

THE EVOLUTION OF PROVISIONAL MEASURES OF PROTECTION UNDER THE CASE-LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (1987-2002)

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I. Introduction

Provisional Measures of Protection represent today, a true *jurisdictional guarantee* of a preventive character, and constitute one of the most rewarding aspects of the work of international safeguard of the fundamental rights of the human person. Like every legal remedy, such measures are susceptible of improvement and further development, above all under an essentially evolutionary conception of Law. In the present report, I shall dwell in particular upon the significant contribution of the evolving case-law of the Inter-American Court pertaining to the provisional measures of protection that it has ordered in the last fifteen years.¹

II. Provisional Measures: Their Transposition from Domestic into International Law

Firstly, some conceptual precisions shall be made to bear in mind the historical transposition of provisional measures, from the domestic legal systems to the international legal order, as well as their transposition from this latter – in the framework of Public International Law – to the International Law of Human Rights, endowed with a specificity of its own.² The precautionary legal action (*acción cautelar*) turned to aim at guaranteeing not directly the subjective right *per se*, but rather the jurisdictional activity itself.

It was above all the Italian procedural law doctrine of the first half of the XXth century³ which gave a decisive contribution to affirm the autonomy of the precautionary legal action.⁴ However, this whole doctrinal construction did not succeed to free itself from a certain juridical formalism, leaving at times the impression of taking the process as an end in itself, rather than as a means for the realization of justice.

The precautionary measures reached the international level (in the international arbitral and judicial practice),⁵ in spite of the different structure of this latter, when compared with the domestic law level. The transposition of the provisional measures from the domestic to the international legal order – always in face of the probability or imminence of an “irreparable damage”, and the concern or necessity to secure the “future realization of a given juridical situation” – had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called “reserved domain” of the State.⁶

This innovative transposition faced difficulties,⁷ but, throughout the years, the erosion of the concept of “reserved domain” of the State (or “exclusive national competence”) became evident, to what the international judicial practice itself contributed.⁸ Article 41 of the

Statute of the International Court of Justice (ICJ) – and of its predecessor, the Permanent Court of International Justice (PCIJ) – in fact set forth the power of the Hague Court to “indicate” provisional measures. The verb utilized generated a wide doctrinal debate as to its binding character, which did not hinder the development of a vast case-law (of the PCIJ and the ICJ) on the matter.⁹

Nevertheless, given the lack of precision as to the legal effects of the indication of provisional measures by the ICJ, such indefiniteness generated uncertainties in theory

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¹ Provisional measures are published in Series E of the Court, so far three volumes.

² In fact, the precautionary measures (*medidas cautelares*), of internal procedural law, inspired the provisional measures which developed subsequently in the ambit of international procedural law.

³ Especially the well-known works by Giuseppe Chiovenda (*Istituzioni di Diritto Processuale Civile*, Naples, 1936), Piero Calamandrei (*Introduzione allo Studio Sistematico dei Provvedimenti Cautelare*, Padua, 1936), and Francesco Carnelutti (*Diritto e Processo*, Naples, 1958).

⁴ As a *tertium genus*, parallel to the legal actions as to the merits and of execution.

⁵ Paul Guggenheim, “Les mesures conservatoires dans la procédure arbitrale et judiciaire”, 40 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 649-761.

⁶ Paul Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 174, 186, 188 and 14-15, and cf. pp. 6-7 and 61-62. And cf. P. Guggenheim, “Les mesures conservatoires...”, *op. cit. supra* note 5, pp. 758-759.

⁷ As illustrated, e.g., by the Iranian reaction to provisional measures indicated by the International Court of Justice in the case of the *Anglo-Iranian Oil Company* (United Kingdom versus Iran), on 5 July 1951; cf. account in: M.S. Rajan, *United Nations and Domestic Jurisdiction*, Bombay/Calcutta/Madras, Orient Longmans, 1958, pp. 399 and 442 No. 2.

⁸ A.A. Cançado Trindade, “The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations”, 25 *International and Comparative Law Quarterly* – London (1976) pp. 715-765, esp. pp. 744-751.

⁹ Cf. Jerzy Sztucki, *Interim Measures in the Hague Court – An Attempt at a Scrutiny*, Deventer, Kluwer, 1983, pp. 35-60 and 270-280; Jerome B. Elkind, *Interim Protection – A Functional Approach*, The Hague, Nijhoff, 1981, pp. 88-152; and, for jurisdictional aspects, cf. Bernard H. Oxman, “Jurisdiction and the Power to Indicate Provisional Measures”, *The International Court of Justice at a Crossroads* (ed. L.F. Damrosch), Dobbs Ferry/N.Y., ASIL/Transnational Publs., 1987, pp. 323-354.

and practice on the matter, lasting for more than five decades, which have led to non-compliance, by the respondent States, with provisional measures indicated by the ICJ in recent years.¹⁰ It was necessary to wait for more than half a century¹¹ until, in the recent judgment of 27.6.2001, the ICJ in the *LaGrand* case concerning the obligations under the Vienna Convention on Consular Relations¹² finally came to the conclusion that provisional measures indicated by it were binding!¹³ It may be observed that the IACourtHR was the first international tribunal to affirm the existence of an individual right to be informed of the existence of the right of consular assistance in the framework of the guarantees of the due process of law.¹⁴

