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## Panel I: The Use of Interim Measures by the Committee against Torture: Towards a Comprehensive Instrument for the Protection of Victims and Witnesses in Torture Cases

Hélène Legeay

Carla Ferstman

Diego Rodríguez-Pinzón

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## PANEL I

# THE USE OF INTERIM MEASURES BY THE COMMITTEE AGAINST TORTURE: TOWARDS A COMPREHENSIVE INSTRUMENT FOR THE PROTECTION OF VICTIMS AND WITNESSES IN TORTURE CASES

### Opening Remarks from H el ene Legeay, Moderator\*

Good morning, everyone. I am the Middle East and North Africa Programme Manager at Action by Christians for the Abolition of Torture (ACAT). ACAT is a French NGO based in Paris. Our main mandate is to fight against torture, the death penalty, war crimes, and crimes against humanity. To present our work in a few words, we provide training for lawyers. I have provided training for lawyers in Tunisia and soon, I hope, in Morocco as well. This training concerns how to document torture cases and how to file complaints before international enforcement bodies. ACAT released an annual report on the phenomenon of torture around the world and we also release some country reports on a regular basis.

Among the means for assisting victims, ACAT has filed several petitions before international bodies, mainly before the Committee against Torture (CAT, Committee). For example, Gerald [Staberock] was talking about the petition concerning a man who was detained in Morocco and was supposed to be extradited to Algeria. ACAT filed this complaint and won.<sup>1</sup> It was the first complaint against Morocco since Morocco recognized the competence of the CAT to take individual communications in 2006. So, it was the first complaint and we won the case before CAT and Morocco complied with the decision. This was really good news. Also, participating in the first hearing before CAT was my colleague in the Uzbekistan-Kazakhstan case.<sup>2</sup> It was the first pleading in CAT and it was successful. I hope we will be able to develop that kind of procedure.

I'm really glad to attend this conference and I'm sure it will give even more ideas on what we can do to collaborate together—NGOs, researchers, and also CAT—to better assist the victims and get protection and reparations for them. Before introducing the first panel, I want to thank the Washington College of Law and OMCT (World Organisation Against Torture) for organizing this conference and for inviting me to moderate this panel, which is important for me and for ACAT as we have tried—sometimes successfully, sometimes not—to protect victims by asking CAT for interim measures orders.

Interim measures—or what are called provisional or precautionary measures—are ordered by international human rights



bodies to preserve the rights of the parties to a case and to avoid the occurrence of an irreparable harm.<sup>3</sup> An order of interim measures may require that the states take positive actions—like providing protection to the victim or access to a doctor—or to refrain from taking action by delaying an execution or an extradition until the case has been resolved by the international body.

In torture cases, interim measures appear to be as important or sometimes more important than the consideration of the merits of the case. The interim measures' aim is to prevent torture in individual cases, to shield potential victims from these actions. In that sense, interim measures are—for the moment—the best tool at the disposal of international bodies to compel states to respect the main purpose of the conventions preventing torture. Reparations, rehabilitation of the victims, and prosecution of torture crimes are important issues that we will also address today. But, we all agree on the idea that the prevention of torture is what we want to achieve.

As protective measures, interim measures are valuable tools as long as they are, first, adapted to the situation—to the threat—and, second, as long as they are efficient.

Although previously considered as merely recommendations by international bodies and their member states, interim measures have progressively gained binding authority, not only through

\* H el ene Legeay is the Middle East and North Africa Programme Manager at Action by Christians for the Abolition of Torture (ACAT).

landmark jurisprudence, but also the International Court of Justice paved the way with its reasoning in the *LaGrand* case in 2001,<sup>4</sup> and it has since been followed by other international or regional bodies.

Despite this encouraging evolution of the international jurisprudence, the legal status of interim measures is still uncertain. As Diego Rodríguez-Pinzón will address in his presentation, some states have proven quite willing to respect interim measures, but still, in too many cases, we have seen states breaching orders and consequently, victims suffering irreparable harm. Some of them have been executed, some have been extradited to a country where they have been ill-treated or tortured, and some have been threatened, attacked, or even killed in that country because of petitions that failed in front of an international body.

As we can see, the good faith of states is still the basis for the efficiency of interim measures, like it is for the efficiency of the decisions of international enforcement bodies in general. In the last year, we have seen positive developments in international jurisprudence regarding the diversity of the interim measures ordered to protect the litigants. NGOs like REDRESS, ACAT, or OMCT assisting victims have widely contributed to these developments. The [Inter-American] Court of Human Rights has been at the forefront on the issue and a source of inspiration for other international enforcement bodies. But, as Carla Ferstman will certainly explain more deeply in her presentation, much more could or should be done to provide the best protection to victims, or potential victims of torture, through interim measures.

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## Remarks of Carla Ferstman\*

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### INTRODUCTION

Today is extremely important, not only because it will explain and explore the importance of the UN Committee against Torture in the overall fight against impunity for torture. But also, it will touch on some very practical measures and hopefully this will help all of us in our respective areas of work to improve the situation of survivors of torture and those who face a risk of torture in their dealings with these types of bodies.

