

## Policy Paper

PROPOSAL TO IMPROVE  
THE INTER AMERICAN SYSTEM  
OF HUMAN RIGHTS:  
CEJIL's response to the Permanent  
Council's document

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**CEJIL** 

Centro por la Justicia y el Derecho Internacional  
Center for Justice and International Law  
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## Presentation

The Center for Justice and International Law (CEJIL) is pleased to present a new issue of CEJIL "Position Paper" series. On this occasion, CEJIL shares its contributions and proposals made in the context of the reflection process on the Inter-American system of human rights.

This document was presented by CEJIL to the Permanent Council of the Organization of American States (OAS), as a response to the Council's invitation to make proposals for the implementation of the recommendations issued in the Report of the "Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights".

CEJIL, as a user and relevant actor within the Inter-American system, shares its preliminary proposals on some of the issues under discussion, such as the system of petitions and cases, and precautionary measures, amongst others.

This paper, result of the collective work of CEJIL staff, intends to shed light on some of the most critical issues related to the Inter American system with the intention of generating a genuine strengthening of the system and, as such, contribute to the effective protection and promotion of human rights in the Americas.

Lawyers Alejandra Vicente and Alejandra Nuño drafted the document under my supervision, with the assistance of Samantha Colli, Carlos Zazueta and Paola Limón, all part of the organization's legal team.

On behalf of CEJIL, I would like to thank the OAK Foundation and Open Society Foundation for their generous support to our work on strengthening the Inter American system, which has been key to disseminating information and presenting our input in the debate.

Viviana Krsticevic  
Directora Ejecutiva

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# CEJIL Proposal on the recommendations made by the working group in the context of the process of reflection

## A. INTRODUCTION

In this document the Center for Justice and International Law (CEJIL) presents its proposal in response to the invitation made on September 19, 2012 by the Permanent Council of the Organization of American States (OAS)<sup>1</sup> for implementing the recommendations made in the Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights (hereinafter “Report of the Working Group”). The Permanent Council of the Organization of American States (OAS) approved that Report on January 25, 2012. Subsequently the OAS General Assembly decided to adopt the Report and to ask the Permanent Council to “draw up proposals for its application in consultation with all parties involved” based on that report, which are to be considered by a Special General Assembly in the first quarter of 2013<sup>2</sup>.

In that context CEJIL presents its preliminary proposals regarding some of the issues discussed. Due to limited time and space we will focus on what we consider to be the priority issues; even so, we may send in observations regarding all of the other issues discussed at a later time. Additionally, we consider that the table format and the limit of 150 words per recommendation suggested by the Permanent Council do not allow us to support or adequately present our proposals. Thus, we have produced the report in a manner other than the one suggested, allowing us to contextualize and detail the matters submitted for discussion.

Before directly addressing the issues, we believe that it is necessary to offer some prior considerations about the principles that should guide any process of reflection on the work done by the Inter-American Commission on Human Rights (hereinafter the “Commission” or “IACHR”). This process of reflection should have the genuine intention of strengthening the scope of human rights protection conferred by the Inter-American system.

## B. PRIOR CONSIDERATIONS ON THE PROCESS OF REFLECTION

CEJIL reiterates its conviction that the regional protection of the Inter-American system is inspired by the need for an ultimate safeguard to guarantee the use and enjoyment of human rights, and to defend human dignity. International protection systems express the collective commitment of states to guarantee human rights within and beyond their national borders, and constitute one of the noblest expressions of the recognition of the dignity of and fraternity among all peoples. Furthermore, human rights treaties recognize the inequality of individuals vis-à-vis state power and the possibility of errors and setbacks in the protection of rights, while also expressing the will of nations to put in place subsidiary protection mechanisms that contribute to the ultimate safeguarding of human rights.

There is a need for the Inter-American Commission and the Inter-American Court to respond institutionally and procedurally to the demand for protection of individual and collective rights in a situation in which grave violations persist in the context of imperfect democracies, which are brought to light by numerous reports, cases, and press releases put out by national mechanisms for the protection of human rights, the organs of the Inter-American system, and the United Nations. Accordingly, it is essential to preserve

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1. OEA/Ser. G CP/doc.4787/12 rev. 4 corr. 1 add. 2, 19 September 2012.

2. See AG/RES. 2761 (XLII-O/12), 5 June 2012.

the protection function of the Commission in its role of safeguarding the rights of those affected and victims who request individual and collective protection, with characteristics adapted to the situations that affect our hemisphere and the capacities of the system of protection.

Considering that as the starting point, any proposal for reforming the Commission's work should be inspired by the ultimate object and purpose of the Inter-American system, i.e. protecting and promoting human rights in the hemisphere, seeking solutions that help safeguard the rights of persons; eradicating the causes and consequences of acts or omissions that gave rise to the international responsibility of the state, and determining measures to avoid the recurrence of comparable situations. Also, the proposals for reform should result in increased access for the most excluded persons and groups, and greater effectiveness of the Inter-American system when it comes to protecting rights.

In considering the recommendations made by the Working Group, the Commission, within its autonomy and independence, should take into account the following principles derived from the spirit of the American Convention on Human Rights and from the case-law of the Inter-American system: the *pro homine*<sup>3</sup> principle, dynamic interpretation<sup>4</sup>, effectiveness<sup>5</sup>, universality<sup>6</sup>, equality of arms and juridical

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3. I/A Court H.R. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, 17 September 2003. It has been defined as “a hermeneutical criterion that informs all international human rights law according to which one should embrace the broadest norm, or the broadest interpretation, when it comes to recognizing protected rights, and, inversely, that one should opt for the most restrictive interpretation when it comes to establishing permanent restrictions on the exercise of rights or their suspension under extraordinary circumstances.” Monica Pinto, “El Principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos” in *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Argentina, Centro de Estudios Legales y Sociales – Editorial del Puerto, 1997, p. 163.
  4. Both the Inter-American Court and the European Court of Human Rights have signaled that “human rights treaties are living instruments, whose interpretation must consider the changes over time and, in particular, present-day conditions.” Inter-American Court. *Case of the Gómez-Paquiyaury Brothers v. Peru*. Judgment of 8 July 2004. Series C No. 110, para. 165; Eur. Court HR. *Tyrer v. United Kingdom*. Judgment of 25 April 1978, Series A No. 26, pp. 15-16, para. 31; Eur. Court HR. *Marckx Case*. Judgment of 13 June 1979, Series A No. 31, p. 19, para. 41; and Eur. Court HR. *Loizidou v. Turkey (Preliminary Objections)*. Judgment of 23 March 1995. Series A No. 310; p. 26, para. 71.
  5. The Inter-American Court of Human Rights has determined that the articles and their content should be interpreted and applied in such a manner that the protection is truly practical and effective, always seeking to observe their useful effect. I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Judgment of 28 November 2003. Series C No. 104, para. 67. Likewise, it refers to the International Court of Justice's interpretation of the principle of useful effect in the *Corfu Channel* case, insofar as: “... the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.” *Corfu Channel Case*. Judgment of 9 April 1949: ICJ Reports 1949, p. 24; and PCIJ, Advisory Opinion No. 13 of 23 July 1926. Series B No. 13, p. 19.
  6. The principle of the universality of human rights is the cornerstone of international human rights law. It has been reiterated in numerous international human rights conventions, declarations and resolutions, *inter alia*, the Charter of the OAS, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.



security<sup>7</sup>, presence of both parties in the proceedings<sup>8</sup>, immediacy of the evidence<sup>9</sup>, access to justice free of charge<sup>10</sup>, simplicity, procedural economy, and informality<sup>11</sup>. These principles reaffirm the central role of the victim within the system, while also safeguarding the procedural guarantees for all parties. We begin with these preliminary considerations, for we think that making explicit the purpose of regional protection and the principles that inspire it is crucial for the proposals that we put forth in this document for your consideration.

The process of reflection begun by the states needs to go beyond the issues proposed in the Report of the Working Group, which does not analyze aspects that are essential for strengthening the IACHR's work, such as improving victims' access to the system, the conditions for the Commissioners to carry out their work (salary, incompatibilities, etc.), determining thematic priorities, the periodic production of information that will make possible clearer evaluations of the obstacles confronting the IACHR in carrying out its work, and the need for full compliance with the decisions of the Commission and the Court, among others.

We believe that these issues should be part of the strengthening agenda planned by the Permanent Council of the OAS.

Additionally, the proposals we make in this document require different levels of action on the part of the Inter-American Commission. First, we observe that neither the states nor the users of the Inter-American system have complete information that would allow us to assess the real obstacles, beyond the financial difficulties, currently facing the Commission and the Court. In our response to the consultation by the IACHR<sup>12</sup> we suggested that the IACHR systematically produce and disseminate information, allowing civil society organizations, states, academics, and other interested users to make a more diligent analysis of the obstacles currently facing the Inter-American system in order to better consider the reforms needed. Additionally, more information is needed on whether previous reforms to the Rules of Procedure

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7. The Commission has noted in this regard: "In a proceeding, the unequal economic or social status of the litigants frequently has the effect of rendering the possibility of defense unequal at trial... Accordingly, the principle of equality of arms should be recognized as one of the integral elements of the guarantee of a fair trial." IACHR. Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, para. 185. For more on the principle of juridical security, see, for example, I/A Court H.R. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights. OC-19/05 of 28 November 2005, para. 27.
  8. The Inter-American Court has established that "all proceedings require certain elements for there to be the greatest possible balance among the parties for due defense of their interests and rights. This involves, among other things, application of the principle of the presence of both parties in the actions." I/A Court H.R. *Juridical Status and Human Rights of the Child*. OC-17/02, Judgment of 28 August 2002, Series A No. 17, para. 132.
  9. Followed by both the IACHR and the I/A Court H.R. in their practice in holding hearings, and recently in the first visit by the I/A Court H.R. to the territory of the Sarayaku indigenous community. See: I/A Court H.R. *Case of Kichwa Indigenous People of Sarakayu v. Ecuador*. Series C No. 245, of 27 June 2012, Section C. Visit to the Sarakayu Community, paras. 18 ff.
  10. Both the IACHR and the I/A Court H.R. have legal assistance funds. See: Rules of Procedure of the IACHR on the Legal Assistance Fund of the Inter-American Human Rights System, available at: <http://www.oas.org/en/iachr/mandate/Basics/fund.asp>; and Rules of Procedure of the Inter-American Court of Human Rights on the Functioning of the Legal Assistance Fund for Victims, available (in Spanish) at: <http://www.oas.org/es/cidh/mandato/Basicos/CORTEASITENCIALEGAL.pdf>.
  11. Established in Articles 8 and 25 of the American Convention on Human Rights
  12. IACHR. Comments – Consultation on Module I: System of Individual Petitions, CEJIL, p. 4. Available at: [http://www.oas.org/en/iachr/consultation/1\\_petitions\\_comments.asp](http://www.oas.org/en/iachr/consultation/1_petitions_comments.asp).

resulted in better protection of human rights. Second, we propose that the Commission carry out reforms to the Rules of Procedure when appropriate. Third, we propose that the Commission adopt or modify internal working guidelines in public documents, or that it reform its practices. Fourth, we propose that the IACHR, among its existing promotion tasks, strengthen that of doing more to encourage states to take actions to advance in carrying out their obligations with respect to issues related to processing cases.

Finally, we are of the view that before the Permanent Council proposes any reform process, it should take into account the economic cost to the Commission of implementing the proposals it considers necessary. The Council should assure the availability of said resources if there is an expectation that the Commission, within its independence and autonomy, will adopt the proposals. At some point in the future the IACHR should create monitoring instruments and indicators of whether the reforms adopted resulted in greater regional protection.

Having taken into account these prior considerations, we will offer our thoughts on the issues the Working Group has submitted for reflection.

## **C. OBSERVATIONS ON THE SYSTEM OF PETITIONS AND CASES**

### **1. ON THE COMPLAINT**

#### **a. Receipt of complaints**

The examination and initial processing of the petitions submitted should consist of verifying that *prima facie* the requirements established in the Rules of Procedure of the IACHR have been met, particularly those laid out at Article 28, which are the minimal formal requirements that a petition must include for initial processing.

In this respect, we consider that the requirements are clear and the Rules of Procedure require no modification whatsoever. Nonetheless, given the delay in the notification and transmittal of initial petitions, perhaps the practice of the IACHR at this stage should be reviewed to determine whether the current delay is due to there being a preliminary determination of admissibility before forwarding the petition to the State, whether the analysis done by the Secretariat goes beyond the formal or material issues particular to this stage (for example, by examining the tacitly waivable requirements or requirements that can be met by the activity of the IACHR, etc.), and whether there is any duplication of internal procedures, among other considerations.

The receipt and review of petitions should be as simple and expeditious as possible, so as to speed up the procedure for their initial processing by the IACHR. Such a review should consist of verifying the allegation of a plausible fact, and the alleged violation of one of the rights of the American Convention on Human Rights or another applicable instrument, and other key elements for the competence of the IACHR that cannot be waived or substituted for by the activity of the Secretariat in the process.

## **b. Notice to the parties**

We agree with the proposal made by the States according to which they should be given notice once a petition has been registered; in this regard it would be advisable for the IACHR to return to its previous practice of acknowledging receipt to both parties to the litigation, once it has been determined that the petition *prima facie* meets the formal requirements for being processed, which should occur fairly quickly.

## **c. Individual identification of the victims**

The Report of the Working Group proposes that mechanisms be established to determine and individually identify the victims<sup>13</sup>. This proposal had been made by Colombia and Bolivia during the debate<sup>14</sup>. It should be noted that in the majority of situations presented to the Inter-American system the victims are clearly identified and named. Nonetheless, there are several situations in which, while it is possible to identify them, it is not possible or desirable to name all of them, as discussed below.

For this reason, contrary to what is included implicitly in the recommendation of the Working Group, we consider that the Commission should not require that all the victims be named in every case, if there are reasons related to the nature of the situation that make it impossible or ill-advised at a given procedural moment. This determination of the course to follow in the cases that require acting without naming a group or all the victims, however, should be done with clear criteria and justification, guided by the solutions offered by comparative law and by the domestic statutory and case law.

In this respect, it is to be noted, first, that in some cases there may be collective subjects who come forward as victims, and who, given their nature, require differentiated treatment. This happens, for example, with respect to cases involving indigenous peoples. In a recent case, for the first time the Inter-American Court held that a violation occurred against an indigenous group as a collective subject, as opposed to against its individual members, which is more in keeping with the protection offered by international law<sup>15</sup>. In this respect, the IACHR and the Court have approached claims of indigenous peoples as such for a long time now, and it is reasonable for that practice to continue.

Second, there may be other situations in which it is necessary or advisable to treat petitions collectively in order to obtain effective and equal protection in a specific case due to the characteristics of the situation in question. For example, in the case of persons deprived of liberty in inhuman conditions at a detention center, or adolescents detained with adults; or groups of migrants or refugee-seekers in a situation that affects a group, among others.

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13. Report of the Working Group, p. 13.

14. Presentation by the Delegation of Colombia on "Procedural Matters in Processing Individual Cases and Petitions Before the IACHR" (Meeting of the Working Group, held on September 20, 2011). OEA/Ser.G, GT/SIDH/INF. 12/11, of October 7, 2011; and Proposals by the Delegation of Bolivia regarding the topics "Principle of Universality," "Promotion of Functions," "Friendly Settlements," "Precautionary Measures," "Procedural Matters," and "Financing" (Third and last phase of the Working Group's tasks). OEA/Ser.G, GT/SIDH/INF.39/11, December 1, 2011.

15. I/A Court H.R..*Case of Kichwa Indigenous People of Sarayaku*. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 232.

There are many experiences stemming from the legislative, case-law, and legal doctrine of the states of the region that provide for the possibility of actions to protect rights, such as *habeas corpus*, *amparo*, and procedures for the protection of collective and diffuse rights that could be useful for providing a wider array of alternatives for guiding the action of the IACHR in such cases<sup>16</sup>. This would improve the effectiveness of the protection in response to situations that affect groups, striking a balance among the guarantees at stake.

Third, another very common situation in the Inter-American system is the impossibility of naming victims due to the dynamics of state violence and the failure of the administration of justice to investigate, as has occurred with massacres in rural areas in a large part of our region. In such situations, releasing the State of responsibility for a situation created by the State itself, in which in general it is impossible to identify all the victims, makes no sense for protecting human rights. Another recurrent case consists of the failure to precisely identify the family members of victims of arbitrary executions or forced disappearances, which due to their suffering become victims. On occasion, in particular in situations of multiple victims whose cases have been pending before the Inter-American system for a long time, family members may not have been clearly identified in the process because it was not a requirement at the time of submitting the initial petition. In most cases the state has information in its possession, such as birth and marriage records, contentious proceedings at the local level, etc., that make it possible to clearly establish the family ties. In such circumstances, the IACHR and the Court should seek to obtain the information needed to identify the victims by asking both parties to submit it<sup>17</sup>. It should be noted that the Court's jurisprudence on this point has varied; in some cases it has created *ad hoc* systems for identifying victims and family members in proceedings for enforcement of judgments<sup>18</sup>.

A fourth situation is requesting collective measures of protection, which will be addressed subsequently in the section on this matter<sup>19</sup>.