However, in spite of the uncertainties which surrounded the matter, international case-law sought to clarify the *juridical nature* of provisional measures, of an essentially preventive character, indicated or granted without prejudice to the final decision as to the merits of the respective cases. Such measures came to be indicated or ordered by contemporary international,¹⁵ as well as national,¹⁶ tribunals. Their generalized use at both national and international levels has led a contemporary doctrinal trend to consider such measures as equivalent to a true *general principle of Law*, common to virtually all national legal systems, and endorsed by the practice of national, arbitral, and international tribunals.¹⁷

III. Rationale and Object of Provisional Measures

The *object* of provisional measures in international litigation (in the framework of Public International Law) is widely known: to preserve the rights claimed by the parties, and, thereby, the integrity of the decision as to the merits of the case, hindering that this latter is rendered meaningless and without efficacy, and that the result of the whole process is frustrated. In other words, provisional measures seek to secure that the sentence as to the merits is not prejudiced by undue actions of the parties *pendente lite*.

In fact, in both domestic and international procedural law, the precautionary or provisional measures, respectively, have moreover the common purpose of seeking to maintain the equilibrium between the parties, as far as possible. The already mentioned transposition of such measures from the domestic to the international order – specifically, to *inter-State* litigation, – does not seem to have generated, in this particular, a fundamental change in the *object* of such measures. This change only came to occur with the more recent transposition of the provisional measures from the international legal order – the traditional *contentieux* between States – to the International Law of Human Rights, endowed with a specificity of its own.

It is in the ambit of this latter that the provisional measures free themselves from the juridical formalism of the legal science of the past. In the International Law of Human Rights, provisional measures go much further in the matter of protection, revealing an unprecedented scope,¹⁸ and determining – by reason of their compulsory character – the effectiveness of the right of individual petition itself at international level:¹⁹ in fact, in the present domain, such measures, besides their essentially preventive character, *effectively protect fundamental rights*, in so far as they seek to avoid irreparable harm to the human person as subject of the International Law of Human Rights. In the ambit of this latter, which is essentially a *law of protection* of the human being, provisional measures reach effectively their plenitude, being endowed with a character, more than precautionary, truly *tutelary*.

IV. Provisional Measures under the American Convention on Human Rights

This is what ensues from Article 63(2) of the American Convention on Human Rights, which provides: “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”.

Article 25(1) of the new Rules of Procedure (of 2000) of the Court²⁰ enshrines the elements set forth in Article 63(2) of the Convention, that is, the extreme gravity and urgency, and the prevention of irreparable damage to persons, enabling the Court in such circumstances to order provisional measures, *ex officio* or at the Commission’s request, at any stage of the proceedings.

In case of matters not yet submitted to its consideration, the Court can act at the request of the Commission (Article 25(2)), in relation to cases pending before this latter. And Article 25(4) of the Rules of Procedure enables the President of the Court, if the Tribunal is not in session, to order *urgent measures* aiming at securing the effectiveness of the provisional measures which the Court may later on adopt in its forthcoming period of sessions.²¹

¹⁰ Cf., e.g., Ch. Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century”, 281 *Recueil des Cours de l’Académie de Droit International de La Haye* (1999) pp. 415-416.

¹¹ For a general study on provisional measures in the procedure before the ICJ, cf. L. Daniele, *Le Misure Cautelari nel Processo dinanzi alla Corte Internazionale di Giustizia*, Milano, Giuffrè, 1993, pp. 5-183.

¹² Full text in 22 HRLJ 36 (2001).

¹³ M. Mennecke, “Towards the Humanization of the Vienna Convention of Consular Rights – The *LaGrand* Case before the International Court of Justice”, 44 *German Yearbook of International Law*(2001) pp. 430-432, 453-455, 459-460 and 467-468; M. Mennecke and C.J. Tams, “The *LaGrand* Case”, 51 *International and Comparative Law Quarterly* (2002) pp. 454-455.

¹⁴ OC-16/99 of 1 Oct. 1991 = 21 HRLJ 24 (2000).

¹⁵ Cf. Rudolf Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer Verlag, 1994, pp. 1-152.

¹⁶ Cf. E. García de Enterría, *La Batalla por las Medidas Cautelares*, 2nd. [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

¹⁷ In the sense of Article 38(1)(c) of the Statute of the International Court of Justice; cf. Lawrence Collins, “Provisional and Protective Measures in International Litigation”, 234 *Recueil des Cours de l’Académie de Droit International de La Haye* (1992) pp. 23, 214 and 234.

¹⁸ Such measures, thus, do not adjust themselves to the abstraction – proper of classic doctrine – of a “juridical world” allegedly self-sufficient, disconnected from the day-to-day problems of human beings, from social reality. Quite on the contrary, they disclose that law does not operate in the vacuum.

¹⁹ R.St.J. MacDonald, “Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights”, 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993) pp. 703-740.

²⁰ Adopted on 24 November 2000, in force as from 1 June 2001.

²¹ For the legislative history of this provision, since the first until the fourth version (2000) of the Rules of Procedure of the Court, cf. A.A. Cançado Trindade, “El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000) y Su Proyección hacia el Futuro: La Emancipación del Ser Humano como Sujeto del Derecho Internacional”, in *XXVIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – OEA* (2001), Washington D.C., Secretaría General de la OEA, 2002, pp. 33-92 with further references.

