

# DANGER AND FEAR IN PRISON

## PROTECTING THE MOST VULNERABLE PERSONS IN AFRICA AND THE AMERICAS BY REGIONAL HUMAN RIGHTS BODIES THROUGH INTERIM MEASURES

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### *Abstract*

*This article focuses on the role the African and Inter-American human rights systems in protecting the rights of detainees through interim measures. The need for regional human rights to complement protection at the national level is all the more pronounced when it comes to detainees, because they often lack democratic leverage at the national level. While complementing the universal system, regional systems have the added benefit of closer connection and binding judgments. Because the situation of detainees often requires urgent intervention, interim measures are required to ensure that detainees do not suffer undue harm. A comparative survey of interim measures in the two regional systems reveals that, while these measures had been issued in both systems, the Inter-American has used them much more frequently. One of the reasons for this difference is the fact that the Inter-American system does not make the submission of a formal complaint a prerequisite for issuing interim measures. The African Commission should amend its Rules of Procedure to allow for a similar possibility; and it should devote more resources and institutionalize this procedure. Despite the inclusion of collective rights in the African system, the African Commission has infrequently dealt with urgent measures affecting groups of detainees. Both systems suffer from some defects. There is a lack of substantiated reasoning in decisions dealing with interim measures, especially when requests are rejected; information is not made available systematically about the fate of all requests for interim measures; and a lack of compliance besets both systems.*

**Keywords:** African human rights system; Inter-American human rights system; interim measures; precautionary measures; provisional measures

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## 1. INTRODUCTION

Although deprivation of liberty entails legitimate restrictions of certain rights – most obviously to freedom of movement, privacy and the freedom to work – detainees must be held in a manner that respects their dignity.<sup>1</sup> Persons deprived of their liberty are protected under national constitutional law and by human rights treaties, which prohibit cruel, inhuman and degrading punishment or treatment, particularly in the three human rights systems functioning under the auspices of the Council of Europe, the Organisation of American States (OAS) and the African Union (AU). Despite these guarantees, appalling prison conditions are still present in many States. Starting from the premise that detainees are a group most open to the vagaries of public opinion, and at best to the neglect and at worst to the abuse by national legal systems,<sup>2</sup> this contribution investigates the potential and actual complementary role of interim (‘provisional’<sup>3</sup> or ‘precautionary’<sup>4</sup>) measures<sup>5</sup> (PMs) adopted within regional human rights systems in protecting persons deprived of their liberty. The focus here falls on PMs, rather than on findings on the merits, because the immediacy of these measures makes them particularly relevant to detainees. An *ex post facto* determination that a detainee’s rights had been violated may be important to establish State responsibility, but may easily render the affected person’s rights illusory. PMs are of primary importance in time-sensitive situations, where an urgent response is called for. As appears from the discussion below, PMs have, in regional human rights systems, indeed most often been invoked in the context of detention.

In doing so, a critical overview and analysis of the PMs issued by the African Commission on Human and Peoples’ Rights (African Commission), the African Court on Human and Peoples’ Rights (African Court), the Inter-American Commission on Human Rights (Inter-American Commission or IACmHR) and Inter-American Court of Human Rights (Inter-American Court or IACHR) is undertaken. The European

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<sup>1</sup> The term deprivation of liberty will be used in cases related to arrest, detention or imprisonment. According to the 1998 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA Res 43/173, 9 December 1988), ‘arrest’ is defined as ‘the act of apprehending a person for the alleged commission of an offence or by the action of an authority’, whereas ‘detention’ and ‘imprisonment’ relate to ‘the condition’ of a person deprived of personal liberty, depending whether or not following a conviction for an offence.

<sup>2</sup> Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, Commissioner Med Kagwa, 52<sup>nd</sup> Ordinary Session of the African Commission, October 2012 <[www.achpr.org/sessions/52nd/intersession-activity-reports/prisons-and-conditions-of-detention/](http://www.achpr.org/sessions/52nd/intersession-activity-reports/prisons-and-conditions-of-detention/)> mentioning the general ‘hands-off’ approach of African courts to matters involving prison administration.

<sup>3</sup> The measures adopted by the African Commission and Court are called ‘provisional measures’. See art 27(2) of the Court Protocol; Rule 51 of the Rules of Court and Rule 98 of the 2010 Commission Rules of Procedure.