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16. Brazil has had actions of this type since 1977, when the Lei de Ação Popular was adopted. In Argentina, as of the decision of the Supreme Court of Justice in the case of *Halabi, Ernesto v. National Executive Branch – Law 25,873 – Decree 1563/04 re: amparo action*, “class or group actions” were created in praetorian fashion in the Argentine legal order. The Court understood that the effects of the judgment would be *erga omnes*, and in this way they reached all members of the “class” that the plaintiff represented. Judgment available at: [http://www.csjn.gov.ar/cfal/fallos/cfal3/ver\\_fallos.jsp](http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp). In addition, in Colombia, Article 88 of its National Constitution establishes the existence in its legal order of “*acciones populares*” (they are used when the group affected is indeterminate in nature). In Chile since the adoption of Law 19,955 “*acciones de interés colectivo*” or “*acciones de clase*” were incorporated to the domestic legal order. See Antonio Gidi and Eduardo Ferrer Mac-Gregor. *La Tutela de los Derechos Difusos, Colectivos e Individuales Homogéneos. Hacia un Código Modelo para Iberoamérica*. Editorial Porrúa, Mexico City, 2003. The United States was one of the great precursors of class actions; already in 1938 the Federal Rules of Civil Procedure set down the guidelines for what were called “class actions” in Rule 23.

17. We believe that the Commission and the Court should not exclude as victims persons whose status as such can clearly be gleaned from the record, despite a procedural omission on the part of the petitioners.

18. See for example, I/A Court H.R. Case of the *Mapiripán Massacre*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 311. *Case of the Plan Sánchez Massacre*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, para. 67.

19. See Response by CEJIL to the IACHR's Consultation on Module II: Precautionary Measures.

In light of the foregoing considerations, we argue that it is not always advisable or necessary to individually identify the victims in order to process cases, a determination that the IACHR should make clearly and with justification, drawing on existing case-law and standards both international and domestic. As the Commission itself recognizes, its duty is not only to rigorously implement procedures to ensure legal certainty and due process, but also to maintain “reasonable flexibility” that can attend to the situation of many cases of poverty and exclusion of victims that come before the System<sup>20</sup>.

#### **d. Digitalizing the procedure**

Regarding the digitalization of the processing of petitions, we attach great value to the efforts of the Commission to take advantage of new technologies and to implement the Petition and Case Management System (“PCMS”) and the Electronic Document Management System (“DMS”)<sup>21</sup>. The use of these mechanisms can facilitate the processing of cases by the Commission.

We also look favorably on the initiative of the Executive Secretariat of implementing a system designed to facilitate access, for users of the Inter-American system, to the system of individual petitions and cases and their respective documents. The implementation of the so-called “Users’ Portal” would afford greater transparency and legal certainty to the parties on the procedural stage of a given petition. We hope that the PCMS will also be used to produce relevant and reliable information on recurrent grievances with the Inter-American system, average length for processing cases in the different stages, enforcement of decisions, etc.

Nonetheless, the Commission must bear in mind the rights of those persons who do not have or have only limited access to electronic media, and thus it should maintain its practice of receiving petitioners in hard copy and to follow-up on the process in the same way for those victims who so require<sup>22</sup>.

Furthermore, it would be necessary for the Commission to analyze the profile of the victims that utilize the Inter-American System, to determine whether the majority do or do not have access to the internet, given that in the latter case, the resources the Commission dedicates to this project may not result in greater access for victims to the System if the majority of them do not have access to the internet.

## **2. EFFECTIVE ACCESS FOR VICTIMS TO THE INTER-AMERICAN SYSTEM**

We observe with great concern that the Working Group did not include any recommendation with respect to improving access to the System for victims. We consider that this issue is of particular relevance to the strengthening of the procedures for processing petitions. The

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20. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, par. 138.

21. Human Rights Clinic, The University of Texas. *Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission on Human Rights*, December 2011, p. 61.

22. The percentage of persons with access to electronic media continues to be low in the Americas, and surely excluded communities with the greatest need for protection have the least access. See, for example, [http://www.un-ngls.org/spip.php?page=article\\_s&id\\_article=3094](http://www.un-ngls.org/spip.php?page=article_s&id_article=3094)

difficulties in accessing the Inter-American system include, among others, economic limitations and limitations in securing suitable legal counsel for protecting rights in the Inter-American system.

On this point, we consider a great advancement the approval of the IACHR's Legal Assistance Fund and likewise the coming into force of its Rules of Procedure in 2011, for it constitutes a step in the direction of greater access for victims<sup>23</sup>. Nonetheless, no public information is available from the IACHR on the establishment of the fund, its use to date or cases in which states have reimbursed costs to the Fund in compliance with recommendations made by the Commission in its merits reports. There is also no information on which states that have contributed to the fund, although based on public presentations of the Commission, such contributions have been minimal to date<sup>24</sup>. Accordingly, the Commission should make that information public, even if the fund had exhausted the resources for its operations, so as to make an assessment of the needs expressed by the victims or petitioners and to evaluate its impact and its actual operations. Similarly, states ought to contribute to the Fund to demonstrate their genuine will to strengthen the work of the Commission.

We would like to highlight that the protective spirit of the Inter-American system finds expression in part in the ability of any person to file a complaint without needing legal representation. We highly value the fact that legal representation is not a compulsory requirement in litigation before the Commission. We understand that part of the role of the IACHR and the Court is to remedy the *de facto* inequality between state and petitioner with a procedure that makes possible access without representation for persons and groups who are most vulnerable. Nonetheless, the technical complexity entailed in litigating some cases could mean that representation would be necessary or advisable to guarantee the victims effective access to the Inter-American system and equality of arms.

Therefore, we also believe that it is key for there to be a discussion as to how to resolve victims' need for technical assistance. In this regard, it may be prudent for the Commission to consider drawing up a roster of attorneys knowledgeable and/or with experience in the Inter-American system to provide *pro bono* representation in those cases in which it is necessary to assign a representative to the victim because the petitioners have shown an economic need, it is in the interest of justice, or the victim so opts.

### **3. ON CHRONOLOGICAL ORDER IN ANALYZING THE PETITIONS**

The current practice of the Commission is to process the petitions following the chronological order in which they were filed. That practice has several exceptions that have to do with categories of petitions that are given priority treatment, such as cases having to do with the death penalty, victims who are older adults or children, persons deprived of liberty, victims who are terminally ill, cases in which there are precautionary measures to prevent irreparable harm to the subject matter of the proceeding, or in exceptional circumstances when the

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23. <http://cejil.org/comunicados/entra-en-vigor-el-reglamento-de-la-cidh-sobre-el-fondo-de-asistencia-legal>

24. The Commission's Assistant Executive Secretary stated, during an academic event held at American University, October 15, 2012, "*Conference on the Future of the Inter-American System of Human Rights*," that throughout the Fund's history, it has only received \$25,000, and it has been used in 2 or 3 cases. Still, this information is not available on the website of the Commission. No report has been issued nor information provided on the use of the Fund, neither on the Commission's website, nor in any of its annual reports since the creation of the Fund Rules.

delay may negatively affect the useful effect of protection. These criteria are not defined formally or publicly by the IACHR<sup>25</sup>. In addition, there is no clarity as to the number of cases received each year by country in the last five years, the issues addressed in the petitions by country and by sub-region, or the exceptions made to the rule on chronological order, among other matters. This information would be useful when making recommendations as to how the regional protection of rights could be made more effective.

In this regard, the Report of the Working Group proposes to the IACHR that it “[c]ontinue to develop objective criteria for setting priorities regarding treatment of petitions and other cases, considering the nature, complexity, and impact of the alleged situations”<sup>26</sup>.

On this issue, we consider that all petitions, whether taken up by chronological order or on a priority basis, should receive timely treatment, and in that regard it is essential that the IACHR organize its work to ensure an effective response to victims.

We think, like the Working Group, that it is important to have more information on the petitions submitted and on the criteria used to organize and prioritize the work. Moreover, on this point we present proposals both on chronological order as the criterion for studying the petitions as well as on the exceptions.

As regards the first, on several occasions CEJIL has proposed that the IACHR adopt an alternative practice that combines chronological order with a country criterion. We are of the view that in this way the Commission could organize the petitions as they come in chronologically, but sorting them by country, and then process a petition from each country in chronological order. This would guarantee addressing a variety of matters from the region, and would avoid any appearance of differentiated treatment by the IACHR with respect to those countries in which there is greater knowledge of the use of the mechanisms of the Inter-American system, which is not necessarily representative of the needs in respect of human rights in the current state of affairs in the region.

As regards the exceptions, CEJIL supports the IACHR applying general criteria, instead of the criteria of categories of cases that are used at present, and which could lead one to think that certain issues have priority over others. We believe that the criteria that should be applied are: (1) the existence of a risk of irreparable harm to the subject matter of the dispute; or (2) in exceptional circumstances when the resolution of a case may help resolve a key issue for advancing human rights that may be useful for resolving endemic or systematic situations.

With respect to the first criterion, we consider that in those situations in which there are precautionary measures, and where given the failure of the state to carry out the measures harm is consummated to persons or a group, the Commission should accord the case priority<sup>27</sup>.

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25. These are included in the consultation of the IACHR, [http://www.oas.org/es/cidh/consulta/1\\_peticones.asp](http://www.oas.org/es/cidh/consulta/1_peticones.asp). See also Human Rights Clinic, The University of Texas. *Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission on Human Rights*, December 2011, p. 19.

26. Report of the Working Group, p. 13.

27. This issue is treated in greater depth in the CEJIL's observations regarding the consultation on module II, on precautionary measures.

Any decision of the IACHR that does not respect chronological order should state its reasoning and the resolution should be made public. We note that most of the categories that the IACHR currently considers could in any event come under one of the two criteria mentioned, but the formulation proposed would not limit it to such cases. This would be a way to make the current criteria explicit in publicly accessible guidelines.

#### **4. ON ADMISSIBILITY AND COMBINING ADMISSIBILITY AND MERITS**

Currently the procedure for individual petitions before the Commission is divided into two stages, admissibility and merits. This was crystallized in the amendments made to the Rules of Procedure in 2000, which clearly modified the practice of ruling on admissibility and merits jointly other than in exceptional circumstances<sup>28</sup>.

One of the criticisms of the introduction of this additional stage in the procedure is that it extended the time for processing cases, it meant an additional decision by the IACHR which in turn did not result in a significant number of friendly settlements, or in less questioning of admissibility issues before the Inter-American Court of Human Rights<sup>29</sup>. As a result, the admissibility decision with its current characteristics impacts the structural delay of the IACHR when it comes to resolving contentious matters.

The current procedure of producing an admissibility report with a detailed analysis of the facts of the case, the analysis of exhaustion of domestic remedies, which in some cases verges on an analysis of the merits regarding the right of access to justice, the numerous exchanges of information between the parties, and even the possible holding of admissibility hearings<sup>30</sup> all contribute to procedural delay and duplication of effort for the Commission.

CEJIL is of the view that the IACHR should address this stage of the procedure so as to modify its practice in order to guarantee a speedier process given the current economic conditions of the Inter-American system.

In this respect, we propose to simplify this stage in the procedure, along the same lines that the IACHR has evolved in recent years.

Accordingly, the admissibility analysis should be as simplified as possible, following the model used by the former European Commission on Human Rights and the current European Court of Human Rights, focused on the *prima facie* verification of the admissibility requirements, avoiding getting into issues that go to the merits such as determining the facts or which rights were violated<sup>31</sup>.

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28. In the late 1990s CEJIL came out against that change in the Rules of Procedure.

29. In previous reforms the states argued that separating admissibility from the merits would facilitate the pursuit of friendly settlements and reduce the caseload by eliminating cases that were not admissible early on. Reality has shown that the benefits anticipated from this reading were not forthcoming. For CEJIL, excessive formality in the processing of cases is what produces the greatest delay in their resolution.

30. IACHR, 2011-2015 Strategic Plan, Part I: 50 Years Defending Human Rights: Results and Challenges, 18 (January 2011), p. 8.

31. See for example, *Jan Nielsen v. Denmark*. Application 10929/84. 10 March 1986. EHRRCD; *ECHR.P.Z. and Others v. Sweden*. Application 68194/10. 29 May 2012.



Continuing its evolution in this direction may help drastically reduce the duration of the process, on making the procedure and the decision simpler, and at the same time giving the parties legal certainty as to the subject matter of the dispute and helping to maintain a differentiated standard of appreciation between admissibility and merits.

Following the simplified procedure of admissibility proposed, the application of Article 36(3) of the IACHR's Rules of Procedure, which provides for the possibility of deferring treatment of admissibility until the consideration and decision on the merits, in exceptional circumstances<sup>32</sup>, should apply when there is an indissoluble bond between admissibility and merits, or, as in the registry stage, when one must act more swiftly in cases in which there is a risk of irreparable harm to the subject matter of the proceeding. To these two causes, which are contained in the Commission's response to the Permanent Council<sup>33</sup>, a third should be added: when justified to resolve recurrent endemic or systematic violations, so as to maintain consistency with the criteria recognized by the Commission for identifying priority cases. The IACHR should make this decision at the earliest possible procedural opportunity once the requirements for doing so are present.

If it is determined not to opt for the simplification of admissibility, we propose for the IACHR to follow the example of the Court on eliminating the admissibility phase and performing the analysis together with that of the merits and reparations with respect to the particular case before it. This measure led the Court to significantly reduce the time for processing cases. According to figures from the Court, with these modifications the time for processing was reduced to 20.78 months, compared to the 40.5 months that it took before the reform of the year 2000<sup>34</sup>. From 2006 to 2010 the average time for processing cases dropped to 17.4 months, and according to the latest figure available, in 2011 it was 16.4 months<sup>35</sup>. This solution may be particularly appropriate for those cases in which it is argued that domestic remedies were not exhausted because they were drawn out or ineffective. A joint analysis of the admissibility, merits, and reparations issues could greatly help reduce procedural delays before the Commission and would require a modification of Article 36(3) of the Rules of Procedure.

Regardless of whether both stages are decided separately or jointly, we believe that the IACHR should adequately spell out the reasoning and basis for its decisions, and therefore should justify –applying the criteria proposed to the concrete case– its decision on joining admissibility and merits as soon as it has the parties' positions on the matter.

As for the operational aspect, at present there is a working group on admissibility that is studying the admissibility of the petitions between sessions, and it makes recommendations to the plenary, which should continue its work and evaluate the possibility of making decisions electronically between the regular sessions.

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32. In serious and urgent cases, or when it is believed that the life or personal integrity of a person is in real and imminent danger. Article 30(4), Rules of Procedure, IACHR.

33. See Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 108.

34. I/A Court H.R..2006 Annual Report 2006, p. 91.

35. See I/A Court H.R..2011 Annual Report, p. 8.

## 5. ON THE TIME FRAMES

We observe that several parts of the consultation on individual petitions consider the possibility of extending the time frames already established in the IACHR's Rules of Procedure for the parties to respond. In that regard, it is proposed to extend the period for the state to respond on admissibility (Article 30(3) of the IACHR's Rules of Procedure), as well as the time for the parties to submit observations on the merits (Article 37(1) of the Rules of Procedure).

In CEJIL's experience the structural problem of delay in the processing of the cases does not find its main cause in the time periods that are currently in the Rules of Procedure, but in many other factors, among which mention should be made of the current capacity of the Commission to adopt prompt decisions once it has the information required to do so. In this respect, the Rules of Procedure have been modified on several occasions to expedite the procedures, yet even so the delay in the process has not been reduced, which is evidence that the problem is not in the rules, but in other causes, such as the serious shortfall of resources available to the Commission to address all petitions in an adequate and timely fashion.

In view of the foregoing, we believe, bearing in mind the current situation in the processing of cases, and the already-existing time periods, that reforms in this regard would not be necessary. We are of the view that the time periods as they currently exist are reasonable and they should be applied flexibly, observing the principle of equality of arms, and being mindful of the nature of the case, the seriousness of the violations, when the facts occurred, and other factors.

With respect to the Commission responding adequately when the parties exceed the period fixed to respond, we observe that international law already provides for clear consequences in the face of the procedural silence of states when faced with an international claim. In this respect, the Court and the IACHR have established, in reiterated case law, that "when the State does not provide a specific reply to the application, it is presumed that the facts about which it remains silent are true, provided that consistent conclusions about them can be inferred from the evidence presented"<sup>36</sup>. Therefore, the repeated failure of the state to respond in a specific case should not be an obstacle to the Commission proceeding to process the petition.

As regards the lack of any response on the part of the victims, the Commission should consider that the victims are the first ones interested in a prompt resolution of the dispute. Therefore, a delay in the response by the petitioners would cause direct harm to the victim but not, in principle, to the state, unless it were to prove otherwise. In addition, and recognizing that the state and the victim are not procedural equals, in various occasions the victims find themselves in adverse circumstances, or do not have the resources or possibilities of answering in a strict time frame, which should be considered by the Commission.

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36. I/A Court H.R. *Case of Bámaca Velásquez*. Merits. Judgment of November 25, 2000, para.100; *Case of Velásquez Rodríguez*. Judgment of July 29, 1988, para.138; *Case of the Constitutional Court*. Merits, Reparations, and Costs. Judgment of January 31, 2001, para.48; *Case of Godínez Cruz*. Merits. Judgment of January 20, 1989, para.144. IACHR, Report No. 37/00, Case 11,481, *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*, April 13, 2000, OEA/Ser.L/V/II.106 Doc. 3 rev. at 671 (1999) paras. 43 and 156.

Finally, we believe it is necessary, in order to provide greater legal certainty, for the Commission to consider sending a notice to the parties in which it would inform them that the matter has been closed and that it is engaged in the final review of the case and will then issue a report on the merits, which would enable the parties to prepare, with lead time, for the subsequent stages of litigation (compliance, referral of the case to the Court, etc.).

## **6. COMPLIANCE WITH THE RECOMMENDATIONS ISSUED BY THE IACHR TO THE STATES**

CEJIL considers full compliance with the recommendations contained in the IACHR's merits reports key for strengthening the Inter-American system: The failure to implement the decisions makes protection ineffective.

Despite that, neither the states nor the Working Group made proposals aimed at creating or improving the domestic mechanisms, or implementing other measures for the purpose of guaranteeing the effective enforcement of the decisions made by the Inter-American Commission. As we have indicated on other occasions, for CEJIL this absence is the clearest evidence of the lack of a genuine will on the part of the states to consolidate the protection conferred by the Inter-American system.

