

Policy Paper

PROPOSALS TO IMPROVE THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS:

Comparative Analysis of the Practice of Precautionary Measures

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**PROPOSALS TO IMPROVE
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Comparative Analysis of the Practice of
Precautionary Measures

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Presentation

This report is the product of a collaboration between the Center for Justice and International Law and the International Human Rights Law Clinic at the University of California, Berkeley, School of Law and was submitted to the Special Meeting of the Permanent Council of the Organization of American States.

Center for Justice and International Law

The Center for Justice and International Law (CEJIL) is a regional non-governmental, non-profit organization that protects and promotes human rights in the Americas through the strategic use of the tools offered by international human rights law. CEJIL's vision is that of a fully democratic hemisphere, in which the rights and dignity of all individuals are respected. CEJIL utilizes strategic litigation and engages in advocacy efforts before the Inter-American System of Human Rights (IAS) to address a wealth of the region's most pressing human rights issues. In this effort, the organization prioritizes paradigmatic cases of endemic human rights violations dealing with the hemisphere's most persecuted and excluded populations, many of which lead to systemic change at the State level, and serve as precedents for the region. Central to CEJIL's work is the role of the victims and our collaboration with human rights defenders and partner organizations with which we litigate, coordinate our efforts, and share our achievements with. CEJIL also carries out efforts to empower and engage other human rights defenders and to create and share information, knowledge, and experiences. CEJIL operates from four offices located in Argentina, Brazil, Costa Rica, and the United States. The paper was edited by Viviana Krsticevic, Executive Director, and Alejandra Vicente, Senior Attorney. For more information, please visit <http://cejil.org/fsi>.

International Human Rights Law Clinic, University of California, Berkeley, School of Law

The International Human Rights Law Clinic (IHRLC) designs and implements innovative human rights projects to advance the struggle for justice on behalf of individuals and marginalized communities through advocacy, research, and policy development. The IHRLC employs an interdisciplinary model that leverages the intellectual capital of the university to provide innovative solutions to emerging human rights issues. The IHRLC develops collaborative partnerships with researchers, scholars, and human rights activists worldwide. Students are integral to all phases of the IHRLC's work and acquire unparalleled experience generating knowledge and employing strategies to address the most urgent human rights issues of our day. The paper was researched and prepared by Lelia Gomez '14, Lali Madduri '14, Nicholas Schrank '13, Renata Stepanov '13 under the supervision of Roxanna Altholz, Assistant Clinical Professor of Law and Laurel E. Fletcher, Clinical Professor of Law. For more information, please visit www.humanrightsclinic.org.

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Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies

I. INTRODUCTION

This paper presents findings of comparative legal research on precautionary measures issued by human rights bodies to contribute to a public discussion of proposed reforms to the Inter-American Commission on Human Rights (IACHR). Commonly referred to as “precautionary,” “provisional,” or “interim” measures (hereinafter “precautionary measures”), these urgent responses direct States to protect rights holders from imminent risk of irreparable damage.¹ Human rights institutions have used precautionary measures since 1945, as a technique to address urgent human rights situations. Today, all international human rights bodies have the authority and have adopted procedures to issue such measures.

The goal of this analysis is to provide stakeholders with an understanding of how the standards and practice of precautionary measures at IACHR compare to those at other international human rights institutions in the following dimensions:

- The authority of international human rights bodies to issue precautionary measures;
- The scope of rights protected by precautionary measures; and
- The procedures that international human rights bodies have established to issue precautionary measures, with a particular focus on how institutions adopt expedited review procedures; apply standards of proof; issue precautionary measures *proprio motu*; establish flexible beneficiary consent requirements; and modify the form (public or private) and format (including findings of fact, law, and legal reasoning) of their decisions.

A. BACKGROUND

On June 29, 2011, the Organization of American States Permanent Council created the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights (IACHR) with a view to Strengthening the Inter-American Human Rights System (IAHRS) (Special Working Group). A report by the Special Working Group was approved by the Permanent Council in January 2012, and later welcomed by the Organization of American States General Assembly.² At its June 5, 2012 meeting, the General Assembly instructed the Permanent Council to prepare proposals for reforms in consultation with all stakeholders to be considered at a Special Session of the General Assembly during the first quarter of 2013.³ Accordingly, the Permanent Council has invited civil society to participate in a meeting on December 7, 2012, to review and discuss the proposals of the Permanent Council.⁴ This paper is submitted in conjunction with the December 7th meeting.

¹ In this paper, the term “precautionary measures” is used to refer to all types of urgent measures issued by human rights bodies to protect rights holders from imminent risk of irreparable damage even though these institutions may refer to these types of measures using a number of terms.

² Organization of American States, AG/Res. 2761(XLII-0/12) available at <http://www.oas.org/consejo/sp/docs/AG-RES2761.doc>.

³ Id.

⁴ Organization of American States, Process for Reflect on the Workings of the IACHR with a view to Strengthening the IAHRS, available at <http://www.oas.org/council/agenda2012.asp>.

B. METHODOLOGY

We surveyed the practice of international human rights bodies that issue precautionary measures by reviewing the work of the following United Nations treaty bodies: the Committee Against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW), the Human Rights Committee (HRC), the Committee on Economic, Social, and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of Persons with Disabilities (CRPD), and the Committee on Enforced Disappearances (CED). We also examined regional human rights bodies: the African Commission on Human and Peoples' Rights (ACHPR), the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), and the European Court on Human Rights (ECHR). Finally, we include relevant practices of the International Court of Justice (ICJ).⁵

This analysis relied on the constitutive documents and rules of procedures, as well as reports, practice guidelines, and case law of each human rights body. We also consulted secondary sources. One limitation of this survey is that we did not review State practice regarding internal measures States have adopted to implement precautionary measures. However, we note that some reviews of practice by member States of the OAS in this regard have been conducted.⁶

C. CONCLUSIONS

Across all human rights bodies surveyed there were remarkably consistent standards and practices of adjudication of precautionary measures.

All human rights bodies relied on explicit or implicit authority to issue precautionary measures derived from positive law and regulations as well as principles of international law. Precautionary measures granted by international human rights bodies protect a wide range of rights at risk of irreparable harm, including, *inter alia*, the right to life, personal integrity, property, freedom of expression, and due process. Human rights bodies all adopt procedures that prioritize efficiency and flexibility to respond effectively to the urgent nature of these requests. They apply a standard of proof calibrated to the urgency of requests, retain discretion in the timing of requests for information from the State, adopt measures to expedite decision-making, grant measures *proprio motu*, establish flexible consent requirements, and modify the form and format of decisions to favor efficient adjudication of requests.

5 While not a human rights institution, the International Court of Justice (ICJ) is included in this study. The ICJ is the oldest international court and has well-developed procedures on precautionary measures.

6 See generally, Felipe Gonzalez, *Urgent Measures in the Inter-American Human Right System*, 13 *SUR Int'l J. on Hum. Rts.* 1 (2010); Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas* (2011), available at <http://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf> [hereinafter "Second Report on Human Rights Defenders"]. States have instituted various practices to implement precautionary measures. For example, Mexico and Bolivia have created intergovernmental ad hoc committees to address the implementation of precautionary measures. *Id.* at 197-96. Other States have institutionalized the responsibility of implementing and monitoring precautionary measures within existing domestic governmental human rights and security programs, such as Canada, Colombia, Ecuador, El Salvador, Guatemala, and Honduras. *Id.*

II. THE PRACTICE OF IACHR REGARDING PRECAUTIONARY MEASURES IS CONSISTENT WITH THE WIDELY-ACCEPTED APPROACH USED BY HUMAN RIGHTS BODIES TO PROTECT HUMAN RIGHTS.

Comparing the current regulations and working methods of IACHR to the institutions surveyed, it is clear that the IACHR is consistent with the standards and practice used to issue precautionary measures by other international human rights bodies. The reforms proposed by the Permanent Council are not required for the IACHR to harmonize its standards and practices with those developed by all other human right bodies.

While reforms may be desirable in some aspects of the functioning of the system, and may improve performance of the IACHR, in depth research in comparative and international law demonstrates the working methods of the IACHR on precautionary measures to be consistent with the approaches utilized by other human rights bodies and tribunals under standard interpretations of international law.

All the human rights bodies surveyed exercise their legal authority to issue precautionary measures. This authority may be explicitly granted in the constitutive document or it may stem from the implicit authority of the human rights body to fulfill its mandate to protect human rights.⁷

A. HUMAN RIGHTS BODIES DERIVE THE AUTHORITY TO ISSUE PRECAUTIONARY MEASURES FROM THEIR CONSTITUTIVE DOCUMENTS.

The treaties or statutes of the ICJ, the IACtHR, CEDAW, and CRPD contain explicit provisions authorizing the body to issue precautionary measures.⁸ Collectively, the record of these bodies establishes a practice of issuing precautionary measures that spans decades.

7 *See e.g.*, article 41 of the ICJ statute states that: “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” Statute of the International Court of Justice, Art. 41, 59 Stat. 1055; T.S. No. 993 [hereinafter “ICJ Statute”]. While the European Convention on Human Rights does not expressly contemplate precautionary measures, the practice is codified in rule 39(1) of the European Court of Human Rights Rules of Court (“The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.”). Rule 39(1), European Court of Human Rights, Rules of Court (2012), available at http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_2012.pdf [hereinafter “ECHR Rules of Court”].