At REDRESS,<sup>5</sup> which is an organization based in the United Kingdom, we work with survivors of torture in all parts of the world and have taken cases before most regional human rights courts as well as many treaty bodies. When it comes to working with survivors of torture and considering what motivates them to bring a case before a regional or international human rights body, first and foremost what they are seeking is some form of acknowledgement of the harm suffered by an independent and impartial body that can draw attention to what they have experienced. Justice is not only, or not mostly, about any kind of revenge against a particular perpetrator or a state. It is really about trying to restore what the victim has lost, which is their dignity through the absence of rights in the context of torture.

When it comes to the issue of protection, one of the biggest challenges for a torture survivor who is undertaking efforts to try to obtain some measure of justice, first at the domestic level and, if that fails, eventually at the international level, is risk of reprisals after already suffering from torture. We can understand why it is so important that the bodies, which are supposed to be there to provide a measure of redress, do not contribute to the problem and end up being a place that, by virtue of the victim seeking some kind of justice, creates a new risk of a reprisal.



This is in a way the overlaying issue for many torture survivors that we need to consider.

Victims invariably face a range of problems when filing claims before international bodies. Certainly they face these problems when they file claims at the domestic level as well. Therefore, we should keep that in perspective. They face threats of physical violence to them and their families; sometimes these threats are carried out. They face further risk of detention; they face new or false claims or civil proceedings brought against them as some kind of punishment. Victims are sometimes forced to withdraw their claims as a result of pressure or extortion that they face.

In 2007, the Parliamentary Assembly of the Council of Europe made a very important statement in relation to the practice of forcing victims to withdraw their complaints in mostly, but not exclusively, applicants from the North Caucasus

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\* *Carla Ferstman is the Director of REDRESS (www.redress.org).*

region of the Russian Federation, as well as from Moldova, Azerbaijan, and—albeit less recently—Turkey.<sup>6</sup> This resolution importantly indicated that the European Court of Human Rights should continue with cases where there had been some indication that the withdrawal by the victim had been requested under spurious grounds. So, it is quite interesting that all regional courts have faced this issue and it is not only an issue that has been faced by the UN Committee against Torture or the Human Rights Committee.

There have been, very importantly, reprisals against human rights defenders and lawyers representing victims in claims before international bodies, as well as claims at the domestic level. So, all of these problems or challenges combine to make the prospect of seeking justice a risky business for victims of torture, which is very unfortunate.

### THE CHALLENGE OF PROTECTION OF VICTIMS IN INTERNATIONAL AND DOMESTIC COURTS

Many of my comments will be based, at least in part, on a study that REDRESS conducted several years ago on the overall challenge of protection of victims.<sup>7</sup> Part of the reason why we undertook this research was as a result of our work on the International Criminal Court and international criminal tribunals, where as many of you know there is quite an extensive practice on the protection of witnesses in the context of those tribunals, with the system at the International Criminal Court differing from the system in place at the *ad hoc* tribunals—the International Criminal Tribunal for Rwanda and for the Former Yugoslavia. Unlike the *ad hoc* tribunals, where victims are only able to appear as witnesses, at the ICC, in addition to their role as witnesses, victims have an independent role where they can present information directly and participate in proceedings. However, the structures of protection at the ICC were modeled on the *ad hoc* tribunals and the ICC was therefore not adequately equipped to deal with victims who were acting on their own initiative. The ICC adopted a prosecution-initiated model where witness protection measures were accorded in relation to the importance of the particular witness to the criminal prosecution.

The reason why I say this is because it is quite similar at the domestic level around the world. Victim and witness protection systems are typically established to deal with organized crime or serious crime cases and are managed by the prosecution service. So, when we think about the victim of a human rights abuse, who is seeking some kind of justice independent from any criminal prosecution that an office of the prosecutor might bring, there are a number of very specific challenges that the victim would face: first, in convincing the relevant bodies that the individual is entitled to protection when there is no criminal case; and second, the typical bodies undertaking the protection are the police, sometimes the military, depending on the kind of case, which are in the context of human rights, often the same bodies that are allegedly responsible for the violations.

So, it is quite important to situate the challenge of victim protection in human rights cases with regard to the situation that operates in most countries around the world. To the extent that protection mechanisms exist at the domestic level, they are not geared to human rights litigants. This is an overall problem. When we start to talk about interim measures, if a regional human rights court or a treaty mechanism is recommending that states take particular action, one must be mindful of the types of systems that exist at the domestic level. How will the state respond to these interim measures, when it has very limited structures in place? This is an overall concern of which we should be mindful in considering the challenge of protection.

Taking one step back, is there an obligation to protect? Is there a human rights obligation that states have to protect? The short answer is, of course, yes. But actually, when one looks through the wide variety of human rights treaties, one can see a distinct absence of the obligation set out in most typical treaties relating to human rights. The reason for that is typically, when we think about protection in the context of criminal trials, the victim is not normally or has not traditionally been seen as a party to proceedings. When we look at the International Covenant on Civil and Political Rights,<sup>8</sup> which has an extensive section on fair trial rights, there is no mention of the obligation to protect victims and witnesses. So, it is quite a stark absence in the overall system of human rights protection.

