's adoption

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Rights: Similarities and Differences, 30 AM. U. L. REV. 155, 156 (1980-81); *see* DAVIDSON, *supra* note 26, at 4.

117. Buergenthal, *supra* note 116, at 166.

118. *Id.*

119. Gros Espiell, *supra* note 52, at 73. Although the Rules of Procedure of the European Court have, in general, been a source and an inspiration for the Rules of Procedure of the Inter-American Court, the Inter-American system relied more closely on the jurisprudence of provisional measures in the ICJ in developing its jurisprudence of provisional measures. *Id.*

120. *See* Abranches, *supra* note 30, at 79, 109.

121. American Convention, *supra* note 22, art. 63(2).

of provisional measures is "an extraordinary instrument, one which becomes necessary in exceptional circumstances."[122] The Court's Rules of Procedure further support this discretionary nature by providing that "the Court may . . . order whatever provisional measures it deems appropriate."[123] Lacking this context, the Convention's statement that "the Court shall adopt such provisional measures,"[124] conceivably could imply that the Court has a legal duty to adopt provisional measures. This interpretation, however, is not consistent with the traditional function and jurisprudence of provisional measures.[125] More likely, the words "shall adopt" demonstrate the binding character of the measures. The authorization that the Court adopt the measures it deems pertinent[126] also allows the Court to exercise its discretion to decide which, if any, provisional measures are justified in a particular situation.

The Court has the authority to adopt provisional measures both in "matters it has under consideration" and "[w]ith respect to a case not yet submitted to the Court."[127] In the first instance, the term "matters" includes contentious cases that the Court is entertaining. The question, however, is why the drafters did not simply use the term "cases" in this context. Dunshee de Abranches has posited that the choice of the word "matters" in place of "cases"[128] raises the interesting possibility that the Court may also adopt provisional measures in the context of a request for an advisory opinion if there is urgent danger of irreparable damage to a person.[129] Traditional international law has not made provisional measures available in advisory matters except perhaps when two states agree to request an advisory opinion in a veiled contentious situation.[130]

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122. Request for Provisional Measures-Chunima Case, Inter-Am. Court 42, 45, OAS/ser.L/V/III.25, doc. 7 (1991). *See* Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights, in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439, 465 (Theodore Meron ed., 1984) [hereinafter Buergenthal, *The Inter-American System*].

123. Inter-American Court Rules, *supra* note 60, art. 24(1).

124. American Convention, *supra* note 22, art. 63(2).

125. *See* SZTUCKI, *supra* note 42, at 61.

126. American Convention, *supra* note 22, art. 63(2).

127. *Id.*

128. Abranches states that the Convention uses the term "case" in referring exclusively to specific denunciations submitted to the contentious jurisdiction of the Court. The Convention uses the term "matter" in a broader sense to refer to "situations" or "questions" submitted to the Commission but not to the Court. Abranches, *supra* note 30, at 109.

129. *Id.* at 125. *See* DAVIDSON, *supra* note 26, at 49 (citing Abranches but opining that the problem is unlikely to arise).

130. *See* SZTUCKI, *supra* note 42, at 139.

Nothing, however, in the Inter-American Convention bars this use in the unlikely event that provisional measures should prove pertinent.[131]

A more logical explanation exists, however, for the use of the term "matters" in the first sentence of Article 63(2). In this context, the term "matters" rather than "cases" clarifies that the criteria of "extreme gravity and urgency," and "when necessary to avoid irreparable damage to persons," apply not only to the adoption of provisional measures in cases that are before the Court under the first sentence of Article 63(2) but also to the adoption of provisional measures at the request of the Commission when a case has not yet been submitted to the Court. A "case not yet submitted to the Court" would not yet be referred to as a "case." Under the terminology of the Convention, "case" refers exclusively to specific denunciations submitted to the contentious jurisdiction of the Court.[132] Thus, "a case not yet submitted to the Court"[133] would be merely a "matter" before the Court on a request for provisional measures. The second sentence of the provision does not otherwise provide criteria necessary for considering such Commission requests.

The Commission's authority to request the Court to adopt provisional measures even when the case has not yet been submitted to the Court is, potentially, the most innovative advance in the jurisprudence of provisional measures in human rights law. Both the Convention and the Statute of the Commission provide for a procedure which allows the Court to adopt provisional measures in urgent circumstances at the request of the Commission, even when the case is not before the Court.[134] Traditionally, a court's authority to order provisional measures has been limited to the period during the course of proceedings in the case.[135] Under this provision, however, the Inter-American system does not have to await the termination of formal proceedings before the Commission. The Court thus can respond more quickly in urgent circumstances to prevent human rights abuse.

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131. *See* DAVIDSON, *supra* note 26, at 49; *see also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), reprinted in* 23 I.L.M. 320 (1983) (Inter. Am. Court H.R. Advisory Opinion) (for a possible scenario in which provisional measures may have been justified in an advisory opinion had the concerned State then been subject to the jurisdiction of the Court).

132. Abranches, *supra* note 30, at 109.

133. American Convention, *supra* note 22, art. 63(2).

134. *Id. See also* Statute of the Inter-American Commission on Human Rights, art. 19(c) (1979) [hereinafter the Statute of the Commission], *reprinted in* BASIC DOCUMENTS, *supra* note 22, at 65.

135. The ICJ rules provide that "[a] written request for the indication of provisional measures may be made by a party at any time *during the course of the proceedings* in the case in connection with which the request is made." *See* ICJ Rules, *supra* note 41, art. 73 (emphasis added).

C. *Jurisdiction of the Court*

Provisional measures may only be adopted by the Court when the Court has first determined that it has jurisdiction over the state party involved.[136] To date, no state has challenged the Court's jurisdiction to decide on provisional measures. Normally this will not be a difficult issue in the Inter-American System, as the subject matter of the Convention is limited to human rights abuses. Most state parties which have accepted the jurisdiction of the Court have done so without reservations or with only a reservation *ratione temporis*, which limits the jurisdiction to offenses which have taken place since the date of ratification.[137] Irreparable damage to persons by torture or death is a human rights abuse and is without doubt within the subject matter jurisdiction of the Court for any state that has accepted the jurisdiction of the Court. Furthermore, the necessary urgent nature of cases calling for provisional measures means that the danger must be occurring in the present, and therefore would not have occurred exclusively before a state party's acceptance of the Court's jurisdiction.

In the event, however, that jurisdiction becomes an issue in a particular case, the gravity and urgency of any situation calling for provisional measures should encourage the Court to follow the relevant precedent of the ICJ.[138] The ICJ holds that, when considering a request for provisional measures and a corresponding objection to jurisdiction, the ICJ need only satisfy itself that there appears to be a prima facie basis for the ICJ's jurisdiction. The ICJ need not satisfy itself that it has jurisdiction on the merits of the case.[139] Thus, a prima facie basis of jurisdiction should also be sufficient for the Inter-American Court when considering requests for provisional measures.

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136. Buergenthal, *The Inter-American System*, *supra* note 122, at 465. *But see* Gros Espiell, *supra* note 52, at 83 (arguing that according to Articles 23.1, 23.5 and 27 of the Rules of the Inter-American Court, the Court can adopt provisional measures even before deciding the question of jurisdiction).

137. *See* Signatures and Current Status of Ratifications, 55-64, *reprinted in* BASIC DOCUMENTS, *supra* note 22, at 55.

138. Buergenthal, *The Inter-American System*, *supra* note 122, at 465-66.

139. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 23 I.L.M. 468, 473 (I.C.J. 1984).

D. *Role of the Commission*

Neither the American Convention nor the Statute of the Inter-American Commission extends the authority to adopt provisional measures to the Inter-American Commission.[140] The Commission's self-authorized regulations, however, empower the Commission in urgent cases to take any action necessary for the discharge of its functions.[141] The action may include making a direct request to a state that it take "precautionary measures" to protect persons.[142] This provision parallels the European Commission's Rules of Procedure by which the European Commission empowered itself to make a request for provisional measures in certain cases.[143] The Inter-American Commission's regulations also provide for immediate action. If the Commission is not in session the Chairman or when necessary, one of the Vice-Chairmen, may decide to request the measures on behalf of the Commission.[144] As with provisional measures in other cases, the request for these measures and their adoption shall not prejudice the final decision on the merits of the case.[145]

The Commission also has the authority to request that the Inter-American Court take provisional measures whether the matter is before the Court or the case has not yet been submitted to the Court.[146] If the Court holds a public hearing on the question, it is the responsibility of the Commission to present the position of the petitioners.[147] It is also within the purview of the Commission to suggest those measures to be taken by the government. In certain cases the Court has charged the

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140. American Convention, *supra* note 22, art. 63(2), and The Statute of the Commission, *supra* note 134, art. 29(2), only authorize the Commission to request that the Inter-American Court take provisional measures.

141. Regulations of the Inter-American Commission on Human Rights, April 8, 1980 (modified on June 29, 1987), art. 29(1), *reprinted in* BASIC DOCUMENTS, *supra* note 22, at 75 [hereinafter Regulations of the Commission].

142. *Id.* art. 29(2). Note that the Spanish and English versions of Article 29 are not in accordance. The Spanish version is entitled "Medidas Cautelares", which means Precautionary Measures. The internal reference in Article 29(2) uses the identical term, "medidas cautelares". The English version, however, uses the term "precautionary measures" in the title, but then changes to the term "provisional measures" in the body of Article 29(2). Most case law uses the term "precautionary measures" when referring to measures which the Commission requests directly from a government, and "provisional measures" when referring to measures which the Court requests of a government.

143. See *supra* notes 88-94 and accompanying text.

144. Regulations of the Commission, *supra* note 141, art. 29(3).

145. *Id.* art. 2.

146. American Convention, *supra* note 22, art. 63(2).

147. American Convention, *supra* note 22, art. 61; *see* Weston et al., *supra* note 101, at 604-05.

Commission with oversight of a government's compliance with the measures ordered and with a subsequent duty to report to the Court.[148]

E. *Requirements of Admissibility Before the Commission*

The question arises whether the Commission can adopt precautionary measures or request that the Court adopt provisional measures when the requirements for admissibility of a petition, as provided in the Convention, have not been met. The Commission has maintained, in a request for provisional measures, that the urgent risk of irreparable damage to persons absolves the Commission from the prior necessity of defining admissibility according to the requirements of the Convention.[149] In this regard, the Commission stated that "such precautionary measures may be requested even when the admissibility of a case has not yet been defined by the Commission pursuant to Article 46 of the Convention, since, by their very nature, provisional measures arise from a reasonable presumption of extreme and urgent risk of irreparable damage to persons."[150] Conversely, Gros Espiell, an Inter-American Court judge for twelve years and a former president of the Court opined that the Commission must accept a case, thereby making at least a preliminary decision on admissibility, before requesting that the Court adopt provisional measures in that case.[151] The Court, in considering provisional measures requested by the Commission, has not challenged the Commission's

148. In the Chunima Court Order, the Court adopted provisional measures for a limited time and required that the Commission advise the Court as to the implementation of the Order. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

149. Request for Provisional Measures in Case 10.548, Inter-Am. Court 25, 27, OEA/ser.G/CP, doc. 2146 (1991) [hereinafter Request for Provisional Measures—Bustios-Rojas Case]. The Commission was referring to provisional measures requested by the Commission (usually referred to as precautionary measures). However, this would also apply to provisional measures requested of the Court.