8 ICJ Statute, *supra* note 7, art. 41; American Convention on Human Rights, art. 63.2, Nov. 21, 1969, 1144 U.N.T.S. 143 [hereinafter “American Convention”] (“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.”); Optional Protocol to the Convention on the Elimination of Discrimination against Women, art. 5, Oct. 6, 1999, U.N. Doc. A/54/49 (Vol. I) (2000) [hereinafter “CEDAW Optional Protocol”] and the Rules of Procedure of the Committee on the Elimination of Discrimination Against Women, rule 63, U.N. Doc. CEDAW/C/ROP (2001) [hereinafter “CEDAW Rules of Procedure”], provide for precautionary measures and contain identical language (“At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.”); and Optional Protocol to the Convention on the Rights of Persons with Disabilities, art. 4, 13 December 2006, G.A. Res. 61/106, Annex II, U.N. Doc. A/61/611 [hereinafter “UNCPRD Optional Protocol”] (“At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.”).

The ICJ, established in 1945, is the first international body to codify the authority to issue precautionary measures in its founding document. Article 41 of the ICJ statute states: “[t]he 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.”⁹ During the ICJ’s sixty-seven year history, the Court has used precautionary measures as an efficient means to protect the rights of parties in matters pending before it.¹⁰

The most recent international human rights treaty to come into force, the Optional Protocol to the Convention on the Rights of Persons with Disabilities, also provides for the issuance of precautionary measures.¹¹ This instrument allows individuals to petition the committee of experts created by the convention to adjudicate claims of violations of rights protected by the treaty. The optional protocol (which entered into force on May 3, 2008) also provides that:

*the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.*¹²

In the Inter-American System, the use of precautionary measures has also been explicitly authorized. Article 63.2 of the American Convention on Human Rights provides the IACtHR with the explicit authority to issue precautionary measures.¹³ One of the most recent human rights treaties in the regional system, the Inter-American Convention on Forced Disappearance of Persons, also codifies the authority of the IACHR to issue precautionary measures and recognizes the authority of the IACtHR to issue precautionary measures.¹⁴ These examples highlight the long-standing recognition in international law, including Inter-American human rights treaties, of the express authority of human rights bodies to protect human rights by issuing precautionary measures.

9 ICJ Statute, *supra* note 7, art. 41.

10 See Eva Rieter, Preventing Irreparable Harm, Provisional Measures in Human Rights Adjudication 13 (2010) [hereinafter “Preventing Irreparable Harm”].

11 UNCRPD Optional Protocol, *supra* note 8, art. 4. Although the International Covenant on Economic Social and Cultural Rights Optional Protocol is the most recent international human rights treaty (it became open to signature on Dec. 10, 2008) and provides for precautionary measures, this treaty is not yet in force.

12 UNCRPD Optional Protocol, *supra* note 8, art. 4.

13 American Convention, *supra* note 8, art. 63.2.

14 Inter-American Convention on Forced Disappearance of Persons, art. XIII, Mar. 28, 1996, 33 I.L.M. [hereinafter “Inter-Am. Conv. on Forced Disappearances”] (“For the purposes of the this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules and Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.”). See also Rules of Procedure of the Inter-American Commission on Human Rights, rule 25 (Rev. 2011), available at <http://www.oas.org/en/iachr/mandate/Basics/22.RULES%20OF%20PROCEDURE%20IA%20COMMISSION.pdf> [hereinafter “IACHR Rules of Procedure”]; American Convention, *supra* note 8, art. 63.2 and Rules and Procedures of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992), art. 24, available at <http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm> [hereinafter “IACtHR Rules of Procedure”].

B. HUMAN RIGHTS BODIES DERIVE THE AUTHORITY TO ISSUE PRECAUTIONARY MEASURES FROM POWERS CONFERRED BY THEIR CONSTITUTIVE DOCUMENTS.

1. The mandate to protect justifies precautionary measures.

Many human rights bodies, including the ECHR, CAT, HRC and IACHR, derive implicit authority to issue precautionary measures from their constitutive documents. These human rights bodies interpret their founding documents in light of their mandates to protect human rights and codify their authority to issue precautionary measures in their corresponding rules of procedure.¹⁵

Notably, the European Convention of Human Rights (European Convention) and subsequent protocols do not contain explicit provisions regarding precautionary measures. Nevertheless, the ECHR, the forbearer to the Inter-American human rights system, locates its authority to issue precautionary measures in the mandate to protect rights enshrined in the European Convention. Article 1 of the European Convention provides that States have a duty to secure for all persons within their jurisdiction the rights enumerated in the treaty.¹⁶ The ECHR has held that “a failure by a respondent State to comply with [precautionary] measures will undermine ... the State’s formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.”¹⁷ The ECHR reasoned that “the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms” permitted the ECHR to issue binding orders to protect rights contained in the European Convention.¹⁸ The rules of procedure of the ECHR codify the authority of the judicial body to issue precautionary measures.¹⁹ Other international human rights treaty bodies such as CAT and HRC have similarly interpreted their constitutive documents to authorize the issuance of precautionary measures.²⁰

15 ECHR Rules of Court, *supra* note 7, rule 39(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Rules of Procedure, rule 114(1), U.N. Doc. CAT/C/3/Rev.5 [hereinafter “CAT Rules of Procedure”] (“At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.”); Rules of Procedure of the Human Rights Committee, rule 92 (formerly rule 86), U.N. Doc. CCPR/C/3/Rev.10 (2012), available at http://www.bayefsky.com/general/ccpr_c_3_rev10_2012.pdf [hereinafter “HRC Rules of Procedure”] (“The Committee may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation.”); IACHR Rules of Procedure, *supra* note 14, rule 25.

16 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf [hereinafter “European Convention”].

17 *Mamatkulov and Askarov v. Turkey* [GC] para. 125, ECHR, nos. 46827/99 and 46951/99, Apr. 2, 2005, available at <http://www.unhcr.org/refworld/category/LEGAL/,,UZB,42d3ef174,0.html> [hereinafter “Mamatkulov”].

18 *Id.* para. 100.

19 ECHR Rules of Court, *supra* note 7, rule 39(1).

20 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Convention) does not explicitly authorize the treaty monitoring body to grant precautionary measures; article 22 of CAT Convention authorizes the treaty monitoring body (the Committee Against Torture or CAT) to consider individual complaints if States separately recognize the competence of the treaty body to do so. Art. 22, Convention Against Torture and Other Cruel, Inhuman or

Consistent with this practice, the IACHR derives its authority to issue precautionary measures to address instances of imminent danger separate from a pending case —referred to as “autonomous” measures or the “protective” aspect of the measures— from the Charter of the Organization of American States.²¹ For example, in issuing precautionary measures on behalf of the detainees at Guantanamo Bay, the IACHR justified its authority in a manner analogous to other human rights bodies, noting that precautionary measures are

*a well-established and necessary component of the Commission's processes. Indeed, where such measures are considered essential to preserving the Commission's very mandate under the OAS Charter, the Commission has ruled that OAS member states are subject to an international legal obligation to comply with a request for such measures.*²²

Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 (“A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.”). The authority of the CAT to issue precautionary measures is codified by its Rules of Procedure. CAT Rules of Procedure, *supra* note 15, rule 114. In its decisional jurisprudence, the CAT has repeatedly found that precautionary measures are necessary to protect persons from irreparable harm. See Cecilia Rosana Núñez Chipana v. Venezuela, Committee Against Torture, No. 110/1998, para. 8, U.N. Doc. CAT/C/21/D/110/1998 (Nov. 10, 1998) [hereinafter “Chipana v. Venezuela”]. In Kalinichenko v. Morocco, the CAT noted that precautionary measures are “vital to the role entrusted to the Committee Failure to respect that provision [. . .] undermines the protection of the rights enshrined in the Convention.” Kalinichenko v. Morocco, Committee Against Torture, No. 428/2010, U.N. Doc. CAT/C/47/D/428/2010 (2010), para. 13.1 [hereinafter “Kalinichenko v. Morocco”]. Moreover, the CAT observed that “States parties implicitly undertook [the obligation] to cooperate with the Committee in good faith” and a failure to respect a request to implement precautionary measures violates state obligations under the Convention Against Torture. *Id.* para. 13.2. Similarly, the Human Rights Committee, the treaty monitoring body of the International Covenant on Civil and Political Rights, has stated that precautionary measure orders “are essential to the [HRC’s] role under the [Optional] Protocol” and that a failure of the State to comply with precautionary measures is a separate breach of its treaty obligations. Piandiong et al. v. Philippines, UNHRC, Comm. No. 869/1999, U.N. Doc. CCPR/C/70/D/869/1999, paras. 5.1-5.4 (2000), available at <http://www1.umn.edu/humanrts/undocs/869-1999.html> [hereinafter “Piandiong et al. v. Philippines”]; see also Ahani v. Canada, U.N. Human Rights Comm., U.N. Doc. CCPR/C/80/D/1051/2002, para. 8.1-8.2, (2004), available at http://www.worldcourts.com/hrc/eng/decisions/2004.03.29_Ahani_v_Canada.htm [hereinafter “Ahani v. Canada”] (“The State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author’s allegation of irreparable harm to his Covenant rights [. . .] Interim measures . . . are essential to the Committee’s role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.”).