On its part, the Commission, by virtue of Article 25(1) of its new Rules of Procedure (also of 2000),²² reserves itself the faculty to take precautionary measures. And Article 74 of its Rules of Procedure in force governs the requests by the Commission to the Court so that this latter adopts the provisional measures which it may deem pertinent.

The provisional measures ordered by the Court are, thus, endowed with a *conventional* basis, – Article 63(2) of the American Convention, situated under section 2 of chapter VIII of the Pact of San José, on “Jurisdiction and Functions” of the Court, – it not being possible to have doubts as to their binding character.²³ In historical perspective, it should be born in mind that the decision of the draftsmen of the Pact of San José was wise in establishing a juridical basis, for the granting of such measures, in the American Convention itself. It ought to be further acknowledged that, due to their interpretation and application by the Inter-American Court, particularly in more recent years, provisional measures of protection have emerged with greater frequency and vigour, so as to fulfil the increasing needs of protection of the human being in our region of the world.²⁴

In any case, the Court is, in whichever circumstances, *master of its own jurisdiction*; as any organ endowed with jurisdictional competences, it retains the *inherent power* to determine the extent of its own competence (*Kompetenz-Kompetenz / compétence de la compétence*), – be it in advisory matters, or in contentious matters, or else in relation to provisional measures of protection. The provisional measures of protection ordered by the Inter-American Court of Human Rights have, by virtue of their conventional basis, an undoubtedly binding character.²⁵

In the inter-State *contentieux*, the power of a tribunal like the International Court of Justice to indicate provisional measures of protection in a pending case aims at *preserving the respective rights of the parties*, avoiding an irreparable damage to the rights in litigation in a judicial process.²⁶ Underlying this reasoning is the search for equilibrium between the interests of the contending parties (claimant and respondent States), reflection of the importance traditionally attributed to the role of reciprocity in international law in general. In any case, in the international process the contending parties have the duty to comply with the provisional measures ordered or indicated by the international tribunal²⁷ at issue, which emanate from a power or faculty inherent to such tribunal.

Distinctly, in the international *contentieux* of human rights, the power of a tribunal such as the Inter-American Court of Human Rights to order provisional measures of protection, as already pointed out, has as its central object to *safeguard the human rights* provided for in the American Convention, in cases of extreme gravity and urgency and to avoid irreparable harm to persons. Underlying the application of provisional measures of protection by the Inter-American Court are superior considerations of international *ordre public*, turned into reality in the protection of the human being. Besides their essentially preventive dimension, such measures also reveal, firstly, the specificity of the International Law of Human Rights,²⁸ and secondly, in its turn, the impact of this latter on the characterization of those measures in the ambit of Public International Law.

V. Provisional Measures: The Case-Law of the Inter-American Court of Human Rights

In their great majority, petitions for provisional measures of protection have been admitted, and the ensuing measures have been ordered, by the Inter-

American Court, in relation both to cases pending before itself, as well as to cases not yet submitted to it, at the request of the Commission.²⁹ On very rare occasions the Court decided not to order the measures requested.³⁰

²² In force as from 1 May 2001, text in 22 HRLJ 293 (2001) with an introduction by Dinah Shelton, 22 HRLJ 169 (2001).

²³ Compliance with them is required by the jurisdictional procedure itself from which they result; A. Aguiar, “Apuntes sobre las Medidas Cautelares en la Convención Americana sobre Derechos Humanos”, *La Corte y el Sistema Interamericano de Derechos Humanos*, San José of Costa Rica, I.A. Court H.R., 1994, pp. 36-37.

²⁴ With the sensible increase of petitions of provisional measures since 1997, the official collection of the Court (Series E, Vol. 2, June 1996-June 2000, and Vol. 3, July 2000-June 2001) follows a chronological order.

²⁵ Such measures, ordered by the Inter-American Court, of a clearly compulsory character, do not leave room for polemics, such as those that have surrounded the provisional measures indicated or granted by other international tribunals; on such polemics or uncertainties, cf. Jo M. Pasqualucci, “Medidas Provisionales en la Corte Interamericana de Derechos Humanos: Una Comparación con la Corte Internacional de Justicia y la Corte Europea de Derechos Humanos”, 19 *Revista del Instituto Interamericano de Derechos Humanos* (1994) pp. 95-97; M.H. Mendelson, “Interim Measures of Protection in Cases of Contested Jurisdiction”, 46 *British Year Book of International Law* (1972-1973) pp. 259-322.

²⁶ This has been pointed out by the Hague Court, for example, in the case of *Fisheries Jurisdiction* (United Kingdom versus Iceland, *ICJ Reports* [1972] p. 16, par. 21, and p. 34, par. 22), in the case of the *Hostages* (United States Diplomatic and Consular Staff in Teheran (United States versus Iran, *ICJ Reports* [1979] p. 19, par. 36), and, more recently, in the case of *Nicaragua versus United States* (*ICJ Reports* (1984) pp. 179 and 182, pars. 24 and 32), and in the case of the *Application of the Convention against Genocide* (Bosnia and Herzegovina versus Yugoslavia [Serbia and Montenegro], *ICJ Reports* [1993] p. 19, par. 34, and p. 342, par. 35). To these latter various other cases are added in which the International Court of Justice has pronounced itself on the matter, “indicating” or not the provisional measures requested; cf., e.g., the cases of the *Frontier Dispute* (Burkina Faso versus Republic of Mali, 1986); of the *Aegean Sea Continental Shelf* (Greece versus Turkey, 1976); of the *Nuclear Tests* (New Zealand and Australia versus France, 1973); of the *Trial of Pakistani Prisoners of War* (Pakistan versus India, 1973); among others. For an account, cf. J.B. Elkind, *op. cit. supra* note 9, pp. 98-141; L. Collins, *op. cit. supra* note 16, pp. 215-233; J. Sztucki, *op. cit. supra* note 9, pp. 35-60 and 270-280.