### IMPORTANT PROTECTIONS IN THE CAT

Luckily though, when it comes to the United Nations Convention against Torture, we do have Article 13, which sets out in no uncertain terms the obligation of states to ensure that victims who are seeking justice do not face reprisals.<sup>9</sup> This is a very important provision. Similarly, in the torture field, the Istanbul Protocol,<sup>10</sup> which deals with the medical and legal documentation of torture, clearly specifies that there is an obligation to protect victims and witnesses. But probably the most significant and extensive provision on protection is in the new International Convention for the Protection of All Persons from Enforced Disappearances,<sup>11</sup> which sets out state obligations in very clear terms.

In accordance with the recent General Comment issued by the UN Committee against Torture on Article 14,<sup>12</sup> which concerns the right to redress and rehabilitation, States Parties should also take measures to prevent interference with victims' privacy and to protect victims, their families, witnesses, and others who have intervened on their behalf against intimidation and retaliation at all times before, during, and after judicial, administrative, or other proceedings that affect the interest of victims. Failure to provide protection to victims stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy. Here, the UN Committee against Torture underscores the relationship between the need to protect and other rights set out in the Convention, so the obligation to protect is not only a self-standing obligation—victims need to be protected—but when there has been a failure to protect, this



impacts a variety of other rights enshrined in the Convention, including the obligation to afford a remedy.

What are the types of measures that states have at the domestic level? As I have already indicated in my introduction, most states that do have protection legislation, as well as protection structures, have developed these systems in the context of criminal law and particularly organized crime. At the international level, the UN Office on Drugs and Crime has spearheaded efforts to encourage states around the world to revise their laws and practices to protect victims and witnesses mainly in the context of organized crime. So, at the international level, there has been some movement to encourage states around the world to adopt protection legislation and establish protection units. However, this initiative of the UN Office on Drugs and Crime has focused on the criminal model. Therefore, it is not sufficient or adequate to respond to the needs of protection in a human rights case, with respect to human rights litigants. Moreover, as I previously mentioned, there are a whole range of protective measures within the international criminal realm, both during the trial proceedings as well as measures on the ground to protect victims and witnesses. However for the most part, these too are focused on a prosecution model.

### THE USE OF INTERIM MEASURES

What about victims who are not criminal witnesses, when they are bringing their own human rights cases? For me, this is the biggest challenge that we face. With respect to this massive gap, one of the areas which we can look at, and which I will discuss now, is the area of interim measures. H el ene [Legeay] has already indicated what interim measures are. Basically they are tools to stop or postpone the execution of a decision or an act that might prejudice the outcome of the proceedings before a final judgment is reached. They can also be positive, requiring a state to take particular action to forestall irreparable harm. There are also instances where an interim measure can be a request or an order to a state to stop negative action. One limitation of the system of interim measures is that they are typically only available for serious and urgent cases. So, we must consider this in light of the variety of needs that torture survivors have with respect to protection and whether they all fit within the context of serious and urgent cases. Most cases fall under these criteria; however it can often be a question of evidence, whether evidence is strong enough to demonstrate the sufficient level of urgency and seriousness.

Another question is whether interim measures are able to provide all of the protection needs of torture victims trying to bring a case at an international level. The first issue is how one assesses the definition of avoiding irreparable harm. Will it necessarily be applicable to protection concerns that are perhaps not amounting to death threats or serious bodily injury? How do we define serious irreparable harm? Do we define it in relation to the harm to the victim, or perhaps can we go further and define

it in terms of harm to the case? Because certainly one of the roles of interim measures is to safeguard the situation so that the litigation can proceed. So, in terms of how we look at the issue of irreparable harm, does the fact that a victim has been threatened, which may force her to withdraw a particular case, amount to sufficient harm although not physical harm?

Another question is whether interim measures are able to address threats against lawyers and human rights defenders, in addition to the direct victim. In principle, one would think that they should be, though the relevant provisions and regulations are not actually so clear. If we read rule 114 of the UN Committee against Torture's regulations, the first paragraph: "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 [P]arty 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."<sup>13</sup> How does one interpret that? Can we possibly say that the threats to the lawyers are part and parcel of irreparable damage to the victim? Certainly that would be an appropriate way in which to look at the matter. However, that interpretation probably goes one step beyond the plain meaning of the text.

Are interim measures able to deal with reprisals after the fact? So, let's say the UN Committee against Torture issues a decision, and as a result the state concerned is very angry and the individual concerned is re-tortured, possibly even killed. What can the treaty body do in that kind of circumstance? I would suggest that interim measures, because of what exactly they are, would have difficulty to operate after the fact. Therefore, the question is what else needs to be in place to ensure the continued ability of the Committee to have oversight over the protection needs after it has issued a decision. Certainly, as the UN Committee against Torture has itself recognized in its recent General Comment, there is a link between remedy and protection. So the UN Committee against Torture or any treaty body or other international mechanism can, in light of the need to guarantee non-repetition, set out the obligation to ensure continued protection to the victim and others concerned. This could potentially be addressed in relation to the remedial order at the end of the case to the extent that the Committee has continuing supervisory ability at the end of the case, which many bodies do.