21 The IACHR has held that “OAS member states, by creating the Commission and mandating it through the OAS Charter and the Commission’s Statute to promote the observance and protection of human rights of the American peoples, have implicitly undertaken to implement measures of this nature where they are essential to preserving the Commission’s mandate.” Juan Raul Garza v. United States of America, Case 12.243, Report N° 52/01, April 4, 2001, para. 117; Inter-American Commission on Human Rights, Report on the Situation of Human Rights Defenders in the Americas (2006), paras. 239, 241, available at <http://www.cidh.oas.org/countryrep/Defenders/defenderstoc.htm> [hereinafter “First Report on Human Rights Defenders”].

22 Precautionary Measures in Guantanamo Bay, Cuba, Inter-American Commission on Human Rights, March 13, 2002, available at http://www.umn.edu/humanrts/iachr/guantanamomeasures2002.html#_ftnref3. To justify its authority to issue precautionary measure, the IACHR referred to the practice of other human rights bodies including the Inter-American Court of Human Rights, the International Court of Justice, the HRC, the European Commission of Human Rights, and the African Commission on Human and Peoples’ Rights (ACHPR).

Another example of the way in which human rights bodies have relied on implicit authority to craft procedural mechanisms which were not explicitly contemplated by constitutive documents comes from a United Nations charter-based body. The UN Human Rights Commission (now the Human Rights Council) created an ad hoc working group to investigate the human rights situation in South Africa in 1967, based on the implicit authority from its mandate to protect, as it did not have explicit authorization to establish expert bodies to address country-specific situations from the UN Economic and Social Council. The Commission's innovative procedure set the stage for the subsequent passage of Resolution 1235, allowing for public scrutiny of human rights violations.²³

Thus the mandate to protect serves as a source of authority upon which several human rights bodies – including the IACHR – rely to justify their use of precautionary measures.

2. *Preserving the rights of parties to pending adjudication justifies precautionary measures.*

A number of judicial and quasi-judicial human rights bodies have found that precautionary measures are necessary to preserve their ability to examine the underlying complaint pending before them. Accordingly, human rights bodies have justified their authority to issue precautionary measures on this basis. For example, the ECHR has observed that precautionary measures are the means by which the Court protects its mandate to adjudicate an individual application in accordance with Article 34 of the European Convention.²⁴ Precautionary

23 The UN Economic and Social Council (ECOSOC) originally resolved in 1946 that the Commission had “no power to take any action with regard to any complaints concerning human rights.” See Commission on Human Rights Report of the First Session, E/259 (1947); ECOSOC Res. 75(V), 5 August 1947. Following two decades of what commentators have referred to as the “era of inaction,” and prompted by international pressure to address racial discrimination and colonial practices, the Commission in 1967 sought to satisfy its mandate to protect human rights by creating a special mechanism – an ad hoc working group of experts – to respond to the situation in South Africa. See Jeroen Gutter, *Special Procedures and the Human Rights Council: Achievements and Challenges Ahead*, 7 Hum. Rts L.Rev. 93, 95-96 (2007). Later the same year, ECOSOC changed its official position regarding the authority of the Human Rights Commission to consider complaints by adopting Resolution 1235 (XLII) of 6 June 1967. See id. at 96. Resolution 1235 explicitly authorized the Commission to examine information in communications relevant to gross violations of human rights and fundamental freedoms, and to initiate a study of the situation in public. See ECOSOC Resolution 1235 (XLII), U.N. Doc. E/4393 (1967). See also Maria Luisa Bartolomei, *Gross and Massive Violations of Human Rights in Argentina 1976-1983, An Analysis of the Procedure under ECOSOC Resolution 1503*, 63 (Juristforlaget I Lund ed.) (1994). The South African working group exemplifies efforts by human rights bodies to respond effectively to human rights violations by innovating. Moreover, it is an example of the Commission on Human Rights using the general authority of the UN Charter and the doctrine of implied powers to define its competence to protect human rights. See Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community* 77 (2006). The authority to establish special thematic procedures at the Commission on Human Rights, a hallmark of the Commission, is also premised on the Charter and its stated objectives, as well as the institutional practice of the Commission, building on Resolution 1253 and the subsequent Resolution 1503. See id. at 77-78. For another example of innovation at the commission-level, see also Sub Commission Prevention of Discrimination and Protection of Minorities Resolution 1 (XXIV) (1971) which, though acting under the Council's broad directive, established its own “provisional procedures for dealing with the question of admissibility of communications.”

24 See also Mamatkulov, *supra* note 17, para. 100 (noting “the Court has previously stated that the provision concerning the right of individual application (Article 34, formerly Article 25 of the Convention before Protocol No. 11 came into force) is one of the fundamental guarantees of the effectiveness of the Convention system of human-rights protection.”).

measures serve to protect the status quo at the time of an individual complaint. This ability is vital to the Court's core adjudicative function. The ECHR has stressed that the individual application is a "key component of the machinery for protecting the rights and freedoms set forth in the Convention."²⁵

The IACtHR has echoed this view, noting that the purpose of precautionary measures is to "preserve the rights of the contending parties, ensuring that the future judgment on the merits is not harmed by their actions *pendente lite*."²⁶ Similarly, the HRC has observed that a State's refusal to adhere to a precautionary measures request is incompatible with the obligations of a State party to avoid "any action that would prevent or frustrate the Committee in its consideration and examination of the communication ..."²⁷

In line with other human rights bodies, the IACHR has stated that precautionary measures "serve a 'precautionary' function by preserving a legal situation brought to the Commission's attention by way of cases or petitions."²⁸ The review of human rights bodies reveals that several, including the IACHR, recognize that their authority to issue precautionary measures is integral to their ability to protect against the imminent and irreparable infringement of rights or to adjudicate substantive claims.

3. *Pacta sunt servanda* justifies precautionary measures.

International human rights bodies, including the CAT, HRC, IACtHR, and IACHR, derive implicit authority to issue precautionary measures procedures from the fundamental principle of international law referred to as *pacta sunt servanda*, or "agreements must be kept."²⁹ Under article 26 of the Vienna Convention on the Law of Treaties, States must undertake a good faith obligation to uphold the international agreements to which they are party.³⁰ In the case of human rights instruments, human rights bodies have held that *pacta sunt servanda* requires states to comply with precautionary measures as part of their general duties to comply with the protection mandates of the relevant treaties.

25 Id., para. 122 ("The Court would stress that although the Convention right to individual application was originally intended as an optional part of the system of protection, it has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention.").

26 Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court* 294-295 (2003) quoting Constitutional Court (Peru), Provisional Measures, Inter-Am. Ct HR, Order of the President, 7 April 2000, "Considering" section, para. 8, 10 [hereinafter "Practice and Procedure of the Inter-American Court"].

27 *Piandiong et al v. The Philippines*, supra note 20, para. 5.2.

28 IACHR, Annual Report of the Inter-American Commission on Human Rights 2011, ch. 3, para. 11, available at <http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp> [hereinafter "IACHR Annual Report 2011"].

29 Black's Law Dictionary (8th ed. 2004), and codified in Article 26 of the Vienna Convention on the Law of Treaties, which provides that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

30 Id.

III. HUMAN RIGHTS BODIES ISSUE PRECAUTIONARY MEASURES TO PROTECT THE RANGE OF RIGHTS RECOGNIZED IN THEIR CONSTITUTIVE DOCUMENTS.

The HRC has referred to the implicit obligation of States Parties to the treaty “to cooperate with the Committee in good faith”³¹ and stressed that the failure to implement precautionary measures is “incompatible” with this obligation.³² The HRC held that a State Party that executed prisoners for whom precautionary measures had been requested had committed a “grave breach” of the State Party’s obligations under treaty and optional protocol.³³ CAT also held that a failure to comply with a precautionary measure request constitutes a breach of the State’s good faith obligation to comply with treaty.³⁴

Both the IACtHR and IACHR have justified their authority to grant precautionary measures in individual complaints on the basis of principle of *pacta sunt servanda*. Citing IACtHR jurisprudence, the IACHR noted that:

*States Parties to the Convention should fully comply in good faith (pacta sunt servanda) to all of the provisions of the Convention, including those relative to the operation of the two supervisory organs; and, that in view of the Convention’s fundamental objective of guaranteeing the effective protection of human rights (Articles 1(1), 2, 51 and 63(2)), States Parties must not take any action that may frustrate the restitutio in integrum of the rights of the alleged victims.*³⁵

IACHR views on the good faith obligations of States to comply with precautionary measures are consistent with those of other human rights bodies in this regard.

All human rights bodies surveyed, including the IACHR, issue precautionary measures to protect the range of rights recognized in their constitutive documents, none of which limits the rights eligible for protection through precautionary measures.