²⁷ So as not to incur into “contempt of court”; cf. E. Hambro, “The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice”, in *Rechtsfragen der Internationalen Organisation – Festschrift für Hans Wehberg* (eds. W. Schätzel and H.-J. Schlochauer), Frankfurt a.M., 1956, pp. 152-171.

²⁸ For a comprehensive analysis, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume I, Porto Alegre, S.A. Fabris Ed., 1997, pp. 1-486; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume II, Porto Alegre, S.A. Fabris Ed., 1999, pp. 1-440; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 1-663.

²⁹ Cf., *inter alia*, as to these latter, the measures ordered by the Court in the cases, e.g., of *Bustíos-Rojas* (Peru, 1990), *Chunimá* (Guatemala, 1991), *Reggiardo Tolosa* (Argentina, 1993), *Colotenango* (Guatemala, 1994-2000), *Digna Ochoa and Plácido and Others* (Mexico, 1999), *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Dominican Republic, 2000, 22 HRLJ 399 (2001)), *Community of Peace of San José of Apartadó* (Colombia, 2000), *Newspaper ‘La Nación’* (Costa Rica, 2001).

³⁰ Cf., e.g., the cases of the *Peruvian Prisons* (1992), and of *Chipoco* (1992, also concerning Peru).

Provisional measures of protection have been ordered in practice in cases implying an imminent threat to the life or integrity of the person. In various requests for such measures on the part of the Commission in cases not yet pending before the Court, this latter has deemed applicable the presumption that such measures of protection are necessary. The Court, in practice, has not required from the Commission a *substantial* evidence that the facts are true, but has proceeded rather on the basis of the reasonable presumption (*prima facie* evidence) that the facts are true.³¹

In almost all of the cases, the measures of protection were ordered by the Court at the request of the Commission. But on one occasion (resolution of 15.1.1988, cases *Velásquez Rodríguez, Fairén Garbi and Solís Corrales*, and *Godínez Cruz*, pertaining to Honduras) the Court ordered them *motu proprio*. On two other occasions (resolution of 7.4.2000, case of the *Constitutional Tribunal*, and resolution of 13.12.2000, case *Loayza Tamayo*, both pertaining to Peru), its President dictated urgent measures likewise *ex officio* (as the Court was not in session), for being cases of extreme gravity and urgency and to avoid irreparable damages to persons; in both cases (the first, then pending before the Court, and the second, already decided by this latter as to the merits and reparations³²), the requests for measures were submitted directly by the petitioners to the Court.

The aforementioned urgent measures, adopted *ex officio* by its President for the first time in the history of the Court, were ratified by the full Court, as soon as this latter started sessioning.³³ Those recent episodes in both cases (*Constitutional Tribunal* and *Loayza Tamayo*), which cannot pass unnoticed, disclose not only the feasibility, but also the importance, of the *direct access* of the individual, without intermediaries, to the Inter-American Court of Human Rights,³⁴ even more so in a situation of extreme gravity and urgency.³⁵

This is precisely what has just been illustrated, quite recently, in a third case of the kind: in its Resolution of 20 December 2002, in the *Bámaca Velásquez versus Guatemala* case, the President of the Court once again ordered urgent measures of protection, upon request of the representative of the victims directly lodged with the Court, so as to safeguard the life and personal integrity of the members of the family Bámaca Velásquez residing permanently in Guatemala (resolatory point No. 1). The case has already been decided as to the merits (25.11.2000, 22 HRLJ 367 (2001)) and reparations (in 2002), but the Court retains jurisdiction over it so as to supervise the execution of, and compliance with, its earlier judgments on the case.

In the great majority of cases, provisional measures ordered by the Inter-American Court, have effectively protected fundamental rights, essentially the right to life and the right to personal (physical, mental and moral) integrity. However, since all human rights are interrelated and indivisible, there does not seem to be, juridically and epistemologically, any impediment that they are ordered so as to safeguard other human rights,³⁶ whenever the pre-conditions of the extreme gravity and urgency are met, and that of the prevention of irreparable damages to persons, set forth in Article 63(2) of the American Convention.

This was precisely what occurred in the period of one year, from July 2000 to June 2001. In fact, in this period, the Court has adopted new resolutions on such measures pertaining to thirteen cases.³⁷ Among these resolutions, those adopted in the cases of the *Haitians and Dominicans*

of *Haitian Origin in the Dominican Republic*, of the *Community of Peace of San José of Apartadó*, and of the *Newspaper "La Nación"*, brought about a new development on the matter, of major significance in the whole history of the Court.