<sup>4</sup> The measures adopted by the IACmHR are called ‘precautionary measures’ and the measures adopted by the IACHR are called ‘provisional measures’. See American Convention on Human Rights, art 63(2) and Rules of Procedure of the IACmHR, art 25.

<sup>5</sup> We will refer to them as ‘interim measures’, ‘precautionary measures’ or PMs.

regional human rights system is not included in this analysis. Although the European Court has in recent years adopted a significant number of ‘provisional measures’,<sup>6</sup> its related jurisprudence is focused on expulsion, extradition and deportation,<sup>7</sup> and it has only on a few occasions dealt with the issue of detention outside this context.<sup>8</sup> The difference in the institutional architecture between the judicialised European system on the one hand, and the hybrid quasi-judicial/judicial nature of the other two systems on the other, further explains the choice to concentrate on the OAS and AU institutions.

As far as Africa and the Americas are concerned, the African Charter on Human and Peoples’ Rights (African Charter),<sup>9</sup> the Protocol to the African Charter on the Rights of Women (Maputo Protocol),<sup>10</sup> the American Convention on Human Rights (American Convention),<sup>11</sup> the American Declaration of the Rights and Duties of Man (American Declaration or Declaration)<sup>12</sup> and the Inter-American Convention to Prevent and Punish Torture,<sup>13</sup> are the main instruments guaranteeing to every

<sup>6</sup> Based on r 39 of the Court’s Rules. In 2011, the European Court received 2782 requests for PMs, and granted 342; in 2012 the total requests numbered 1973, and the number granted was 103. Information available at <[www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956700110\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956700110_pointer)> accessed 1 January 2014.

<sup>7</sup> Yves Haeck and Clara Burbano-Herrera, ‘Interim Measures in the Case Law of the European Court of Human Rights’ (2003) 21 *Netherlands Quarterly of Human Rights*, 625–75. For an overview of PM adopted to protect persons deprived of liberty under the European system, See Clara Burbano-Herrera, ‘How does the European System of Human Rights Protect Detainees in Bad Health?’ (2013) 6 *IntAm & EurHum RtsJ*, 157–72 and Eva Rieter, *Preventing irreparable harm: provisional measures in international human rights adjudication* (Intersentia, Antwerp 2010) 329–83, 599–605.

<sup>8</sup> See eg *Aleksanyan v Russia* App no 46468/06 (2008) and *Groni v Albania* App no 25336/04 (2009), and the Court’s use of the ‘pilot judgment’ procedure in *Torreggiani and others v Italy* App no 43517/09 (2013), in which the Court finds a violation of art 3 of the European Convention due to overcrowding in a number of Italian prisons and orders the State to take measures to ensure that a domestic system is set up within one year to effectively deal with overcrowding.

<sup>9</sup> The African Charter (‘Banjul Charter’) was adopted in Nairobi, Kenya, by the Organisation of African Unity on 27 June 1981 and entered into force on 21 October 1986. See arts 4 and 5. The Banjul Charter and other African human rights documents can be viewed on the website of the AU available at <[www.au.int/en/treaties](http://www.au.int/en/treaties)> accessed 1 January 2014.

<sup>10</sup> The Maputo Protocol was adopted in Maputo, Mozambique on 1 July 2003 and entered into force on 25 November 2005. See Articles 1(j), 4(2)(j), 3, 4 and 20(1). The substance of the African Charter was extended by the adoption of this Protocol over which the African Commission and Court also have jurisdiction, including the competence to issue PMs.

<sup>11</sup> The American Convention (also called ‘Pact of San José of Costa Rica’) was adopted in San José, Costa Rica, by the OAS on 22 November 1969 and entered into force on 18 July 1978. See art 5. Inter-American human rights treaties and documents can be viewed on the website of the OAS available at <[www.oas.org](http://www.oas.org)> accessed 1 January 2014.

<sup>12</sup> The American Declaration was adopted in Bogota, Colombia, by the OAS in April 1948. The Declaration includes in art XXV that every person who has been deprived of his liberty has the right to humane treatment during the time he is in custody.