ECHR, CAT, CEDAW, HRC, CRPD, ACHPR, ICJ, IACHR and IACtHR issue precautionary measures to protect the range of rights enshrined in their respective founding instruments. Human rights bodies frequently issue precautionary measures to protect the right to life and personal integrity contained in the constitutive treaties, but they have also used precautionary measures to protect other rights. For

31 Piandiong et al. v. The Philippines, supra note 20, para. 5.2.

32 Human Right Committee General Comment 31 on The Nature of The General Legal Obligation Imposed on States Parties to the Covenant, art. 2, Mar. 29, 2004.

33 Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Tajikistan, CCPR/CO/84/TJK, 18 July 2005, para. 8, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/55e8730f3e8f767bc125704b0050c572/\\$FILE/G0543466.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/55e8730f3e8f767bc125704b0050c572/$FILE/G0543466.pdf). The HRC urged the State party to fully comply with its obligations in accordance with the principle of *pacta sunt servanda*, and take the necessary measures to avoid similar violations in the future. Id.

34 Chris Ingelse, The UN Committee against Torture: An Assessment 180 (2001).

35 First Report on Human Rights Defenders, supra note 21, para. 240 (citing IACtHR, James et al. case Trinidad and Tobago, Provisional Measures, Order of August 29, 1998, seventh whereas clause.).

example, the ECHR has issued precautionary measures to protect the right to property and prevent eviction,³⁶ the right to family,³⁷ the right to housing,³⁸ and the right to a fair trial and due process.³⁹ The ECHR also has required a State to appoint counsel to represent applicants before the European Court to protect the right to counsel.⁴⁰ The ACHPR has used precautionary measures to protect freedom of expression,⁴¹ the right of the family,⁴² and property rights of indigenous peoples.⁴³ The ICJ has provided precautionary measures to prevent harm to the environment.⁴⁴ CEDAW has held that both physical and mental health rights will be protected through precautionary measures.⁴⁵

36 See *Yordanova and Others vs. Bulgaria*, European Court of Human Rights, application no. 25446/06 (2012) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449>. The Court indicated to the Government of Bulgaria, under rule 39 of the Rules of Court, that the applicants should not be evicted from their houses pending receipt by the Court of detailed information about any arrangements made by the authorities to secure housing for the children, elderly, disabled or otherwise vulnerable individuals to be evicted.

37 See *Neulinger and Shuruk v. Switzerland*, European Court of Human Rights, application no. 41615/07 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99817> (precautionary measures were issued to prevent the removal of a child from his family under Article 8 recognizing the right to family); See e.g. *Uppal v UK*, European Court of Human Rights, application no.8244/78 (1980) DR 20, 29; *Merzouk v France*, European Court of Human Rights, application no.48453/99 (1999); *Neulinger and Shuruk v Switzerland*, European Court of Human Rights, application no.41615/07 (2009) at 4. See also *Evans v UK*, European Court of Human Rights, application no.6339/05 (2007) at 5 (precautionary measures to preserve frozen embryos of a woman whose ovaries had been removed because of pre-cancerous tumors under imminent threat of being destroyed after withdrawal of consent by the applicant's male partner).

38 *X. v Netherlands*, European Court of Human Rights, application no.21741/07 (2008); *X. v Netherlands*, no.60915/09 (2009).

39 *Öcalan v Turkey*, European Court of Human Rights, application no.46221/99 (2005) at 5; *Bilasi-Ashri v Austria*, European Court of Human Rights, application no.3314/02 (2002).

40 *X v Croatia*, European Court of Human Rights, application no.11223/04 (2008), para. 61; *D.B. v Turkey*, European Court of Human Rights, application no.33526/08 (2010), paras. 66-67.

41 ACHPR, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe, Zimbabwe*, Communication 284/03, April 3, 2009, paras. 11-12, 28, available at <http://caselaw.ihrda.org/doc/284.03/view/> (requesting provisional measures, the Complainants "argued that the current closure of the paper is causing irreparable harm to the freedom of expression and information."The Commission granted their request and ordered the State to return the seized equipment of the ANZ).

42 ACHPR, *Amnesty International / Zambia*, Communication 212/98, May 5, 1999 ("The Commission also requested that provisional measures be adopted by the Government of Zambia, namely to allow the burial of Mr John L. Chinula, in Zambia and the return of Mr William S. Banda to his family in Zambia pending the finalisation of the matter by the Commission.").

43 See ACHPR, *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya*, Communication No. 276/2003, February 2010.

44 *Preventing Irreparable Harm*, *supra* note 10, at 12-30.

45 Margaux J. Hall, *Using International Law to Promote Millennium Health Targets: A Role for the Cedaw Optional Protocol in Reducing Maternal Mortality*, 28 *Wis. Int'l L.J.* 74, 104 (2010).

The IACtHR has also issued precautionary measures to protect rights other than those to life and personal integrity,⁴⁶ including the freedom of expression,⁴⁷ the right to property of indigenous peoples,⁴⁸ and the rights of the child.⁴⁹ Similarly, the IACHR has issued precautionary measures to protect a diverse array of rights. While most precautionary measures have been granted to protect the rights to life and physical integrity,⁵⁰ the IACHR has also issued measures to protect the right to indigenous property,⁵¹ the right to freedom of expression,⁵² the right of access to public information,⁵³ the right to access to healthcare treatment and testing,⁵⁴ the right to health when it was endangered by high levels of pollution,⁵⁵ and the rights of the child.⁵⁶

The approach of the IACHR to issue measures to protect the range of rights set forth in the American Convention and other Inter-American treaties is consistent with the practice of other human rights bodies.

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- 46 Bustíos-Rojas Case, Order of the Court of June 5, 1990, Inter-Am. Ct. H.R. (Ser. E) (1990) available at <http://www.umn.edu/humanrts/iachr/E/bustios-rojas6-5-90.html>.
- 47 Herrera-Ulloa v. Costa Rica, Judgement of July 2, 2004, Inter-Am. Ct. H.R. (2004) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf.
- 48 The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) (2001).
- 49 Case of the Yean and Bosico Children v. The Dominican Republic, Order of the Court of Sept. 8, 2005, Inter-Am. Ct. H.R. (2005), available at http://corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf.
- 50 Inter-American Commission on Human Rights, Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System, para. 67 (2012) [hereinafter “Reply of IACHR”] (stating “Most of the IACHR’s decisions on precautionary measures have been aimed at protecting the rights to life and human treatment of persons or communities with a broad conceptualization of those rights”).
- 51 See Sarayacu v. Ecuador, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.118, doc. 5 rev. 2, “Precautionary Measures” at para. 34 (2003); Comunidades Indigenas Mayas v. Belice, Case 12.053, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.111, doc. 20 rev., “Precautionary Measures” at para. 11 (2000); Comunidad Yaxye Axa del Pueblo Enxet-Lengua v. Paraguay, Case 12.313, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.114, doc. 5 rev., “Precautionary Measures” at para 53 (2001); Doce Clanes Saramaka v. Surinam, Case 12.338 Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1, “Precautionary Measures” at para. 89 (2002); Comunidad Garífuna Triunfo de la Cruz v. Honduras, Case No. 12.548, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.127, doc. 4 rev. 1, “Precautionary Measures” at para. 34 (2006); Comunidades Indigenas Ngobe y Otras v. Panama, PM 56/08, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 51 rev. 1, “Precautionary Measures” at para. 43 (2009); Pueblo Inidgena Naso de la Region Bocas del Toro v. Panama, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 51 rev. 1, “Precautionary Measures” at para. 44 (2009); Comunidad Indigena Maho v. Suriname, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 5 rev. 1, “Precautionary Measures” at para. 43 (2010); Comunidad Lof Paichil Antriao del Pueblo Indigena Mapuche v. Argentina, Inter-Am. Comm’n H.R. OEA/Ser.L/V/II. doc. 69 rev. 1, “Precautionary Measures” at para. 27 (2011).
- 52 Trabajadores de la Radio Calenda v. Mexico, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.130, doc. 22 rev. 1, “Precautionary Measures” at para. 41 (2007); See also Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1, “Precautionary Measures” at para. 90-96 (2002).
- 53 Rafael Rodriguez Castañeda v. Mexico, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.134, doc. 5 rev. 1, “Precautionary Measures” at para. 33 (2008).
- 54 Jorge Odir Miranda Cortez y otros v. El Salvador, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.111, doc. 20 rev.1, “Precautionary Measures” at para. 30 (2000); “Amelia” v. Nicaragua, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 5 rev. 1, “Precautionary Measures” at para. 71 (2010); X – Argentina, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 69 rev. 1, “Precautionary Measures” at para. 29 (2011); Niurka Luque Alvarez v. Cuba, Inter-Am. Comm’n H.R., Medidas Cautelares, available at <http://www.oas.org/es/cidh/decisiones/cautelares.asp> (2012).
- 55 Comunidad de la Oroya v. Peru, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.130, doc. 22 rev. 1, “Precautionary Measures” at para. 46 (2007).
- 56 AW v. Guyana, PM 254/07, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.134, doc. 5 rev. 1, “Precautionary Measures” at para. 22 (2008).