150. *Id.*

151. HECTOR GROS ESPIELL, ESTUDIOS SOBRE DERECHOS HUMANOS [STUDIES OF HUMAN RIGHTS] 170 (1988); *see also* Gros Espiell, *supra* note 112. *But see* Aguilar Andres, *Procedimiento que Debe Aplicar la Comision Interamericana de Derechos Humanos en el Examen de las Peticiones o Comunicaciones Individuales Sobre Presuntas Violaciones de Derechos Humanos, in* DERECHOS HUMANOS EN LAS AMERICAS [*Procedure that the Inter-American Commission on Human Rights Should Apply in the Examination of Individual Petitions and Communications of Presumed Violations of Human Rights, in* HUMAN RIGHTS IN THE AMERICAS] OAS 199, 204 (arguing that the Commission should dispense with formal requirements of admissibility in urgent situations to avoid human rights violations and to comply with the humanitarian character of its duties).

stance on admissibility. Whether this is due to the failure of a state party to object, thus constituting a waiver of the procedure, or to the basic agreement of the Court with this premise, is unclear.

A prima facie determination that a petition meets the requirements of admissibility should be made before the Commission may request that the Court adopt provisional measures. Even in serious and urgent cases, with the prior consent of the state, the Convention specifies that the petition or communication must fulfill all the formal requirements of admissibility for the Commission to conduct an investigation.[152] The Convention provides that the Commission has the power "to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51" of the Convention.[153] These Articles contain the requirements which parties must fulfill before the Commission may admit a petition or communication.[154] Furthermore, the regulations of the Commission provide that the Commission "shall take into account [petitions] only when they fulfill the requirements set forth in [the] Convention, in the Statute and in these Regulations."[155] These provisions have been interpreted to require that the Commission need only make a prima facie determination that the petition meets the requirements of admissibility[156] and thereby accept the petition "in principle."[157] The Commission need not make an express declaration of ad-

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152. American Convention, *supra* note 22, art. 48(2); *see also* Regulations of the Commission, *supra* note 141, art. 44(2).

153. American Convention, *supra* note 22, art. 41(f).

154. The formal requirements of admissibility are that 1) the domestic remedies have been exhausted, 2) the petition has been lodged within a period of six months from the date of violation of the right, 3) the subject of the petition is not pending in another international proceeding, 4) the petition contains the appropriate information, including the name, nationality, profession, domicile, and signature of the person or legal representative lodging the petition, 5) the petition states facts that tend to establish a violation of rights protected by the Convention, and the petition is not manifestly groundless or out of order. American Convention, *supra* note 22, arts. 46(a)-(d), 47(b)-(c).

155. Regulations of the Commission, *supra* note 141, art. 31.

156. The normal practice of the Commission is to first make a prima facie determination of admissibility based on the requirements of Articles 46 and 47. Thereafter it must furnish the information in the petition to the government and await a response for a prescribed period. Then, depending on whether the Government has responded and the content of the response, the Commission may, *inter alia,* declare the petition inadmissible on the basis of information received, presume the truth of the allegations, or place itself at the disposal of the parties to facilitate a friendly settlement. American Convention, *supra* note 22, art. 48(1) ; *see* DAVIDSON, *supra* note 26, at 25.

157. Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1987, para. 39, Series C: No. 3.

missibility.[158] If the Commission is claiming that it need not make even a preliminary prima facie determination of admissibility, rather than simply restating the accepted principle that it need not make a final decision of admissibility, its stance is not legally justifiable. Statutory authority does not absolve the Commission from making a prima facie determination of admissibility even in serious and urgent cases, and thus the Court should so hold in requests for provisional measures.

F. *The President's Adoption of Interim Measures Pending the Convocation of the Court*

In light of the urgent nature of a provisional measures request and the part-time nature of the Court, the President of the Court is authorized to "call upon" a government to adopt emergency measures when the Court is not in session.[159] The Commission may present a request for provisional measures "to the President, to any judge of the Court, or to the Secretariat, by any means of communication."[160]

Previously, the rules required that the President, after adopting urgent measures when the Court was not sitting, call the Court into session immediately.[161] The prospect of special sessions was well beyond the

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158. *Id.* The Commission can decide on the admissibility of the petition based on the petition itself. If the Commission has ruled that the petition is admissible, it may request information from the government which subsequently may show that the petition is not admissible because, for example, domestic remedies have not been exhausted or the communication is manifestly groundless. Abranches, *supra* note 30, at 112.

159. Rules of Procedure of the Inter-Am. Court of H.R., art. 24(4), modified by the Court at its Twenty-Seventh Regular Session, held in January 1993 (not yet published) [hereinafter Court Rules of Procedure].

In *Chunima*, the Court coined the term "emergency measures" to differentiate between "provisional measures" which can be adopted by the Court, and the measures which the President is authorized to order the government to adopt until the Court can meet. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991). There may be a problem of translation, in that the Spanish version of Chunima refers to "medidas de urgencia" (measures of urgency) which the President may require of the parties. This term is more in keeping with the Rules of Procedure of the Court which authorizes the President to require "medidas urgentes"(urgent measures). The Spanish translation is authentic.

160. Court Rules of Procedure, *supra* note 159, art. 24(3).

161. This rule was modified at the Court's Twenty-Seventh Regular Session in January, 1993. It now provides that:

> If the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible the judges, shall call upon the government concerned to adopt the necessary urgent measures and to act so as to permit any provisional measures subsequently ordered by the Court in its next regular session to have the requisite effect.

budget of the Court, even if the Comission only occasionally requests provisional measures.[162] Recently, however, the Court adopted a procedural modification to counterbalance the need for provisional measures with the financial limitations of the Court. Rather than meeting in special session, the President can adopt urgent measures, and the Court will consider the request and the President's response to it at its next regular session,[163] thus eliminating the expense of a special session of the Court.[164]

A foreseeable difficulty with this modification could arise should a government refuse to comply with the urgent measures of the President in a case which, by its definition, is grave and urgent and threatens irreparable harm to persons. The urgent measures dictated by the President do not appear to be binding on the state parties,[165] as the authority is granted by the Court's self-adopted Rules of Procedure, not by the Convention.[166] Furthermore, the very wording of the rule implies that the President's resolutions in this matter would not be binding. The rule provides that the President "shall call upon the government" to take measures "and to act so as to permit any provisional measures, subsequently ordered by the Court . . . to have the requisite effect."[167] In the event that a government did not comply with the President's resolution, it would be necessary for the full Court to meet. Although this modifica-

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Id. art. 24(4). Article 25(1) of the Statute of the Inter-American Court of Human Rights [hereinafter Statute of the Inter-American Court], *reprinted in* BASIC DOCUMENTS, *supra* note 22, at 105, authorizes the Court to draw up its Rules of Procedure. Article 25(2) provides that, "[t]he Rules of Procedure may delegate to the President or to Committees of the Court authority to carry out certain parts of the legal proceedings, with the exception of issuing final rulings or advisory opinions. Ruling or decisions issued by the President or the Committees of the Court that are not purely procedural in nature may be appealed before the full Court." *Id.* art. 25(2).

162. *See infra* text accompanying notes 329-340.

163. Court Rules of Procedure, *supra* note 159, art. 24(4) as modified.

164. The seat of the Court is in San Jose, Costa Rica. Agreement Between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights, art. 2, *reprinted in* BASIC DOCUMENTS, *supra* note 22. The Court may, however, convene in any Member State of the OAS. Statute of the Inter-American Court, *supra* note 161, art. 3.

165. *Restrictions to the Death Penalty*, *supra* note 131, at 326.

166. Court Rules of Procedure, *supra* note 159, rule 24(4). However, the President's resolutions are labeled Orders both by the President and the Plenary Court. *See* Order of the President of the Inter-American Court of Human Rights of July 15, 1991, Inter-Am. Court 46, 50-51, OAS/ser.L/V/III.25, doc. 7 (1991) [hereinafter Order of the President-Chunima Case]; Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

167. Court Rules of Procedures, *supra* note 159, rule 24(4).

tion to the Court's Rules is positive, it may not be adequate if requests for provisional measures increase and states do not comply with the President's requests for urgent measures.

To date, the Court has not been sitting on any of the occasions when the Commission has requested the Court to adopt provisional measures. On two of these occasions, the President, in consultation with the other judges, made formal orders of urgent provisional measures.[168] In both cases, the terms of the orders were general, requiring the state to adopt without delay all necessary measures to protect the right to life and the physical integrity of the persons named.[169] The President did not attempt to suggest any specific actions to be taken or avoided by the government. The President, operating under the rule which required that he immediately convene the Court, then scheduled a public hearing[170] to allow the plenary Court the opportunity to determine whether provisional measures were required.[171]

Although a question may exist about whether the emergency measures ordered by the President are binding on a government, the Court has stated unequivocally that these measures are not subsequently binding on the plenary Court.[172] The Court itself is careful to distinguish between the provisional measures that the Court has the authority to adopt under Article 63(2) of the Convention, and the "emergency measures" the

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168. To date, the President has adopted urgent measures on two occasions and the States have at least purported to comply with them. *See* Order of the President in the Bustios-Rojas Case, Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991) [hereinafter Order of the President--Bustios-Rojas Case]; Order of the President--Chunima Case, Inter-Am. Court 46, 50-51, OAS/ser.L/V/III.25, doc. 7 (1991). In the Honduran cases the President called upon the State to act, but did not officially adopt measures. Honduras responded that it would take the measures suggested. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 43, OAS/ser.L/V/III.19, doc. 13 (1988). The President made these orders pursuant to Article 23(4) of the Rules of Court adopted in 1980, which has since changed. See *supra* note 161 for the present version of the rule, which is now Article 24(4).

169. Order of the President--Bustios-Rojas Case, Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991); Order of the President-Chunima Case, Inter-Am. Court 46, 50-51, OAS/ser.L/V/III.25, doc. 7 (1991).

170. Order of the President--Bustios-Rojas Case, Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991); Order of the President-Chunima Case, Inter-Am. Court 46, 50-51, OAS/ser.L/V/III.25, doc. 7 (1991).

171. Order of the President--Bustios-Rojas Case, Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991); Order of the President-Chunima Case, Inter-Am. Court 46, 50-51, OAS/ser.L/V/III.25, doc. 7 (1991).

172. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

President can order under Article 24(4) of the Rules.[173] The emergency measures requested by the President do not result in a *"fait accompli"*.[174] Those measures ordered by the President serve to avoid irreparable actions until the Court can meet to study the matter.[175] At that time the Court may refuse to adopt provisional measures or may adopt measures other than those mandated by the President. To date, however, the Court has ratified all provisional measures adopted by the President.[176]

G. *Cases in Which the Court Has Ordered Provisional Measures*

Once the questions of jurisdiction and admissibility have been determined, the decision whether the Court will adopt provisional measures is fact-specific. The factual situation must demonstrate the requisites of gravity, urgency, and the likelihood of irreparable damage to persons to justify adopting the extraordinary remedy of provisional measures.[177]

The Inter-American Court has considered requests for provisional measures in five instances, and has ordered that a state take provisional measures in three of those instances.[178] In only one instance, that of the three joined Honduran cases were provisional measures requested when the case was on the Court's docket.[179] In the other cases, as well as on the two occasions when the Court refused to adopt provisional measures, the Commission requested that the Court adopt provisional measures in cases which had not yet been submitted to the Court.[180] It is necessary to

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173. *Id. See supra* note 168 (discussing the change in the emergency measures rule, from Article 23(4) to Article 24(4)).

174. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

175. *Id.*

176. *See id.* at 56; Order of the President--Bustios-Rojas Case, Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991).

177. American Convention, *supra* note 22, art. 63(2).

178. Order of the President-Chunima Case, Inter-Am. Court 46, 47, OAS/ser.L/V/III.25, doc. 7 (1991); Order of the President--Bustios-Rojas Case, Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991); Judgment of the Court-Velasquez Rodriquez Case, Inter-Am. Court 35, 44, OAS/ser.L/V/III.19, doc. 13 (1988); Godinez Cruz Case, Judgment of January 20, 1989, Series C: No. 5; Fairen Garbi and Solis Corrales Case, Judgment of March 15, 1989, Series C: No. 6. The last three cases were Honduran cases which were joined by the Inter-American Court. For purposes of this section, these cases will be referred to only by the name of one case, the Velasquez Rodriguez case.

179. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, OAS/ser.L/V/III.19, doc. 13 (1988).

180. American Convention, *supra* note 22, art. 63(2).

consider the cases to understand the reasoning of the Court in making its determinations.

1. Honduran Cases

In the *Honduran Cases*,[181] the Commission requested that the Court order Honduras to take provisional measures to protect the lives of witnesses who had testified, or who were scheduled to testify, before the Court.[182] The *Honduran Cases* arose from the alleged forced disappearances of more than 100 people in Honduras from 1981 to 1984[183] and resulted human rights petitions to the Inter-American Commission.[184] In 1986, the Commission unable to reach a friendly settlement between the parties, referred three of these cases to the Court.[185]

A public hearing on the merits of the cases was held in October 1987. At that time, several Honduran nationals testified that numerous persons had been kidnapped and had disappeared in Honduras and that these

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181. The Commission referred three cases to the Court, all based on alleged disappearances in Honduras. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, OAS/ser.L/V/III.19, doc. 13 (1988). *See supra* note 39 for facts of that case.

182. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 43-44, OAS/ser.L/V/III.19, doc. 13 (1988).

183. *Id.* at 63. Typically, the practice of disappearances followed a recognizable pattern. The victims were usually student or union leaders, human rights activists or others suspected of being subversives, who were often first placed under surveillance prior to the abduction. *Id.* at 56. The kidnappers drove vehicles with tinted glass, which required a government permit. The vehicles either did not have license plates or were equipped with false plates. The kidnappers, at times dressed in civilian clothes, with or without disguise, and at other times wore military attire. They took the victims from their homes, or even from public streets in the presence of witnesses. In one instance, the police attempted to intervene but the kidnappers identified themselves as special security forces and were then allowed to take the victim. *Id.* at 55. Victims were often brought to secret detention centers where they were tortured and sometimes murdered. *Id.* at 56. Families, if they dared seek out their relatives, were given no information. See *Commission Nacional Sobre la Desaparicion de Personas, Nunca Mas* [*National Commission on the Disappearance of Persons, Never Again*], *supra* note 15, for a detailed description of the practice of "disappearance" during the Dirty War in Argentina. *See also*, Linda Drucker, *Governmental Liability for 'Disappearances': A Landmark Ruling by the Inter-American Court of Human Rights*, STAN. J. INT'L L 289, 299-300 (1988); James LeMoyne, *Testifying to Torture*, N. Y. TIMES MAGAZINE, June 5, 1988, at 45 (interviewing two witnesses to the Honduran cases).

184. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 36 OAS/ser.L/V/III.19, doc. 13 (1988).

185. *Id.* at 37; Godinez Cruz Case, Judgment of January 20, 1989, Series C: No. 5; Fairen Garbi and Solis Corrales Case, Judgment of March 15, 1989, Series C: No. 6.

disappearances were imputable to the Honduran Armed Forces.[186] On their return to Honduras following the hearings, two witnesses received death threats. The Commission then requested that the Court adopt interim measures under Article 63(2) for the protection of these witnesses.[187] As the Court was not in session at the time of the Commission request, it fell upon the President, in conjunction with the Permanent Commission, to determine whether urgent measures were called for under the circumstances, and, if so, to convene the Court.[188] The President did not formally request urgent provisional measures. Rather, the President forwarded the Commission's information to the government of Honduras along with the statement that although he did not have enough proof as to the identity of the party responsible for the threats, he nonetheless "strongly wishe[d] to request" that the government of Honduras take all measures necessary to guarantee the safety of the lives and property of the two witnesses threatened.[189] The President did not convene the Court at that time, but stated in his communication to Honduras that he would do so if the abnormal situation continued.[190] In response, Honduras informed the Court that it would guarantee the two named witnesses "the respect of their physical and moral integrity."[191] Although the two named witnesses were not subsequently harmed, shortly thereafter three other past and prospective witnesses were assassinated in Honduras.[192]

The Court, sitting on the date of the final assassination, required Honduras immediately to adopt provisional measures necessary "to prevent further infringements on the basic rights of those who have appeared or have been summoned" to appear before the Court.[193] The Court also ordered the government to investigate the crimes and to identify and punish the perpetrators.[194] The Commission subsequently re-

186. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 41, OAS/ser.L/V/III.19, doc. 13 (1988).

187. *Id.* at 43.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 44; *see* DAVIDSON, *supra* note 26, at 50 (arguing that the provisional measures ordered "come perilously close to implicating the Honduran government in the assassinations and threats.").

194. Judgment of the Court-Velasquez Rodriquez Case, Inter-Am. Court 35, 44, OAS/ser.L/V/III.19, doc. 13 (1988).

quested more detailed, complementary provisional measures.[195] A public hearing was held regarding these additional measures. The Court resolved that Honduras was to inform the Court of specific measures adopted to protect the witnesses and of its investigations of the threats and assassinations: Honduras, in compliance, later submitted the required reports.[196] No additional witnesses were harmed.[197]

2. Bustios-Rojas Case (Peru)

In the *Bustios-Rojas Case*, the Commission relied, for the first time, upon its authority under Article 63(2) of the Convention to request provisional measures in a case not yet submitted to the Court. The Commission requested that the Court order Peru to adopt provisional measures to protect witnesses in a case before the Commission.[198] According to the Commission's Request, in November 1988 two Peruvian journalists had been ambushed while in route to investigate a murder. One of the journalists, Hugo Bustios-Saavedra, was killed while the other was wounded.[199] An eyewitness to the attack, who had accused members of the Peruvian military of responsibility, was subsequently murdered.[200] The military threatened and detained two other eyewitnesses, and both the wife of the assassinated journalist and the journalist who survived the attack received death threats. The government, however, neglected to investigate their complaints.[201]

The petitioner, the Committee for the Protection of Journalists, claimed that, under the circumstances, the very filing of a petition before the Commission placed the lives of the surviving victim and the witnesses further at risk.[202] Therefore, the petitioners submitted that "there [was]

195. *Id.* at 45.

196. *Id.* In addition Honduras was required to adopt measures "to make clear that the appearance of an individual before the Inter-American Commission or Court of Human Rights. . .is a right enjoyed by every individual." *Id.*; *see* DAVIDSON, *supra* note 26, at 51 (arguing that there is no such right under the applicable legal instruments).

197. Judgment of the Court-Velasquez Rodriquez Case, Inter-Am. Court 35, 45-46, OAS/ser.L/V/III.19, doc. 13 (1988); *see generally*, Juan E. Mendez and Jose M. Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990) (for a detailed description and analysis of the Honduran cases.)

198. Request for Provisional Measures—Bustios-Rojas Case, Inter-Am. Court 25, 28, OEA/ser.G/CP, doc. 2146 (1991).

199. *Id.* at 25.

200. *Id.*

201. *Id.* at 26.

202. *Id.* at 25.

an urgent need for precautionary measures to compel the government to cease and desist from intimidating the victims and witnesses and to guarantee their lives and personal safety until a final decision on the merits of the petition [was] rendered."[203] The Commission directly requested that precautionary measures be taken by the government of Peru to protect the lives and personal integrity of the seven named persons[204] and, in the same resolution, requested that the Court also adopt provisional measures in the case.[205]

The Court was not sitting at the time of the Commission's request. The President of the Court resolved to convene the Court, hold a public hearing, and enjoin that the government of Peru to immediately adopt those measures necessary to protect the lives and personal integrity of the persons named in the Commission request.[206] The Peruvian government asked for a postponement of the public hearing, even though it claimed to have adopted the necessary measures.[207] The Court denied the request for a postponement.[208]

At the public hearing, the Commission claimed that the only measure taken by the government had been a public radio announcement asking the persons threatened to meet at military headquarters, a measure that intimidated the very persons it supposedly was designed to protect.[209] The representative of the government could not cite to any other measures it had taken.[210] The Court, therefore, resolved to allow the Peruvian government a limited time to adopt adequate measures and to inform the Court as to their nature.[211] The Court further charged the Commission with the duty to inform the Court about Peruvian governmental compliance. In addition, the President and the Permanent Com-

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203. See Petition to the Inter-American Commission on Human Rights, Violations of the Human Rights of Peruvian Journalists Hugo Bustios Saavedra and Eduardo Rojas Arce (May 3, 1990) (submitted by the Committee to Protect Journalists, 16 East 42nd Street, Third Floor, New York, N.Y. 10017, USA) (on file with author).

204. Request for Provisional Measures--Bustios-Rojas Case, Inter-Am. Court 25, 28, OEA/ser.G/CP, doc. 2146 (1991).

205. *Id.*

206. Order of the President--Bustios-Rojas Case; Inter-Am. Court 29, 31, OEA/ser.G/CP, doc. 2146 (1991).

207. Order of the Court in the Bustios-Rojas Case, Aug. 8, 1990, Inter-Am. Court 33, 34, OEA/ser.G/CP, doc. 2146 (1991) [hereinafter Order of the Court—Bustios-Rojas Case].

208. *Id.* at 35.

209. *Id.*

210. *Id.*

211. *Id.* at 37.

mission of the Court[212] were authorized to adopt any additional measures deemed necessary, to verify the implementation of the Court's order, and to inform the Court thereof.[213] In the subsequent Court Order of January 1991, the Court required Peru to continue provisional measures and returned the case to the Commission.[214]

3. Chunima Case (Guatemala)

The *Chunima Case* involving Guatemala[215] presented the third instance in which the Court ordered provisional measures. As with the *Bustios-Rojas Case*, this case was before the Commission but not the Court. After several members of a Guatemalan Indian human rights monitoring group had been murdered and others threatened with death,[216] Americas Watch and the Center for Justice and International Law filed a petition with the Commission.[217] In response the Commission made a formal request that the Court adopt the provisional measures necessary to protect the lives and safety of fourteen people.[218] The Commission did not directly request that Guatemala take precautionary measures to protect those at risk.[219] Instead, it relied solely on the conventional power of the Court to order provisional measures.[220]

As the Court was not sitting at the time of the *Chunima* request, the President initially resolved "[t]o order" the government of Guatemala to

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212. The Permanent Commission of the Court is composed of the President, Vice President and a third judge named by the President. Court Rules of Procedure, *supra* note 159, art. 6.