First, as in other areas, the IACHR should improve its information on the status of compliance with its decisions, and of the Court's decisions to the extent possible, so as to identify recurrent obstacles to implementation.

In addition, the IACHR itself could take steps to encourage greater compliance by the states. We propose that the IACHR include giving impetus to legislation and mechanisms for implementing decisions as one of the priority issues on its promotion agenda.

We suggest that in its reports on the merits the Commission be more specific as to the content of its recommendations. In addition, the Commission should be more active in follow-up on compliance with those recommendations through monitoring activities, and not in an advisory capacity. In this connection, it could act through the tasks it performs in its country and thematic rapporteurships, visits to countries, formal and non-formal working meetings between the parties, hearings, press releases, and all the other tools available to the IACHR. We note that some of these measures have been proposed by the Commission in its response to the Permanent Council<sup>37</sup>.

Recognizing that the current financial needs make it difficult for the Commission to earmark the resources necessary for this activity, we propose that the Commission include in its already existing activities identifying those recommendations that answer to structural human rights problems, and compliance with which would have a positive effect on the procedural delays before the IACHR due to the filing of cases that address recurrent violations (for example, the unlawful use of the military criminal courts for investigating serious human rights violations).

Finally, as regards the suspension of the three-month term for the Commission to refer a case to the Court, we are of the view that Article 46 of the Rules of Procedure is sufficiently clear as regards the conditions that must be in place for the IACHR to give positive consideration to

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37. See, for example, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 182.

the request of the states. In this respect, each state must fully abide by Article 46(a) of the Rules of Procedure, and send detailed information that shows that it is taking actions aimed at compliance.

Therefore, granting one or several extensions to those states that fail to send reports to the IACHR or whose reports evidence inaction is unjustified. Such a decision would leave the victims, who have already given their consent to submit their case before the jurisdiction of the Court, unprotected and without a voice. In that regard, we are in disagreement with the proposal of the IACHR to consider the mere existence of domestic mechanisms for ensuring implementation of the decisions of the Inter-American system when considering whether to grant extensions to the states<sup>38</sup>. Based on our experience in litigation, the mere existence of domestic mechanisms for ensuring implementation of the decisions of the Inter-American system does not guarantee the recommendations will be carried out, and, therefore, without more, should not be grounds for suspending the time period for referring cases to the Court.

## **7. ARCHIVING PETITIONS**

The Report of the Working Group recommends to the IACHR that it “[d]evelop and broaden the criteria or parameters for setting aside petitions and cases, including, in particular, those in which there has been a protracted period of procedural inactivity”<sup>39</sup>. Among the proposals the states had made on the matter was to establish time periods for archiving cases in which the petitioner does not follow up on a case within a fixed period, or when it is no longer possible to offer the petitioner any remedy<sup>40</sup>.

In its response to the Permanent Council, the IACHR proposed to include “a provision in the Rules of Procedure under which the absence of any procedural momentum by the petitioner would be grounds for archiving the respective case file”<sup>41</sup>.

We sustain that the automatic application of this provision, without considering the reasons for the delay on the part of the petitioner, would be entirely contrary to the principles of *pro homine*, effectiveness, and universality that inspire the Inter-American system.

First, it is important to note that although there might be procedural inactivity on the part of the petitioners in some cases, this does not necessarily mean that the alleged violation of human rights has ceased, which is the requirement contemplated in Article 48(1) of the

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38. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, par. 120.

39. Report of the Working Group, p. 12.

40. Presentations by the Delegation of Mexico on “Procedural Matters in Processing Individual Cases and Petitions” and “Friendly Settlements” (Meetings of the Working Group on September 20 and 27, 2011). OEA/Ser.G, GT/SIDH/INF. 10/11, October 7, 2011; Presentations by the Delegation of Brazil on “Friendly Settlements,” “Procedural matters in processing individual cases,” “Financing of the IACHR,” and “promotion of Human Rights,” as well as Brazil’s remarks during the working group’s meeting with the IACHR on 1 November 2011. OEA/Ser.G, GT/SIDH/INF.30/11, November 3, 2011; and Proposals by the delegation of Chile on the subject of “Promotional Functions,” “Precautionary Measures,” “Friendly Settlements,” “Procedural Matters in Processing Individual Cases and Petitions,” and “Financing” (Third and last phase of the Working Group’s tasks). OEA/Ser.G, GT/SIDH/INF. 33/11, of November 11, 2011.

41. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 103.

American Convention in order to consider archiving a case. In this respect, in keeping with the American Convention and the protective nature of the procedure, the IACHR can continue processing a petition despite the inactivity of one of the parties, so long as the facts that led to its presentation exist or subsist<sup>42</sup>. The Commission should factor, in this regard, that in some contexts certain pressures may be exerted on the victims to abandon international litigation, which is why the Commission should preserve its competence to evaluate case by case whether the requisites are present to proceed to archive a case.

Furthermore, it is unclear what the states and Commission refer to when using the term “procedural inactivity”. In some situations, despite the petitioners presenting the briefs that correspond to the distinct procedural stages, the Commission does not adopt a timely decision due to delay in the processing. This can result in, with the passage of time, the information in the case no longer being current or the situation of the petitioners having changed due to the delay. Obviously, this passage of time can influence the victims’ capacity to respond (due to displacement, death, relocation, or other reasons). Additionally, the inactivity of the petitioner is not always synonymous with the inactivity of the victim. It is thus necessary to define what is meant by the “procedural inactivity of the petitioner, and analyze case by case the circumstances that may cause it, to ensure that the victim does not suffer as a result of a delay caused by the protective body, the State, or consequences inherent in the violation itself.

As such, we do not find amending the Rules of Procedure on archiving cases to be necessary. Article 42 of the IACHR’s Rules of Procedure, amended almost in its entirety in the 2009 reform, sets forth in detail the procedure for archiving cases. We are of the view that Article 42 is sufficiently clear and therefore does not need to be amended.

Notwithstanding this, in those situations where archiving a case seems appropriate in light of Article 42 of the Rules of Procedure, such action should not be taken without considering the position of the victim. The Commission ought to notify the victim and the representatives regarding the cases that are being considered for archiving, and should provide them an adequate opportunity to explain the reasons for the inactivity and the underlying facts that motivated the petition.

Lastly, we disagree with the Commission’s proposal to include a provision in the Rules of Procedure that would make the archiving of a case “definitive”, if this is to be understood to be like *res judicata*. In accordance with the protective spirit of the Inter-American system, and the *pro homine* principle, the archiving of a case should be considered at most a provisional suspension of the proceedings, without prejudicing the possibility of the petitioner presenting information at a later date that would justify the reopening of the proceedings. This proposal would be, without a doubt, more protective of the victims’ rights, while still providing the necessary legal certainty to the parties. Furthermore, the majority of our domestic legal systems distinguish between the archiving of a case and a “nonsuit”, which are different concepts with different legal consequences.

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42 See Article 48 of the American Convention on Human Rights.

## 8. FRIENDLY SETTLEMENTS

The possibility of implementing a friendly settlement is provided for in the American Convention on Human rights<sup>43</sup> and in the IACHR's Rules of Procedure<sup>44</sup>. The Commission recently included strengthening the friendly settlement procedure in its 2011-2015 Strategic Plan, and also created a specialized working group on the topic<sup>45</sup>. The IACHR held a consultation in 2011 whose results we don't know, and we would be grateful to have access to any preliminary outcome thereof<sup>46</sup>.

While we welcome those developments and recognize the usefulness of the friendly settlement mechanism, we are concerned about some of the proposals made by the states in the Report of the Working Group<sup>47</sup>.

First, we consider the recommendation to train staff of the Commission on "facilitation of friendly settlement processes" to be a delicate matter. In this respect, the IACHR is considering "to involve mediation specialists in the negotiation stages of friendly settlement proceedings," as well as "will continue to have meetings with experts in mediation, arbitration, and other forms of alternative conflict resolution"<sup>48</sup>. In this sense, while the training of Secretariat personnel on this subject is positive, it is important that the IACHR keep in mind what its role is and the criteria that should guide its action, when putting itself at the disposal of the parties to pursue dialogues that may lead to a friendly settlement.

In this respect, the role of the Commission is not to act as a mediator or arbitrator, but to ensure that justice is obtained in a given case. To that end, it must consider the nature and seriousness of the violations alleged, the requirements of the interest of justice, the circumstances of the specific case, and the attitude of the state, among others. In this regard, the Commission establishes in its Rules of Procedure that it "may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to such a resolution

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43. Article 48(1)(f) American Convention on Human Rights.

44. Article 40(1), Rules of Procedure, IACHR.

45. "We have a working group on precautionary measures; we have a working group on court cases. Well part of the implementation of the phase one of this project is the implementation of the working group on friendly settlements, so that we can have people who are specialized in this mechanism and who can also produce more results in the mechanisms. As I've said the funding is quite limited so I am in conditions to present to you right now the working group of the Commission on the question of friendly settlement which is a person within our secretariat which is a person who is primarily in charge of the implementation of this project, and that's Fanny Gomez. She is our working group and I accompany her in this initiative. So we're starting this strengthening process. It's a very limited and modest initiative but because the Commission takes this so seriously, the Commission did reach out to seek and obtain external funding to do it." PRESENTATION BY THE EXECUTIVE SECRETARIAT OF THE IACHR ON THE TOPIC "FRIENDLY SETTLEMENT" (Working Group meeting of September 27, 2011). Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the IAHRs -OEA/Ser.G/GT/SIDH/INF. 41/11/ 2 December 2011.

46. The Commission referred to this consultation in its response to the Council. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 126.

47. See Report of the Working Group, p. 14.

48. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, paras. 130 and 141.

or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on the respect for human rights<sup>49</sup>. We also think it is fundamental for the IACHR to assess the degree of compliance of the states with friendly settlement agreements already approved and the decisions of the IACHR when it comes to encouraging new agreements. As such, the indicator of success for the IACHR, must not be a greater number of agreements, but rather the actual extent of full reparation for the victims in the specific cases.

Along these lines, we consider that no friendly settlement report should be issued that cuts off the possibilities of a petitioner prevailing in the international procedure until the proposed solution is carried out in practice. For this reason, we disagree with the IACHR's proposal which would require the parties to include in the friendly settlement a clause that would establish the time periods for compliance, with which, once the parties give their consent to the agreement, the Commission would publish the report<sup>50</sup>. First, we consider that with this framework, that is, with the publication of the report prior to compliance, the petitioners have no incentive to consent to friendly settlements. Second, this option leaves the victims without the possibility of coming before the Court or requesting that the IACHR issue an Article 51 report in the case of non-compliance on the part of the state with the agreement<sup>51</sup>.

In addition, we are concerned about the proposal by the states on the consideration of friendly settlement agreements by the IACHR, once a report on the merits is issued, for it is at odds with Articles 49 and 50 of the American Convention, under which, if there is no friendly settlement, the IACHR proceeds to issue the report on the merits. Therefore, it is not possible to reach a friendly settlement agreement once a report on the merits has been issued, which moreover would be inconsistent with the determination of international responsibility set forth in the report. This is without prejudice to the possibility of a state, once a report has been issued, to recognize its responsibility, total or partial, in the case; and that as a result an agreement may be reached for complying with the reparations in the specific case<sup>52</sup>.

We also note with concern that the Report of the Working Group does not take up any recommendations for the states regarding measures to improve the implementation of friendly settlement agreements. In this respect, considering the IACHR's limited resources, we find that it would not be appropriate for the Commission to be responsible for drawing up a manual/guide on friendly settlements, their objective, criteria, advantages, and other information suggested by the states. As we indicated above, it seems to us that it would be appropriate for the states to adopt mechanisms to fully comply with all the decisions of the Inter-American system, including the friendly settlement agreements. This would be the measure that, without a doubt, would incentivize the conclusion of a greater number of friendly settlements.

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49. Article 40(2) and (4) of the Rules of Procedure of the IACHR.

50. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 138.

51. If the model proposed by the IACHR had been in effect, cases such as the emblematic *Las Dos Erres vs. Guatemala* would never have come before the Inter-American Court, nor would the Article 51 report have been published in the case of *Víctor Hugo Maciel vs. Paraguay*, in which due to the non-compliance of the State with the second resolution in the Friendly Settlement Agreement (Guarantees of Justice), the IACHR decided to publish a Merits Report. See: IACHR. Report. No. 85/09 "Compliance Agreement Víctor Hugo Maciel, Paraguay", August 6, 2009.

52. We note that this last point is what was proposed by the IACHR in its response to the Permanent Council, with which we agree. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 133.

## **D. CONSIDERATION ON PRECAUTIONARY MEASURES**

### **1. THE PRECAUTIONARY MEASURES ISSUED BY THE COMMISSION**

For more than 30 years precautionary measures have contributed to the protection of thousands of persons at risk in the member states of the OAS<sup>53</sup>. Since 1967, recommendations have been issued to the states to prevent irreparable harm to persons<sup>54</sup> and that same year, in Article 48(b) of the Rules of Procedure of the IACHR, a procedure was established to respond to reprisals against persons who presented petitions to the IACHR.

The IACHR has used the measures to provide protection to thousands of persons and groups of persons at risk of having their fundamental rights violated<sup>55</sup>.

In addition, precautionary measures represent the most effective tools available in the Inter-American system to guarantee the firm protection of the rights of individuals and communities in the Americas, and to safeguard the legal interests at stake in the procedures under its jurisdiction.

Like other quasi-judicial courts and organs, both international and regional, the IACHR has the power to issue precautionary measures, which are binding for all member states of the OAS<sup>56</sup>. In Public International Law, the ability to dictate protective measures is enshrined, for example, in Article 41 of the International Court of Justice<sup>57</sup>, and Article 25 of the International Tribunal for the Law of the Sea<sup>58</sup>.

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53. IACHR.Press Release 84/09.IACHR Publishes New Rules of Procedure. Washington D.C., December 10, 2009. Available at: [www.cidh.org/Comunicados/Spanish/2009/84-09sp.htm](http://www.cidh.org/Comunicados/Spanish/2009/84-09sp.htm)

54. See Presentation by the Executive Secretariat of the IACHR on the topic "Precautionary Measures" (Meeting of the Working Group of November 29, 2011), GT/SIDH/INF.43/11, available at the webpage of the Working Group: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>.

55. These groups include, among others, human rights defenders, journalists, and trade unionists, and vulnerable groups such as women, children, Afro-descendant communities, indigenous peoples, displaced persons, LGBTBI communities, and persons deprived of liberty. In addition, the measures have given protection to witnesses, judicial officers, persons in the process of being deported to a country where they could be subject to the death penalty, face torture or be subjected to cruel and inhuman treatment, among other considerations. See: IACHR, 2011 Annual Report, Chapter 3, section C, paragraph 10. Available at: <http://www.oas.org/es/cidh/informes/anales.asp>.

56. IACHR.OEA/Ser.L/V/II.124 Doc. 5 rev.1.Report on the Situation of Human Rights Defenders in the Americas. March 7, 2006. Paras. 235, 240-241.

57. Article 41 of the Statute of the ICJ states: "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." Similarly, the Permanent Court of International Justice previously established that, "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." See *Electricity Company of Sofia & Bulgaria*, 1939 P.C.I.J. (ser.A/B) No. 79, at 199 (Dec. 5).

58. Article 25 states: "1. In accordance with article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures. 2. If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, the provisional measures shall be prescribed by the chamber of summary procedure formed under article 15, paragraph 3, of this Annex. Notwithstanding article 15, paragraph 4, of this Annex, such provisional measures may be adopted at the request of any party to the dispute. They shall be subject to review and revision by the Tribunal."



With respect to International Human Rights Law, Article 62(3) of the American Convention consecrates the adoption of urgent protective measures by the Inter-American Court. Likewise, the Protocol to the African Charter on Human and Peoples Rights, states in Article 27 that in cases of extreme gravity and urgency, and when it is necessary to avoid irreparable harm to persons, the Court may dictate those provisional measures it deems necessary<sup>59</sup>. In the European regional system, the European Convention for the Protection of Human Rights and Fundamental Liberties, adopted in 1950, does not give jurisdiction neither to the European Court nor the now extinct European Commission on Human Rights to adopt urgent protective measures, despite the fact that both bodies issues them in practice<sup>60</sup>.

Likewise, other quasi-judicial bodies, such as the United Nations Human Rights Committee (Rule 86, U.N. Doc. CCPR/C/3/Rev.3 (1994)), the United Nations Committee Against Torture (Rule 108 (1), U.N. Doc. CAT/C/3/Rev.3 (1998)), and the Committee on the Elimination of Racial Discrimination (Rule 94, U.N. Doc. CERD/C/35/Rev.3, 01/01/89 (1989)), provide for precautionary measures mechanisms in their Rules of Procedure, without a treaty or statutory base.

The legal basis of precautionary measures derives from the implicit powers of the IACHR<sup>61</sup>, reaffirmed in its practice and set forth in its Statute<sup>62</sup> and successive rules of procedure<sup>63</sup>. Their binding nature emanates from the general obligation to ensure human rights that the states have as per the commitments they have acquired in Inter-American human rights treaties, in particular the American Convention and the OAS Charter<sup>64</sup>.

Through this mechanism the Commission has been carrying out its mandate “to promote the observance and protection of human rights” in the terms of Article 106 of the OAS Charter and Article 41 of the American Convention, and to assist the states in carrying out their inescapable duty of protection – which is their obligation in every instance<sup>65</sup>.

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59. Article 27 FINDINGS: “If the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.” See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), art. 27(2). Available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html>.