**IV. HUMAN RIGHTS BODIES
USE PROCEDURES TO ISSUE
PRECAUTIONARY MEASURES
THAT ARE NECESSARILY
FLEXIBLE TO RESPOND TO THE
URGENT NATURE OF REQUESTS.**

**A. HUMAN RIGHTS BODIES ISSUE PRECAUTIONARY MEASURES BASED ON PRIMA FACIE EVIDENCE OF THE RISK
OF IRREPARABLE HARM AND DAMAGE.**

The human rights bodies surveyed apply a lower standard of proof for precautionary measures than for determinations of claims on the merits. Most of these institutions also have procedures to withdraw measures if evidence later emerges demonstrating that the risk is not sufficiently serious or imminent.⁵⁷ In considering precautionary measures, all human rights bodies are concerned with protecting against urgent and irreparable harm or prejudice to the rights of individuals and groups.

The vocabulary used to describe the standard of proof for precautionary measures varies across human rights bodies. Human rights bodies also use different terms to refer to standards at different moments in their history or in relation to different rights or parties. The CAT⁵⁸ and the HRC⁵⁹ use the language of “likely” or “reasonably likely” irreparable harm to describe the standard of proof petitioners must meet,

57 CAT Rules of Procedure, *supra* note 15, rule 114(3) (“The decision to grant interim measures may be adopted on the basis of information contained in the complainant’s submission. It may be reviewed, at the initiative of the State party, in the light of timely information received from that State party to the effect that the submission is not justified and the complainant does not face any prospect of irreparable harm, together with any subsequent comments from the complainant.”); but see Report of the Committee Against Torture, Forty-Seventh session (31 Oct. – 25 Nov. 2011) and Forty-Eighth Session (7 May – 1 Jun. 2012), Supp. No. 44 (A/67/44) [“hereinafter CAT 47th Session”] (“The Rapporteur has taken the position that such requests need only be addressed if based on new and pertinent information which was not available to him or her when he or she took his or her initial decision on interim measures.”); see also CAT Rules of Procedure, *supra* note 15, rule 114(7) (The State party may inform the Committee that the reasons for the interim measures have lapsed or present arguments why the request for interim measures should be lifted); CAT Rules of Procedure, *supra* note 15, rule 114(8) (the Rapporteur, the Committee or the Working Group may withdraw the request for interim measures); Rules of Procedure of the Committee on the Rights of Persons with Disabilities, rule 64 (4), CRPD/C/4/2 (22–26 Feb. 2010) (“On the basis of the explanations or statements submitted by the State party the Committee or the Special Rapporteur on Communications under the Optional Protocol, acting on behalf of the Committee, may withdraw the request for interim measures.”), available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> [hereinafter “CRPD Rules of Procedures”]; see Rules of Procedure of the International Convention for the Protection of All Persons from Enforced Disappearance, rule 70, U.N. CED/C/1CED (22 June 2012) (“The Committee, a Rapporteur or the Working Group may withdraw a request for interim measures on the basis of information received from the State party and the author(s) of the communication.”), available at http://www.ohchr.org/Documents/HRBodies/CED/CED-C-1_en.pdf [hereinafter “CED Rules of Procedure”]; The Practice and Procedure of the Inter-American Court, *supra* note 26, at 313-15 (“The duration of provisional measures is specific to the facts and circumstances of each request, and must be maintained while the circumstances that led to their implementation persist.”); European Court on Human Rights, Article 39 Presentation, available at http://www.echr.coe.int/NR/rdonlyres/40270423-50B3-4249-B04E-6E62586FF62E/0/Art39_Presentation_EN.pdf [hereinafter Article 39 Presentation] (“An order under Rule 39 may be lifted at any time by a decision of the Court.”); Rules of Court of the International Court of Justice, 1978 I.C.J. Acts & Docs. 4, art. 76 [hereinafter “ICJ Rules of Court”] (“The court may revoke or modify any decision concerning provisional measures at the request of a party anytime before the final judgment, if, in its opinion, the situation justifies revocation or modification.”).

58 See CAT 47th Session, *supra* note 57 (“a complaint must have a reasonable likelihood of success on the merits for it to be concluded that the alleged victim would suffer irreparable harm in the event of his or her deportation.”).

59 See Human Rights Committee General, Comment 33 on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, at para. 19, UN Doc. CCPR/C/GC/33, Nov. 5, 2008 (interim measures may be appropriate “when an action taken or threatened by the State party would appear likely to cause irreparable harm to the author or the victim unless withdrawn or suspended pending full consideration of the communication by the Committee.”).

though “prima facie” is sometimes cited interchangeably.⁶⁰ The ICJ requires a finding of “plausible” irreparable prejudice.⁶¹ The ECHR requires a “plausible risk” of imminent and irreparable damage,⁶² though the guidelines of the Court rephrase this minimum bar as the “real risk of serious, irreversible harm.”⁶³

The IACtHR similarly uses a “prima facie” norm when ordering precautionary measures,⁶⁴ requiring a situation of extreme urgency and gravity⁶⁵ and threat of irreparable damage.⁶⁶ The IACHR also seeks “prima facie” proof of gravity and urgency, and that the measure is designed to prevent irreparable harm.⁶⁷

60 See Committee Against Torture, Summary Record of the 662nd Meeting at para. 4, 19 May 2005, CAT/C/SR.662, Jun. 2, 2005 [hereinafter “CAT Summary Record of 662nd Mtg.”] (Mr. Mavrommatis, Rapporteur for new communications and interim measures; upon receipt of a complaint, the Committee must determine whether or not the complainant would be at risk of real irreparable harm if deported. If there was no prima facie case for the threat of torture, the complaint was refused.).

61 See Alexandra C. Traviss, Temple of Preah Vihear: Lessons on Provisional Measures, 13 Chi. J. Int’l L. 317, 321-22 (2012) (International Court of Justice finds that interim measures are justified upon proof of urgency, the potential for irreparable prejudice to the rights at subject of the dispute, and plausibility); see also Certain Criminal Proceedings in France (Congo v. France), ICJ Rep. 2003, 102, 107 at para. 22 (“Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has its object to preserve the respective rights of the parties . . . and presupposes that irreparable prejudice should not be caused to rights what are the subject of the dispute . . . and whereas such measures are justified solely if there is urgency.”).

62 See Mamatkulov, supra note 17, at para. 108 (“In cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court’s determination of the justification for the measure.”); see also id. at paras. 103-104 (“The grounds on which Rule 39 may be applied are not set out in the Rules of Court but have been determined by the Court through its case-law [T]he Court applies Rule 39 only in restricted circumstances Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage.”).

63 See European Court on Human Rights, Practice Direction on Interim Measures, as amended on 7 July 2011, available at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Practice+directions/> (“Interim measures are only applied in exceptional cases. The Court will only issue an interim measure against a Member State where . . . it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied.”).

64 See Preventing Irreparable Harm, supra note 10, at 846.

65 See American Convention, supra note 8, art. 63(2).

66 See Practice and Procedure of the Inter-American Court, supra note 26, at 303 (“The threat must be of irreparable damage. Irreparable damage is serious and irreversible In more recent cases, the [IACtHR] appears to have broadened its interpretation of irreparable damage to include any type of irreparable damage to persons. For example, a person or community of persons can suffer irreparable damage if their ancestral grounds are logged and denuded of trees. Persons may also suffer irreparable damage in certain cases if their personal possessions or livelihood are taken from them.”).

67 See Second Report on Human Rights Defenders, supra note 6, para. 422 (“When examining a request seeking precautionary measures, the Commission looks for three factors: i) the gravity; ii) the “urgency”; and iii) whether the measure is intended to ‘prevent irreparable harm to persons.’ Even though the facts which motivated a request for protective measures do not have to be fully proven, a minimum degree of detail and information is necessary to assess prima facie a situation of gravity and urgency.”); see also Practice and Procedure of the Inter-American Court, supra note 26, at 296 (“The Commission’s initial standard, which authorized the Commission to request interim measures ‘in cases where the denounced facts are true,’ was unworkable in that it appeared to require a prejudging of the merits of the case,” citing Regulations of the Inter-American Commission on Human Rights, approved Jun. 29, 1987, art. 29(2)); IACHR Rules of Procedure, supra note 14, art. 25(4) (“The Commission shall consider

In the absence of reasoned opinions issued by human rights bodies, it is difficult to draw conclusions regarding the practical difference, if any, between the standard of “reasonably likely” or “plausible” as compared to “prima facie.” However, the available guidance strongly suggests that the IACHR’s standard of proof is comparable to that of other human rights bodies surveyed. Additionally, our survey of international human rights bodies reveals that the standard of proof applied to precautionary measures is consistently lower than the standard of proof for pending cases.⁶⁸ This practice reflects the purpose of precautionary measures – to generate quick State action to avoid imminent danger – which is distinguished from underlying cases which may require a more extensive, time-consuming review of evidence to establish the facts in dispute.

B. HUMAN RIGHTS BODIES HAVE CREATED ABBREVIATED PROCEDURES TO ISSUE PRECAUTIONARY MEASURES.

1. Human rights bodies issue measures without requesting information from the State when justified by the urgency of the circumstances.