Another concern is the response by the different states to interim measures. This has to do with the overall challenge of enforcing anything that a treaty body or even some of the regional courts recommend or order, as the case may be. I suggest two main issues with respect to the response to interim measures. The first concern is limited capacity. As already indicated, one of the most significant challenges is the limitation of domestic legislation and domestic procedures on the ground to deal with protection concerns. So, if an order or request for interim measures is made to a particular country where the systems and

structures are not adequately in place, there will be a capacity problem with respect to the ability of that state to appropriately and effectively give effect to that order or recommendation. The second concern is the lack of will. This is particularly problematic for the treaty bodies, whose ‘views’ or decisions are not understood as binding, although of course the argument can be made that the views and decisions of the treaty bodies are necessarily binding given that they are the authoritative interpretation of the treaty, which the states have agreed to enforce.

With respect to the legal basis of interim measures, there are several different types of frameworks. Some courts and bodies have within their treaties the power to order interim measures. So, for instance, the International Court of Justice, or the Inter-American Court of Human Rights have specific provisions in their founding documents which deal with these matters. Others do not have such provisions in their statutes, but internal regulations have provided their ability to order interim measures. Here we can think of the European Court of Human Rights as an example, which has developed rules, but they are not part of the statute as such. And, other bodies have no provisions either in the statute, or in regulations, however they nonetheless interpret their mandate to allow them to order interim measures.

With respect to how these different frameworks have been understood, the International Court of Justice has come out with an important decision, which H el ene has already mentioned, in the *LaGrand* case.<sup>14</sup> The Court indicated that the failure of the United States to implement the interim measures that were issued by the International Court of Justice constituted a violation of the United States’ obligations. In that particular case, it was quite interesting, because the International Court of Justice in its Statute specifically recognizes interim measures; however, it does not go so far as to indicate that the interim measures contained in the Statute are binding. So, it is mentioned in the Statute; however, there is no mention of whether they are binding or recommendatory. Nonetheless, the International Court of Justice’s decision concluded that because of the important role of interim measures in safeguarding the sanctity of the system, those interim measures had to be regarded as binding.

There has been progressive development in the jurisprudence of the European Court of Human Rights. In an early case regarding an expulsion from Sweden to Chile, the European Court indicated that the interim measures were not binding. But that position has changed. In a more recent case regarding an extradition from Turkey to Uzbekistan, the European Court made a very clear finding that interim measures must necessarily be binding.

To a certain extent, this judgment was likely influenced by the *LaGrand* case, given the timing.

## CONCLUSION

In summary, with respect to the legal basis for interim measures, we have a variety of different systems. The legal basis will be determined either by treaty, internal rules, or it will be determined by implication, binding on the basis of a good faith interpretation of the relevant treaties. Bodies that issue views or recommendations face distinct challenges in the sense that if the overall mandate of the body is not capable of issuing binding decisions, and therefore it is more difficult to imply a binding nature to an interim measure. This is one of the challenges of UN treaty bodies in trying to cultivate the argument that interim measures are binding. Not to say that the argument cannot be made—certainly it can and it should—but one can understand why it can be difficult, and why certain states have not seen it necessary to enforce interim measures.

In conclusion, the first way to strengthen protection measures in the context of human rights litigants’ need for protection is to make the system of interim measures as binding as possible. Second, I suggest that it is necessary to clarify what states are obliged to do in order to make protection effective. Given the gaps at the domestic level, it would be helpful for international bodies—including the treaty mechanisms, and in particular the UN Committee against Torture—to explain in great detail what is necessary to protect human rights litigants in the context of the Convention. This is something which has not been done; domestic practice is inadequate, international standards are simply not sufficiently clear. While there must be continued efforts to tackle the lack of will at the domestic level, capacity is something that one has a greater chance of influencing. Making those standards as clear as possible to enable implementation by domestic authorities is important.

What are the positive measures of protection that human rights bodies can insert into their interim measures? The UN Committee against Torture and other bodies can be more descriptive in the types of measures that they set out in their interim measures findings. And, also it would be helpful to strengthen follow-up mechanisms, both follow-up of interim measures as well as follow-up of decisions where protection features as part of the decision. In addition, it may be useful for the Committee to issue a General Comment on Article 13 of the Convention against Torture. It could be quite interesting and it could potentially have an important role not only in relation to the Convention against Torture but also with respect to the clarification of applicable standards of protection in human rights cases more broadly.

## Remarks of Diego Rodríguez-Pinzón\*

### INTRODUCTION

I think the topic of this panel is a fascinating discussion overall, the theme of the conference is a very practical perspective to sit and find some new ideas to improve the protection mechanisms, particularly the individual complaint mechanisms of the Convention against Torture (CAT, Convention), and again to begin to look to different types of mechanisms that exist around the world. In my case, I was invited to talk a bit about the Inter-American Human Rights System. Particularly, I would like to focus on the Inter-American Commission on Human Rights (IACHR, Commission). A lot has been written and said about the Inter-American Court of Human Rights, but a more detailed and narrow approach exploring the powers and practice of the Commission as a reference for discussion with the mechanisms of the treaty bodies of the UN—particularly the Committee against Torture—could be extremely useful and has yet to be explored in-depth.