60. Provisional and Precautionary Measures, p. 158 <http://biblio.juridicas.unam.mx/libros/5/2047/12.pdf>

61. On the theory of implicit powers and their use by the IACHR, see: Medina, Cecilia, *The Battle for Human Rights: Gross, Systematic Violations and the Inter-American System*. Dordrecht (The Netherlands): Martinus Nijhoff Publishers, 1988. 363; see also, European Court of Human Rights, *Mamatkulov v. Turkey*, Judgment of February 6, 2003. It should be noted that the European Court has developed its provisional measures through its case-law, as they are not expressly provided for in the treaty.

62. See Statute of the IACHR, Article 19(c).

63. See Rules of Procedure of the IACHR (approved at its 660<sup>th</sup> session, held April 8, 1980), Article 26. In addition, see Rules of Procedure of the IACHR (approved by the Commission at its 137<sup>th</sup> regular period of sessions, held October 28 to November 13, 2009, and modified September 2, 2011), Article 25 (currently in force).

64. IACHR.OEA/Ser.LV/II.124 Doc. 5 rev.1. Report on the Situation of Human Rights Defenders in the Americas. March 7, 2006. See IACHR, Report on the Situation of Human Rights Defenders in the Americas, paras. 240-241.

65. IACHR.2011 Annual Report, Chapter 3B, para. 6.

That power has also been consolidated through its consistent practice, which has been accepted by the states in the region, as evidenced by greater compliance with protective measures than to the merits reports of the IACHR, as well as the mechanisms that the states themselves have adopted to properly implement them<sup>66</sup>.

In addition, it is interesting to observe that the Inter-American Convention on Forced Disappearance of Persons was adopted without any questioning of the applicability or validity of precautionary measures, which were already provided for in the Rules of Procedure of the IACHR in force at that time<sup>67</sup>. To the contrary, that Convention has a provision that attributes jurisdiction that refers generically to the Rules of Procedure of the IACHR, expressly mentioning, in addition, precautionary measures. This can be construed as another act of acceptance of the institution of precautionary measures by the member states of the OAS.

At present, precautionary measures are provided for and regulated by Article 25 of the Commission's Rules of Procedure, which was amended substantially in 2009 to include many of the proposals made at the time by the states. As discussed below, the processing and implementation of precautionary measures can be improved in several ways to make the process clearer and more effective. This could eventually be done by adopting or modifying the internal practices of the IACHR, and having them consolidated in directives or other internal and public instruments. In addition, supervising the adequate implementation of the measures and developing mechanisms for their enforcement domestically should be a fundamental part of the IACHR's agenda.

On that basis, we will make the following proposals.

## **2. ON REQUESTS FOR PRECAUTIONARY MEASURES**

### **a. Identification and/or determination of beneficiaries**

The Report of the Working Group recommended that the Commission, when granting precautionary measures, should improve the mechanisms for determining and individually identifying the beneficiaries<sup>68</sup>.

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66. Many states have implicitly accepted the IACHR's competence to issue measures by establishing procedures, creating organs, adopting decisions, and passing laws for the purpose of implementing the decision on precautionary measures put out by the IACHR. Some States, such as Bolivia and Mexico, hold inter-institutional meetings on implementing the measures of protection ordered by the organs by the Inter-American system; as do Guatemala, Canada, Ecuador, El Salvador, Colombia, Honduras, and Peru.

67. That Convention makes express reference to the precautionary measures mechanism at Article XIII.

68. Report of the Working Group, p. 11 (subsection h). See also Proposals by the delegation of Colombia regarding the following topics: "Precautionary Measures," "Procedural Matters in Processing Individual Cases and Petitions," "Friendly Settlements," and "Criteria for Constructing Chapter IV of the IACHR'S Annual Report" (Third and last phase of the Working Group's tasks: presentation and consideration of member states' proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G, GT/SIDH/INF. 34/11, November 11, 2011; and Delegation of Colombia Presentation on the Topic "Criteria for Constructing Chapter IV of the Annual Report of the IACHR" and Proposals on the topic "Precautionary Measures" - Meeting of the Working Group, held on November 29, 2011. OEA/Ser.G, GT/SIDH/INF. 40/11, December 1, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>; and Presentation by the Delegation of Mexico on the topics

In this respect, while in some cases identifying the beneficiaries of the measures may be important to facilitate the protection of a given group of victims, it should not become an essential requirement for granting the protective measures. This is because the effective protection of the rights of a person or group may require or make it advisable to adopt collective measures without naming the individual victims (some or all), that do not identify each beneficiary, as is the case, for example, in a prison fire, the deportation of a group of unnamed migrants on a barge, or other circumstances that have already been identified by the bodies of the Inter-American system.

These situations are not unaffected by the developments of comparative law or domestic law, which in their provisions of law, case-law, and the writings of legal scholars include many ways to address such issues through flexible mechanisms such as preventive *habeas corpus*, *amparo*, and actions to protect collective and diffuse rights<sup>69</sup>.

In this regard, the reforms made to the IACHR's Rules of Procedure in 2009 expressly included the capacity of the Commission to grant collective measures with the aim of preventing "irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members"<sup>70</sup>. This reform consolidated relevant developments in the case-law of both the Court and the Commission regarding collective protective measures<sup>71</sup>. In this respect, the Inter-American system has defined important standards on granting measures in emblematic cases of groups whose members could not be individually identified by requiring that it be "an organized community, located in a determined geographic place, whose members can be identified and individualized and who,

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"Challenges and Medium- and Long-Term objectives of the IAHRs" and "Precautionary Measures" (Working Group meeting of September 12, 2011), OEA/Ser.G GT/SIDH/INF.4/11, September 12, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>.

69. In Argentina, as of the decision of the Supreme Court of Justice in the case of "*Halabi, Ernesto v. National Executive Branch – Law 25,873 – Decree 1563/04 re: amparo action*," "class or group actions" were created in praetorian fashion in the Argentine legal order. The Court understood that the effects of the judgment would be *erga omnes*, and in this way they reached all members of the "class" that the plaintiff represented. Judgment available at: [http://www.csjn.gov.ar/cfal/fallos/cfal3/ver\\_fallos.jsp](http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp). In addition, in Colombia, Article 88 of its National Constitution establishes the existence in its legal order of "*acciones populares*" (they are used when the group affected is indeterminate in nature). In Chile since the adoption of Law 19,955 "*acciones de interés colectivo*" or "*acciones de clase*" were incorporated to the domestic legal order. The United States was one of the great precursors of class actions; already in 1938 the Federal Rules of Civil Procedure set down the guidelines for what were called "class actions" in Rule 23. Brazil has had actions of this type since 1977, when the Lei de Ação Popular was adopted. See Antonio Gidi and Eduardo Ferrer Mac-Gregor. *La Tutela de los Derechos Difusos, Colectivos e Individuales Homogéneos. Hacia un Código Modelo para Iberoamérica*. Editorial Porrúa, Mexico City, 2003.)

70. Rules of Procedure of the IACHR, Article 25(3).

71. Accordingly, among the collective provisional measures issued by the Inter-American Court at the request of the IACHR, we have those granted in the case of *Awastingni* (on indigenous peoples), and in the case of the girls *Yean and Bosicó* (Haitians and Dominicans of Haitian Origin in the Dominican Republic). Collective urgent measures have also been issued in relation to extreme prison conditions, as in *Urso Branco* (Brazil), *Uribana* (Venezuela), and *Mendoza Prisons* (Argentina), in addition to another series of measures referring to the conditions of confinement of children and adolescents (FEBEM – Brazil) or of persons with mental disabilities, as in *Patients of the Hospital Neuropsiquiátrico* (Paraguay). For its part, the IACHR has granted numerous precautionary measures aimed at safeguarding the right to property of several indigenous communities, among which mention should be made of the indigenous community of Sarayaku, those issued to benefit the Maya indigenous communities and their members in Belize, those issued on behalf of the Yakyé Axa indigenous community; those for the Saramaka people (*v. Suriname*); among many others. See Felipe González, "Las medidas urgentes en el Sistema Interamericano." *Revista Sur*, V. 7 No. 13, Dec. 2010, pp. 63 and 64.

due to the fact of belonging to said community, all its members are in a situation of similar risk of suffering acts of aggression against their personal integrity and lives"<sup>72</sup>.

In light of the foregoing, we believe that a strict requirement to individually identify the beneficiaries in all precautionary measures would constitute a setback with respect to the gains made by the system, consistent with international law and the legal orders of the states of the region.

Nonetheless, we consider that it is useful and reasonable for the IACHR to state the justification for adopting a measure on behalf of unnamed victims or of a group that has been or can be determined.

In addition, it should be noted that the measures to be granted no doubt will be in accordance with the nature of the situation that merits a measure on behalf of a group or a partial or total set of persons who are unnamed yet can be determined. Finally, the states should make significant efforts, in coordination with the beneficiaries of the measures, to improve their local practices and mechanisms so as to effectively comply with such measures.

Nonetheless, we consider that it is useful and reasonable for the IACHR to state the justification for adopting a measure on behalf of unnamed victims or of a group that has been or can be determined. In this regard, we observe that the Commission noted in its reply to the Permanent Council that it "will incorporate the criterion that the beneficiaries can be determined by geographic location or when one can identify the collective group, people, community, or organization to which they belong, and they are in a situation of risk as a result of being part of that community or group"<sup>73</sup>.

In addition, it should be noted that the measures to be granted no doubt will be in accordance with the nature of the situation that merits a measure on behalf of a group or a partial or total set of persons who are unnamed yet can be determined. Finally, notwithstanding the initiative proposed by the IACHR to develop manuals on jurisprudence and best practices on this issue<sup>74</sup>, it is within the competence of the states to exert significant efforts to, in coordination with the beneficiaries of the measures, improve their practices and local mechanisms with the goal of complying effectively with such measures.

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72. See, for example, I/A Court H.R., Provisional Measures, *Matter of the Peace Community of San José de Apartadó regarding Colombia*, Order of November 24, 2000, considering paragraph 7; Provisional Measures, *Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela*, Order of February 9, 2006, considering paragraph 8; Provisional Measures, *Matter of the Sarayaku Indigenous People regarding Ecuador*, Order of July 6, 2004, considering paragraph 9; and, IACHR, MC 259-02 (United States), *Regarding the Situation of the Detainees at Guantanamo Bay*, March 12, 2002.

73. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 81.

74. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 84.

**b. Reporting the situation domestically, standard of proof, and obtaining the consent of the beneficiaries**

The member states suggest that for the sake of “according greater importance to the subsidiary nature of international protection” the Commission should be sure that domestic remedies have been exhausted prior to granting precautionary measures<sup>75</sup>. In addition, the Report of the Working Group recommends that when the IACHR states the reasons for its decisions on such measures it should disclose “the factual elements that have been presented to it, as well as evidence provided to *corroborate the veracity* of the events”<sup>76</sup>. (Emphasis added.). Similarly, the states propose that the IACHR confirm, “where appropriate, that potential beneficiaries of precautionary measures have granted authority or consent for requests to be lodged on their behalf”<sup>77</sup>.

In relation to the issue of pursuing a claim domestically, it is very worrisome in our view that the states are proposing a requirement of “exhaustion of domestic remedies” in relation to a procedure of the nature of precautionary measures, an expeditious procedure designed to prevent irreparable harm in serious and urgent situations. In this context, it is unreasonable to ask that potential beneficiaries exhaust domestic remedies, for this would delay the procedure and render any protection ineffective. As the IACHR has said in this regard:

*[I]t has been recognized by this Commission and other international adjudicative bodies that the effective exercise of their mandates requires the ability, in certain circumstances, to request a state to act or refrain from acting in situations of extreme gravity or urgency where application of the usual rule of exhaustion of domestic remedies may not be appropriate or practicable. . . . In light of the inherently urgent and vital nature of such measures, the Commission, like other international bodies, has not considered establishment of the exhaustion of domestic remedies requirement to be a precondition for its longstanding authority to grant precautionary measures*<sup>78</sup>.

In addition, the current Rules of Procedure of the IACHR have already incorporated as one of the requirements for the Commission to take into account when considering granting precautionary measures “whether the situation of risk has been brought to the attention of

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75. Proposals by the Delegation of Brazil on the topics “Grounding of Decisions,” “Processing of Petitions, Cases and Precautionary Measures,” “Deadlines for States,” “Friendly Settlement Mechanism,” “Promotion of Human Rights,” and “Transparent Management” (Third and last phase of the Working Group’s tasks: presentation and consideration of member states’ proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G/GT/SIDH/INF. 48/11, December 6, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>

Presentations by the Delegation of Argentina on “Procedural Matters in Processing Cases and Individual Petitions before the IACHR” and “Precautionary Measures.” (Meeting of the Working Group on September 20, 2011). OEA/Ser.G, GT/SIDH/INF.6/11, September 26, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>

See also, The Secretary General of the OAS has so stated expressly (IACHR. Preparatory Seminar on the Strengthening of the Inter-American Human Rights System. May 30, 2012. Audio available at: <http://www.oas.org/es/cidh/actividades/seminario2012audios.asp>).

76. Report of the Working Group, p. 11 (subsection g, first point).

77. *Id.* (subsection i).

78. IACHR, Precautionary Measures 259-02, *Regarding the Situation of the Detainees at Guantanamo Bay* (United States), Resolution of October 28, 2005.

the pertinent authorities or the reasons why it might not have been possible to do so<sup>79</sup>. While the filing of a domestic claim is one of the elements for the IACHR to consider, CEJIL has maintained that its automatic application could render the mechanism of protection ineffective given that there are many situations in which the beneficiaries may be impeded from filing a complaint domestically (for example, in cases of democratic instability, disruption of the rule of law and of the functioning of the institutions, when the threat comes from the local authorities with whom one would lodge the complaint, when the situation of the victims keeps them from lodging a complaint, or similar situations).

In the same vein, we consider that the recommendation of the Working Group that the Commission consider the information offered to “corroborate” the veracity of the facts, is totally contrary to the urgent nature of the precautionary measures mechanism, and to the standard of proof developed in international law in this area. In this respect, the Inter-American Court has noted that the facts that motivate a request for provisional measures do not need to be fully corroborated, but rather “a minimum degree of detail and information is necessary so as to allow the Court to assess *prima facie* a situation of extreme gravity and urgency”<sup>80</sup>.

As a result of the more flexible and protective yardstick used to issue precautionary measures, the Rules of Procedure of the IACHR expressly state that their adoption does not imply a judgment on the admissibility or merits of a petition. It should also be noted that in the course of the processing of precautionary measures a state may present factual information that verifies that a factual assumption that underpinned the adoption of the measures was incorrect without changing the standard of proof for their adoption.

We have similar observations on the consent of the beneficiaries. That requirement was included in Article 25(4)(c) of the current version of the Rules of Procedure, which establishes that the IACHR shall take into account “the express consent of the potential beneficiaries whenever the request is filed before the Commission by a third party unless the absence of consent is duly justified.” In this respect, once again we consider that its strict application in all cases would limit the capacity of the Commission to respond in cases of extreme need for protection. To cite one example, when CEJIL, along with other organizations, sought precautionary measures in 2002 on behalf of the persons detained at Guantánamo, the government of the United States did not allow the families of the detainees or their attorneys to have any contact with them. If the requirement of the current Article 25(4)(c) had existed at that time, and had been strictly applied, the IACHR would have been impeded from acting in one of the then most emblematic cases. In that sense, it is not hard to imagine similar situations of persons deprived of liberty or held in incommunicado detention, communities that are hard to access, persons threatened by state agents, among others, in which obtaining written consent from each protected person could become impossible or risky. In addition, it is noteworthy that the IACHR presumes victims’ consent to the lodging of an international complaint unless it is expressly called into question by a petitioner, representative, or the state itself.

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79. See Article 25(4)(a) of the IACHR’s Rules of Procedure.

80. See *Matter of Children Deprived of Liberty in the “Complexo do Tatuapé” of FEBEM*. Provisional Measures and Request for Extension of Provisional Measures regarding the Federative Republic of Brazil. Order of the Inter-American Court of Human Rights, July 4, 2006, Considering paragraph 23. See also, I/A Court H.R. Request for Provisional Measures regarding Panama. *Matter of Four Ngöbe Indigenous Communities and their Members*. Order of May 20, 2010, para. 10.

Even so, and for the purpose of bestowing greater transparency and legal certainty on the procedure, we consider that in its decision to grant precautionary measures, if there were any question as to the victims' consent, the Commission could spell out the reasons that led it to grant the measures in those situations in which it did not have the express consent of all the beneficiaries.

We note that in its response to the Permanent Council, the IACHR points out that it is considering including in the Rules of Procedure the addition of the terms "authorization" and "consent"<sup>81</sup>. While it is not clear what scope the addition of these concepts will have, we hope that upon approving this reform, the IACHR does not require formal powers of attorney from the beneficiaries, which would have the effect of making ineffective this mechanism of precautionary measures in many situation in which the protection required cannot wait for a lengthy bureaucratic proceeding.

### **c. Request for information from the State**

During the sessions of the Working Group, some member states suggested that a prior request for information by the Commission from the state involved should be compulsory<sup>82</sup>. Nonetheless, other Delegations suggested that in cases characterized as "serious" and "urgent" measures could be granted without a prior request for information from the state, but that it should be by a qualified majority of the Commission<sup>83</sup>. This second position was included in the Report of the Working Group<sup>84</sup>.

In this respect, we observe that some of the proposals are redundant insofar as they are already provided for in the current Rules of Procedure of the IACHR, which indicate that "[p]rior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures." (Article 25(5)). Therefore, the request for information is already the current rule, with the exception of those situations in which the urgency justifies acting without informing the state.

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81. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 86.