213. Order of the Court--Bustios-Rojas Case, Inter-Am. Court 33, 37, OEA/ser.G/CP, doc. 2146 (1991).

214. Order of the Court in the Bustios-Rojas Case, Jan. 17, 1991, Inter-Am. Court 15, 16, OAS/ser.L/V/III.25, doc. 7 (1991) [hereinafter Second Order of the Court--Bustios-Rojas Case]. In this Order, the Court additionally required that Peru provide civilian liaison authorities. *Id.*

215. Request for Provisional Measures-Chunima Case, Inter-Am. Court 42, OAS/ser.L/V/III.25, doc. 7 (1991). The Court's jurisdiction over Guatemala in this case was based on Guatemala's ratification of the American Convention on May 25, 1978 and Guatemala's acceptance of the compulsory jurisdiction of the Court on March 9, 1987. Article 1(1) of the Convention provides that all States Parties are obligated not only to respect the rights and freedoms recognized in the Convention but also to ensure their free and full exercise to all persons subject to their jurisdiction.

216. *Id.* at 43. For a more complete description of the facts of the case, see *supra* part 1.

217. *Id.* at 42.

218. *Id.*

219. *Id.* at 45.

220. *Id.*

adopt, in general, all necessary measures to protect the life and physical integrity of those named in the Commission's request.[221] The President also convened a special session of the Court and ordered the government of Guatemala and the Commission to appear at a public hearing.[222] Guatemala, although it twice requested postponement of the hearing, did appear and present its position.[223] Furthermore, at the hearing, Guatemala announced the arrest and incarceration of the principal suspects, in accordance the arrest warrants issued and with the request of the Commission.[224]

The Court resolved to confirm the President's order and extend its effect for a set time.[225] It further ordered the Guatemalan government to specify the measures taken in compliance and the Commission to inform the Court of their implementation.[226] At the end of the time specified, the measures lapsed.

H. *Cases in Which the Court Denied Provisional Measures*

In 1992, the Commission requested that the Court adopt provisional measures in two cases which were before the Commission but had not been submitted to the Court.[227] In these two cases, both of which involved the government of Peru, the Court refused to order provisional measures.[228]

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221. Order of the President-Chunima Case, Inter-Am. Court 46, 50-51, OAS/ser.L/V/III.25, doc. 7 (1991).

222. *Id.* at 51. At the time of the President's Order, the Rules of Procedure of the Court required that the President convoke the Court immediately upon receiving a request for provisional measures.

223. *Id.* at 54.

224. *Id.*

225. *Id.* at 56.

226. *Id.*

227. Chipoco Case, Resolution of the Inter-American Court of Human Rights, Jan. 27, 1993, Provisional Measures Requested by the Inter-American Commission on Human Rights Regarding Peru (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court) [hereinafter Resolution of the Court-Chipoco Case]; Peruvian Prisons Case, Resolution of the Inter-American Court of Human Rights, Jan. 27, 1993, Provisional Measures Requested by the Inter-American Commission on Human Rights Regarding Peru (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court) [hereinafter Resolution of the Court-Peruvian Prisons Case].

228. Resolution of the Court-Chipoco Case (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court); Resolution of the Court-Peruvian Prisons Case (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court).

1. The Chipoco Case (Peru)

In the *Chipoco Case*, the Commission requested provisional measures to protect Peruvian human rights activist Carlos Chipoco, who had previously cooperated with the Commission when Peru was accused of violating human rights. Chipoco was criminally charged in Peru with the crime of "justification of terrorism against the state,"[229] a conviction which could have resulted in loss of Peruvian nationality and more than twenty years in prison.[230] Although Chipoco was in the United States at the time of the indictment, he could have been tried in abstentia in Peru. The Peruvian Court would not issue an arrest warrant, however, until the indictment was modified to fully identify him.[231] At this stage of the proceedings, while Chipoco was in the United States and before an arrest warrant had been issued, the Commission requested that the Inter-American Court adopt provisional measures in the case. The Commisión requested that Peru be ordered to verify the truth of the allegations; specify the existing evidence before initiating a penal action; carry out an exhaustive investigation; specify the acts on which the charge of terrorism was based; disclose the evidence against Chipoco; and guarantee him the full exercise of his human rights during the judicial proceedings and the right to petition the Inter-American human rights system.[232]

The Court was not sitting at the time of the request, and the President refused to adopt the urgent measures requested.[233] Since an arrest warrant for the alleged victim had not been issued, the President found that the "conditions do not now exist which would require the Government to adopt urgent measures of a provisional nature."[234] He did, however, resolve to submit the Commission's request to the plenary Court at its next regular session.[235] At this session, the Court also refused to adopt provisional measures, finding that the Commission had not submitted sufficient information to the Court "to support a presumption of the truth of the allegations and of a situation whose grave seriousness and urgency

229. Order of the President in the Chipoco Case, Dec. 14, 1992, Inter-Am. Court 97, 98, OAS/ser. L/V/III.27, doc. 10 (1992) [hereinafter Order of the President-Chipoco Case].

230. *Id.*

231. *Id.* Other Peruvians were charged in the same indictment. In the indictment, Mr. Chipoco was identified only as Carlos Chipoco, which was not his full name. The Criminal Court of Lima ordered that the identification be completed and the indictment amended. *Id.*

232. *Id.* at 97.

233. *Id.* at 99.

234. *Id.*

235. *Id.*

could cause irreparable harm to persons."[236]

2. The Peruvian Prisons Case

In the *Peruvian Prisons Case*, the Commission alleged in its request for provisional measures, that a "grave situation" existed in various Peruvian prisons, due to the poor conditions of imprisonment of those accused and sentenced for terrorism.[237] The Commission further alleged that in these prisons there was "a high incidence of diseases, loss of weight, overcrowding, isolation and psychological and emotional problems among male and female prisoners," as well as incidents of mistreatment, insults, and humiliation.[238]

The Commission had unsuccessfully requested precautionary measures on its own authority, seeking *inter alia* to visit the prisons.[239] The provisional measures which the Commission requested the Court to adopt included Peruvian authorization for a Commission on-site visit to the prisons, for visits by relatives of the prisoners to bring them clothes, medications, and other supplies, and for independent institutional visits to provide medical care to the prisoners.[240]

The Court was not sitting at the time of the request, and the President refused to adopt the urgent measures requested. He found that the Commission's request for an on-site visit of the prisons could not be considered a precautionary or provisional measure because Article 48(2) of the Convention required the permission of the government of Peru for the visit.[241] The President also found that the evidence presented was insufficient to prove the allegations of mistreatment of the prisoners and lack of medical assistance.[242] The Court, when it considered the request at its next regularly-scheduled session, also found the evidence insufficient to support a resolution to adopt the requested measures.[243]

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236. Resolution of the Court-Chipoco Case (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court).

237. Order of the President in the Peruvian Prisons Case, Dec. 14, 1992, Inter-Am. Court 101, 103, OAS/ser.L/V/III.27, doc. 10 (1992) [hereinafter Order of the President-Peruvian Prisons Case].

238. *Id.* at 102.

239. *Id.* at 103.

240. *Id.* at 102.

241. *Id.* at 104.

242. *Id.*

243. Resolution of the Court-Peruvian Prisons Case (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court).

I. *Requirements for and Contents of Provisional Measures*

The Court may order whatever provisional measures it deems appropriate, but only in cases of "extreme gravity and urgency" when it is "necessary to avoid irreparable harm to persons."[244] The situation which may result in irreparable harm to persons must first be urgent,[245] requiring immediate attention. The Court found that the *Chunima Case* presented such an urgent situation, as five people had already been killed and others, including the judges who issued the arrest warrants for the suspects, had received death threats and were in hiding.[246] In the *Chipoco Case* by contrast, in which Carlos Chipoco was safely in the United States and had not yet been charged with a crime in Peru, there was not sufficient urgency to justify the adoption of provisional measures.[247]

The primary purpose of provisional measures in the Inter-American system is to avoid irreparable injury to persons.[248] As stated above, in human rights law, irreparable injury to persons traditionally refers to torture or death.[249] A request for provisional measures to protect property, although allowable under the ICJ, would not be granted in the Inter-American system.[250] The President of the Court, in what appeared to be an informal request to Honduras, has asked that Honduras protect the property of the human rights monitoring organization in Honduras. The Court, however, did not repeat this request when it ordered formal provisional measures.[251]

Initially in each case, the Court has adopted only general orders which mandate that certain named persons be provided protection by the government.[252] It has not specified particular measures that the government

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244. American Convention, *supra* note 22, art. 63(2).

245. Urgency is generally a prerequisite for the adoption of provisional measures. *See* Norgaard & Kruger, *supra* note 79, at 112. The prospect of injury must be imminent under the European system. *Id.*

246. Request for Provisional Measures-Chunima Case, Inter-Am. Court 42, OAS/ser.L/V/III.25, doc. 7 (1991).

247. Resolution of the Court-Chipoco Case (on file with the author) (to be published in the 1993 Annual Report of the Inter-American Court).

248. American Convention, *supra* note 22, art. 63(2).

249. *See supra* text accompanying notes 79-81.

250. American Convention, *supra* note 22, art. 63(2).

251. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 43, OAS/ser.L/V/III.19, doc. 13 (1988).

252. Order of the Court-Chunima Case, Inter-Am. Court 52, 53, OAS/ser.L/V/III. 25, doc. 7 (1991); Order of the President-Peruvian Prisons Case, Inter-Am. Court 101, 102, OAS/ser.L/V/III. 27, doc. 10 (1992).

must take to fulfill its obligations of protection, despite the particularized requests made by the Commission. In *Chunima*, the Commission proposed specific steps to be taken by the Government to provide the requested protection not only for those named, but also apparently for all human rights activists in the area.[253] The Commission further requested that the Guatemalan authorities carry out the arrest warrants issued against the principal suspects in the case and publish a declaration in the Guatemalan media recognizing the legitimacy of the work of human rights monitors in Guatemala.[254] The Court, in accordance with the Convention, limited itself to measures to protect the persons who were in grave and imminent danger, and simply ordered Guatemala to inform the Court of the measures it had taken to protect the persons listed.[255]

Only when the initial measures adopted by a government proved to be inadequate did the Court specify additional measures to be taken. In *Bustios-Rojas*, the Court made specific demands on Peru after being informed by the Commission of limitations in the protective measures taken under the Court's original order.[256] Thus, the Court, in the absence of the opportunity to educate itself about the appropriate possibilities of protection in each state, appears to refrain from ordering specific measures; instead it will allow the government in its sovereignty to determine what measures will fulfill the Court's general demands of protection. Should these measures prove inadequate, it is the province of the Commission to notify the Court and suggest more adequate alterna-

253. The Commission first recommended that the government of Guatemala provide the human rights organizations with the name and telephone number of a civilian official in the government who would be responsible for their protection; second, "that the government of Guatemala effectively ensure that human rights activists may return to their homes in Chunima without fear of further persecution at the hands of civil patrols or the army[; third,] that the Guatemalan authorities carry out the arrest warrants issued against the principal suspects [in the case; and fourth, that the Guatemalan authorities publish a declaration in the Guatemalan media] recognizing the legitimacy of the work of human rights monitors in Guatemala and acknowledging that their activities are protected not only by the American Convention on Human Rights, but also by the Constitution of the Republic of Guatemala." Request for Provisional Measures-Chunima Case, Inter-Am. Court 42, 45, OAS/ser.L/V/III.25, doc. 7 (1991).