The timing of requests by a human rights body for information from the State regarding a request for precautionary measures depends on a number of factors including: (1) whether States have an initial statutory right to a hearing; (2) whether the human rights body routinely confers with the States, even if this procedure is not codified; and (3) the rights at stake, the urgency of violation, and the complexity of facts involved.

Similar to the IACHR,⁶⁹ most human rights bodies adopt a flexible approach to seek input from the State prior to issuing precautionary measures, if not by statute then in practice, based upon a case-by-case assessment of urgency and the need for additional information. For example, even the ICJ, which provides States a statutory right to a hearing before deciding upon a request for provisional measures,⁷⁰ made an exception to this rule when the beneficiary was scheduled for execution the day the request for measures was made, and issued precautionary measures without providing the State the opportunity to be heard.⁷¹

the gravity and urgency of the situation, its context and the imminence of the harm in question when deciding whether to request that a State adopt precautionary measures.”).

68 See *infra*, note 76.

69 See IACHR Rules of Procedure, *supra* note 14, art. 25(5) (“Prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures.”).

70 See ICJ Rules of Court, *supra* note 57, art. 74(3) (“The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it.”).

71 See Practice and Procedure of the Inter-American Court, *supra* note 26, at 39-40 (“In the LaGrand Case, however, in which the beneficiary of the measures was to be executed on the day the ICJ ordered the measures, the ICJ for the first time ordered provisional measures without holding a hearing.”). Even for routine requests, the ICJ President has discretion to schedule a hearing based on the degree of urgency. See ICJ Rules of Court, *supra* note 57, art. 74(2) (“The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.”); see also, Preventing Irreparable Harm, *supra* note 10, at 9.

Several human rights bodies that do not provide States a statutory right to comment before precautionary measures are granted, nevertheless in practice confer with States prior to issuing precautionary measures.⁷² However, human rights bodies may adjust this practice if the harm is imminent. For example, the HRC has granted precautionary measures before it has given the State the opportunity to comment based on the “material and temporal urgency of the matter.”⁷³ The IACtHR recognizes in its Rules of Procedure that giving States an opportunity to provide additional information is not always possible or necessary.⁷⁴ Moreover, States commonly retain the opportunity to contest the grant of precautionary measures via well-established mechanisms to review the grant of precautionary measures as soon as feasibly possible, or as soon as conditions change.

The current rule and practice of the IACHR to “request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures,” falls squarely within the common practice of other bodies.⁷⁵

2. Human rights bodies use streamlined procedures to consider requests for precautionary measures and use technology to expedite the process.

Human rights bodies have adopted numerous methods to expedite consideration of requests for precautionary measures. Some of these methods are codified and others involve streamlining administrative decision-making or adopting technological measures. The underlying rationale of these measures is to prevent irreparable harm. When fundamental rights are at stake, such as the right to life, the accessibility and promptness of procedures are crucial.

The opportunity to request and grant precautionary measures is generally available during the entire course of the proceedings, and in most cases, even before a decision is made about the admissibility of the complaint.⁷⁶ In addition, the rules of several bodies prioritize

72 See CAT Summary Record 662nd Mtg., *supra* note 60, para. 36 (while trying to observe the 24-hour rule, it is sometimes necessary to ask the State Party for further information); see Preventing Irreparable Harm, *supra* note 10, at 820-21 (“[I]n the practice of the HRC we see that the Rapporteur transmits the case to the State once there is a certain amount of evidence and, possibly, once there are some questions to be posed to the State. It is also at this stage that the Rapporteur normally uses provisional measures, although there are exceptions. There have been instances in which the Rapporteur used provisional measures before he or she ordered the Secretariat to transmit the petitioner’s submission to the State for comment.”).

73 *Id.* at 820-21 (“[W]hile the HRC generally seems to use the same criterion for prima facie evidence for decisions to transmit the case and for decisions to use provisional measures, there are situations in which material and temporal urgency warrant the use of provisional measures even though the Rapporteur considers that insufficient information is available to transmit the case to the State.”).

74 See IACtHR Rules of Procedure, art. 27(5) (“The Court, or if the Court is not sitting, the Presidency, upon considering that it is possible and necessary, may require the State, the Commission, or the representatives of the beneficiaries to provide information on a request for provisional measures before deciding on the measure requested.”).

75 See IACHR Rules of Procedure, *supra* note 14, art. 25(5).

76 See Shabtai Rosenne, *Provisional Measures in International Law* 93 (2005) (“when states raise preliminary objections to the jurisdiction of the [ICJ] or the admissibility of the application, the Court can still proceed with the issuance of interim measures. The Court in such a case will examine whether it has prima facie jurisdiction over the merits as a basis for its action under Article 41.”); CAT Rules of Procedure, *supra* note 15, rule 114(2) (when interim measures are requested, “the request shall not imply a determination of the admissibility or the merits of the complaint.”); Gino J. Naldi, *Interim Measures in the UN Human Rights Committee*, 53 *Int’l & Comp.L.Q.* 445, 446-447 (2004) (“The Special

urgent requests for precautionary measures over other matters, or otherwise require that precautionary measures be adopted as urgently as the situation demands.⁷⁷

Several bodies, notably the CAT, the ECHR, and the HRC, have adapted their administrative mechanisms to ensure a quick and efficient procedure for requests. The CAT, for example, introduced the new role of Special Rapporteur on New Complaints and Interim Measures in 2002, to enhance the consistency and speed of responses.⁷⁸ Moreover, it appears that a decision is attempted within one day of receipt of the request for precautionary measures.⁷⁹ Similarly, the ECHR, accepts precautionary measures by facsimile, and has same-day processing of requests.⁸⁰ Finally, the HRC permits the submission of requests via E-mail, and in practice has issued provisional measures within approximately a day of receiving a request.⁸¹ While each body has unique challenges and needs, it appears that all bodies benefit from having sufficient staff members available to resolve requests for precautionary measures, and petitioners benefit from the ability to quickly send requests via E-mail, facsimile, or other expedited means.

The current practice of the IACHR is that all Commissioners consider requests for precautionary measures and decisions are based on an absolute majority.⁸² Therefore, the IACHR practices and procedures to review precautionary measures requests are in line with, if not more deliberative and inclusive than, those of other human rights bodies.

Rapporteur may issue interim measures before a decision on admissibility.”); Laurence Burgorgue-Larsen, *Interim Measures in the European Convention System of Protection of Human Rights*, 2 *Inter-Am. and Eur. Hum. Rts. J.* 99 (2009) (The practice of the Commission was to intervene, prior to ruling upon the admissibility of an application, in order to request the respondent State to suspend the execution of a disputed judicial decision that would have irreversible effects.”); Egyptian Initiative for Personal Rights and Interights v. Egypt, at paras. 38-50, Comm. 334/06, 20th ACHPR AAR Annex IV (Nov. 2006); Practice and Procedure of the Inter-American Court, *supra* note 26, at 296 (“The Commission maintains that the urgent risk of irreparable damage to persons absolves the Commission from the prior necessity of making a formal decision on the admissibility of a complaint before requesting that the State take precautionary measures since by their very nature, such measures arise from a reasonable presumption of extreme and urgent risk of irreparable damage to persons,” citing Cea et al. v. El Salvador, Provisional Measures Case 10.548, Inter-Am. Ct. H.R. 27, OEA/Ser.G/CP, doc.2146 (1991)).

77 See ICJ Rules of Court, *supra* note 57, art. 74 (“A request for the indication of provisional measures shall have priority over all other cases,” and that the Court shall be convened “as a matter of urgency.”); see also ACHPR, Rules and Procedure of the African Commission on Human and Peoples’ Rights, rule 98.1, Feb. 13, 1988, (the body may adopt provisional measures “as urgently as the situation demands”), available at <http://www.achpr.org/instruments/rules-of-procedure-2010/> [hereinafter “AHCR Rules of Procedure”]; Article 39 Presentation, *supra* note 57 (“Every request for interim measures is dealt with as a matter of priority, unless the request is manifestly intended as a delaying tactic.”).

78 See Preventing Irreparable Harm, *supra* note 10, at 138.

79 See CAT Summary Record 662nd Mtg., *supra* note 60, para. 36.

80 See European Court of Human Rights, Interim Measures – Practical Information, available at <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Interim+measures/Practical+information/>.

81 See Preventing Irreparable Harm, *supra* note 10, at 109 (“The actions of the subsequent Special Rapporteurs on New Communications have shown that, on occasion, it was possible to intervene within days. Yet it was only over time and with the introduction of modern communication methods that a practice developed of prompt intervention. Since the Rapporteurs became accustomed to the use of email, the HRC often used provisional measures within a day or even on the same day, depending also on resources and alertness at the Secretariat.”).

82 Reply of IACHR, *supra* note 51, para. 78.

C. HUMAN RIGHTS BODIES HAVE THE AUTHORITY TO ADOPT PRECAUTIONARY MEASURES PROPRIO MOTU.

Scholars have observed that the authority to issue provisional measures proprio motu is an essential element of a functioning precautionary measures system.⁸³ Most human rights enforcement bodies are authorized to issue precautionary measures proprio motu when there is imminent risk or irreparable harm and waiting for a formal request would endanger beneficiaries or jeopardize the ability of the human rights body to later determine the case on its merits.⁸⁴ This practice reflects the understanding that procedures should serve the mandate of a treaty to protect the rights established by constitutive documents.