I am going to tell you why I think it is very important to narrow it down and to begin to look at the practice in the Commission in the framework and architecture of the Inter-American Human Rights System.

Human rights supervision is now a very well-settled practice, general supervision—when we talk about countries, thematic reports, general comments, and advisory services—as well as individual complaints. In order to discharge their mandates under the corresponding human rights treaties, these powers have developed and evolved constantly to improve promotion and protection of human rights in light of the object and purpose of the pertinent treaty. On the one hand, the general supervisory powers play a very important role in inducing states to adopt structural changes that will prevent future violations of human rights in the immediate term. Such general supervision is also a very useful instrument to highlight the existence of endemic problems in specific countries or specific issues in a region, and in many instances empowers the work of civil society organizations and other actors on the local level.

In the realm of individual complaints, most of the powers of these international mechanisms have been geared toward establishing the international responsibility of the state. This of course usually occurs after violations have occurred, and the only available remedies are reparations, including compensation. In fact, this usually happens months, if not years later, after local remedies have been exhausted. It is *ex post facto* action on the



international level on the basis of the traditional finding of international responsibility of states.

However, one of the key elements of human rights regimes is the need to prevent human rights violations, which is arguably one of the most important aspects of the object and purpose of such regimes. This is true as a duty of states and it is true to inform the work of international human rights bodies. This may, for example, explain in part why the UN treaty bodies, such as the Human Rights Committee or the Committee against Torture, have established in the Rules of Procedure the power to adopt interim measures.<sup>15</sup> Such a preventive mandate requires the exercise of expansive actions to adequately respond to certain human rights violations.

This expansive interpretation of these committees' own powers has been replicated by the Inter-American Commission on Human Rights. While only the Inter-American Convention on Forced Disappearance of Persons<sup>16</sup> explicitly refers to such a power—interim measures—the Commission has included in its Rules of Procedure such a provision since the 1980s.<sup>17</sup> And it is recognized by most states of the [Organization of American States] as a legitimate development of its implied powers in individual cases under the American Convention on Human Rights<sup>18</sup> and under other regional international treaties.

This provision has evolved constantly to the current draft recently approved by the Commission, which will enter into force in August of this year. Hopefully I will be able to talk a little bit about this process.

### STRUCTURE OF THE INTER-AMERICAN COMMISSION

I will focus on some aspects of the practice of the Commission that could be interesting and useful for the discussion about provisional measures of the Committee against Torture.

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\* Diego Rodríguez-Pinzón is Professorial Lecturer in Residence and Co-Director of the Academy on Human Rights and Humanitarian Law at American University Washington College of Law.



However, I will not deal with the provisional measures of the Inter-American Court of Human Rights, as I intend to narrow the presentation to the powers of the Commission, as an interesting reference of quasi-adjudicatory bodies on the practice of interim measures.

Let me now turn to explain very briefly the general framework, the general architecture of powers that inform the Commission's practice on the protection and promotion of human rights. The Commission has received a very broad mandate by the states of the Organization of American States. The Commission has both the power to deal with general situations and deploy diplomatic and political tools to confront human rights violations of all sorts. The Commission can use these powers to confront individual situations or more structural endemic problems, as well as gross and systematic violations of human rights, as it has done in the past, through several decades during the 1970s, 1980s, and 1990s in Central America, in the Southern Cone, and in the Andean region, where we saw the practice by several states of massive violations of human rights.

One of the most notable mechanisms of the Commission is its power to perform on-site visits, a function in place since the inception of the Commission in the 60s. In the first decade of existence, the Commission performed several on-site visits to the countries of the region. As you may very well know, this is a very intense proposition for an international supervisory body to deploy itself into the jurisdiction of one of the supervised states, but it has settled into a very important practice of the Commission to confront, among others, systematic violations of human rights.

Another very important set of tools with respect to this general supervisory power of the Commission is country reporting. The Commission has reported systematically about country situations throughout the region and regional endemic problems. The most important report, I believe, of the Inter-American Commission, was the *Report on Terrorism and Human Rights*,<sup>19</sup> released after September 11, 2001. This report basically collected the Commission's prior activities from the previous decades throughout the region—regimes arguing that they were combating the threat from terrorist groups and adopting measures that clearly violated human rights law. The Commission was very quick in introducing this general report on terrorism and human rights to engage in a dialogue with countries, many of them, including the [United States], engaged in practices that, in my opinion, clearly violated established international human rights law.

### INDIVIDUAL COMPLAINTS AND INTERIM MEASURES

There are other mechanisms, such as rapporteurships, interim measures, and cases regarding torture, as well as other practices such as press releases. But I want to now turn to the adjudicatory dimension, which of course takes us into the realm of interim measures. The adjudicatory dimension of the Inter-American Commission must be understood again in this architecture by which the Commission holds the key of access to individual complaints in the Inter-American System. And it means that all

cases, all interim measures, are first processed in the Commission and subsequently could end up reaching the Inter-American Court of Human Rights. So, in order to understand the rightful dimension of the individual complaint system in the Americas region, we have to understand that the process of the Court is not a different process from that of the Commission on individual complaints. It is one system, one procedure, in which there is a process of incremental pressure on states. And there are different moments in the processing of petitions that empower the Commission, empower the victims, petitioners or in many cases government officials, to do things on a national level in order to respond to the process in the Inter-American Commission and the Inter-American Court.