254. *Id.*

255. Order of the Court-Chunima Case, Inter-Am. Court 52, 56, OAS/ser.L/V/III.25, doc. 7 (1991).

256. Second Order of the Court--Bustios-Rojas Case, Inter-Am. Court 15, 15-16, OAS/ser.L/V/III.25, doc. 7 (1991). The Court ordered Peru to provide civilian liaisons in certain rural areas in addition to or in place of the military liaisons already named by the Government. *Id.* at 16.

tives,[257] which minimizes the burden on the Court by putting the Commission in the position of overseer.

J. *Governmental Compliance*

To date, all governments called before the Inter-American Court on requests for provisional measures have attended the public hearings convoked by the Court and have presented their arguments.[258] This is in contrast to the ICJ, in which the Court has had to make a decision ex parte in the majority of requests on provisional measures.[259] In the Inter-American system, governments have requested postponements of the hearings, but when these requests have been denied, they have complied with their obligations to appear and have presented their positions.[260]

In general, the governments have made an effort at least to appear to comply with both the initial orders of urgent measures made by the President of the Court and the orders for provisional measures taken by the full Court. In *Chunima*, prior to the public hearing, the Guatemalan

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257. *Id.*

258. Guatemala appeared in the Chunima Case. Order of the Court-Chunima Case, Inter-Am. Court 52, 54, OAS/ser.L/V/III. 25, doc. 7 (1991). Peru appeared in the Bustios-Rojas Case. Order of the Court--Bustios-Rojas Case, Inter-Am. Court 33, 36, OEA/ser.G/CP, doc. 2146 (1991).

259. Iran failed to appear in the Anglo-Iranian Oil Company Case (Request for the Indication of Interim Measures of Protection) when the United Kingdom request for provisional measures was granted. Anglo-Iranian Oil Company Case (U.K. v. Iran), 1951 I.C.J. 89 (June 30). Iceland failed to appear in the Fisheries Jurisdiction Cases. Fisheries Jurisdiction Case (U.K. v. Ice.), 1972 I.C.J. 12 (Aug. 17); Fisheries Jurisdiction Case, (F.R.G v. Ice.), 1972 I.C.J. 30 (Aug. 17). France failed to appear in the Nuclear Tests Cases brought by Australia and New Zealand. Nuclear Tests Case (Austl. v. Fr.), 1973 I.C.J. 100 (June 22); Nuclear Tests Case (N.Z. v. Fr.), 1973 I.C.J. 136 (June 22). India failed to appear in Concerning the Trial of Pakistani Prisoners of War. Case Concerning Trial of Pakistani Prisoners of War (Pak. v. India); 1973 I.C.J. 329 (July 13). *See generally*, JEROME B. ELKIND, NONAPPEARANCE AND DISAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS (1984).

260. In the case of Guatemala, the government twice requested postponements for the stated purpose of allowing the Government to first undertake an investigation before presenting its position before the Court. When the Court denied the government's requests, the government accepted the Court's decision and presented its argument at the public hearing as ordered. The hearing was delayed one day due to the Court's consideration of the requests of the government of Guatemala. Order of the Court-Chunima Case, Inter-Am. Court 52, 53-54, OAS/ser.L/V/III.25, doc. 7 (1991). In the *Bustios-Rojas Case*, Peru also requested a postponement, but appeared before the Court as ordered when the postponement was denied. Order of the Court—Bustios-Rojas Case, Inter-Am. Court 33, 34, OEA/ser.G/CP, doc. 2146 (1991).

government professed to be in compliance with the measures ordered by the President by having ordered the authorities to provide protection in a way to allow the persons named to specify the type of protection they desired.[261] The most impressive instance of government compliance was announced at the public hearing in the *Chunima Case*. There, the Guatemalan government made the surprise announcement that it had arrested the civil patrol leaders as originally requested by the Commission. The government could not, however, name any specific measures that it had taken or would take with respect to the protection of the lives and physical integrity of those persons it was to protect.[262]

Although it is difficult to prove that a government complied with a Court's order of provisional measures, it is interesting to note the occurrences in the Honduran cases.[263] As stated above, in those cases, two witnesses who had appeared before the Court received death threats. The President of the Court, in what appeared to be less than an order of urgent measures, requested that the government of Honduras protect these particular witnesses. The government duly informed the Court that it would guarantee their safety as requested.[264] Although those particular witnesses were not harmed, three other witnesses, who were not directly referred to in the President's communication with the government but who had appeared before the Court or who were scheduled to give evidence, subsequently were murdered.[265]

At times, a government's compliance has appeared to be perfunctory at best. In *Bustios-Rojas*, Peru's response to the request for urgent measures to protect the lives and safety of certain persons was limited to a public radio announcement requesting that the persons named for protection come to a particular military installation to discuss the provisional measures of protection.[266]

Unfortunately, despite the governments' apparent compliance in the instances in which provisional measures have been ordered by the Court, difficult situations continue to arise for some of those parties accorded

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261. Order of the Court-Chunima Case, Inter-Am. Court 52, 53-54, OAS/ser.L/V/III.25, doc. 7 (1991). The Government of Guatemala also noted that in compliance with the President's order, it had "intensified the security measures of the Chunima area in order to provide its inhabitants with better protection." *Id.* at 53.

262. *Id.* at 54.

263. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, OAS/ser.L/V/III.19, doc. 13 (1988).

264. *Id.* at 43.

265. *Id.* at 43-44.

266. Order of the Court--Bustios-Rojas Case, Inter-Am. Court 33, 35, OEA/ser.G/CP, doc. 2146 (1991).

protection.[267] However, in the tenuous political situation in which people continued to be murdered and disappear daily, none of those for whom the Court ordered provisional measures of protection were harmed. This result is not likely to be mere happenstance. Rather, it can be attributed to the Court's order of protection and to the international publicity arising from the Court's consideration of the situation.

K. *Enforceability of Provisional Measures*

The Convention provides that the judgment of the Court shall be final.[268] States parties to the Convention have, moreover, agreed to comply with these judgments.[269] The Inter-American Court, however, lacks the power to enforce either final judgments or orders of provisional measures. Should a State Party fail to comply with an order of provisional measures, the only recourse of the Court is to specify the failure in its annual report to the OAS General Assembly.[270] A problem in the case of provisional measures, however, is that the General Assembly meets only once a year for a fairly short period.[271] Considering the urgent character of provisional measures, this recourse will not be particularly useful unless, by chance, the meeting occurs at the point of a state's failure to comply with provisional measures. Even then no action would be taken unless the General Assembly has the political will to act. The statutory remedies are not often the main instigating factors of compliance. As Judge Buergenthal stated, "Compliance and non-compliance by states

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267. In Guatemala, Amilcar Mendez, who is the founder of CERJ, the human rights monitoring organization, and one of the persons protected under the Court's order of interim measures in the Chunima Case, continued to have problems with the government. In one instance, while he was in the United States, Mendez was charged with criminal activity in Guatemala and a warrant was issued for his arrest. The charge was based on the testimony of two "campesinos" (rural peasants) who had been arrested and who allegedly informed government officials that Mendez had supplied them with bombs and arms. International and Guatemalan public opinion believed that these charges were trumped up, and that Mendez would be in danger while in custody. Mendez returned to Guatemala accompanied by several influential people, including a United States senator. The charges later were dropped when the two witnesses admitted that they did not even know Mendez and had lied about the arms. *See Policia Nacional Tiene Orden de Detener a Amilcar Mendez [National Police obtain an Order to Detain Amilcar Mendez], Siglo Veintiuno*, November 21, 1992, at *Nacional* 6; *Marta Altolaguirre, El Caso de Amilcar Mendez [The Case of Amilcar Mendez], Siglo Veintiuno*, November 24, 1992, at Opinion 10.

268. American Convention, *supra* note 22, art. 67.

269. *Id.* art. 68(1).

270. *Id.* art. 65. Court Rules of Procedure, *supra* note 159, art. 24(5).

271. *See* DAVIDSON, *supra* note 26, at 9.

with their international obligations depend less on the formal status of a judgment and its abstract enforceability. Much more important is its impact as a force capable of legitimating governmental conduct and the perception of governments about the political cost of non-compliance."[272]

V. For the Most Effective Use of Provisional Measures in the Inter-American System

A. *The Binding Nature of Provisional Measures*

Provisional measures must be binding on the parties in the Inter-American system to be most effective. To date, the binding nature of these measures has not been challenged in the Inter-American system. In the three instances in which the Inter-American Court has adopted interim measures, none of the states parties have refused compliance.[273] However, since it has been held in the parallel context of the European Convention that these measures are not binding on the states parties,[274] and as it is still a subject of dispute whether they are binding in the ICJ,[275] it is prudent to analyze the differences between the jurisprudence of these two systems and the Convention.

The European Court has held that in the absence of a Convention provision authorizing the enforcement organs to order interim measures, these measures are not binding on the Contracting States to the European Convention.[276] Provisional measures in the European system are authorized only by the European Court's and European Commission's rules of procedure.[277] Rules adopted by the enforcement organs are not usually considered to be binding on the parties, as the parties to the treaty have not granted this authority to these organs.[278] Conversely, express statutory provisions, such as the provisions of the American Convention and the Statute of the ICJ, which grant the courts the authority

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272. Buergenthal, *The Inter-American System, supra* note 122, at 470.

273. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 36-37, OAS/ser.L/V/III.19, doc. 13 (1988); Order of the Court-Chunima Case, Inter-Am. Court 52, 53, OAS/ser.L/V/III.25, doc. 7 (1991); Second Order of the Court--Bustios-Rojas Case, Inter-Am. Court 15, 15-16, OAS/ser.L/V/III.25, doc. 7 (1991).

274. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 33 (1991).

275. The ICJ has not ruled as to whether an order of provisional measures is binding on the parties. Restatement (Third) of Foreign Relations Law of the United States § 903 cmt. (1987).

276. *See supra* text accompanying notes 83-86.

277. *See supra* text accompanying notes 87-89.

278. *See also* Sztucki, *supra* note 42, at 64-65.

to adopt interim measures in the proper circumstances, are more likely to be reflective of the binding nature of the measures.[279]

Even when statutory authority for provisional measures exists, the location in the treaty of the provision may affect the extent to which these measures are binding. It is sometimes argued that provisional measures are not binding in the ICJ because they are merely procedural rather than jurisdictional.[280] This argument is based on the location of the article on interim measures in the statute of the ICJ chapter on procedure rather than in the chapter on the competence of the Court, which relates to jurisdictional matters.[281] In contrast, Article 63(2) of the American Convention is located in the chapter entitled "Jurisdiction and Functions,"[282] eliminating in the Inter-American context what has been a potent argument in the ICJ for the nonbinding nature of the measures.[283]

The strength of the wording of the Article on provisional measures also affects the extent to which it is binding. The wording of the Statute of the ICJ, that the Court has the power to "indicate" provisional measures that "ought to be taken," is argued to imply that the Court's adoption of interim measures is a mere suggestion to be complied with out of the good will of the state.[284] This same argument against the binding character of the measures has been successful in the European system,

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279. American Convention, *supra* note 22, art. 63(2); Statute of the International Court of Justice, *supra* note 54, art. 41(1).

280. ELKIND, *supra* note 44, at 155, 156 (citing Hammarskjold). Article 41 is included under chapter III of the Statute of the ICJ, entitled "Procedure," rather than under Chapter II of the Statute, entitled "Competence of the Court," *supra* note 54. *See also* J. Peter Bernhardt, *The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran: Fiat Iustitia, Pereat Curia?*, 20 VA. J. INT'L L., 557, 561 (1980) (for a discussion of controlling provisions of the Statute of the ICJ).