The ICJ and the ECHR are authorized by their rules of court to issue measures proprio motu and to issue measures different in type from those requested.⁸⁵ The ICJ has used this power to try to halt an imminent execution⁸⁶ and has modified a petitioner's requested measures to prevent escalation of a dispute by imposing measures on both parties.⁸⁷ The HRC also has used proprio motu authority to issue precautionary measures beyond the scope of those requested, and has issued measures on the basis of legal theories not introduced by the petitioner.⁸⁸

⁸³ See Preventing Irreparable Harm, supra note 10, at 189.

⁸⁴ ICJ Rules of Court, supra note 57, art. 75(1-2); ECHR Rules of Court, supra note 7, rule 39(1); HRC Rules of Procedure, supra note 15, rule 92; IACHR Rules of Procedure, supra note 14, rule 25(1-3); Committee on the Elimination of Racial Discrimination, *Rules of Procedure of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/35/Rev.3 (1986), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/cb35dcd69a1b52a3802564ed0054a104/\\$FILE/ROP_En.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/cb35dcd69a1b52a3802564ed0054a104/$FILE/ROP_En.pdf) [hereinafter "CERD Rules of Procedure"] ("In the course of its consideration, the Committee may inform the State party of its views on the desirability, because of urgency, of taking interim measures to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on precautionary measures does not prejudice either its final opinion on the merits of the communication or its eventual suggestions and recommendations"); CAT Rules of Procedure, supra note 15, rule 114(1). See also Jo M. Pasqualucci, Interim Measures in International Human Rights: Evolution and Harmonization, 38 Vand. J. Transnat'l L. 1, 37 (2005).

⁸⁵ ICJ Rules of Court, supra note 57, art. 75(1-2) ("(1) The Court may at any time decide to examine proprio motu whether the circumstances of the case require the indication of precautionary measures which ought to be taken or complied with by any or all of the parties. (2) When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request" and ECHR Rules of Court, supra note 7, rule 39(1) (the Court may "of its own motion, indicate to the parties any precautionary measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it").

⁸⁶ See *F.R.G v. U.S.*, 1999 I.C.J. 104, pp. 5, 22, 29 (Mar. 3).

⁸⁷ See *Cameroon v. Nigeria*, 2002 I.C.J. 303 (Oct. 10), a maritime boundary dispute in which the petitioner State requested precautionary measures to bind the other State party, and the Court, seeking to avoid escalation and irreparable harm, issued an order restricting both parties.

⁸⁸ HRC Rules of Procedure, supra note 15, rule 92 ("The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether precautionary measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on precautionary measures does not imply a determination on the merits of the communication."). See also *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Views, Human Rights Comm. 7th Sess., U.N. Doc. CCPR/C/7/D/5/1977 (Aug. 15, 1979) (issuing measures requesting information about the health of the petitioner's detained relatives although that information was not requested by the petitioner); Bernard Ominayak, Chief

Like the HRC, the ICJ and the ECHR, the authority of the IACHR to issue precautionary measures *proprio motu* is codified in its rules of procedure⁸⁹ and its exercise of this authority is similar to these other adjudicatory bodies.

D. HUMAN RIGHTS BODIES DO NOT REQUIRE FORMAL CONSENT BY BENEFICIARIES TO ISSUE PRECAUTIONARY MEASURES.

International human rights bodies recognize that the urgent and grave circumstances that justify precautionary measures may also make it difficult to obtain consent from beneficiaries. When warranted, many judicial and quasi-judicial bodies do not require beneficiary consent before issuing precautionary measures. The ECHR rules of court do not include a consent requirement and, in fact, permit parties to the case and “any other person concerned” to request precautionary measures.⁹⁰ The HRC, the CAT, and the CERD also have considerable discretion to issue precautionary measures without the consent of the beneficiary. These human rights bodies permit third parties to file petitions on behalf of victims when the victim is not able to do so.⁹¹

The IACHR takes a similar, if somewhat more strict, approach in this regard. The human rights body expresses a preference for “express consent” of potential beneficiaries but will proceed to issue precautionary measures in the absence of this condition, if justified by the circumstances.⁹²

and *Lubicon Lake Band v. Canada*, Views, Human Rights. Comm. 38th Sess., U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990) (rejecting petitioner’s request for measures to preserve the cultural heritage of an indigenous groups, but issuing measures on another legal theory).

89 The grant of *proprio motu* authority to issue precautionary measures is explicit in IACHR Rules of Procedure. IACHR Rules of Procedure, *supra* note 14, art. 25(1-3) (“(1) In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case. (2) In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons under the jurisdiction of the State concerned, independently of any pending petition or case. (3) The measures referred to in paragraphs 1 and 2 above may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identifiable members.” (emphasis added)).

90 ECHR Rules of Court, *supra* note 7, rule 39(1).

91 HRC Rules of Procedure, *supra* note 15, rule 92. Rule 96 of the HRC Rules of Procedure also allows petitions to be submitted by third parties “when it appears that the individual in question is unable to submit the communication personally.” (emphasis added). CAT Rules of Procedure, *supra* note 15, rule 114(1). Similar to rule 96 of the Rules of Procedure of the HRC, rule 104 of the Rules of Procedure of CAT permit in some circumstances, a close relative to submit a petition on behalf of a beneficiary (“No complaint shall be registered by the Secretary-General if . . . [i]t is not submitted in writing by the alleged victim or by close relatives of the alleged victim on his/her behalf or by a representative with appropriate written authorization.” (emphasis added)). CERD Rules of Procedure, *supra* note 84, rule 94(3). Rule 91 of the CERD Rules of Procedure also allows a third party to submit a petition on behalf of a beneficiary if the beneficiary is unable to do so (“the Committee may, however, in exceptional cases accept to consider a communication submitted by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim’s behalf.” (emphasis added)).

92 IACHR Rules of Procedure, *supra* note 14, rule 25(4) (“The Commission shall consider the gravity and urgency of the situation, its context and the imminence of the harm in question when deciding whether to request that a State adopt precautionary measures. The Commission shall also take into account: (c) the express consent of the potential beneficiaries whenever the request is filed before the Commission by a third party unless the absence of consent is duly justified” (emphasis added)).

Nevertheless, our research indicates that the practice of the IACHR lies within the range of approaches human rights bodies have adopted on this topic: these institutions recognize that the urgent nature of some cases requires a flexible approach to formal requirements such as consent to precautionary measures. Human rights bodies seek adequate assurances that deviation from the principle of individual consent is warranted, which balances the priority of protection and the nature of the claim with the need to ensure the integrity of petitions.

E. MOST HUMAN RIGHTS BODIES ISSUE PRECAUTIONARY MEASURES IN A CONCISE, UNPUBLISHED FORMAT TO RESPOND TO URGENT SITUATIONS IN AN EFFICIENT MANNER.

1. Human rights bodies generally do not publish their decisions.

Human rights bodies generally prioritize efficiency over transparency when issuing precautionary measures. With the exception of the IACtHR, most human rights bodies – the HRC, CEDAW, CAT, ACHPR, IACHR, and ECHR – do not publish their decisions on precautionary measures.⁹³ Instead, these bodies usually request that the State implement precautionary measures via a letter or a Note Verbale (a diplomatic communication that is less formal than a note, is drafted in the third person, and is never signed).⁹⁴ Human rights bodies do not publish the contents of

93 See Preventing Irreparable Harm, *supra* note 10, at 123,141,169,180 (noting that precautionary measures issued by the HRC, CEDAW, and CAT are included in an unpublished note verbale to the State, the ACHPR does not publish information on precautionary measures that it issues, and the European Court on Human Rights does not publish separate decisions on precautionary measures). See also CEDAW Rules of Procedure, *supra* note 8, rule 74(2-3) (“2. All working documents prepared by the Secretariat for the Committee, working group or rapporteur, including summaries of communications prepared prior to registration and the list of summaries of communications, shall be confidential unless the Committee decides otherwise; 3. The Committee, working group or rapporteur shall not make public any communication, submissions or information relating to a communication prior to the date on which its views are issued.”).