In the first of those three cases, that of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, the Court adopted provisional measures of protection (by means of its resolution of 18.8.2000, 22 HRLJ 399 (2001)), which had as object, *inter alia*, to protect the life and personal integrity of five individuals, to avoid the deportation or expulsion of two of them, to allow the immediate return to the Dominican Republic of two others, and the family reunification of two of them with their young sons, besides the investigation of the facts. By means of this provisional measure, which represents the embryo of an international *habeas corpus*, the Court thus extended for the first time protection to new rights (in

³¹ This is a criterion which finds support in the principle of the *summaria cognitio*, by virtue of the urgency of the cases at issue, – a principle that has been applied in relation both to precautionary measures in domestic procedural law as well as to provisional measures in international procedural law.

³² And the case being, thus, in the state of supervision of compliance with the judgment (as to reparations). For the judgment on reparations in the case of *Loayza Tamayo v. Peru* see 20 HRLJ 194 (1991).

³³ Cf. Resolutions of the Inter-American Court on Provisional Measures of Protection, of 14 August 2000 (case of the *Constitutional Tribunal*), and of 3 February 2001 (case *Loayza Tamayo*).

³⁴ For a recent study on distinct aspects of the *direct access* of individuals to the international jurisdictions of protection (Inter-American and European Courts) of human rights, cf. A.A. Cañado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, University of Deusto/Spain, 2001, pp. 9-104; and cf. A.A. Cañado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", in *Karel Vasak Amicorum Liber – Les droits de l'homme à l'aube du XXI^e siècle*, Bruxelles, Bruylant, 1999, pp. 521-544.

³⁵ A.A. Cañado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional", 30/31 *Revista del Instituto Interamericano de Derechos Humanos* (2001) pp. 45-71, esp. pp. 60-61.

³⁶ In this respect, it may be pointed out that, in the European system of protection of human rights, for example, provisional measures of protection have taken place, in their great majority, in cases of probability or risk of extradition or expulsion Cf. C.A. Nørgaard and H. Krüger, "Interim and Conservatory Measures under the European System of Protection of Human Rights", *Progress in the Spirit of Human Rights – Festschrift für Felix Ermacora* (eds. M. Nowak et al.), Kehl am Rhein, N.P. Engel, 1988, pp. 109-117; P. van Dijk and G.J.H. van Hoof et alii, *Theory and Practice of the European Convention on Human Rights*, 3rd. ed., The Hague, SIM/Kluwer, 1998, pp. 103-107 and 215; D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, Butterworths, 1995, pp. 667-668.

³⁷ Namely, cases *Álvarez, Blake, Cesti Hurtado, Clemente Teherán, Colotenango, Community of Peace of San José of Apartadó, Haitians and Dominicans of Haitian Origin in the Dominican Republic* (22 HRLJ 399 (2001)), *Ivcher Bronstein, James and Others, Loayza Tamayo, Paniagua Morales, Newspaper "La Nación"*, and *Constitutional Tribunal* (22 HRLJ 397 (2001)).

addition to the fundamental rights to life and personal integrity) under the American Convention.³⁸

Subsequently, in the case of the *Community of Peace of San José of Apartadó*, the full Court ratified the urgent measures ordered (in the resolution of 9.10.2000) by its President in favour of the members of a "Community of Peace" in Colombia; the Court extended protection (by means of the resolution of 24.11.2000) to all the members of the Community (not named but identifiable),³⁹ and requested the State, *inter alia*, to secure the necessary conditions for the persons of the aforementioned Community "who had been forced to displace themselves to other zones of the country, to return to their homes".⁴⁰ And in the more recent case of the *Newspaper "La Nación"*, concerning Costa Rica and pertaining to freedom of expression, the full Court, likewise, ratified the urgent measures ordered by its President (resolution of 6.4.2001), suspending the execution of a sentence of a national tribunal (resolution on provisional measures of 21.5.2001).

Earlier on, in the case *James and Others*, concerning Trinidad and Tobago and pertaining to the guarantees of the due process of law, the Court maintained its suspension of the execution of the sentences of national tribunals (resolutions of 16.8.2000 and 24.11.2000). In this respect, also the European Court of Human Rights had the occasion to order a provisional measure of protection of this kind (on 30.11.1999), in the case *Öcalan versus Turkey*, even in the absence of a conventional norm⁴¹ on the matter (counting rather on the provision of its Rules of Procedure of Article 36); the provisional measure ordered by the European Court has so far been complied with by the respondent State. It is somewhat surprising that the draftsmen of Protocol No. 11 to the European Convention on Human Rights (in force as from 1.11.1998) have lost the unique opportunity to erect the provision of Article 36 of the Rules of Procedure of the Court⁴² into a provision of the European Convention itself (amended by such Protocol).⁴³

The provisional measures of protection ordered by the Inter-American Court of Human Rights in the aforementioned cases of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* and of the *Community of Peace of San José of Apartadó* are endowed with particular importance: in both cases the measures adopted very much enlarge the circle of protected persons. In fact, in a Report (of March 2000) to the Organization of American States (OAS) I pointed out, that more than 200 persons (petitioners or witnesses) had been protected (until then) by the measures ordered by the Inter-American Court, representing a great advance in the procedural law of human rights.⁴⁴

Within the space of roughly one year (until mid-2001), the total of persons protected by such provisional measures has considerably enlarged, reaching approximately 1,500 persons, what discloses their extraordinary potential as measure of safeguard of a preventive character. In two other Reports to the OAS, which I presented in March and April of 2001, respectively, I described the modifications introduced by the new Rules of Procedure of the Court (adopted on 24 November 2000, and in force as from 1 June 2001) into the proceedings before the Tribunal;⁴⁵ in the debates which followed in the OAS, on both occasions, I again emphasized the growing importance of the provisional measures of protection ordered by the Inter-American Court.