82. Proposals by the Delegation of Brazil on the topics "Grounding of Decisions," "Processing of Petitions, Cases and Precautionary Measures," "Deadlines for States," "Friendly Settlement Mechanism," "Promotion of Human Rights," and "Transparent Management" (Third and last phase of the Working Group's tasks: presentation and consideration of member states' proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G, GT/SIDH/INF. 48/11, December 6, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>; Proposals by the delegation of Chile on the subject of "Promotional Functions," "Precautionary Measures," "Friendly Settlements," "Procedural Matters in Processing Individual Cases and Petitions," and "Financing" (Third and last phase of the Working Group's tasks: presentation and consideration of member states' proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G, GT/SIDH/INF. 33/11, November 11, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>

83. Proposals by the delegation of Chile on the subject of "Promotional Functions," "Precautionary Measures," "Friendly Settlements," "Procedural Matters in Processing Individual Cases and Petitions," and "Financing" (Third and last phase of the Working Group's tasks: presentation and consideration of member states' proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G, GT/SIDH/INF. 33/11, November 11, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>

84. Report of the Working Group, p. 11 (subsection f).

Since the adoption of Article 25 of the 2009 Rules of Procedure, CEJIL has expressed concern over the delay that the request for information introduces into the processing of the measures, which should be expeditious. Indeed, in some cases the acts of harassment occurred precisely during the period when information was being requested of the state<sup>85</sup>. In other cases, the IACHR has been forced to grant precautionary measures without receiving information from the states, because of the state's refusal to provide it<sup>86</sup>.

Accordingly, a strict and automatic application of this rule without considering the context and the specific case could create a heavier burden for the requesters, and make the procedure for having them granted slower, on occasion heightening the risk to the requester, and thereby compromising the efficacy of the precautionary measure mechanism.

We are of the view that the requests for information from the states should be made granting time frames that are reasonable yet in line with the seriousness and urgency of the situation described. Once the state has been given the opportunity to submit information, the Commission should avoid granting extensions.

As regards the request for a qualified majority of the Commission for granting measures in those cases in which the Commission does not have information from the state, the Commission indicated in its reply to the Permanent Council that the decision regarding the provision, denial or lifting of measures "is adopted by absolute majority"<sup>87</sup>. We trust that the IACHR will adopt the guarantees necessary so that the procedure for adopting such measures will be the most efficient and agile possible, in accordance with the expeditious character of the protective proceedings.

In addition, as for the states' recommendation that a precautionary measure granted without first requesting information from the state be reviewed "as soon as possible in consultation with the State"<sup>88</sup>, we consider that this clarification is unnecessary, insofar as the states, under Article 25(7) of the Rules of Procedure, may submit a supported petition for the IACHR to set aside the measure at any time, which in practice would mean a review of that request. At any rate, a request of this nature must necessarily be a matter for consultation with both parties, not just the State.

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85. See, for example, request for precautionary measures from the IACHR by the Colectivo de Abogados José Alvear Restrepo on behalf of the next-of-kin in the Palace of Justice case v. Colombia, September 13, 2010. In that case, when it received the request, the Inter-American Commission requested information from the State pursuant to Article 25(5) of the Rules of Procedure, during which time one of the potential beneficiaries had to go into exile before receiving any response from the Commission in light of the imminent danger to his life and the lack of measures of protection.

86. See IACHR. PM 13/12 – Members of the Human Rights Lawyers Group, Guatemala. Available at: <http://www.oas.org/en/iachr/decisions/precautionary.asp>

87. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, para. 78.

88. Report of the Working Group, p. 11 (subsection e).



### **3. CRITERIA FOR GRANTING PRECAUTIONARY MEASURES: “SERIOUSNESS,” “URGENCY,” “CONTEXT,” AND “IMMINENCE OF HARM”**

The proposals made by the Working Group<sup>89</sup>, the states<sup>90</sup>, and the Inter-American Juridical Committee<sup>91</sup> agree on proposing that the Commission establish more precise criteria for granting precautionary measures. Some states and the Inter-American Juridical Committee are of the view that the criteria should be incorporated in the Commission’s Rules of Procedure<sup>92</sup>. The Working Group recommends defining “objective criteria or parameters for determining ‘serious and urgent situations’ and the imminence of the harm, taking into account the different risk levels”<sup>93</sup>.

By means of the 2009 reform to the Rules of Procedure the IACHR explicitly incorporated the general criteria it considers for granting measures, which include the seriousness and urgency of the situation, the context, irreparability, and the imminence of the harm<sup>94</sup>.

The Commission has also developed the content of these criteria in the Second Report on Human Rights Defenders (2011). It established the mechanisms it uses and the information it takes into account to consider and weigh whether a situation fits within those criteria<sup>95</sup>. In addition, the Commission emphasized that the analysis of the request for precautionary measures must be done “with due consideration of the particularities of each specific situation. The analysis cannot be subject to strict or generalized criteria, instead, it has to attend to the nature of the risk and of the damage that is to be prevented”<sup>96</sup>.

In line with these considerations, the IACHR has indicated that on weighing the “seriousness” of a request it takes into account its “contextual aspects,” for example “(a) the nature of the threats received (spoken, written, symbolic, etc.); (b) a history of acts of aggression against persons in similar situations; (c) any direct acts of aggression committed against the potential beneficiary; (d) an increase in the threats indicative of a

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89. Report of the Working Group, pp. 10 and 11.

90. Mexico, Costa Rica, and Colombia.

91. OAS Permanent Council, Inter-American Juridical Committee. “Strengthening the Inter-American System for the Protection and Promotion of Human Rights and Report on Strengthening the Inter-American System for the Protection and Promotion of Human Rights.” Available at: [http://www.oas.org/cji/CP-INF\\_6421-12\\_esp.pdf](http://www.oas.org/cji/CP-INF_6421-12_esp.pdf)

92. See: Presentation by the Delegation of Mexico on the topics “Challenges and Medium- and Long-Term objectives of the IAHRs” and “Precautionary Measures” (Working Group meeting of September 12, 2011), OEA/Ser.G GT/SIDH/INF.4/11, September 12, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>; and OAS Permanent Council, Inter-American Juridical Committee. “Strengthening the Inter-American System for the Protection and Promotion of Human Rights and Report on Strengthening the Inter-American System for the Protection and Promotion of Human Rights.” Available at: [http://www.oas.org/cji/CP-INF\\_6421-12\\_esp.pdf](http://www.oas.org/cji/CP-INF_6421-12_esp.pdf)

93. Report of the Working Group, pp. 10 and 11.

94. Article 25(4) of the IACHR’s Rules of Procedure.

95. IACHR. OEA/Ser.LV/II. Doc. 66. Second Report on the Situation of Human Rights Defenders, December 31, 2011, paras. 422-431. Available at: <http://www.oas.org/es/cidh/defensores/docs/pdf/defensores2011.pdf>.

96. *Id.*, para. 423.

need for preventive action, and (e) factors such as apology of and incitement to violence against a person or group of persons<sup>97</sup>.

As regards “urgency,” the IACHR clarifies that it corresponds to the imminence of the risk or threat, thus it requires an immediate response; in this respect, the IACHR “has considered elements such as: (a) the existence of cyclical threats and assaults, which strongly suggests the need to take immediate action; (b) the continuing nature of the threats and how close one follows upon the other; among others<sup>98</sup>.”

In addition, in evaluating these requirements, the IACHR indicates that it has also considered “information describing the events that form the basis for the request (telephone threats, written threats, assaults, acts of violence, accusations, ultimatums); the identity of the source of the threats (private parties, private parties with ties to the state, state agents, others); the complaints made to the authorities; the protective measures that the potential beneficiary has already received and information concerning their effectiveness; a description of the context, which is needed to assess the gravity of the threats; the chronology and proximity in time of the threats made; the identity of the persons affected and the degree of danger to them, or identification of the group to which they belong<sup>99</sup>.” Similarly, it has considered “factors related to the context in the country concerned” such as “(a) the existence of an armed conflict; (b) the existence of a state of emergency; (c) the efficacy of the judicial system and the severity of the problem of impunity; (d) indicia of discrimination against vulnerable groups, and (e) the control that the executive branch exercises over the other branches of government<sup>100</sup>.”

We therefore consider that the IACHR, in both its Rules of Procedure and in public documents, has made an effort to define the criteria that it considers when weighing requests for precautionary measures. As the IACHR itself indicated in the above-noted report, each specific situation has its particularities, accordingly it is not viable to establish a closed list of criteria for justifying whether granting measures is in order, insofar as it would not be possible to reflect the diversity of situations of risk that may give rise to them. In addition, the IACHR, like any other organ of protection, should have a sufficient level of discretion to be able to adapt its practice to different contexts and changing realities, thus strict regulation of the criteria would end up limiting the capacity of the Commission to respond adequately in such situations.

This does not mean that the Commission cannot develop other criteria or further define the already-existing ones in reports and public directives. Indeed, we are of the view that the IACHR could bear in mind additional considerations of context, such as the level of compliance of the state involved with other precautionary measures in similar situations.

In addition, the IACHR should draw more on other tools to consider the context of a given request, using the information gathered in on-site visits, thematic reports, and country reports, information collected by the rapporteurships, as well as the reports issued by United Nations agencies and national and international human rights organizations. We are of the view that at this time these sources are not explicitly incorporated into the decisions of the IACHR when it comes to granting the measures.

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97. *Id.*, para. 424.

98. *Id.*, para. 425.

99. *Id.*, para. 426.

100. *Id.*, para. 427.

#### **4. COMMUNICATION AND GROUNDING OF THE DECISIONS**

Another aspect discussed in depth by the states and adopted as a recommendation by the Working Group has to do with stating in more precise terms the legal and factual considerations that lead to a decision that the requirements for granting measures have been met<sup>101</sup>.

On this point, we agree with the states on the need for a stronger statement by the IACHR of the factors considered for granting or rejecting precautionary measures. Nonetheless, this consideration must not interfere with the expeditious nature of the procedure. Accordingly, a stronger statement of the considerations should not delay the granting of measures by making the decision technically more elaborate. In this sense, the IACHR must seek to strike a balance among transparency, legal certainty, and the principle of effectiveness such that the mechanism does not become illusory.

Accordingly, we do not agree with the recommendation of some states to establish a time frame for analyzing the request<sup>102</sup>. In our view, it is not necessary insofar as the precautionary measures mechanism is urgent by nature, and therefore the IACHR must rule on requests as soon as possible. In this respect, we believe that the request and exchange of information between the parties that the IACHR engages in should be reduced to the essential minimum for the Commission to obtain the information needed to make a decision.

#### **5. MEASURES TO BE ADOPTED**

This point must be addressed in view of some of the positions put forth by the member states regarding the measures granted by the IACHR and the differentiated treatment they should be given.

As regards the measures of protection, different types of measures can be distinguished depending on what is needed to avoid irreparable harm to a right protected by the fundamental instruments of the Inter-American system.

For example, measures to safeguard life and integrity include those we call soft measures of protection<sup>103</sup> and hard measures of protec-

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101. Report on the Working Group, p. 11 (subsection g).

102. With respect to this proposal, see Statement by the Delegation of Brazil on the topics “Challenges and Medium- and Long-term objectives of the IACHR” and “Precautionary Measures” (Working Group meeting of September 12, 2011). OEA/Ser.G, GT/SIDH/INF. 5/11, September 16, 2011; Proposals by the Delegation of Brazil on the topics “Grounding of Decisions,” “Processing of Petitions, Cases and Precautionary Measures,” “Deadlines for States,” “Friendly Settlement Mechanism,” “Promotion of Human Rights,” and “Transparent Management” (Third and last phase of the Working Group’s tasks: presentation and consideration of member states’ proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G, GT/SIDH/INF. 48/11, December 6, 2011. Both available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>;

103. For example, public pronouncements in support of the work of the beneficiaries, institutional visits by high-level state officials, mechanisms for community protection, measures of protection for the families, psychosocial assistance for the beneficiary, providing emergency numbers, preparing emergency plans and security protocols, among others.

tion<sup>104</sup>, as well as investigating and imposing sanctions for the acts that gave rise to the measure<sup>105</sup> for the purpose of determining the appropriate treatment that should be given to each situation, considering its particular characteristics.

We consider that such measures are more or less important for deactivating the risk depending on each case. In some contexts hard measures of protection may not suffice to deactivate the risk, and, to the contrary, political measures may have a greater effect in terms of protection for the beneficiaries. For example, in contexts in which the beneficiaries have been publicly stigmatized (the case of human rights defenders labeled terrorists, or environmentalists stigmatized for holding up the country's development), the recognition by the Government in question would have a greater positive impact than merely providing them with a police escort.

This is why one should not accept the argument of some states according to which once hard measures of protection are implemented precautionary measures should be lifted because the risk to the life and integrity of the beneficiaries has disappeared.

Moreover, the factual reality faced by the petitioners for precautionary measures in many cases overtakes the protection granted. For example, "police protection may at times be problematic for the beneficiaries, especially when the imminent risk that gave rise to the measures was brought on by police forces or other state agencies"<sup>106</sup>. This happened in the precautionary measures granted by the IACHR after the coup d'état in Honduras, for many of the beneficiaries had no expectation that the precautionary measure would entail police protection, and so refused it<sup>107</sup>.

As we have already noted above, collective measures may require particular needs to be implemented, similar to measures with respect to the right to health, the superior interest of children, and others<sup>108</sup>.

Considering such situations, we are of the view that it is essential that the measures be adopted and implemented in a manner agreed upon and coordinated with the beneficiaries in all cases in order for the protection to be truly effective.

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104. For example, providing bodyguards and drivers who are persons of trust; unarmed security personnel, if that is the choice of the persons protected; personal or proprietary alarms; means of communication (telephones, radio systems, satellite phones, Internet access, etc.); safe means of transport; armoring the headquarters of the organization or home; surveillance equipment; among others.

105. Criminal investigation, disciplinary measures against public officials, etc.

106. González, Felipe. "Las Medidas Urgentes en el Sistema Interamericano de Derechos Humanos", in *Sur Revista Internacional de Derechos Humanos*, Volume 7, Number 13, December 2010, p. 64.

107. *Id.*

108. See for example: PM 29-01 Jorge Odir Miranda Cortez and others vs. El Salvador, in which the IACHR recommended precautionary measures on behalf of Mr. Jorge Odir and 26 other persons to protect their rights to life and health, as they needed attention from State institution to gain access to treatment for HIV. Similarly, PM Oroya Community – Perú, 2007, in which the IACHR issued precautionary measures on behalf of 65 residents of the city of La Oroya in Perú. The beneficiaries suffered from a series of health problems due to contamination in the community of La Oroya, caused by the metallurgical companies located there. A series of other measures were issued with respect to detention conditions for children and adolescents (FEBEM – Brasil) and persons with mental disabilities, patients of a neuropsychiatric hospital (Paraguay), amongst others.

## **6. IMPLEMENTATION AND DURATION OF PRECAUTIONARY MEASURES**

Among the suggestions made by the Working Group to “reinforce the temporary nature of the measures requested” is the establishment of a work plan for periodic review of the precautionary measures in force following a regular timetable<sup>109</sup>. Another proposal, along the same lines and made by the Inter-American Juridical Committee, was to establish “a mechanism for periodic follow-up on the precautionary measures in effect, with the participation of the beneficiary, the requester and the State, to collaborate in carrying them out and determining the need to maintain or eventually suspend them”<sup>110</sup>.

Following are our observations in this respect.

### **a. Duration of the measures, establishing intervals for review**

While we recognize that precautionary measures are by their nature temporary, we believe that imposing a set duration would be contrary to the objective the measures seek to attain, i.e. to prevent irreparable harm in serious and urgent situations. In addition, it should be noted that there are circumstances that justify extending the time of certain precautionary measures, many of which depend on the State in question responding appropriately. One example of this is the failure to adopt structural measures to favor vulnerable groups, particularly with respect to those whose situation is already known to the state; another example has to do with the adequate and effective investigation into and punishment for the acts that gave rise to the request for precautionary measures.

Accordingly, the duration of precautionary measures as well as their subsequent lifting should be subject to the cessation of the source of the imminent risk of irreparable harm that justified the request for the measure, and its adoption.

In our view, the same criterion applies to the establishment of intervals for review. We believe that subjecting the precautionary measures mechanism to a review by the Commission in each period of sessions may prove futile, in addition to illusory, insofar as the IACHR at present does not have the resources necessary for performing this task adequately, nor with respect to all the measures it supervises. Finally, the constant possibility of a review of the measures could have an effect on the personal integrity of the beneficiaries, who would experience a great uncertainty with respect to the availability of protection when it becomes necessary.

As we noted above, in application of Article 25(7) of the IACHR’s Rules of Procedure the states can make a well-founded request that the measures be lifted when they have a basis for arguing that they are no longer necessary.

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109. Report of the Working Group, p. 11 (subsection d).

110. Inter-American Juridical Committee. CJI/doc.400/12 rev. 3. *Strengthening the Inter-American System for the Protection and Promotion of Human Rights*. March 9, 2012, p. 11, subsection f.

## **b. Establishment of timetables and deadlines**

We are of the view that having the parties draw up timetables, with the assistance of the IACHR, establishing deadlines for the states to comply with some specific measures, could prove most useful for monitoring them. At the same time, one should recall that given the nature of the protection mechanism certain measures must be implemented immediately to prevent the consummation of violations.

## **c. Monitoring**

We believe that monitoring the measures is an essential part of the mechanism, as it is the stage in which the Commission must supervise whether the measures are being implemented effectively.

The monitoring the IACHR currently does of precautionary measures is similar to its monitoring of compliance with the recommendations of the merits reports. It takes place through written communications among the Commission, the beneficiaries, and the respective state, and by means of hearings and working meetings<sup>111</sup>.

In this respect, the IACHR has noted: "The information supplied by both parties is to be substantive enough to enable the IACHR to assess whether the measures should remain in effect and ascertain the beneficiaries' current situation." And it "is troubled by the fact that on occasion, the reporting requirements are not satisfied by either the States or the beneficiaries' representatives within the established timeframe, which makes it difficult for the IACHR to keep track of the situation and, in particular, to assess how effective and relevant the precautionary measures are"<sup>112</sup>.