94 See Preventing Irreparable Harm, *supra* note 10, at 123. See also *A.T. v. Hungary*, Comm. No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003, para. 4.2 (Jan. 26, 2005) [hereinafter *A.T. v. Hungary*](“[A] note verbale was sent to the State party for its urgent consideration, requesting the State party to provide immediate, appropriate and concrete preventive interim measures of protection to the author, as may be necessary, in order to avoid irreparable damage to her person.”); Letter from Hamid Gaham, Chief, Support Services Branch, United Nations Office of the High Commissioner for Human Rights, to Reed Brody, Advocacy Director, Human Rights Watch (Apr. 2001) (referring to the use of note verbale or communication to the State party to issue precautionary measures by CAT), available at http://www.hrw.org/legacy/french/themes/images/guengueng_small.jpg [hereinafter “Letter from Hamid Gaham”]; Open Society Justice Initiative (on behalf of Pius Njawe Noumeni)/Cameroon, Communication 290/2004, para. 12 (May 25, 2006) (“By a letter ... the Chairperson of the African Commission sent an urgent request for the adoption of provisional measures in accordance with the provisions of article [98.1] of the African Commission’s rules of procedure, to H.E Mr. Paul Biya, President of the Republic of Cameroon requesting that provisional measures be taken to ensure that no irreparable damage is done to the equipment of Radio Freedom FM.”); International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) / Nigeria, Communication 137/94-139/94-154/96-161/97, para. 8 (Oct. 31, 1998) (“The Secretariat of the Commission faxed a Note Verbale invoking interim measures under revised rule 111 of the Commission’s Rules of Procedure to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in The Gambia.”); Article 39 Presentation, *supra* note 57 (“The procedure is a written one ... Applicants are informed of the decisions of the Court regarding requests for interim measures by letter (sent by fax and by post).”).

these communications; however these decisions may become public if a party decides to publish the communication.⁹⁵

The lack of a public archive of decisions on precautionary measures makes it impossible to generalize about the reasoning of human rights bodies applied to such requests. However, occasionally human rights bodies will reference the contents of a communication during their decisions on the merits.⁹⁶ Other human rights bodies publish a summary of the precautionary measures they issued in a given year in their Annual Reports.⁹⁷

2. Human rights bodies generally do not publish guidelines for their decisions.

With respect to the HRC and the CAT, a single Special Rapporteur is tasked with processing precautionary measures.⁹⁸ There are no public, written, guidelines to which the Special Rapporteur must adhere, nor is the Special Rapporteur required to justify a decision to issue

95 For an example of counsel informing the press of precautionary measures issued by the HRC see Richard C. Paddock, A Family Apart in Australia, L.A. Times, Apr. 10, 2002, available at <http://articles.latimes.com/2002/apr/10/news/mn-37079> (“On March 28, a Geneva-based United Nations human rights panel agreed to examine the family’s case. The committee’s findings will not be binding, but it recommended that Australia not deport Roqia and the children until the panel has weighed in[.]”). See also Letter from Hamid Gaham, *supra* note 95. For more examples of information on precautionary measures made available pending proceeding see Press Release, Human Rights Watch, United Nations Ask Senegal to Hold Ex-Chad Dictator (April 23, 2001), available at <http://www.hrw.org/news/2001/04/22/united-nations-asks-senegal-hold-ex-chad-dictator>. See also Preventing Irreparable Harm, *supra* note 10, at 180 (noting that the European Court on Human Rights does not explain its decisions to issue precautionary measures and that most information available on precautionary measures is found in judgments on the merits of accompanying cases and in inadmissibility decisions).

96 See *Glen Ashby v. Trinidad and Tobago*, CCPR/C/74/D/580/1994, para. 3.1 (Mar. 21, 2002); *A. T. v. Hungary*, *supra* note 96, para. 4.2; see generally *Dar/Norway*, CAT/C/38/D/249/2004, (May 15, 2007) (example of decision on the merits that discusses factual circumstances surrounding the request for precautionary measures); Amnesty International/Zambia, Communication 212/98, paras. 17-18, 47 (May 5, 1999) (providing a procedural overview of when precautionary measures were issued).

97 The Annual Report of the HRC provides a summary of cases, including precautionary measures requested, issued, whether accepted by the State, and the number of precautionary measures that the Special Rapporteur on new communication and precautionary measures issued in a given year. See Human Rights Committee: Latest Annual Report, available at <http://www2.ohchr.org/english/bodies/hrc/LatestAnnualReport.htm>; CEDAW Rules of Procedure, *supra* note 8, rule 74 (10) (“The Committee shall include in its annual report under article 21 of the Convention a summary of the communications examined and, where appropriate, a summary of the explanations and statements of the States parties concerned, and of its own suggestions and recommendations ...”); CEDAW, Report of the Committee on the Elimination of Discrimination against Women, A/67/38 (2011-12), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/281/61/PDF/N1228161.pdf?OpenElement/>;

the annual reports of the CAT provide a summary of cases, including precautionary measures requested, issued, whether accepted by the State, as well as States’ views on the precautionary measures; CAT, Annual Reports of the Committee Against Torture, available at <http://www2.ohchr.org/english/bodies/cat/reports.htm>; the Activity Report of the ACHPR includes a brief summary of the precautionary measures issued in a given year, see ACHPR, 31st Activity Report of the African Commission on Human and Peoples’ Rights (African Commission), 206 (2012) available at http://www.achpr.org/files/activity-reports/31/achpr50_actrep31_2011_eng.pdf; the Annual Report of the European Court includes statistics on the number of requests for precautionary measures received, refused, and granted. European Court, Annual Report 2011, available at http://www.echr.coe.int/NR/rdonlyres/77FF4249-96E5-4D1F-BE71-42867A469225/0/2011_Rapport_Annuel_EN.pdf.

98 See Office of the United Nations High Commissioner for Human Rights, 23 FAQ about Treaty Body complaint procedures, available at <http://www2.ohchr.org/english/bodies/petitions/individual.htm>.

precautionary measures.⁹⁹ In practice, neither treaty body provides justifications for their decisions.¹⁰⁰ One scholar argues that these bodies favor consistency and efficiency over the need for extensive written legal reasoning justifying their decisions.¹⁰¹

The format by which the IACHR issues precautionary measures is consistent with that employed by other human rights bodies. The IACHR does not publish its decisions to issue precautionary measures. However, since 1996, the IACHR has included a summary and statistics regarding the precautionary measures it issues in a given year in its Annual Report.¹⁰² It has published two studies regarding the criteria and procedures it applies to precautionary measures.¹⁰³ Recent decisions, that have not yet been included in the Annual Report, are available on the website of the IACHR.¹⁰⁴ Moreover, Article 25 of the IACHR Rules of Procedure articulates various factors it considers in reviewing a request for precautionary measures.¹⁰⁵ The IACHR further elaborates its criteria on its website and in its annual report.¹⁰⁶

The IACHR has provided a public record of its precautionary measures practice and detail about its assessment criteria which is as high if not higher than that provided by the other human rights bodies examined.¹⁰⁷

99 See Comm. Against Torture, Summary Record, 27th Sess., 487th mtg. at para. 22, CAT/C/SR.487 (Nov. 13, 2001) [hereinafter “CAT, Summary Record of 487th mtg.”] (“There were no written guidelines on those matters and the [HRC rapporteurs] applied the criteria set out in the Optional Protocol and the Committee’s jurisprudence, which was often very extensive, although in certain cases the rapporteur had to innovate.”); CAT, Summary Record of 662nd Mtg., *supra* note 60, para. 4 (“[A]lthough some States had requested the Committee to establish guidelines on criteria for requesting interim measures, the Committee considered that guidelines could be restrictive.”).

100 See CAT Summary Record of 487th mtg., *supra* note 99, para. 4 (the HRC Special Rapporteur on New Communications provided the CAT with an overview of issuance of precautionary measures and noted that a benefit of having a “Special Rapporteur for New Communications was that there was no need to justify the requests for precautionary measures of protection. The Special Rapporteur had full latitude in making such requests and, where necessary, withdrawing them.”); *id.* at para. 7 (quoting the CAT Chairman observing that: “[t]he Committee against Torture could only endorse the reasons given—consistency and speed—to explain the usefulness of having a special rapporteur. Furthermore, he himself never gave explanations when addressing requests for interim measures to State parties.”).

101 See Preventing Irreparable Harm, *supra* note 10, at 143.

102 IACHR, Annual Report of the Inter-American Commission on Human Rights 1996, available at <http://www.cidh.org/annualrep/96eng/chap.2.htm> (“The Commission has decided to include in this chapter a report on the Precautionary Measures requested by the Commission from the member states of the Organization, on its own initiative, or at the request of an interested party The precautionary measures are presented in the same order as admitted for review by the Commission; name of the person or persons on whose behalf they are being requested; summary of the facts on which the claim is based; rights of the persons exposed to grave and imminent danger; number of the case, if it has a number; date on which the Commission requested the measures indicated; name of the state to which the requests were submitted.”). IACHR Annual Reports are available at <http://www.cidh.org/annual.eng.htm>.

103 Second Report on Human Rights Defenders, *supra* note 6; First Report on Human Rights Defenders, *supra* note 21.

104 IACHR, Precautionary Measures, available at <http://www.oas.org/en/iachr/decisions/precautionary.asp> [hereinafter “IACHR Precautionary Measures”].

105 See IACHR Rules of Procedure, *supra* note 14, art. 25(4).

106 IACHR Precautionary Measures, *supra* note 104; see also IACHR Annual Report 2011, *supra* note 28, ch. 3 at paras. 16-18.

107 FIRST REPORT ON HUMAN RIGHTS DEFENDERS, *supra* note 21; SECOND REPORT ON HUMAN RIGHTS DEFENDERS, *supra* note 6. It may be useful for the IACHR to include its criteria for issuing precautionary measures in a separate report to ensure visibility of those guidelines and facilitate identification of any clarifications that might be necessary.