281. ELKIND, *supra* note 44, at 155, 156 (citing Hammarskjold).

282. The legislative history of Article 63(2) offers no explanation as to the placement of the Article. *See infra* note 287.

283. The Inter-American Court has carefully elaborated its jurisdictional basis in these matters. Under Article 63(2) the Commission is authorized to request provisional measures in a case not yet submitted to the Court. American Convention, *supra* note 22, at 48, art. 63(2). Under Article 33, the Court has competence with respect to matters relating to the fulfillment of the commitments made by the State Parties to the Convention. *Id.* art. 33. Article 62(3) provides that the jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction. *Id.* art. 62(3). The Court further supported its argument by relying on Article 1 of the Statute of the Court. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 45, OAS/ser.L/V/III.19, doc. 13 (1988).

284. ELKIND, *supra* note 44, at 153-66. *See* ROSENNE, *supra* note 41, at 149 & n.1.

which also adopted the word "indicate" in its rules on provisional measures.[285] In contrast, the phrasing of the Article on provisional measures in the American Convention avoids the traditional, but controversial term "indicate," instead providing that the Court "shall adopt" the measures that it deems pertinent,[286] a more forceful term that goes beyond mere suggestion. This more forceful language, combined with the placement of the provisional measures article in the jurisdictional chapter, suggests that the drafters of the American Convention, by eliminating the basis for the long standing arguments against the binding nature of the measures, have made provisional measures binding in the Inter-American system.[287]

B. *Submission of the Case to the Court When There Is No Friendly Settlement*

Although provisional measures are likely to be deemed binding on the parties to the Inter-American Convention, these measures must be utilized in accordance with the Convention if the system is to function properly. The Convention authorizes the Court to adopt provisional measures in "matters it has under [its] consideration."[288] In these cases, the provisional measures terminate, at the latest, upon final judgment.[289] The Convention further authorizes the Court to adopt provisional mea-

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285. Rules of Procedure of the European Court of Human Rights, *supra* note 89, art. 36; Rules of Procedure of the European Commission on Human Rights, *supra* note 88, art. 36. The European Court commented in this regard, that even the wording of the rule which states that the Commission "may indicate any interim measure the adoption of which seems desirable" reflected the non-binding nature of the obligation. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 35 (1991).

286. American Convention, *supra* note 22, art. 63(2).

287. The legislative history of the Article on provisional measures does not provide insight into the intent of the drafting body. Provisional measures were first raised by the Costa Rican delegate who proposed that the Court be given the power, common to all world tribunals, to act in serious and urgent situations. HUMAN RIGHTS, THE INTER-AMERICAN SYSTEM, Vol. 2, Minutes of the Sixth Session of Committee II, Summary Version, November 20, 1969, 214 (Buergenthal and Norris ed.). The text of the proposed Article read, "[t]he Court shall be able to take provisional measures that it considers pertinent, in urgent situations and when there is sufficient cause to justify it, for the protection of the right allegedly violated." The provision was defeated with one vote in favor, none against, and sixteen abstentions. *Id.* at 215. At a subsequent meeting, the Costa Rican representative introduced the provision in substantially its present form. The provision passed, but the legislative history does not provide any discussion. Minutes of the Third Plenary Session, Summary Version, November 21, 1969, *in id.* at 262.

288. American Convention, *supra* note 22, art. 63(2).

289. *See* SZTUCKI, *supra* note 42, at 198.

sures at the request of the Commission "[w]ith respect to a case *not yet submitted to the Court*,"[290] a situation that applies while the Commission is undertaking the required procedures in a case.[291] One goal of the Commission in undertaking these procedures is to bring about a friendly settlement between the parties.[292] If the Commission is successful and the parties reach a friendly settlement, provisional measures will no longer be necessary. On the other hand, when a friendly settlement is not reached, the reference in Article 63(2) to "a case *not yet submitted to the Court*" implies that the Commission will refer the case to the Court.[293] Were the case to be submitted to the Court, the provisional measures could be extended, if necessary, until final judgment.

The Commission does not currently comply with this provision of the Convention, since it has not referred cases to the Court after requesting that the Court adopt provisional measures. This malfunctioning of the system results in conflict management problems and the prolongation of provisional measures for the Court. In the *Bustios-Rojas* and *Chunima* cases, the parties did not reach a friendly settlement, and the Commission failed to refer either case to the Court for final adjudication. The Court cannot be expected to undertake long-term conflict management. Provisional measures are by their very nature temporary and cannot be prolonged indefinitely. [294] Moreover, these measures are to be ordered provisionally only in cases of gravity and urgency.[295] The reality in many parts of Latin America, however, is that an urgent situation may continue, and a person may be in danger of irreparable injury for extended periods. It is untenable, however, for the Court to continue monitoring a state's compliance with provisional measures for an extended period of time when the case is not on its docket.

Consequently, the Court has been forced to evolve a jurisprudential approach to deal with this aberration. In the situation of a case not before the Court, the Commission must show that the continuation of provisional measures is necessary, or the Court will allow the measures to lapse at the time stated in the initial court order.[296] That was the

290. American Convention, *supra* note 22, art. 63(2) (emphasis added).

291. Articles 46-48 provide the procedures which the Commission must follow when considering a case. American Convention, *supra* note 22, arts. 46-48. For a description of the Commission's procedures, see *supra* note 156.

292. American Convention, *supra* note 22, art. 48(f).

293. American Convention, *supra* note 22, art. 63(2).

294. *See* DUMBAULD, *supra* note 43, at 4 (arguing that "protection thus afforded is purely provisional").

295. American Convention, *supra* note 22, art. 63(2).

296. Letter from Hector Fix-Zamudio, President of the Inter-American Court of

outcome in *Chunima* when the Commission failed to provide evidence to refute Guatemala's claims that the situation had improved. Alternatively, should the Commission show that the measures continue to be necessary after a prolonged period, but fail to refer the case to the Court, the Court may transfer the supervisory function to the Commission by returning the proceedings to that body and entrusting it to verify the implementation of the measures, as it did in *Bustios-Rojas*.[297] In *Bustios-Rojas*, the Court returned the case to the Commission with the proviso that, should the gravity and urgency of the situation warrant, the Commission could again request that the Court adopt provisional measures.[298]

The Court also sets time limits on provisional measures orders and allows them to lapse at a set time if evidence is not produced of the continued gravity and urgency of the situation. In *Chunima*, the Court specified that the measures required would be in effect for a limited time of approximately four months.[299] The Court further ordered that the government inform the Court what measures had been taken and that the Inter-American Commission and the government duly inform the President of the Court regarding the implementation of the measures.[300] When the government complied with its obligation and no contradictory information was provided by the Commission, the Court, in accordance with its order, allowed the provisional measures to lapse on the date set.[301]

Rather than requiring the Court to perform long-term management in a case not before it, or requiring the Court to develop other, often less than satisfactory alternatives, the Commission should utilize provisional measures in accordance with the dictates of the Convention. Once the Commission has requested provisional measures in a case not yet submitted to the Court, and the Court has adopted these measures, the Commission should refer the case to the Court in the absence of a friendly settlement between the parties, and not stop short at the point of merely

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Human Rights, to the Government of Guatemala (Dec. 3, 1991) (informing the government of the lapse in the required measures) (on file with the Court).

297. Second Order of the Court—Bustios-Rojas Case, Inter-Am. Court 15, 16, OAS/ser.L/V/III.25, doc. 7 (1991).

298. *Id.*

299. The Court's order was issued on August 1, 1991 and extended the Order of the President of the Court until December 3, 1991. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

300. *Id.*

301. Letter from Hector Fix-Zamudio, President of the Inter-American Court of Human Rights, to the Government of Guatemala (Dec. 3, 1991), *supra* note 296 (on file with the Court).

requesting measures.[302] If the Commission were to refer the cases, the Court could fully consider matters, arrive at a judgment, and provisional measures could be terminated.

C. *The Court's Imposition of Additional Requirements Beyond Those Statutorily Required for the Adoption of Provisional Measures*

In lieu of the proper functioning of the system, the Court appears to be instituting additional requirements beyond those statutorily mandated before adopting provisional measures. The Court, of course, enjoys discretionary power to order provisional measures.[303] This discretion, however, should be limited to determining the presence of the statutory requisites of extreme gravity and urgency, and the likelihood of irreparable damage to persons.[304]

1. The Requirement That the Commission First Call Upon the Government to Take Precautionary Measures

The Court has stated repeatedly that the Commission must first request on its own authority that the state party take precautionary measures, and only when this avenue has not proved effective, may the Commission request that the Court adopt provisional measures.[305] The Commission's adoption of precautionary measures is neither statutorily required nor authorized. The American Convention, the Statute of the Court, and the Statute of the Commission do not authorize the Commis-

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302. *See* American Convention, *supra* note 22, art. 63(2).

303. European Court Rules, *supra* note 89, art. 24(1).

304. American Convention, *supra* note 22, art. 63(2).

305. In the *Bustios-Rojas* Case, the Commission simultaneously requested that the Government take precautionary measures and that the Court adopt provisional measures. Request for Provisional Measures—Bustios-Rojas Case, Inter-Am. Court 25, 28, OEA/ser.G/CP, doc. 2146 (1991). In *Chunima*, the Commission did not request that the government take precautionary measures under Article 29. Although the Court ratified the measures previously adopted by the President, it stated that the Commission had not complied with Article 29. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991). In *Chipoco*, the Commission did not first request precautionary measures. The President, in his resolution refusing to adopt provisional measures, commented that the Commission "after adopting the measures established in Article 29 of its Regulations" may then present the request to the Court. Order of the President-Chipoco Case, Inter-Am. Court 97, 99, OAS/ser.L/V/III.27, doc. 10 (1992). In the Peruvian Prisons Case, the Commission did first request precautionary measures, which were ignored by the Government. The Court refused to adopt provisional measures on other grounds. Order of the President-Peruvian Prisons Case, Inter-Am. Court. 101, 104, OAS/ser.L/V/III.27, doc. 10 (1992).

sion to take these measures. Article 29 of the Regulations of the Commission contains the only reference to provisional measures to be requested directly by the Commission and is essentially a power which the Commission has granted to itself.[306] Article 29 provides that, "[i]n urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases where the denounced facts are true."[307]

Governments are less likely to comply with measures requested by the Commission.[308] Furthermore, those measures adopted by the Commission under the authority of Article 29 probably are not binding on the state parties to the Convention.[309] If a power is not authorized by an instrument that has been ratified by the parties, the exercise of the power usually is not binding on the parties.[310] Since Article 29 was never ratified by the state parties, but arose in the context of Commission self-regulation, the exercise of power by the Commission under the Article does not bind the state parties. The requirement that the Commission first adopt measures that may be ineffective undercuts the very purpose of provisional measures; to act quickly and with authority in urgent cases to avoid irreparable damage to persons.

Certainly, it would be more effective for the Inter-American system if interim measures dictated by the Commission were binding on the parties. If that were the case, there might be greater compliance with a Commission request, which in turn would minimize the need to resort to the Inter-American Court in every urgent situation. However, since the states, in the exercise of their sovereignty, have not authorized the Commission to adopt provisional measures, and the European Court, in par-

306. Regulations of the Commission, *supra* note 141, art. 29(2).

307. *Id.*

308. *See* Order of the President-Peruvian Prisons Case, Inter-Am. Court 101, 104, OAS/ser.L/V/III.27, doc. 10 (1992). *See also* Request for Provisional Measures—Bustios-Rojas Case, Inter-Am. Court 25, 28, OEA/ser.G/CP, doc. 2146 (1991) (the Commission directly requested precautionary measures of the government and provisional measures from the Court simultaneously).