In addition, we are of the view that in order to increase the effectiveness of the monitoring mechanisms the Commission should make greater use of its other competences in relation to precautionary measures (for example, on making visits to the countries it should bring a list of measures of protection being monitored and request specific information from the state to verify the situation *in situ*); in relation to the processing of cases; granting a larger number of hearings and working meetings to monitor the implementation of measures; putting out press releases; and including the serious cases of failure to comply with precautionary measures in Chapter IV of its Annual Report.

Furthermore, both the Commission and the Court should establish substantive, procedural, and political consequences for the states for failing to implement, in full or in part, the measures of protection ordered. In this regard, one should establish aggravated responsibility for the states when they have failed to carry out the measures of protection issued by the organs of the system.

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111. In reality, the convening of hearings is less common than working meetings in the case of precautionary measures. For example, the Commission has held several public hearings for following up on the precautionary measures issued with respect to the persons deprived of liberty by the United States in Guantánamo (Felipe González, "Las Medidas Urgentes en el Sistema Interamericano de Derechos Humanos," in *Sur Revista Internacional de Derechos Humanos*, Volume 7, Number 13, December 2010, p. 65).

112. IACHR, Second Report on the Situation of Human Rights Defenders, *supra* n. 36, para. 436.

In this regard, given a violation of the rights of a person with protective measures, the state violates not only the substantive right to life, integrity, and others, but also the right to petition for the protection offered by the Inter-American system through its system of precautionary measures (Article 41 of the American Convention) and the system of individual petitions (established at Article 44 of the American Convention)<sup>113</sup>. Accordingly, in the provisional measures referring to *Eloisa Barrios et al.*, then-Judge Antonio CançadoTrindadedenoted that there are obligations that emanate from provisional measures of protection *per se*, as they constitute a “legal rule endowed with its own autonomy”;and the failure to comply with them gives rise to state responsibility, without prejudice to the examination and resolution of the case on the merits<sup>114</sup>. In its recent case-law on provisional measures the Inter American Court has mentioned that the orders emanating from Article 63(2) of the Convention “imply a special duty to protect the beneficiaries of the measures, insofar as they are in force, and any breach thereto may trigger international responsibility of the State”<sup>115</sup>.

In the same vein, situations where violations are consummated in which there is no case before the Inter-American system should be addressed by the Commission in the context of the individual petitions system and accorded priority treatment.

We are also of the view that the Commission should consider including a state in Chapter IV of its annual report, or other measures that will highlight noncompliance, when it displays a systematic failure to comply, or when threats are carried out.

Lastly, we propose that the IACHR engage in more coordination with other international organs regarding compliance with precautionary measures, and its decisions in general. In this sense, the regional and country offices of the United Nations High Commissioner, as well as others, could be key actors in monitoring the effective compliance with these measures.

In conclusion, CEJIL recommends a more active monitoring role for the IACHR, making use of all the tools the Inter-American system has, actively assessing the degree of compliance by the States so that monitoring is not reduced to a mere exchange of information between the parties.

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113. See, along similar lines, European Court of Human Rights. *Mamatkulov and Askarov v. Turkey*. Judgment of February 4, 2005. Paras. 108, 118 and 128-129.

114. See, I/A Court H.R., *Eloisa Barrios et al. v. Venezuela*, Order on provisional measures of June 29, 2005, opinion of Judge Cançado Trindade, paras. 7 and 8.

115. I/A Court H.R., *Matter of 19 Tradesmen v. Colombia*. Provisional Measures. Order of July 8, 2009. para. 90; I/A Court H.R., *Case of Perozo et al.* Judgment of January 28, 2009. para. 70; I/A Court H.R., *Matter of the Communities of Jiguamiandó and Curbaradó*. Provisional Measures. Order of the Court of February 7, 2006, considering paragraph 7, I/A Court H.R., *Matter of the Mendoza Prisons. Provisional Measures*. Order of the Court of March 30, 2006, considering paragraph 10; I/A Court H.R., *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, paras. 196 to 200.

## **7. ON THE TERMINATION OR TRANSFORMATION OF PRECAUTIONARY MEASURES**

On lifting precautionary measures, the member states and the Working Group agreed to ask the IACHR to establish more objective criteria and suggested that one should take into account as considerations for lifting the measures the loss of their purpose<sup>116</sup>, loss of interest of the beneficiaries, force majeure or impossibility of performance, “the beneficiaries’ refusal to accept precautionary measures, their misuse thereof, or a change in the circumstances that prompted them shall be cause for lifting them”<sup>117</sup>, and lifting measures that have been rejected by the I/A Court H.R.<sup>118</sup>.

In this respect, we are of the view that once precautionary measures have been granted, the main cause for lifting them should be that the measures have ceased to serve their purpose, i.e. when the serious and urgent situation that gave rise to the imminent risk of harm to rights of the person or group has ceased to exist.

The beneficiaries’ lack of interest cannot be presumed merely because they have refused to receive a particular type of measure, for example when they refuse to receive hard measures of protection by official forces when they consider those very forces to be the source of risk. Nor should it be presumed that the lack of information coming in to the IACHR, pursuant to Article 25(8) of the Rules of Procedure, means that the beneficiaries have lost interest. We consider that in these cases the Commission should not automatically lift the measures without first assessing the context in which the beneficiaries and/or their representatives find themselves, and the reasons why they have not given the corresponding information. The analysis must be done on a case-by-case basis, for prematurely lifting the measures may lead to a resurgence of the risk or the consummation of the violation.

As regards the loss of the purpose of the precautionary measures, it must be assessed on a case-by-case basis, and always providing for the possibility to seek them once again, for there have been situations in which the risk that led to the measures has arisen once again after and in the wake of the state’s failure to comply with them<sup>119</sup>.

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116. Brazil defends the notion that if the state shows that there are domestic mechanisms to resolve the situation, the precautionary measures would cease to have a purpose, contrary to what we have already argued with respect to the exhaustion of domestic remedies. See: Proposals by the Delegation of Brazil on the topics “Grounding of Decisions,” “Processing of Petitions, Cases and Precautionary Measures,” “Deadlines for States,” “Friendly Settlement Mechanism,” “Promotion of Human Rights,” and “Transparent Management” (Third and last phase of the Working Group’s tasks: presentation and consideration of member states’ proposals to be forwarded for consideration by the Permanent Council). OEA/Ser.G, GT/SIDH/INF. 48/11, December 6, 2011. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>; and Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for Consideration by the Permanent Council, GT/SIDH 13/11 rev. 2, p. 10. Available at: <http://www.oas.org/consejo/sp/grupostrabajo/Reflexion%20sobre%20Fortalecimiento.asp>, pp. 10 and 11.

117. Report of the Working Group, p. 11 (subsection k).

118. *Id.*, section I.

119. See for example the case of Chinese citizen Wong Ho Wing, in prison in Peru, who filed a claim with the Commission for violations of due process and requested a precautionary measure alleging the imminence of his extradition for alleged crimes with respect to which the death penalty could be applied. The Commission granted



Finally, regarding the proposal that the precautionary measures should not be issued in cases where the Court refused to issue provisional measures, we coincide with the Commission in that the rejection of protective measures, whether by the Commission or by the Court, does not preclude its evaluation and re-evaluation and its issuance if the requirements have been met. Similarly, as the Commission indicates, it “has competence independent of that of the I/A Court H.R. in the exercise of its competence to oversee compliance by the States with their international obligations”<sup>120</sup> and the standards applied by these organs to evaluate the request for measures are different<sup>121</sup>.

## **8. THE MAJOR CONSIDERATION ABSENT FROM THIS DISCUSSION: THE RESPONSIBILITY OF STATES IN RELATION TO PRECAUTIONARY MEASURES**

We note with concern that none of the recommendations made by the Working Group to the states is aimed at improving the level of compliance with the measures, beyond “seeking” to exchange best practices among themselves<sup>122</sup>, even though the success of the precautionary measures (which would translate into the measure being lifted due to the effective deactivation of the source of risk and consequent disappearance of the purpose) depends fundamentally on their adequate implementation by the state in question.

In this respect, we consider that all the states should establish national mechanisms for implementing precautionary and provisional measures, designate the authorities responsible for doing so, generate inter-institutional coordinating mechanisms, have machinery for reviewing and improving the measures implemented, guarantee ongoing coordination with the beneficiaries, and ensure the resources necessary for the adequate operation of these mechanisms. This fundamental task is for the states, not the Commission.

While we support the Commission being able to create and disseminate manuals and practice guides on the precautionary measures mechanism, such an initiative necessarily has to be tied to a substantial increase in the resources provided by the states to the IACHR for adequately carrying out that task.

Furthermore, we are very concerned to see that while the question of precautionary measures is one of the most contested issues with the states, and considering the large number of requests that reach the IACHR, the Protection Group entrusted with receiving, analyzing, processing, and following up on the requests for precautionary measures has scant human and material resources.

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the precautionary measures in March 2009 and subsequently made a request for provisional measures to the Court. The Court issued those measures in May 2010, and ordered them lifted in October 2011, as it considered the danger of extradition to have ended; nonetheless, as new facts arose that could have led to the extradition of the Chinese citizen, the Court at the request of the Commission once again ordered provisional measures in June 2012. I/A Court H.R. Provisional Measures in *Matter of Wong Ho Wing regarding Peru*, June 26, 2012.

120. See, Reply of the Inter-American Commission on Human Rights to the Permanent Council, October 23, 2012, par. 98.

121. In this regard, while Article 63 of the ACHR requires situations of “extreme gravity and urgency” to issue provisional measures, Article 25 of the Rules of Procedure of the IACHR only requires “gravity and urgency”.

122. Report of the Working Group, p. 12 (section B, subsection a).

Many of the proposals made by the states and civil society to improve the processing of precautionary measures and their effectiveness would clearly require a significant increase in the resources available to this Unit in the Commission's Secretariat. Therefore, we understand that the Commission's real capacity to implement some of the reforms suggested in this document will largely depend on an increase in financing for the Inter-American Commission. Once again, that task corresponds primarily to the states, and also to the General Secretariat of the OAS<sup>123</sup>.

## **E. CONSIDERATIONS ABOUT PROMOTION TASKS**

### **1. INTRODUCTION**

In its report, the Working Group suggested to the Inter-American Commission on Human Rights that it "achieve a better balance between promotion and protection of all human rights"<sup>124</sup>. To that end, it made the following recommendations:

#### **A. To the Inter-American Commission on Human Rights:**

- a. Continue to engage in human rights promotion activities in coordination with interested states.
- b. Collaborate with states in strengthening their domestic law enforcement and justice administration institutions or authorities, including in the training of their officials.
- c. Contribute to the strengthening of national human rights protection institutions through cooperation agreements with them.
- d. Disseminate more widely the promotion work it carries out.
- e. Identify and group for each state the most recurring problems in the petitions submitted, in order to cooperate with national authorities in dealing with them, seeking comprehensive and lasting solutions.
- f. Provide advisory services to the states for compliance with the IACHR's recommendations.
- g. Introduce a code of conduct to govern the management of IACHR rapporteurships in order to ensure the requisite coordination between those mechanisms and states.

#### **B. To the member states:**

- a. In collaboration with the IACHR, encourage greater cooperation and exchange of best practices among states, after identifying each other's areas of strength and opportunity<sup>125</sup>.

In addition, in the section "Challenges and medium- and long-term objectives of the IACHR" the Working Group recommended to the IACHR, *inter alia*, that it "Actively incorporate as a priority in its strategies and work on human rights promotion, the signing of, ratification of, and accession to the American Convention on Human Rights and all other Inter-American human rights instruments in those countries that have not yet done so"<sup>126</sup>.

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123. Report of the Working Group, p. 18 (section C, subsection a).

124. Permanent Council.Special Working Group to Reflect on the Workings of the Inter-American Commission with a view to Strengthening the Inter-American Human Rights System (hereinafter "Report of the Working Group"). Doc. OEA/Ser.G GT/SIDH-13/11 rev. 2, approved by the Permanent Council January 25,2012, p. 9.

125. Id., section 6:"Promotion of human rights."

126. Id., section 1:"Challenges and medium- and long-term objectives of the IACHR," recommendation b.

No doubt, both the promotion and protection of human rights are part of the broad mandate of the IACHR and, in turn, are fundamental for guaranteeing effective observance of human rights. Even so, they do not have the same impact or act analogously in all circumstances. Each of these aspects has its own scope of action and they require differentiated capabilities and resources, even though they are mutually reinforcing and spur one another on.

In addition, the work of the IACHR is clearly expressed in the instruments that established it, and, therefore, the recommendations set forth in the report of the Working Group have to be considered in light of that mandate; the current context in the region; and the resources of the IACHR.

Given that the Working Group made several recommendations, the last section of the document will include some proposals related to them.

## **2. THE MANDATE GRANTED BY THE CHARTER OF THE OAS AND THE AMERICAN CONVENTION**

The IACHR derives its mandate from the Charter of the OAS and the American Convention on Human Rights and other human rights treaties adopted in the OAS<sup>127</sup>.

Article 41 of the American Convention provides: “The main function of the Commission shall be to promote respect for and defense of human rights.” To that end, that provision confers on it the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

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127. Articles 53(e) and 106 of the Charter of the OAS.

Other Inter-American treaties designate the IACHR as the organ entrusted with processing petitions<sup>128</sup> and urgent measures of protection<sup>129</sup>; and establish that the IACHR shall be informed by the state parties “of any legislative, judicial, administrative, or other measures they adopt” as per the Inter-American Convention to Prevent and Punish Torture (Article 17, first paragraph) and the Protocol of San Salvador (Article 19(2))<sup>130</sup>.

By preparing publications and reports, the IACHR has established standards and indicators for various rights in an effort that is additional and subsidiary to the assessments based on the system of individual petitions. One example is to be found in the “Guidelines for the Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights”<sup>131</sup>, as a contribution to establishing clearer criteria for the states based on the “Standards for the Preparation of Periodic Reports pursuant to [Article 19 of] the Protocol of San Salvador.”

A careful review reveals that most of the mandates granted to the IACHR give it the power to oversee, monitor, and review the actions of the member states and to recommend that they take actions to comply with the obligations that derive from the instruments to which each is a party.

### **3. THE CONSIDERATIONS SET FORTH IN THE REPORTS BY THE ORGANS OF THE OAS**

It has been recognized that the protection activities the Inter-American system carries out are, at the same time, a way of promoting human rights. The Inter-American Juridical Committee noted in its study of the strengthening of the Inter-American system:

We can assert that when the IACHR works on behalf of protecting and defending human rights, this is also . . . promoting compliance with such rights through awareness of their content and scope<sup>132</sup>.

Both the Working Group and the Inter-American Juridical Committee consider that the tasks of promoting and protecting human rights are not mutually exclusive but mutually reinforcing. The Working Group noted that promotion and protection “are complementary and equally indispensable, so it is desirable to maintain the best possible balance”<sup>133</sup>, while the Inter-American Juridical Committee indicated that “the activities meant to promote human rights and those meant to protect and defend them are not in contradiction with, but rather complement one another”<sup>134</sup>.

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128. See Convention of Belém do Pará, Protocol of San Salvador, Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Forced Disappearance of Persons.

129. See Article XIV, Inter-American Convention on Forced Disappearance of Persons.

130. The provision provides that since the states must submit the reports to the General Assembly, the Secretary General of the OAS “shall send a copy of such reports” to the IACHR.

131. IACHR. Guidelines for the Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. OEA/Ser.L/V/II.132 Doc 14, July 19, 2008.

132. Inter-American Juridical Committee. Strengthening the Inter-American System for the Protection and Promotion of Human Rights (hereinafter, “Report of the CJI”). CJI/RES. 192 (LXXX-O/12), p. 12.

133. See Report of the Working Group, *Op. cit.*, p. 15.

134. See Report of the CJI, *Op. cit.*, p. 12.

In its report the Inter-American Juridical Committee suggested, *inter alia*, that a working group be established within the IACHR charged with “designing, elaborating, funding and carrying out projects meant to cooperate with and strengthen human rights in member countries”<sup>135</sup>; that a “dialogue mechanism” be put in place with the member states<sup>136</sup>; and that the IACHR draw up “guides for the States on the best practices” for implementing their human rights obligations<sup>137</sup>.

While it is true that neither the report of the Secretary General nor the initial Position Document of the IACHR make any mention of the issue, it is evident that both had previously stated positions in this respect. In that regard, Mr. José Miguel Insulza had stated as follows:

... [S]trengthening democracy in the region calls for a human rights system that not only monitors the behavior of countries in this area and gathers evidence about the problems that still remain, but one that will also promote and advise the states in terms of enacting rules and formulating concrete policies; and provide them with advice for solving problems involving human rights issues. We need a system that balances jurisdictional action with human rights promotion, like we do with other systems of verification and support (elections, corruption, drugs, etc.) – one that combines oversight with technical assistance<sup>138</sup>.

On other occasions it has even been suggested that the IACHR could also advise private entities, such as oil or mining companies, in relation to their human rights obligations. Under international law, the interlocutor of the IACHR should be the state (with its various institutions), which does not prevent other mechanisms from having the possibility of assuming an advisory or oversight role with respect to the actions of private companies.

In its 2011-2015 Strategic Plan the IACHR incorporated the issues related to promotion in various sections<sup>139</sup>, yet also had another section for “Other activities to promote human rights”<sup>140</sup> and recalled the importance of resources for ensuring the effectiveness of the Inter-American system<sup>141</sup>.

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135. See Report of the CJI. *Op. cit.*, p. 13, section (a).

136. *Id.*, p. 13, section (b).

137. *Id.*, p. 13, section (c).