In the framework of the individual complaints procedure in the Inter-American System, we will explore the normative structure that informs the individual complaint procedure, specifically the interim measures regime in the individual complaint procedure in the Inter-American System. The Commission primarily grants precautionary measures to protect persons from grave and imminent danger of injury of rights recognized under the American Declaration on the Rights and Duties of Man (Declaration)<sup>20</sup> and other regional treaties. This is the normative regime that informs individual cases and that of course is directly relevant to the adoption of interim measures. The Charter of the Organization of American States<sup>21</sup> sets out the legal architecture of the OAS and it is binding on all OAS members, including the [United States], Canada, and all Central American, Caribbean, and South American countries—all of the region.

Under Article 106 of the Charter, the primary function of the Commission is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in these matters. The notion of protection in this provision necessarily involves the powers to receive and adjudicate human rights cases. Every state in the Americas has accepted the competence of the Commission to consider the individual complaints concerning alleged human rights violations that occur in their jurisdiction just by ratifying the Charter. For those states that have not yet ratified the American Convention, the Commission will determine whether the state violated the rights set forth in the American Declaration. The Commission and the Inter-American Court have both held that the Declaration, although not initially adopted as a legally binding instrument, is now a source of legal obligation for OAS Member States. Additionally, by approving the Commission's Statute, the Member States have established the Commission's authority to receive and decide individual complaints alleging violations of the Declaration against those states that are not parties to the Convention.

Furthermore, the Commission has read the Declaration as an evolving source of law, noting that its application is consistent with the practice of the Inter-American Court of Human Rights. Therefore, the Declaration serves as a parallel to the American Convention for those states that have not ratified the American Convention.



In the Inter-American System, the purpose of precautionary measures is to prevent irreparable harm to persons or to preserve the subject matter of the proceedings in connection with pending litigation. Therefore, their adoption does not require a case pending before the Commission, nor do they have to join the claim of a human rights violation. Although the precautionary measures are not explicitly mentioned in the American Convention or statute, as I mentioned before, these measures have been institutionalized for decades through Rules of Procedure of the Commission.<sup>22</sup> Under Article 25 of the Rules of Procedure of the Commission, in serious and urgent situations the Commission may, on its own initiative or the initiative of a party, request that a state adopt precautionary measures.

If protections are provided by the state as a result of an order issued by the Inter-American Commission, these may be due to its own motion or at a request of a party. Taking into consideration the special circumstances existing in several states of the Americas, the Commission has adopted precautionary measures to protect persons on an individual and collective basis. In this sense, beneficiaries of precautionary measures have been, among others, human rights defenders, persons in detention—some of whom have been sentenced to capital punishment or are being kept in deplorable health conditions—persons being harassed in the context of judicial procedures, persons with health problems, children, and entire communities of indigenous peoples.

### STUDY ON THE COMMISSION'S USE OF PRECAUTIONARY MEASURES

Behind each one of these situations, there are grim realities that stem from armed conflict, discrimination, poverty, corruption, precarious prison conditions, and impunity, which unfortunately still exist in the Americas. On this basis, with a colleague in the University of Ghent in Belgium, we studied all of the measures that have been adopted by the Inter-American Commission since they first adopted this power in the regulations in the 1980s; we ended up with a collection of 771 precautionary measures. Then we studied how the Commission dealt with petitions regarding different countries—the Americas is composed of a very diverse set of countries, some of which have gross, systematic violations of human rights, others with established democracies—to understand the scope of application of the precautionary measures of the Commission and how they have been used in its history.

We intend to release this article in two or three months, and hopefully it will increase understanding of the Commission's measures, as opposed to the practice of the provisional measures of the Court, given that there is much more information on these. The Commission can issue measures regarding any right recognized by the Inter-American instruments for which the individual complaint procedure is available, that is the basic prerequisite. This very broad subject matter jurisdiction is, however, limited by notions that were mentioned before—gravity, urgency and irreparability of a particular situation, and on those bases it has narrowed its measures to specific situations and specific rights.

After doing a very quick analysis of the measures, we found that of the 771 measures adopted by the Commission from 1994 to 2012, 665 measures dealt with the right to life, along with other rights. Six hundred thirty-four measures dealt with life and humane treatment. Five hundred eighty-two dealt with personal integrity, along with rights other than the right to life. Eighty-three measures dealt with the right to life alone. Only seven measures dealt with humane treatment alone—not related to the right to life or other rights under the American Convention. Therefore, the great majority of the precautionary measures adopted by the Inter-American Commission on Human Rights have focused on these non-derogable core rights established both in the Declaration and the American Convention.