Subsequently, in my report, presented to the OAS on 19 April 2002, titled "*Towards the Consolidation of the International Juridical Capacity of the Petitioners in the Inter-*

American System of Protection of Human Rights", I drew attention to the growing importance of provisional measures of protection within the framework of the *locus standi in judicio* of the individuals in the procedure before the Court.⁴⁶ In my subsequent report, presented to the OAS on 16 October 2002, titled "*The Right of Access to International Justice and the Conditions for Its Realization in the Inter-American System of the Protection of Human Rights*", I stressed the importance of the individual right of access (*lato sensu*) to justice at international level,⁴⁷ which has a bearing also on the individual right (in cases pending before the Court) to request directly interim measures of protection.

Quite recently, with the aggravation of the situation of human rights in Colombia, and with its new provisional measures of protection ordered on 18 June 2002, in the case of the *Community of Peace of San José of Apartadó*, the Inter-American Court of Human Rights, once again, enlarged the scope of its provisional measures. In these new provisional measures that it adopted, the Inter-American Court has quite significantly enhanced the links between such measures and the obligations *erga omnes* of protection of the States Parties to the American Convention on Human Rights.

By virtue of its obligations, as the Court has pointed out in its recent resolution of 18.6.2002, the State is bound to protect – also *vis-à-vis* third parties, notably clandestine groups and paramilitary, – the life and personal integrity of all the members of that Community of Peace, including those of the persons who render their services to that same Community.⁴⁸ This decision of the Court thus indicates, in

³⁸ Cf. Inter-American Court of Human Rights, case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, resolution of 18 August 2000, Separate Opinion of Judge A.A. Cançado Trindade, paragraphs 1-25.

³⁹ Pursuant to a criterion inaugurated by the Court in the case *Digna Ochoa Plácido and Others*, Resolution on Provisional Measures of 17 November 1999 (resolatory point No. 2).

⁴⁰ Resolatory point No. 6.

⁴¹ Equivalent to Article 63(2) of the American Convention on Human Rights.

⁴² Article 36 of the Rules of Procedure A of the European Court corresponded to Article 38 of its Rules of Procedure B (prior to Protocol No. 11 to the European Convention).

⁴³ Which could definitively have put an end to the uncertainties on the matter, raised as from the decision of the European Court in the case *Cruz Varas and Others versus Sweden* (of 20.3.1991 = 12 HRLJ 142 (1991)). Cf., in this respect, A. Drzemczewski, "A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol No. 11", 6 *Collected Courses of the Academy of European Law* (1995) pp. 190, and cf. p. 170. – It may be observed that the faculties of supervision (presumably also of the ordered provisional measures of protection) of the Committee of Ministers were, nevertheless, maintained under the new system of Protocol No. 11. See most recently the case of *Mamatkulov v. Turkey* (First Section, judgment of 6 February 2003, still pending before the Grand Chamber).

⁴⁴ Cf. OAS document OEA/Ser.G/CP/CAJP-1627/00, of 16.3.2000, pp. 13-14.

⁴⁵ Cf. OAS document OEA/Ser.G/CP/CAJP-1781/01, of 10.4.2001, pp. 13-19.

⁴⁶ Cf. OAS document OEA/Ser.G/CP/CAJP-1933/02, of 25 April 2002, pp. 7 and 13-15.

⁴⁷ Cf. OAS document OEA/Ser.G/CP/doc.3654/02, of 17 October 2002, pp. 12-16.

⁴⁸ A new enlargement of the provisional measures of protection in that case. Cf. Inter-American Court of Human Rights, case of the *Community of Peace of San José of Apartadó*, concerning Colombia, resolution on Provisional Measures of Protection of 18 June 2002, paragraphs 8-11.

my view, the way to follow, and acknowledges the pressing need to develop the obligations *erga omnes* of protection in the framework of the American Convention on Human Rights.⁴⁹

In the course of the second semester of 2002 the Inter-American Court has adopted new and successive provisional measures of protection covering a variety of situations. Thus, in its Resolution on Provisional Measures of 6 September 2002, in the case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua*, the Court ordered the State to adopt the necessary measures to protect the right to the use and enjoyment of the property⁵⁰ of the lands belonging to the aforementioned Community Mayagna (Sumo) Awas Tingni in Nicaragua and of the natural resources existing therein (resolatory point No. 1).

On other very recent occasions, provisional measures have effectively protected fundamental rights. Thus, in its Resolutions of 18 June and 29 August 2002, in the case of the *Prison "Urso Branco"* concerning Brazil, the Court order provisional measures of protection of the life and personal integrity of all persons detained in the Prison "Urso Branco", and further ordered the State to undertake investigation of the facts which led to the adoption of those measures and to provide further information thereon to the Court. In addition, in the case of *Helen Mack Chang and Others*, pertaining to Guatemala, the President of the Court ordered (Resolution of 14 August 2002) urgent measures, endorsed by the Court as provisional measures (Resolution of 26 August 2002), in order to protect the life and personal integrity of the members of the Myrna Mack Foundation in Guatemala.