138. Permanent Council. Update of the Secretary General of the OAS Reports on the Inter-American Democratic Charter Submitted to the Permanent Council in April 2007 and May 2010, Section 5: “Human Rights”. Doc OEA/Ser.GCP/INF. 6222/11, April 11, 2011, p. 11. Available at: <http://scm.oas.org/pdfs/2011/CP26026S.pdf>.

139. The IACHR has included advisory services for the political organs of the OAS (Plan of Action 1.3); identifying standards and producing manuals, studies, and protocols (Plan of Action 1.4); working visits by country rapporteurs (Plan of Action 3.2); country reports (Plan of Action 3.4); and thematic approaches (Plans of Action 4 and 5). See IACHR. Strategic Plan 2011-2015. Document available at: <http://scm.oas.org/pdfs/2011/CP26757S-1.pdf>

140. *Id.*, Executive Summary, Program 6: “Other promotion activities,” p. 12. Document available at: <http://scm.oas.org/pdfs/2011/CP26757S-1.pdf>

141. According to the IACHR: “The human rights system’s efficiency is a direct function of the availability of sufficient funds to be able to operate to meet its users’ demands. The capacity of the Inter-American Commission on Human Rights to carry out its broad and diverse mandate depends upon a commitment in terms of assigned financial and human resources to maintain the organization and structures that are necessary to meet the challenges that it will face.” IACHR. Strategic Plan 2011-2015. *Op. cit.* Executive Summary, section III: “The Challenges the Commission Faces in 2011-2015,” p. 4. *Id.*, Executive Summary, Program 6: “Other promotion activities,” p. 12. Document available at: <http://scm.oas.org/pdfs/2011/CP26757S-1.pdf>

In addition, the IACHR has stated its position on this issue in the response it recently sent the Permanent Council of the OAS<sup>142</sup> in which it reiterated what the Strategic Plan says about promotion activities being subject to obtaining resources<sup>143</sup>.

As regards the recommendation of the Working Group on “promotion activities in coordination with interested states,” the IACHR proposes the following:

- The IACHR “will do its utmost to ... expand cooperation projects in partnership with the States and their institutions” (para. 154), which implies –among other things– boosting “dialogue with the member states” (para. 155).
- It will continue to seek resources to guarantee fellowships, which are useful for training attorneys (para. 156); it will continue to develop the internship program (para. 158); and it “will continue to play an active part in training programs throughout the Hemisphere,” in particular in programs for training administration of justice and law enforcement officials (paras. 159 and 173).
- “The IACHR will continue to organize in situ and working visits to member countries by its thematic and country rapporteurs” (para. 161) and will continue to publish thematic and country reports (para. 162)<sup>144</sup>.
- The Commission will carry out campaigns to disseminate the country reports (para. 164) and will seek to increase and deepen the activities for disseminating the thematic reports. A commitment has been made to seek “funds for organizing more numerous events at which to present the thematic reports and discuss their contents with stakeholders, in the hopes of presenting each thematic report in as many languages and member states as possible. The IACHR will also organize training seminars for government officials involved with the subject matter addressed in a particular report, in order to engage in dialogue regarding the contents and regarding implementation of the recommendations made therein” (para. 163 *in fine*).
- The IACHR will continue to produce various publications to promote the dissemination, knowledge, and workings of the Inter-American human rights system (para. 167).
- “... the IACHR will prepare practical guides and information brochures to systematize information and provide background on precautionary measure decisions and decisions regarding the admissibility of petitions. These new projects are additional to the one already [under] way aimed at producing an information brochure on friendly settlements.” (para. 168)
- “The IACHR will continue to organize and take part in exchanges, academic activities, and fact-finding visits with organs of a similar nature in the African, European, Asian, and universal systems.” (para. 170). It will also “strengthen coordination with OAS entities, whose mandates include activities involving the promotion of, and training in, human rights, such as the Inter-American Institute of Human Rights, the IIN, the Inter-American Commission of Women, and others.” (para. 172).

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142. IACHR.Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System (hereinafter, “Reply of the IACHR to the Permanent Council”), submitted October 23, 2012, to the Permanent Council of the Organization of American States (OAS). See, in particular, chapter VI, “Promotion of Human Rights” (pp. 42 to 48).

143. *Id.*, para. 175.

144. In that regards, the IACHR clarified as follows: “The reports provide an opportunity to highlight human rights topics and issues in a country or in the region as a whole, to compile and disseminate best practices, to establish and develop human rights standards, and to issue both general and specific recommendations to the member states in a constructive spirit of cooperation. The reports are designed to help the authorities craft and implement effective responses to the human rights challenges they face.” *Id.*, para. 162.

- The Commission will continue making its historical archives more available (para. 169) and offering advisory services to the political organs of the OAS (para. 171).

The Commission also stated that it “is ready to enter into cooperation agreements on the subject with the member states”<sup>145</sup>. In particular, it will emphasize cooperation with national human rights institutions “with a view to designing and executing actions to strengthen national human rights implementation capabilities.” (para. 177)

In addition to the foregoing, the IACHR, based on the recommendation of the Working Group regarding the importance of “... more widely [disseminating] the promotion work it carries out,” has undertaken to publish periodically an electronic newsletter to report on the activities carried out in the respective period<sup>146</sup>, and has indicated that it will include those activities in a section of its annual report, and seek funds to have more virtual tools to help expand dissemination.

One very important aspect of the document is that while the IACHR recognizes the importance of identifying patterns and issues that have the greatest impact (para. 181), it does not put forth any specific proposal.

Finally, in relation to compliance with its recommendations, the Commission “is more than willing to provide States with the technical advice they request” (para. 184) and undertakes as follows:

- The IACHR will “look for funding to prepare a study on the status of compliance with its decisions.” (para. 182)
- Agreements on compliance with recommendations will be promoted that include timetables for work and for working visits, recognizing that “meetings with government officials in charge of implementing the recommendations have proved to be a highly effective way of advising States.” (para. 183)

#### **4. THE NEED TO PRIORITIZE THE TASKS ENTAILED IN PROMOTION AND PROTECTION**

The protection work done by the institutions of the Inter-American system through the case system is fundamental for ensuring respect for rights in the hemisphere. The Inter-American system has the distinct feature of being able to provide solutions in the nature of binding decisions. This makes it possible to resolve the human rights violations that are not heard and that were put forth by victims, and to respond to structural problems through measures of non-repetition and satisfaction that are usually issued by the organs of the Inter-American system in their decisions. This working tool distinguishes it from other regional or international mechanisms for the promotion or protection of human rights. This strength –subsidiary in nature– is not found in any other international human rights body that supervises the human rights situation in the hemisphere.

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145. *Id.*, section (b), para.175 *in fine*.

146. The information that document will contain is on the “visits to member states, participation in meetings of OAS political bodies, participation in seminars and training workshops, the publication of case reports, summaries of thematic and country reports, decisions to grant precautionary measures, and other activities.” *Id.*, para.179 *in fine*.

Similarly, the urgent protection procedures (precautionary and provisional measures) are especially useful for protecting the rights of thousands of persons and communities. The good offices of other agencies, diplomatic efforts, trainings and similar activities do not have the same direct impact of preventing the risk of a violation of rights as a specific order of protection issued by the IAHCR or by the I/A Court H.R. which, apart from being binding on the states, contains detailed elements of the protection that should be provided, in addition to consistent and detailed monitoring and updating by the organ that has issued the protective measure.

Recognizing this distinct feature of the Inter-American system, and in particular of the IACHR, we are of the view that it is important that its promotion work not be to the detriment of its capacity to respond to human rights violations in the hemisphere, but rather it should be very clearly selected to complement the efforts to mount a general response to the grave deficits that persist in the Americas in respect of human rights and democracy. We will expand upon this idea below.

**a. The complementary or subsidiary nature of the organs of the Inter-American system and the hemispheric context**

The Inter-American system, like any other international oversight system, is subsidiary to the domestic systems of protection<sup>147</sup>. Bearing that in mind, one mustn't lose sight of the fact that the figures that the IACHR includes in its annual reports on the individual petitions presented to it continue to be considerable and reflect the current issues faced by the countries or the region, which have been documented by civil society organizations, ombudspersons' offices, and other international organizations. They show that while under democratic governments many states have taken significant steps to ensure the enjoyment of rights, major debts persist in relation to equality, the rule of law, and security and protection in the face of violence.

It is for that reason that until such time as many of the states of the Americas assume responsibility, have the will or capacity to fight impunity, eliminate corruption, advance in a profound agenda to guarantee equality and plurality, and ultimately ensure the better operation of their institutions, the Inter-American system will continue to be a last resort for many persons who have suffered human rights violations and have not obtained an adequate response from their authorities.

In light of the foregoing, the pronouncement by the Secretary General does not necessarily address the current context in various countries<sup>148</sup>.

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147. That principle is established in the Preamble to the American Convention and has been embraced as of the first judgments of the Inter-American Court. This principle is also upheld in the Report of the Working Group, which noted: "the complementary or supplementary role of the IAHRs, as applicable, in conjunction with the national efforts. The Working Group held that linkage and cooperation among all stakeholders of the IAHRs is essential to move toward a true culture of respect of basic rights in the region." See Report of the Working Group, *Op. cit.*, section on "Introduction," p. 7 *in fine*, para. 2.

148. According to Mr. Insulza, "When the IACHR began operating, this was considered a basic purpose, reiterated in the Charter and in the Convention. But there were needs stemming from the many dictatorships and internal conflicts, repeated violations that needed addressing. Hence advocacy and its jurisdictional function became the Commission's primary duty. Although the Country Reports and the creation of Rapporteurships on critical issues have increased the functions of the Commission in a positive way, the promotion function needs to be more properly fulfilled and, more so, the advisory role that democratic governments need in order to address issues that are sensitive from a human rights standpoint, with the support that the recognized technical capacity of the OAS in this area can afford them." This position put



## **b. The workload of the IACHR**

In 2011, in its work of protecting human rights through the case system, the Commission received more than 1,600 complaints, adopted 67 reports on admissibility, 11 reports on inadmissibility, eight on friendly settlement, 54 decisions to archive, and 25 reports on the merits; it published five reports on the merits, submitted 23 cases to the Inter-American Court of Human Rights, made decisions with respect to more than 400 requests for precautionary measures, held 91 hearings and 58 working meetings<sup>149</sup>. During the same period, the I/A Court H.R. issued 18 judgments, 36 orders of provisional measures, 31 resolutions on supervision of judgments, and one resolution that was the interpretation of a judgment. It also held 28 hearings (24 public, four private)<sup>150</sup>.

Nonetheless, these efforts do not appear to be sufficient in comparison to the enormous demand from victims. Accordingly, as of July 31, 2012: “the IACHR was responsible for undertaking the initial study of approximately 7,200 petitions; issuing pronouncements on admissibility in respect of 1,150 petitions, and on the merits in 530 cases, as well as following up on the recommendations contained in 182 reports on the merits and the agreements signed by the states and petitioners corresponding to 100 friendly settlement reports”<sup>151</sup>. This very limited capacity for a timely response through the case system is largely explained by the inadequate level of resources allocated to it and by other matters that are entrusted to it<sup>152</sup>. In effect, one of the harshest criticisms of the Working Group and of different states regarding

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forth by the Secretary General even before the Working Group was established does not correspond to the reality the hemisphere faces, in which grave human rights violations continue, considering not only civil and political rights, but also economic, social, and cultural rights, and the weakness of the institutions, which is reflected, among other serious matters, in coups d'état, institutional ruptures, and grave erosion of the rule of law, with novel features. In the face of this reality one must note that even living in democracy – and precisely for that reason – the work of protecting human rights continues to be necessary, valuable, and irreplaceable.

149. IACHR. Position paper on the process of Strengthening the Inter-American Human Rights Protection System. OEA/Ser.L/V/II. Doc. 68.8 April 2012, paragraph 9.

150. I/A Court H.R. 2011 Annual Report. Available at: <http://www.corteidh.or.cr/docs/informes/espanol.pdf>

151. Speech by the President of the IACHR, Commissioner José de Jesús Orozco Henríquez, San José, Costa Rica, 11 September 2012.

152. In its Strategic Plan 2011-2015 the IACHR set out the work load it has pending, spelling out the following:

In 2010, the Commission received 1,598 complaints and 380 requests seeking precautionary measures; by year's end, it had some 1,600 petitions and cases in process (over 1,100 in the admissibility phase and 500 in the merits phase). At the same time, approximately 500 requests were received asking for hearings and working meetings; the Commission was able to agree to only 88 hearings and 47 working meetings.

To the activities involved in processing individual cases and urgent measures of protection must be added the mandates entrusted by the General Assembly in specific resolutions. In 2009 alone, the General Assembly called upon the Commission to devote special attention to migrant workers and their families, ... human rights defenders, ... persons deprived of liberty, ... the elderly ... and the issues of human rights, sexual orientation and gender identity.... It has also been charged with matters of particular concern, such as racism, discrimination and intolerance, ... freedom of expression and access to information, ... and protection of human rights in the fight against terrorism... The Assembly also instructed the Commission to prepare special reports and studies on these and other new issues, such as the development of the right to know the truth in the hemisphere ... and the enforcement of the Protocol of San Salvador on economic, social and cultural rights, where it asked the Commission to propose benchmarks... These efforts are occurring against the backdrop of political and juridical situations that, by their nature, call for an immediate and priority response on the Commission's part. In 2009, for example, the Commission invested a considerable percentage of its resources and personnel to follow closely the situation in Honduras in the wake of the coup d'état; a detailed description of these activities and the respective process, which reveals how important

the performance of the IACHR consists of the long time it takes to make its decisions.

According to the calculations of the IACHR: "Based on the Commission's experience, estimates are that between January 2011 and December 2015, some 1,650 petitions will be received the first year (i.e. in 2011), which will increase by another 150 petitions every year thereafter; thus, the total number received in 2015 will be approximately 2,250 petitions"<sup>153</sup>. Given that the target of the IACHR is to have no lag as of December 31, 2013, a total of 10,000 legal evaluations will have to be made from January 1, 2011 to December 31, 2013<sup>154</sup>. In addition, the Strategic Plan discusses the need to issue just over 500 admissibility reports pending, and a similar number of reports on the merits<sup>155</sup>.

**c. The work of the organs of the Inter-American system vis-à-vis other international human rights mechanisms**

If consideration is being given to entrusting many more human rights promotion functions to the institutions of the Inter-American system they would have an enormous budgetary impact and would urgently require an increase in the financing the system receives.

To cite one example, the financing received by the IACHR in 2011 was 5,135,000 dollars<sup>156</sup> and the I/A Court H.R. had financing of just over 3,670,000 dollars<sup>157</sup> while for the same period and only for their activities in the Americas, the budget of the Office of the United Nations High Commissioner for Human Rights (OHCHR) was more than 20 million dollars<sup>158</sup> and the financing of the office of the UN High Commissioner for Refugees (UNHCR) was more than 100 million dollars<sup>159</sup>.

As mentioned in the next section, no doubt if one takes into account the circumstances and contextual circumstances and the lack of resources, the IACHR should prioritize the tasks of adjudicating cases and define on a complementary basis those promotion tasks that are most relevant for ensuring a better response in terms of protecting the rights of those of us who live in the Americas.

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these activities are, is available in the reports the Commission issued on this situation. The General Assembly has also asked the Commission to assist in the process of drafting declarations and conventions, as in the case of the American Declaration on the Rights of Indigenous Peoples and the Inter-American Convention against Racism; that it play an active role in programs and projects to eliminate obstacles impairing effective participation in democratic processes, and that it assist in the programs for demobilizing outlaw groups.

See IACHR. Strategic Plan 2011-2015. Part I, Chapter V ("The Challenges of the Inter-American Human Rights System"), pp. 37 *in fine* and 38.

153. IACHR. Strategic Plan 2011-2015. Part II, Plan of action 2.1, "Initial Review" (Registry Section), 5.

154. *Id.*, p. 6 *in fine*.

155. *Id.*, p. 9.

156. IACHR. Financial Resources. Available at: <http://www.oas.org/es/cidh/mandato/finanzas/2011esp.pdf>

157. I/A Court H.R. Contributions and donations. Available at: <http://www.corteidh.or.cr/donaciones.cfm>

158. OHCHR. Financial information 2011. Available at: [http://www2.ohchr.org/english/ohchrreport2011/web\\_version/ohchr\\_report2011\\_web/allegati/17\\_Financial\\_Statements.pdf](http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/17_Financial_Statements.pdf)

159. UNHCR. 2012 Regional Operations Profile-Americas. Information available at: <http://www.unhcr.org/pages/4a02da6e6.html> (page consulted in August 2012).

#### **d. Other international mechanisms with a promotion mandate**

Many international organizations and agencies may help ensure adequate promotion of human rights in the hemisphere. These institutions have stood out for their significant work of accompanying and providing technical support to the states, yet none of them can assume functions of protecting human rights.

In that regard, the organs that are engaged in promotion work are very well known. The OAS itself has several entities that have a mandate to carry out such promotion work. Its specialized agencies include the Inter-American Commission of Women, the Inter-American Children's Institute, and the Inter-American Indian Institute. There are also other organs such as the Inter-American Institute of Human Rights (IIDH) and the Justice Studies Center of the Americas (JSCA), which with their wide-ranging expertise can provide accompaniment and technical support to the OAS and the states parties on specific issues related to justice<sup>160</sup>.

The Office of the United Nations High Commissioner for Human Rights has a considerable presence on the ground:

- It has two regional offices: Central America (Panama) and South America (Santiago, Chile);
- It has four country offices: Bolivia, Guatemala, Mexico, and Colombia;
- It has a human rights component in the peacekeeping mission (United Nations Stabilization Mission in Haiti, MINUSTAH); and,
- There are four human rights advisers: Ecuador, Nicaragua, Honduras, and Paraguay<sup>161</sup>.