We have numbers for other rights related to, for example, freedom of expression with 25 measures; right to health with 26 measures; equality with fifteen measures; personal safety with thirteen measures; and liberty with eight measures. You will see that there is a clear focus of the Commission on these particular rights, even though the normative framework of the Commission is very broad—not only right to life, equality, and personal integrity, but many other rights. The Commission has been very deliberate and careful in using these powers on these types of rights, dispelling some conceptions that the Commission has been very liberal in dispensing precautionary measures in all sorts of situations, particularly in the framework of the *Belo Monte* case.<sup>23</sup>

Another important finding that illustrates the scope and where the Commission focuses its measures are the number of precautionary measures issued by country. Which countries receive the most precautionary measures? In the last decade, Colombia had the most with 173 measures. Then comes Guatemala, with 97 measures, then Mexico with 75, and—I would say surprisingly for some and not for others—the United States is fourth, with 72 precautionary measures. As you can imagine, these entail issues of *non-refoulement* and issues related to the death penalty.

There is very little information about the implementation of the measures. We only found some references, particularly dealing with the death penalty. Of the death penalty cases, there were only a few reported—139 cases reported on the death penalty, and only 45 of those cases were followed up in these reports. And of those 45 death penalty cases, there was some sort of compliance with the measures only in half of them. The [United States] complied with seven cases with interim measures of the Commission. Other countries have complied with precautionary measures—half of them have been complied with in some way or another, partly on the basis of the report regarding death penalty cases.

### THE VALUE OF PRECAUTIONARY MEASURES

Finally, I would like to highlight a couple more issues. First is the importance of precautionary measures for the protection of the most basic rights. The Commission has been very deliberate in opening its measures not only for situations that have been dealt with in cases, as I mentioned, but beyond that. You can

bring a petition for precautionary measures to the Commission even before you have filed the case in the Inter-American Commission on Human Rights. This is a very broad interpretation of its implied powers. States have not opposed this interpretation, so there is a consistent practice. Opposition comes from, for example, the United States under the American Declaration, stating that there is no jurisdiction of the Commission on that softer regime. The United States has not ratified the American Convention. However, the practice of issuing protective measures beyond the existence of a case, is a very well-settled practice.

I submit to you, and I think it is something that we could eventually discuss, that if we think about the object and purpose of a convention such as the American Convention, the traditional notion of interim measures being linked to the existence of a case may be appropriate in situations where there are two countries involved in inter-state litigation before the International Court of Justice. But, when you are talking about these public regimes, in which you are protecting human rights, the object and purpose is prevention which governs the interpretation of the powers of the organs that supervise implementation. And in that sense, it would be quite narrow to apply these measures, in the case of the Inter-American System, only when there is a case already filed. There are some dilemmas that, I think, have been solved in the case of the Inter-American Commission on Human Rights and, that having a viable case in terms of the American Convention would not be an adequate interpretation of the need to have quick action. I think it is an important reference regarding provisional measures in the [Committee against Torture] and the possibility of improving how you read the Convention, and how to re-craft the rules of procedure.

### THE COMMISSION'S RESPONSES AND ENFORCEMENT

From the perspective of the Inter-American Human Rights System, I can mention that prevention is a real-time exercise. In that sense, when someone is in danger of being tortured, how can you interpret your normative framework in order to be able to react in those situations to say, "I am a human rights body, I have to develop tools that would allow me to prevent torture in real time, one of the most dramatic situations that you can have in the violation of human rights"? In that sense, I think the [Inter-American] Commission [on Human Rights] has been very strategic in the use of press releases. The Inter-American Commission indeed has used its press release capabilities when there are certain situations. For example, on September 26, 2012, the Commission issued a press release concerning the acts of violence in a prison of the United States. It basically reacted to what was happening in real time, using this press release, not necessarily precautionary measures, but again with careful wording indicating the Commission is worried about what is happening in those particular settings.

One of the aspects of the latest developments that I think is very important in the practice of the Commission is oral proceedings. Oral proceedings have been crucial and if we step back and think about the enforcement of human rights law, I believe

there is an intrinsic relationship between international regimes and the publicity, the mobilization of information in order to signal: "Where do we have problems, in which countries?" The oral proceedings were happening in the Commission since the creation of the mechanism, but were strengthened with the creation of the Inter-American Court proceedings. So, once the Court was in place in 1980, the Commission and the new regulations allowed for more liberal use of oral proceedings in individual cases. The Commission had been holding hearings here in Washington, D.C., two times a year, and as soon as Internet was available, these new technologies allowed for the more efficient dissemination of information, including webcasting of the hearings through the Internet. This included not only cases and hearings in individual cases, but also in precautionary measures. So, there are several cases in which precautionary measures have been dealt with in the public scene using these technologies.

On the other hand there is enforcement. Once the public is aware and sees the government and the parties talking about the situation that is probably occurring in real time, you may have a good possibility of preventing torture or arbitrary execution. I do accept that there are other situations in which you have to be very careful when you are using publicity because you could create problems, but again, you assess in which situations this can be useful and in which situations it should not be done. The Commission can refrain from publishing certain names to avoid this problem. This publicity is very important for enforcement and in the case of precautionary measures and provisional measures, it induces certain pressure on states to prevent irreparable damage.