Still quite recently, in three Resolutions on Provisional Measures adopted on 27 November 2002, – in the cases of *L. Uzcátegui, Liliana Ortega and Others*, and *Luisiana Ríos and Others*, all concerning Venezuela, – the Inter-American Court ordered the State to take the necessary measures to protect the life and personal integrity of the individuals concerned. In the second of those cases (*L. Ortega et alii*) the beneficiaries of the measures of protection are human rights defenders, and in the third case (*L. Ríos et alii*) they are workers in a television station in Caracas.

In general, in its resolutions on provisional measures, the Inter-American Court, besides the adoption of such measures, has also required the State to inform periodically on them, and the Commission to present to the Court its observations on State reports.⁵¹ This has enabled the Court itself to exert, besides the protection of a preventive character (*supra*), a *continuous monitoring* of the compliance, on the part of the States at issue, with the aforementioned provisional measures of protection ordered by it.

In order to assess the experience of the Court in the use of provisional measures, the period between 1987 and mid-2001 may be summarised as follows:⁵² While in its first decade of work in this domain (1987-1996) the Court took resolutions on provisional measures in 18 cases,⁵³ only throughout the year of 1997, the Court resolved provisional measures in 11 more cases.⁵⁴ That is, only in the year of 1997, the deliberations of the Court concerning provisional measures surpassed its deliberations in the first eight years of operation (1987-1994). This pattern of increasingly greater utilization of this remedy has been maintained lately. Thus, only in the course of the year 1998, the Court ordered resolutions on provisional measures in nine cases,⁵⁵ and during the year of 1999, the Court again resolved provisional measures in eight cases.⁵⁶

And, as already seen, from mid-2000 to mid-2001 the Court adopted resolutions on provisional measures on thirteen cases (cf. *supra*).

Orders of provisional measures has been seen to be steadily increasing. This is a clear symptom of the growing needs of protection of the human being and of the increasingly greater dissemination and conscientization of this mechanism of protection, of an essentially preventive dimension.

Some of these cases have required several deliberations by the Court (reiterated or enlarged provisional measures) or by its President (urgent measures).⁵⁷ Just as there were cases (very few) in which the Court resolved not to dictate the measures requested⁵⁸ and cases in which the Court found them concluded or lifted them,⁵⁹ there have also been cases in which the measures have been maintained or prolonged for a long time.⁶⁰

VI. Concluding Observations

There has been an already vast and ever increasing practice of contemporary international tribunals on provisional or interim measures of protection,⁶¹ and the

⁴⁹ *Ibid.* (note 48), Separate Opinion of Judge A.A. Cançado Trindade, paragraphs 1-20.

⁵⁰ Under Article 21(1) of the American Convention (right to property).

⁵¹ Cf., on this specific point, D.J. Padilla, "Provisional Measures under the American Convention on Human Rights", *Liber Amicorum Héctor Fix-Zamudio*, vol. II, San José of Costa Rica, I.A. Court H.R./E.U., 1998, p. 1193.

⁵² See my Prefaces to volumes II and III of *Series E* on Provisional Measures of the Inter-American Court.

⁵³ Namely, *Velásquez Rodríguez, Godínez Cruz, Fairén Garbi and Solís Corrales, Bustíos Rojas, Chunimá, Chipoco, Peruvian Prisons, Reggiardo Tolosa, Colotenango* [reiteratedly], *Caballero Delgado and Santana, Carpio Nicolle* [repeatedly], *Blake, Alemán Lacayo, Vogt, Suárez Rosero, Serech and Saquic, Loayza Tamayo, and Giraldo Cardona*.

⁵⁴ Namely (some of them repeatedly), *Caballero Delgado and Santana, Giraldo Cardona, Alemán Lacayo, Colotenango, Blake, Álvarez and Others, Cesti Hurtado, Carpio Nicolle, Serech and Saquic, Vogt, and Loayza Tamayo*.

⁵⁵ Namely, *Cesti Hurtado, Álvarez and Others, Paniagua Morales and Others and Vásquez and Others, Clemente Teherán and Others, James and Others, Giraldo Cardona, Carpio Nicolle, Bámaca Velásquez, and Colotenango*.

⁵⁶ Namely, *Clemente Teherán and Others, James and Others, Caballero Delgado and Santana, Colotenango, Cesti Hurtado, Carpio Nicolle, Giraldo Cardona, Digna Ochoa and Plácido and Others*; moreover, in the first ordinary period of sessions of the year 2000, the Court again adopted another resolution on provisional measures of protection (case *Colotenango*).

⁵⁷ Such as, for example, – to refer to the most numerous ones, – the cases *James and Others* (eleven deliberations), *Álvarez and Others* (eleven), *Colotenango* (ten), *Carpio Nicolle* (nine), *Giraldo Cardona* (seven), among others.

⁵⁸ E.g., *Chipoco*, and *Peruvian Prisons*.

⁵⁹ E.g., *Alemán Lacayo, Vogt, Serech and Saquic, Paniagua Morales and Others and Vásquez and Others, Suárez Rosero, Loayza Tamayo, Cesti Hurtado, Ivcher Bronstein, Constitutional Tribunal* (14.8.00, 22 HRLJ 397 (2002)).

⁶⁰ E.g., *Colotenango*, 1994-2001; *Carpio Nicolle*, 1995-2000; *Caballero Delgado and Santana*, 1994-1999; *Álvarez and Others*, 1997-2001; *Blake*, 1995-2000; *Giraldo Cardona*, since 1996; *Cesti Hurtado*, as from 1997; among others.