It could be said that the Government of Guatemala complied with a specific request for precautionary measures in the *Chunima Case*. Guatemala announced at the public hearing before the Court that it had arrested the two civil patrol leaders charged with the murders of the human rights activists. The arrests had been requested earlier by the Commission with no immediate results. The President of the Court had not made that request of the government. It is questionable, however, whether Guatemala would have made the arrests without the pressure of the public hearing. *See* Order of the Court-Chunima Case, Inter-Am. Court 52, OAS/ser.L/V/III.25, doc. 7 (1991).

309. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 35 (1991).

310. *Id.*; *see* SZTUCKI, *supra* note 42, at 64-65.

allel circumstances has held that provisional measures are not binding on the state party,[311] it is unlikely that the Inter-American Court could justify an opposite holding were the issue before it. As stated in reference to the ICJ, "the Court cannot afford to reach decisions, even on applications for interim measures of protection, which suggest support for rules which are too far advanced for community acceptance."[312]

Although the Commission should be encouraged to request directly that the state adopt interim measures, and the state should be encouraged to comply with the Commission's request, in circumstances in which the situation is grave and urgent and the lives and safety of persons are imminently at risk, the Court should not insist upon a potentially ineffective Commission request before adopting provisional measures.

2. Regulations of the Commission and the Standard of Proof

In addition to the requirement that the Commission first request that a government take precautionary measures before the Commission turns to the Court, [313] the Court further requires that the standard of proof enunciated in Article 29(2) must be met before the Commission may request that the Court impose provisional measures.[314] Article 29(2) of the Commission's Regulations allows the Commission to request interim measures "in cases where the denounced facts are true."[315] This reference to Article 29 as a prerequisite to a request of the Court appears to be technically inappropriate, for as previously noted this Article is applicable only when the Commission itself, and not the Court, adopts interim measures.

A separate provision, Article 76 of the Regulations of the Commission,[316] governs those instances when the Commission requests that the Court take provisional measures. Article 76 clarifies the conventional power granted to the Commission to request that the Court adopt provisional measures in grave and urgent situations "in a matter that has not yet been submitted to the Court."[317] Located in the chapter addressed to

311. Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 35 (1991).

312. Peter J. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258, 263 (1974).

313. Regulations of the Commission, *supra* note 141, art. 29.

314. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

315. Regulations of the Commission, *supra* note 141, art. 29(2).

316. *Id.* art. 76.

317. *Id.*

procedures before the Court, this provision is similar to and includes little more than is included in Article 63(2) of the Convention, which governs provisional measures.[318] Primarily, Article 76 expedites the judicial process by allowing the request to the Court to be made by the Chairman or Vice-Chairman when the Commission is not in session.[319] The Article does not include a standard for its application such as the "in cases where the denounced facts are true" standard of Article 29.

The Court's reference to Article 29 of the Commission's Regulations may be interpreted to mean that the Court has chosen to graft the standard of Article 29 onto Article 76.[320] The Court may reason that if the Commission will not adopt precautionary measures unless "the denounced facts are true," then it likewise should not request that the Court order provisional measures unless this standard is met. If this is the case, however, the Court should clarify its position. The Court has determined that under this standard, in both the Article 29 and Article 76 contexts, it is "not a question of fully determining the truth of the facts; rather, the Commission must have a reasonable basis for assuming them to be true."[321] The Commission must ascertain "the truth of the allegations, though in preliminary fashion,"[322] and transmit the corresponding evidence to the Court with the request for provisional measures.[323]

3. The Requirement that the Commission Have Evidence in Addition to the Petition

It is necessary for the Commission to transmit the evidence of the allegations of urgency and danger to the Court so that the Court may make an independent evaluation of the facts. The Court is at a disadvantage

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318. Article 76 provides that "[i]n cases of extreme gravity and urgency, and when it becomes necessary to avoid irreparable damage to persons in a matter that has not yet been submitted to the Court for consideration, the Commission may request it to adopt any provisional measures it deems pertinent." *Id.*

319. *Id.* art. 76(2).

320. The Court seems to have rejected the prima facie standard, which the Commission applied in its request for provisional measures in the Chunima case. Request for Provisional Measures-Chunima Case, Inter-Am. Court. 41, 44, OAS/ser.L/V/III.25, doc. 7 (1991).

321. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

322. Order of the President-Chipoco Case, Inter-Am. Court 97, 99, OAS/ser.L/V/III.27, doc. 10 (1992).

323. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

when provisional measures are requested in cases not before it, as the Court "lacks information regarding the facts and circumstances surrounding the case."[324] The underlying information is essential to the Court's consideration of a request because the Court does not rely on the Commission's statement of the underlying facts, but rather re-evaluates the situation for itself.[325] The Court, therefore, requires the Commission to gather "preliminary evidence to support a presumption of the truth of the allegations,"[326] and provide this evidence to enable the Court to arrive at a decision.[327] The transmittal of sufficient information has been a problem for the Court. The Court has not always been satisfied with the information supplied and has stated repeatedly that the information supplied was insufficient to support the adoption of provisional measures.[328] Unfortunately, the Court has not specified the sources of evidence that would serve to establish a "reasonable basis" for assuming the truth of the facts.[329] The Court has stated that the petitioner's unsubstantiated allegations of the facts are not adequate to meet the burden imposed by this standard.[330]

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324. *Id.*

325. See, for example, the Velasquez Rodriguez Case, where the Court requested additional information. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 42, OAS/ser.L/V/III.19, doc. 13 (1988).

326. *See* Order of the President-Peruvian Prisons Case, Inter-Am. Court 101, 103, OAS/ser.L/V/III.27, doc. 10 (1992); Order of the President-Chipoco Case, Inter-Am. Court 97, 99, OAS/ser.L/V/III.27, doc. 10 (1992).

327. *Id.*

328. *See* Order of the President-Peruvian Prisons Case, Inter-Am. Court 101, 103, OAS/ser.L/V/III.27, doc. 10 (1992); Order of the President-Chipoco Case, Inter-Am. Court 97, 99, OAS/ser.L/V/III.27, doc. 10 (1992).

329. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

330. *Id.* Conversely, it appears that any admission of the government, no matter how general, may serve as adequate evidence of the truth of the allegations. In Chunima, the Court found that the Commission did not have a reasonable basis for assuming the facts of the petition to be true, as the Commission's request "merely transcribe[d] the facts reported by the petitioner." *Id.* at 55. Despite the lack of basis, the Court also found that the President's order of provisional measures was properly adopted. *Id.* The Court based this determination on the "blanket acknowledgment" by the government that for the last thirty years there had been an "internal armed conflict" that resulted in the occurrence of violent acts in the Chunima area. *Id.* The Court found that this statement lead to the "presumption that a situation exists which could bring about irreparable damage to persons." *Id.* If this general acknowledgment is truly sufficient evidence to give rise to an order for provisional measures, then in the future any requests for provisional measures arising in the highlands of Guatemala or in many other conflicted areas in Latin America, should result in a presumption that the situation could bring about irreparable damage to persons. This would weaken the standard rather than strengthening it. Even

The requirement that the Commission not rely solely on the petition to provide a reasonable basis for assuming the truth of the allegations, if not reconsidered, may prove to be unduly limiting. It is true that, in many cases, relying on the unsupported facts provided by the petitioner, who is the injured party or a relation, and thus emotionally involved in the case, might not provide a reasonable basis for assuming the truth of the facts. Should the petitioner be a disinterested third party who has studied the situation, however, the evidence should be considered more reliable.

In the Inter-American system, the petitioner may be someone other than the victim of the abuses. For instance, the petitioner may be an international nongovernmental organization that has studied the situation and interviewed the participants.[331] Any state party to the American Convention automatically agrees to the right of individual petition, not only by the victim or relative of the victim, but also by "any nongovernmental entity legally recognized in one or more member states" of the OAS.[332] This expanded opportunity under the American Convention allows nongovernmental organizations, which have more extensive resources than individuals and suffer fewer security problems, to investigate and file complaints.[333]

Two nongovernmental organizations, America's Watch and Center for Justice & International Law (CEJIL),[334] that had investigated and verified the abuses, were the joint petitioners in *Chunima.* These organizations filed a detailed petition furnishing the dates, places, and facts for all those who had been threatened and killed. No other supporting documentation was supplied to the Court. The Court found that the petition

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more damaging, this policy of accepting government allegations as true, without more, encourages governments to refrain from submitting any information to the Court, for fear that this information will be used against it. Guatemala had not only commented on its internal situation but had expressed a willingness to comply with the order of provisions by the President. and had taken effective steps to put the order into effect. *Id.* at 53-54. Compliance by the State Parties should be encouraged.

331. American Convention, *supra* note 22, art. 44.

332. *Id.* In the European System, a State Party may make an express declaration recognizing the competence of the Commission to receive petitions from individuals. Such a declaration allows a petition to be made by any person, nongovernmental organization (NGO), or group of individuals claiming to be the victim of a violation. European Convention, *supra* note 72, art. 25. In the Inter-American system, the NGO need not be the victim, but can file on behalf of the victim. American Convention, *supra* note 22, art. 44.

333. *Id.*

334. Request for Provisional Measures-Chunima Case, Inter-Am. Court 42, 42, OAS/ser.L/V/III.25, doc. 7 (1991).

was not sufficient to prove the truth of the allegations.[335] Conversely, the Court did not challenge the sufficiency of the evidence in the *Bustios-Rojas* Case, in which the petitioner was the Committee to Protect Journalists, a nonpartisan, nonprofit organization based in New York, that documents and publicizes worldwide abuse against journalists.[336] In *Bustios-Rojas*, the only case in which the Court deemed that the information submitted was sufficient, the petitioner submitted newspaper articles documenting the abuses, which the Commission transmitted to the Court along with its request for provisional measures.[337] Newspaper articles documenting threats and abuses, when available, are undoubtedly an excellent source of evidence. It is unlikely, however, that newspaper accounts consistently will be available given the limitations on freedom of the press and the self-censorship found in many states. Even in the *Bustios-Rojas* Case the articles did not come from Peru's major newspapers, but only from the newspaper that had employed Bustios as a journalist.

Had the petitioner been a victim or a relative of a victim and also attached a relevant report by America's Watch or other well respected NGO, one would suppose that the Commission then would have a reasonable basis for assuming the facts to be true. When the petitioner is the same party who has investigated the facts, it is difficult to determine what type of evidence would be acceptable to meet the standard of proof. The victims or family members of the victims could sign affidavits, but this merely would be equivalent to the unverified word of the party represented by the petitioner. Perhaps affidavits of witnesses would be sufficient, but this approach, as was alleged in the *Bustios-Rojas* Case, would likely put those witnesses in greater danger. It would seem that when the petitioner is a respected human rights organization whose work is known to the Commission, and when that NGO has undertaken a study of the facts before presenting them to the Commission, the Commission should be deemed to have a reasonable basis for assuming the veracity of the facts reported. The Government will subsequently have the opportunity to refute the allegations at a public hearing.[338]

If NGO reports are not adequate to provide a reasonable basis for

335. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991).