### CASE STUDY: GUANTANAMO BAY

The last thing I want to comment on is one interesting example of how the Commission works and the possibility of the use of the mechanisms of the Commission and the famous Guantanamo measures of the Inter-American Commission on Human Rights. The United States has not ratified the American Convention, so it was only [subject] to the Commission's procedures and interim measures—the Court was not available. These measures were adopted only a few months after September 11, 2001—less than a year. In March 2002, the first measures were issued by the Inter-American Commission, when information began to trickle in that there could be violations occurring in Guantanamo and elsewhere, and that people could be tortured. The Commission began to issue interim measures; there was no case then, only interim measures. It began to document and put pressure on the United States as the only mechanism available for individual complaints regarding this country.

The Commission began to expand, modify, and amplify these measures throughout the years—2004, 2005, 2007, etc. The latest developments are very interesting because now some of the petitioners—the Center for Constitutional Rights and CEJIL (Center for Justice and International Law) here in Washington—have requested that the Commission begin to implement public hearings on the situation in Guantanamo, and to hold public hearings that are streamed through the Internet, and to

mobilize public information. So, this is something that shows that these petitioners that are using the individual complaint procedure, using the interim measures, using the cases that have been filed subsequently, now are resorting to the political diplomatic powers of the Commission seeking a thematic hearing from the Commission regarding the situation of human rights in Guantanamo and elsewhere.

For those that are interested, you can look for this information on CEJIL's website,<sup>24</sup> among others, and see the latest developments, how it advocates, and how petitioners are using all of the tools at their disposal to induce pressure in a specific situation. The Guantanamo measures, I think, are a very interesting example in this regard.

### Endnotes: Panel I

<sup>1</sup> *Ktiti v. Morocco*, U.N. Comm. Against Torture, CAT/C/46/D/419/2010 (Jul. 5, 2011) *available at* <http://sim.law.uu.nl/SIM/CaseLaw/fulltextcat.nsf/160f6e7f0fb318e8c1256d410033e0a1/edda8c9ea6e9d834c12579660040f447?OpenDocument>

<sup>2</sup> *Abdussamatov v. Kazakhstan*, U.N. Comm. against Torture, CAT/C/47/D/444/2010 (Nov. 15, 2011) *available at* [http://www.bayefsky.com/pdf/kazakhstan\\_t5\\_cat\\_444\\_2010\\_scan.pdf](http://www.bayefsky.com/pdf/kazakhstan_t5_cat_444_2010_scan.pdf)

<sup>3</sup> Committee against Torture, Rules of Procedure, U.N. Doc. CAT/C/3/Rev.5 (2011).

<sup>4</sup> *La Grand Case (Ger. v. U.S.)* 2001 I.C.J. 104 (June 27) *available at* <http://www.icj-cij.org/docket/files/104/7736.pdf>.

<sup>5</sup> See [www.redress.org](http://www.redress.org).

<sup>6</sup> Eur. Consult. Ass., Council of Europe member states' duty to co-operate with the European Court of Human Rights, 31st Sess., Doc. No. 11183 (2007).

<sup>7</sup> *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action*, REDRESS (Dec. 2009), *available at* <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>.

<sup>8</sup> International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 I.L.M. 368 (1967).

<sup>9</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>10</sup> U.N. Office of the High Comm'r for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2004, HR/P/PT/8/Rev.1, *available at*: <http://www.unhcr.org/refworld/docid/4638aca62.html>.

<sup>11</sup> International Convention for the Protection of All Persons from Enforced Disappearances, UN Doc. E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

<sup>12</sup> Committee against Torture, General Comment No. 3, U.N. Doc. CAT/C/GC/3 (Dec. 2012) *available at*: <http://www2.ohchr.org/english/bodies/cat/GC3.htm>.

<sup>13</sup> Committee against Torture, Rules of Procedure, ¶ 114, U.N. Doc. CAT/C/3/Rev.5 (Feb. 2011) *available at*: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/411/40/PDF/G1141140.pdf?OpenElement>.

<sup>14</sup> See *LaGrand*, *supra* note 4.

<sup>15</sup> See Rules of Procedure, *supra* note 13.

<sup>16</sup> Organization of American States, Inter-American Convention on Forced Disappearance of Persons, OAS Treaty Series No. 68, 33 ILM 1429 (1994).

<sup>17</sup> Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights (2011), *available at* <http://www.oas.org/en/iachr/mandate/Basics/22.RULES%20OF%20PROCEDURE%20IA%20COMMISSION.pdf>.

<sup>18</sup> Organization of American States, American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

<sup>19</sup> Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, 5 rev. 1 corr. (2002).

<sup>20</sup> American Declaration of the Rights and Duties of Man, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev. 1 at 17.

<sup>21</sup> Charter of the Organization of American States, 119 UNTS 3, entered into force 13 Dec. 1951, amended 721 UNTS 324, entered into force 29 Feb. 1970.

<sup>22</sup> Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2, 2011.

<sup>23</sup> Inter-Am. Comm'n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin*, Pará, Brazil, PM 382/10 (Apr. 1, 2011) (granting modification of precautionary measures).

<sup>24</sup> See [www.cejil.org](http://www.cejil.org).