This presence is in addition to the accompaniment that the Office of the High Commissioner may provide from its offices in Geneva, and does not include the enormous supervisory and promotion effort of the 10 oversight bodies of United Nations human rights treaties<sup>162</sup>, which are mandated precisely to oversee public policies and government actions that impact human rights and to offer —through a system of reports, a constant and interactive dialogue, and recommendations— orientation and advisory services to the states so that they can guarantee the highest standards of human rights through the use of best practices.

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160. According to the information at its website, "The Justice Studies Center of the Americas (JSCA) is an agency of the Inter-American system, endowed with technical and operational autonomy, established in 1999 by the institutions of the Inter-American system. Its headquarters is in Santiago, Chile and its members are all the active member states of the Organization of American States (OAS)." At present it has a series of studies or projects that are divided into four areas: criminal justice, civil justice, justice and civil society, and vulnerable groups. For more information, see: <http://www.cejamerica.org/portal/>

161. United Nations.OHCHR,OHCHR's Support to Implementation at Country Level.Information available at: <http://www.ohchr.org/EN/Countries/Pages/MapOfficesIndex.aspx> (page visited August 2012).

162. Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee Against Torture (CAT), Subcommittee on Prevention of Torture (SPT), Committee on the Rights of the Child (CRC), Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), Committee on the Rights of Persons with Disabilities (CRPD), and the Committee on Enforced Disappearances (CED).

The United Nations also has 36 special procedures of the Human Rights Council that can take the form of independent experts, rapporteurs, special rapporteurs, or working groups. In the Americas there is also one country mechanism: the independent expert on the human rights situation in Haiti.

Many other institutions provide technical advisory services to the states on human rights or closely related to human rights. To mention some:

- The United Nations Children’s Fund (UNICEF) has operations and maintains offices in practically all the members states of the OAS<sup>163</sup>;
- The Economic Commission on Latin America and the Caribbean (ECLAC) has two subregional headquarters (Mexico and Trinidad and Tobago) and five offices (Colombia, Brazil, Argentina, Uruguay, and the United States)<sup>164</sup>;
- UNAIDS has two regional teams in the Americas<sup>165</sup>;
- The United Nations Development Program (UNDP) has projects in most of the member states<sup>166</sup>; and
- The UNHCR has two regional offices (Argentina and Panama) and maintains operations in Brazil, Canada, Colombia, Costa Rica, Ecuador, Mexico, the United States, and Venezuela<sup>167</sup>.

In addition, nationally and internationally there has been a healthy proliferation of training programs by non-governmental and governmental institutions, universities, and offices of the ombudsperson, among others. Indeed, various countries have schools or institutes for the professional training of civil servants, which also provide for their participation in events and workshops even if outside their countries for the purpose of learning from other comparative experiences.

This situation is reinforced by the development of new technologies that allow for virtual proximity so as to facilitate interaction in courses, trainings, and other events from a distance, as well as tools that simplify the use and transmission of information through video and sound recordings, emails, e-publications, and data bases open to the public, among others.

The unequal distribution of promotion and protection mechanisms causes one to question the idea that the Inter-American system should substantially change its work so as to accord greater weight to the promotion of human rights. The promotion that is offered to the member states of the OAS by other international organizations is substantial, and is backed by large staffs and budgets far greater than that allocated to the Inter-American system.

In view of this situation, as addressed further in the next section, we consider that it is more appropriate to allow the Inter-American system to deepen and develop its protection work at the same time as it makes more efficient and strategic the already-existing mechanisms for

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163. UNICEF. Information by country. Available at: <http://www.unicef.org/spanish/infobycountry/latinamerica.html> (page consulted in August 2012).

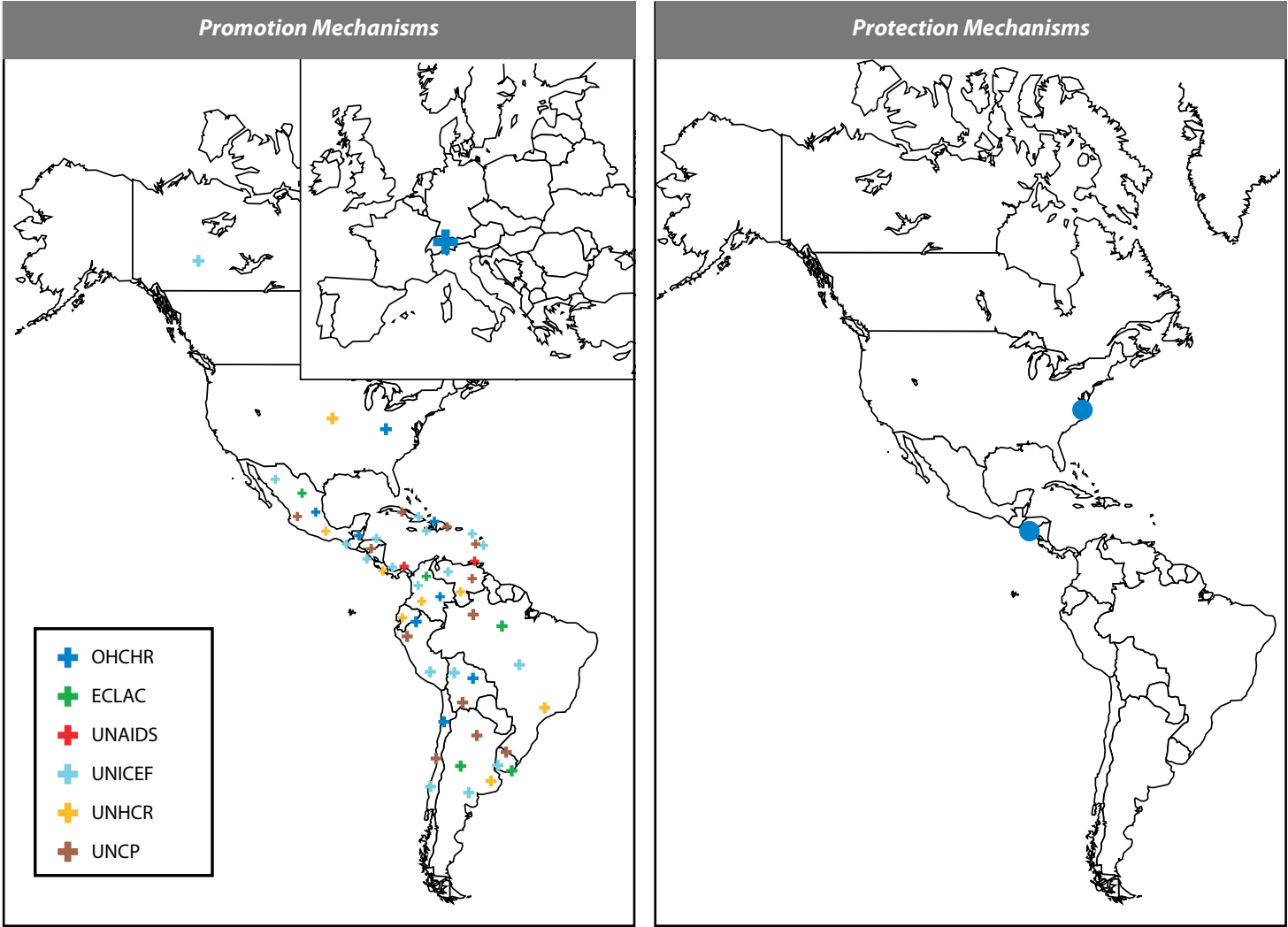
164. ECLAC. Subregional Headquarters and Offices. Available at: <http://www.eclac.org/subsedes/> (page consulted in August 2012).

165. UNAIDS Regional Support Teams. Information accessible at: <http://www.unaids.org/es/ourwork/regionalsupportteams/> (consulted in August 2012).

166. UNDP. UNDP around the world. Available at: <http://www.undp.org/content/undp/es/home.html> (consulted in August 2012).

167. UNHCR. 2012 Regional Operations Profile-Americas. *Op. cit.*

promotion tasks, and that the member states should make more intense use of the abundant support and advisory services provided by others. This would not suppress promotion as one of the functions of the Inter-American human rights system, but it would be left up to its organs to decide the form, type, and regularity of such efforts, with a view to not having a detrimental impact on its exclusive functions of protecting human rights in the hemisphere. The IACHR may create synergies with many of these institutions, drawing more strength from their joint efforts, and ensuring better assistance to the OAS.



It is also important to note that the work of providing technical assistance, training civil servants, and guaranteeing that they incorporate the highest human rights standards in their activities goes beyond the occasional workshops or trainings, and, based on the experience of several institutions that have implemented training programs it is evident that not even a full-time Inter-American Commission could respond to all those needs, which are also amply met by other agencies, such as the IIDH and the JSCA, as mentioned above.

In other words, genuine promotion and technical assistance work is not resolved by holding a few isolated events or activities. To the contrary it requires a very wide-ranging effort to identify needs and study contexts, and to design and implement medium- and long-term measures. The other organizations that promote human rights in the hemisphere generally take years to carry out projects that oftentimes merit a direct presence, on the ground, and a budget much greater than the budget of the Inter-American human rights system. To carry out an effort on that scale, the Inter-American Commission and the Inter-American Court would have to have much more in the way of human and financial resources, and possibly offices in the member states.

### **5. ON WHAT PROMOTION TASKS SHOULD THE IACHR FOCUS ITS WORK?**

The IACHR should focus on those promotion tasks that are functional to the current basic agenda for the protection of human rights in the hemisphere. It should be articulated with the problems that arise both from the cases, as some states have suggested, and from its specialized studies on the human rights situation and its strategic plan.

In this regard, we consider it reasonable for the Inter-American system to prioritize its protection tasks and to carefully select the promotion tasks it can carry out in light of the priority issues pending in human rights in the Americas and its capacity in terms of resources. This is so in particular due to the fact, as has been seen, that there are other mechanisms and organizations that also promote human rights and with which the Commission could create synergy, strengthening its efforts without replicating tasks and maximizing the impact of its work.

The IACHR could prioritize them mindful of this purpose, so as to include:

1. Participating in giving impetus to mechanisms or processes that help incorporate standards or recommendations at the local level, and to promote mechanisms or means for enforcement of the decisions of the Commission and Court in the system of cases and measures of protection.
2. A sustained effort to address structural violations of human rights (e.g., the lack of protection for certain communities or violence directed against certain groups).
3. Appropriate, timely, and systematic response to exceptional situations such as coups d'état, or other serious threats to human rights.
4. Taking action in response to unfolding events that are clearly at odds with treaty obligations (e.g. legislative proposals contrary to the case law of the Inter-American human rights system or peace and disarmament processes).
5. The capacity to act in the face of new challenges in the region, subregion, or country (for example, the participation of persons with disabilities in drawing up the policies that affect them).
6. The possibility of the IACHR systematizing human rights standards so as to give guidance to all the states of the OAS on critical issues, instead of giving particularized advisory services to each state.

7. The search for the universality of the Inter-American system, which was already highlighted by the Working Group, which identified it as one of “the main challenges” facing the system”<sup>168</sup>.

## **6. RECOMMENDATIONS**

The IACHR has to prioritize the allocation of limited resources. Given the presence on the ground of several agencies with technical assistance mandates, and of numerous national, regional, and international actors who perform training and advisory services, as well as the context of the historical debt of justice, and in response to structural violations and new challenges in the protection of human rights, it is fundamental that the IACHR continue to earmark a significant share of its resources for the protection and defense of rights.

It is fundamental that the IACHR determine and prioritize the activities it will perform in respect of promotion by a specific proposal along the lines expressed in this document, clearly establishing the costs of these activities and giving them the publicity necessary as recommended by the Working Group.

In this regard, we observe that in its response to the Permanent Council, the IACHR proposes to produce a total of five guides and manuals on practices, doctrine, and decisions of the Commission; one digest on precautionary measures; one report on the effects of not having universal ratification of the Inter-American treaties; and several specific reports in the area of economic, social and cultural rights. The Commission also undertakes to conduct several trainings, including of the states’ civil servants. These initiatives give rise to at least two major concerns. The first has to do with the financial resources the IACHR could need to carry out these tasks. Second, we ask ourselves how much staff the IACHR would need to carry out all those commitments, without its mission of protection suffering a major impact, further slowing down the processing of cases and measures of protection.

As regards the recommendations of the Working Group, the following suggestions and considerations are offered:

### **A. Determine and prioritize themes for and modalities of promotion to be accorded priority**

- i. This is, no doubt, an interesting recommendation, but resources are needed, among other things, to carry out the systematization, update it, and translate it into the various languages.
- ii. It is important to continue the thematic studies and reports identified in the 2011-2015 Strategic Plan and to expand them to include a vision that goes beyond the thematic division of the rapporteurships.
- iii. The IACHR should strengthen its capacity to identify structural issues and endemic human rights violations in order to prioritize the promotion tasks. Among other measures to take the IACHR can take up anew and adapt to current circumstances the prior experience of systematizing regional issues, as it did in several of its annual reports<sup>169</sup>.

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168. “Report of the Working Group,” *Op. cit.* p. 9.

169. In several annual reports the IACHR set aside a section (generally Chapter V) under the heading “Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.” Nonetheless, that practice it has

- iv. Many of the issues identified by the organs of the Inter-American system have also been documented by the United Nations. Therefore, it is once again recommended that there be good communication and, when called for, coordination with these mechanisms and offices, as happened in the joint activity by the Rapporteurship on the Rights of the Child and UNICEF.
- v. Making progress on a data base that can cross-reference issues by country and also by region<sup>170</sup>. In a second stage, this could also be fed with the information put out by United Nations agencies.
- vi. Set aside one day a year in its periods of sessions to discuss the issue. In this regard, it is important to consider the experience of the Committee on the Rights of the Child in its thematic discussions<sup>171</sup>.

**B. Further publicize and make accessible the tasks that are carried out:**

Independent of what the IACHR already does, the following could be done:

- i. Set aside a space at its website specifically for that purpose;
- ii. Transmit via webcast the events, as appropriate, as the IACHR has been doing of lately<sup>172</sup>;
- iii. Upload at its website the audios, videos and other useful tools (power point presentations, systematizations, etc.); and
- iv. Establish a section of its annual report in which it reports on those activities.

**C. Cooperation with state institutions to strengthen them**

*(including training for civil servants and signing cooperation agreements with offices of the ombudsperson).*

The IACHR should contribute to strengthening the state institutions through specific collaborations that contribute to the effective incorporation of standards in the internal practice of the states, but without compromising its efforts in other areas. The following considerations are offered considering that there is plenty that can be done to strengthen the state institutions, independent of what the IACHR has already identified in its 2011-2015 Strategic Plan:

- i. Signing agreements does not necessarily imply that one is engaged in a sustained collaboration. It is important to review what other mechanisms and organizations are doing, particularly in relation to the offices of the ombudsperson in the hemisphere. For example, one could pursue closer ties with the IIDH (in its capacity as technical secretariat for the Central American Council of Ombudspersons (Consejo Centroamericano del Ombudsman) or with the office of the United Nations devoted expressly to working on such matters;

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been more than 10 years since that practice has been followed (for example, it has not been seen in the reports from 1999 to 2011, or in the annual reports of 1997 and 1995). The IACHR did include such a section for more than two decades (see annual reports from 1970 to 1994, and in 1996 and 1998).

170. In this respect, see the proposal the IACHR had already made in its strategic plan. See Strategic Plan 2011-2015. Plan of Action 1.4 - Identification of Standards and Development of Manuals, Studies and Protocols."Op. cit.

171. United Nations.Committee on the Rights of the Child. Day of general discussion. Information available at: <http://www2.ohchr.org/english/bodies/crc/discussion.htm> (consulted in August 2012).

172. See Response of the IACHR to the Permanent Council, October 23,2012, paras. 20-28.



- ii. The IACHR should continue to coordinate closely with other mechanisms and organizations that are already providing technical assistance (see supra). In that regard, it is recommended that the IACHR multiply actions such as those carried out at the high-level event that brought together representatives of the UN mechanisms against torture and the IACHR last year<sup>173</sup>.
- iii. The IACHR must ensure that its efforts will have a broad impact on most of the states through open dialogues that encompass the region instead of focusing on activities with multiple actors in each state.

***D. Provide technical advisory services for carrying out recommendations:***

- i. We note that the IACHR has indicated in its response to the Permanent Council that it “is more than willing to provide States with the technical advice they request”<sup>174</sup>. In this respect, this statement causes us great concern insofar as the IACHR could easily find itself in a conflict of interest situation, on providing technical advisory services to the parties in litigation when at the same time it should preserve its independence so as to assist the degree of compliance with the recommendations contained in its reports on the merits.
- ii. Encourage the states to make progress in complying with the decisions. That could be done as part of the promotion agenda already adopted by the IACHR, promoting domestic legislation or mechanisms for implementation, and also promoting compliance with measures of reparation that address structural human rights problems, and whose implementation would also have a positive effect on procedural delays before the IACHR due to the filing of cases involving recurrent violations (for example, the unlawful use of the military criminal courts for investigating serious human rights violations).
- iii. Independent of the technical assistance the IACHR may provide, it is important to bear in mind that:
  - a. Many recommendations are not carried out due to the lack of capacity of the state, or due to the lack of political will;
  - b. Given that the IACHR is forwarding most of the cases to the I/A Court H.R., it is understood that the recommendation of the Report of the Working Group refers to the period for complying with the recommendations of the Article 50 report, which is practically impossible to implement.

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173. See IACHR. International Mechanisms Against Torture Agree to Elaborate Joint Report in Light of High Level of Non Compliance with their Recommendations. Press Release 124/11, November 30, 2011.

174. See response of the IACHR to the Permanent Council, October 23, 2012, para. 184.