336. Request for Provisional Measures--Bustios-Rojas Case, Inter-Am. Court 25, OEA/ser.G/CP, doc. 2146 (1991).

337. *See Bustios-Rojas* file at the Inter-American Court.

338. American Convention, *supra* note 22, art. 24(4). This guarantee is not as effective under the new modified version of Rule 24(4). Under the modified rule, the plenary Court will not reconsider any measures adopted by the President until its next regular session, which could be six months in the future. *Supra* note 161.

assuming the truth of the facts, it appears that the only remaining avenue is for the Commission to independently verify the facts. Independent verification could be undertaken through on-site visits in the state where the provisional measures are requested, or by conducting witness interviews and studying written accounts outside the state. Both types of studies are time-consuming and thus are not ideal in urgent situations when a person's life or safety is endangered. An on-site study is, of course, preferable because it accords access to the alleged potential victims. These visits, however, must be approved by the state party to be visited.[339] As the Court has stated: "The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."[340] The difficulty of obtaining such permission was evident in *Peruvian Prisons*, in which the Commission formally requested, and was denied, permission to visit the prisons.[341]

Even if permission is granted, on-site visits are time-consuming and expensive. The Commission does not possess the resources to independently investigate every complaint and every request for provisional measures.[342] Furthermore, the need for immediate action could not be satisfied when this time-consuming approach was employed. Given the lack of realistic alternatives, the Court should specify at least some basic forms of evidence, in addition to the Commission studies, that it would regard as adequate. NGO investigative reports should be included in the types of evidence which would at least provide a "reasonable basis" for assuming the truth of the facts.

D. *OAS Increase in Court Sessions and Funding for Human Rights*

The Court is justifiably reluctant to adopt provisional measures in instances when a case is not before the Court. Should the Court open itself up to greater consideration of these cases, the number and type of human rights abuses in the Americas could conceivably result in an avalanche of requests. The urgency of many of these situations, however, should over-

339. American Convention, *supra* note 22, art. 48(2).

340. Judgment of the Court-Velasquez Rodriguez Case, Inter-Am. Court 35, 61, OAS/ser.L/V/III.19, doc. 13 (1988).

341. Order of the President-Peruvian Prisons Case, Inter-Am. Court 101, 102-03, OAS/ser.L/V/III.27, doc. 10 (1992); *cf.* T.O. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW 95 (2d. rev. ed., 1992).

342. *See* Volio, *supra* note 37, at 71 (for the proposition that the volume and seriousness of human rights denunciations has no parallel in history).

shadow any hesitancy on the part of the Court to limit its caseload or to avoid the potential conflict-management role involved in overseeing the implementation of the measures ordered.[343]

The adoption of provisional measures must be limited to cases of extreme gravity and urgency when the Court has sufficient evidence that a person is in danger of being tortured or killed. The Court has emphasized that the adoption of provisional measures should not be a normal exercise of the Court's jurisdiction.[344] The Court's position is in keeping with international law, which deems provisional measures to be an exceptional remedy. The ICJ has held that the power to adopt interim measures is exceptional and is only conferred on the judiciary under the express terms of the statute if the court considers that the circumstances so require.[345]

Unfortunately, in the Inter-American system, grave and urgent human rights violations that call for the implementation of provisional measures occur on a regular basis. If the Court has compelling evidence that the requisites for this relief are present, the Court should adopt provisional measures. If the Court is to exercise its mandate to enforce human rights in the Americas, it may be necessary for the Court to adopt provisional measures whenever the circumstances show a grave and urgent possibility of irreparable harm to persons. The difficulty with this approach is that the Court, which meets only infrequently, could not process a significant increase in its caseload.

A developing problem in the Inter-American human rights system is the infrequency of the Court's sessions. The Court, since its inception, has functioned on a part-time basis, holding two, and sometimes three, regular two week sessions per year.[346] The seven judges,[347] who must be nationals of different states,[348] are at the disposal of the Court and travel

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343. *Cf.* Goldsworthy, *supra* note 312, at 258 (for similar argument regarding the adoption of interim measures in environmental cases).

344. Order of the Court-Chunima Case, Inter-Am. Court 52, 55, OAS/ser.L/V/III.25, doc. 7 (1991). *See* Order of the President-Chipoco Case, Inter-Am. Court 97, 99, OAS/ser.L/V/III.27, doc. 10 (1992); Order of the President-Peruvian Prisons Case, Inter-Am. Court 101, 104, OAS/ser.L/V/III.27, doc. 10 (1992).

345. Aegean Sea Continental Shelf Case (Greece v. Turk.), 1076 I.C.J. 3, 11.

346. Court Rules of Procedure, Inter-Am. Court 18, 21, art. 11, OAS/ser.L/V/III.25, doc. 7 (1991). In addition the Court may meet for special sessions. *Id.* art. 12.

347. The judges must be jurists of the "highest moral authority" and be "recognized for their competence in the field of human rights." American Convention, *supra* note 22, art. 4.

348. American Convention, *supra* note 22, art. 52(1).

to the seat of the Court when necessary.[349] The requirement that the judges readily be available is partially a recognition of the urgent nature of many of the cases within the Court's competency.[350]

The infrequent meetings of the Court were adequate in the years immediately following its inception, but rapidly are becoming inadequate to process the ever increasing caseload of the Court.[351] Initially, the Court's caseload was light. The Court, which has jurisdiction to hear contentious cases,[352] issue advisory opinions,[353] and adopt provisional measures at the request of the Commission, [354] issued only twelve advisory opinions and decided one joined contentious case in the first ten years of its existence.[355] By contrast, in the first six months of 1993, the Court has considered or is considering five contentious cases, two requests for provisional measures, and one request for an advisory opinion.[356] If the Court's caseload continues to increase, it will be necessary for the Court to meet more regularly or perhaps become a permanently sitting court.[357]

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349. Statute of the Court, *supra* note 161, art. 16. Most of the judges, who are paid emoluments, per diem, and travel allowances when the Court is in session, have full time positions in their countries of residence. *Id.* art. 17. The Statute of the Court also lists positions and activities which are incompatible with a judgeship on the Inter-American Court. *Id.* art. 18.

350. As explained by Dunshee de Abranches, a renowned legal scholar of international law and the Inter-American system:

> Even though they are not required to live in the place where the Court has its permanent seat, the judges must be at the disposal of the only jurisdictional organ of the OAS, particularly for the urgent and serious cases requiring provisional measures that the Commission can request from the Court in crisis situations, which arise so frequently in the lives of the American peoples.

Abranches, *supra* note 30, at 79, 96.

351. *See id.* (arguing that the judges should sit full-time).

352. American Convention, *supra* note 22, art. 63.

353. *Id.* art. 64.

354. *Id.* art. 63(2).

355. *See* General information of the Court, issued by the Inter-American Court of Human Rights (on file with the author). Note that the Court did not accept the contentious case of the government of Costa Rica (In the Matter of Viviana Gallardo et al.), 20 I.L.M. 1424 (1981).

356. *Id.*

357. The Court's draft Statute originally envisioned a permanent court with full-time judges. The General Assembly of the OAS found this proposal unjustified until such time as the Court would have a substantial caseload. Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 232-33, nn. 11, 17 (1982) (citing draft Statute OEA/ser.P/AG/doc.1112/79 (Oct. 10, 1979), arts. 20 and 22); *see* Drucker, *supra* note 183, at 321 (stating that there is a need for a permanent or semi-permanent Court); *see* Ryssdal, *supra* note 77, at 11 (arguing that a full time European Court of Human Rights will be necessary in the foreseeable future due to the increasing

An increase in the sessions of the Court will require a corresponding increase in financing. Unfortunately, the OAS, which funds the Court, is experiencing an almost continual fiscal crisis that shows no signs of abating.[358] If the OAS cannot obtain greater funding, which appears likely in the current economic crisis, then the time has come for the OAS to re-evaluate its priorities and eliminate all but the most essential avenues of spending. A top priority in the Inter-American system must be the promotion and protection human rights,[359] for the gross and systematic violation of human rights is one of the gravest problems facing the Americas. This priority is not reflected in the budget of the OAS. Currently, the OAS allocates funding to various social and cultural programs and studies,[360] and while these programs are no doubt valuable, their impact pales compared to that of monitoring and enforcing of human rights in the Americas.[361] Many social and cultural activities of the OAS should be dropped or should depend on voluntary contributions. The OAS should instead focus additional attention and financing on the Inter-American Court and Commission if it hopes to enforce human rights in the Americas.

VI. CONCLUSION

Most states, even those that commit gross and systematic human rights violations, do not wish to be identified as violators of human rights. The rapid focus of international publicity, therefore, has to date proved to be an effective means of preventing and curtailing human rights abuses. The referral of a case to an international human rights court can focus this international attention, but the delay for a case to reach the Court is

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workload.)

358. *See* Thomas Buergenthal, *The Inter-American Court and the OAS*, 7 HUM. RTS. L. J. 157-63 (1986).

359. *See* Farer, *supra* note 13, at 401 (commenting that critics have cited the Inter-American Commission as the main justification for the existence of the OAS.)

360. Organization of American States, Proceeding, Volume I, Twenty-Second Regular Session, Nassau, The Bahamas, May 18-23, 1992, OEA/Ser.P/XXII.O.2, June 21, 1992, Court Budget, 77-88.

361. Canada, which joined the OAS on January 8, 1990, has urged that the OAS increase financial support for the Inter-American human rights system. *See* L.A. Address by the Honorable Barbara McDougall, Canadian Secretary of State for Foreign Affairs to the XXIII OAS General Assembly (June 7, 1993) (on file with the author). Furthermore, Canada has advocated that funding be curtailed to certain OAS committees including the Inter-American Defense Board. Conversation with Harold Hickman, Counsellor and Alternative Representative of the Canadian Mission to the OAS (Oct. 1993).

normally a matter of years. A unique power of the Inter-American system that allows the Inter-American Commission to request the Inter-American Court to adopt provisional measures minimizes delay and allows the formalized human rights system to act quickly. The most important advantage of this use of provisional measures in the Inter-American system is that these measures immediately provide protection for potential victims.

Provisional measures must be binding on the parties if they are to be maximally effective in the Inter-American system. The Commission must utilize requests for measures in accordance with the directives of the American Convention. After requesting provisional measures in a case not yet submitted to the Court, the Commission subsequently should submit the case to the Court if the parties do not reach a friendly settlement. Should provisional measures be employed as was foreseen by the Convention, the Court will have less need to limit the consideration of requests for provisional measures by demanding additional requirements beyond those statutorily mandated.

Even with the above procedural changes, a continuing barrier to the effective use of provisional measures, as well as to the overall functioning of the human rights system in the Americas, is the limited funding and the resulting infrequent sessions of the Inter-American Court. The flagrant human rights abuses in the Americas and the resultant increase in the caseload of the Court mandate that funding for the Court now be increased to allow for more frequent meetings. The OAS is experiencing a long-standing financial crisis, the proper solution to which is to limit the number of roles that the OAS attempts to play. Many social and cultural activities of the OAS should be dropped or should be dependent on voluntary contributions. This will permit the OAS to focus on its most important mandate, to enforce human rights in the Americas.

Provisional measures will never be a panacea to all human rights problems in this hemisphere. These measures realistically can protect only a few people in limited situations. The threat of their adoption by the Court, however, and the attention drawn to a situation when such measures are adopted, can have a chilling effect on human rights abuses in the area and would be another step toward ending these abuses worldwide.