⁶¹ Cf., e.g., R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag 1994, pp. 1-152.

case-law of the Inter-American Court of Human Rights provides a remarkable contribution on the matter. These relevant jurisprudential developments do deserve in our days closer attention from all juridical circles, as they reflect a phenomenon which does not appear to have been sufficiently analysed to date: that of the resurgence of the old ideal of an *international justice*, and of the direct access of the human being to such justice.⁶² An eloquent illustration is provided by the three cases so far in which measures of protection were adopted *ex officio* in response to *direct* requests by the individual petitioners to the Court (cf. *supra*).

This ideal has indeed been gaining considerable ground; the case-law of an international human rights tribunal such as the Inter-American Court has done much to assert the aptitude of international law to regulate legal relations in a distinct and complex context (that of human rights protection), and to assert values shared by the international community as a whole. That case-law provides an eloquent illustration that international law can be made proper use of, in the light of the international instrument at issue, also in the relations between the State and human being under their respective jurisdictions.⁶³

To pretend to minimize or neglect the contribution of specialized international tribunals is to fail to apprehend that the world has changed, and that the operation of such tribunals responds today to a true *necessity* of contemporary international life. Contemporary international law leaves no room for legal parochialisms of the past. All international tribunals have been contributing to the development – and indeed, the enrichment – of international law and the realization of justice at international level. A remarkable illustration to that effect is provided by their evolving case-law on provisional measures of protection.

Despite the prolonged debate as to the binding character of those measures in the case-law of distinct international tribunals,⁶⁴ the Inter-American Court of Human Rights has been clear and unequivocal from the start: its provisional measures of protection, endowed with a conventional basis in the American Convention on Human Rights itself (*supra*), are binding. Respondent States have displayed a reassuring record of compliance with the provisional measures ordered by the Inter-American Court, aware as they are of the risk of incurring into an independent breach of treaty if they do not abide by them. Such provisional measures have thus become a true *jurisdictional guarantee*, of a preventive character, of the rights of the human person protected under the American Convention.

Provisional measures of protection ordered by the Inter-American Court (and urgent measures of protection ordered by its President) are, by definition, of a temporary character;⁶⁵ nevertheless, if their pre-requisites – the elements of “extreme gravity and urgency” and the need to “avoid irreparable damage to persons”, set forth in Article 63(2) of the American Convention – persist in time, to the Court there is no alternative left than to maintain them⁶⁶ (and, in some cases, even to enlarge them), as the primacy rests with the imperatives of protection of the human being. It is not at all surprising that, in our region, where the conditions of vulnerability of the fundamental rights of the human person are prolonged pathologically in time (despite, in some cases, the efforts of the public power), provisional measures of protection have had likewise to be maintained in time, in order to face up to the chronic threats to those fundamental rights.

In conclusion, it may be added that the most frequent

use of provisional measures by the Court, including the urgent measures ordered by its President, is encouraging, in the sense that it has stressed the preventive dimension of the international protection of human rights, and that it calls for the enhancement of that procedural institution of crucial importance for the protection of the fundamental rights of the human person. In the continuing development of such measures, a most important role is naturally reserved to the case-law on the matter.

As previously pointed out, provisional measures of protection nowadays constitute undoubtedly one of the most gratifying aspects in the work in support of the international safeguard of the fundamental rights of the human being. The expansive application of such measures by the Inter-American Court has considerably enlarged the circle of protected persons. Those measures have become a true jurisdictional guarantee of a preventive character, disclosing the impact of the International Law of Human Rights on Public International Law in this specific domain of international legal procedure.

Editors' note: See further pp.169-174, IACourtHR, 6 March 2003, Provisional measures ordered v. Colombia to protect 515 families of African descent (2,125 unnamed members of two communities). The Court's earlier case-law, as described above, is confirmed.

⁶² Cf., recently, A.A. Caçado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao/Spain, Universidad de Deusto, 2001, pp. 9-104.

⁶³ A.A. Caçado Trindade, “La perspective trans-atlantique: La contribution de l'œuvre des Cours internationales des droits de l'homme au développement du droit public international”, in *La Convention européenne des droits de l'homme a 50 ans – Bulletin d'information sur les droits de l'homme*, No. 50 (special issue), Strasbourg, Conseil de l'Europe, 2000, pp. 8-9.

⁶⁴ Cf., e.g., R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, *op. cit. supra* note 15, pp. 121-122, 128-129, 133-134 and 140-141 (especially for the lucid interventions by P. Pescatore, H. Mosler, Sir Ian Sinclair, R. Bernhardt and K. Doehring, respectively, concerning their binding character, at least in the domain of human rights protection).

⁶⁵ Such is the case that several of them have been, subsequently, lifted by the Court; cf., *inter alia*, the measures in the cases of *Alemán Lacayo* (Nicaragua, 1996, lifted in 1997), *Vogt* (Guatemala, 1996, lifted in 1997), *Serech and Saquic* (Guatemala, 1996, lifted in 1997), *Cesti Hurtado* (Peru, 1997, lifted in 2000).

⁶⁶ E.g., already for more than six years in the *Colotenango* and *Caballero Delgado and Santana* cases; more than five years in the *Blake* and *Carpio Nicolle* cases; and more than four years in the *Giraldo Cardona* case.