<sup>13</sup> The Inter-American Convention to Prevent and Punish Torture was adopted in Cartagena, Colombia, by the OAS on 9 December 1985 and entered into force on 28 February 1987. The Convention contains a definition of torture but does not distinguish it from other cruel, inhuman or degrading treatment or punishment. See art 1 and 2. At the universal level, cruel, inhuman or

person – including detainees – the right to humane treatment.<sup>14</sup> The African Charter provides in Article 5 that every individual has the right to respect of the dignity inherent in a human being, and prohibits torture, inhuman or degrading punishment and treatment. Article 5(2) of the American Convention prohibits torture and cruel and inhuman or degrading treatment and punishment,<sup>15</sup> and requires that persons deprived of their liberty be treated with respect for their inherent dignity. The American Convention and the Maputo Protocol also indicate that, when States exercise their duty to protect the well-being of prisoners, they must take into consideration any special vulnerability of a detained person arising, for instance, from being minors<sup>16</sup> or women.<sup>17</sup>

Consistent to what is mentioned above, in conditions of detention, States are the main guarantor of the rights of the persons deprived of their liberty, and therefore States are responsible for what occurs inside detention centres. Detainees should be ensured a minimum standard of living, and they should be treated with dignity. Nonetheless, the jurisprudence of the African Commission, the African Court, the IACmHR and IACHR show that several prisoners and detainees in many detention facilities in Africa and the Americas confront conditions that are inhuman. Prisoners are detained in severely overcrowded penitentiaries; ill prisoners do not have access to medical care; and convicted prisoners are sentenced to death without due process. Furthermore, in some cases specific reference has been made to police brutality and the use of torture for the purpose of extracting confessions.

The contribution is divided in five parts. The first section deals with the normative basis which gives competence to the African Commission and Court, and the Inter-American Commission and Court to request PMs. The next section, considers

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degrading treatment or punishment is not defined either in the United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (also called 'Torture Convention') which treats it as a residual category for acts that do not rise to the level of torture. See UNGA Res 39/46 art 16(1). The Human Rights Committee has said that '[i]t may be not necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment'. Human Rights Committee, General Comment N. 7: Torture or cruel, inhuman or degrading treatment or punishment (art 7) para 2. The Torture Convention was adopted in New York, USA, on 10 December 1984 and entered into force on 26 June 1987.

<sup>14</sup> See African Charter, art 4. American Convention, art 4 and 5, and American Declaration, art 1.

<sup>15</sup> The IACHR has defined the scope of this right as one that has several gradations, and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors, which must be proven in each specific situation. See IACHR, *Loayza Tamayo v Peru*, Judgment of 17 September 1997 para 57.

<sup>16</sup> American Convention, art 5(5). See also, Diego Rodríguez-Pinzón and Claudia Martín, *The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System* (Series Editor: B Wijkström, vol 2, 2006) 122.

<sup>17</sup> The Maputo Protocol indicates in art 2 that 'States Parties shall take appropriate and effective measures to ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women'.

the frequency of the use of PMs in the African and the Inter-American systems in general, and in respect of situations of detention, specifically. This is followed by an analysis of the diverse situations of danger in which detainees have requested PMs. The next section evaluates the follow-up mechanism to monitor compliance and the (un)willingness of the Member States to abide by PMs. The conclusion briefly emphasizes some positive and negative aspects of the interim measures and makes some recommendations.

## 2. LEGAL BASIS

In international human rights law PMs have been developed as a tool for preventing human rights violations. At the regional level, in Africa and the Americas, both the Commissions and Courts are competent in cases of extreme gravity and urgency to issue PMs, in order to prevent irreparable damage to the rights of victim(s) and person(s) protected under the human rights treaties ratified by the Member States. None of the universal or regional human rights treaties establishing quasi-judicial bodies bestows an explicit mandate on quasi-judicial monitoring bodies to issue PMs.<sup>18</sup> However, the Rules of Procedure of these bodies have for decades served as the basis for institutionalizing practices of issuing interim measures.

In 1988, the African Commission incorporated the competence to adopt such measures in its first set of Rules of Procedure, more specifically in Rule 109. When it amended its Rules of Procedure in 1995, the Commission elaborated upon its competence to adopt PMs in Rule 111.<sup>19</sup> Since 2010, the restated competence to adopt PMs has been contained in Rule 98 of the Commissions' current Rules of Procedure, which states that 'the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.<sup>20</sup>

In the Inter-American system, PMs were also expressly incorporated in the first Commission's Rules of Procedure in 1980. Since 2009, the restated competence to

<sup>18</sup> See for example Human Rights Committee, Rules of Procedure, r 92; the Committee Against Torture, Rules of Procedure r 114(1); African Commission, Rules of Procedure, r 98; the extinct European Commission of HR, Rules of Procedure, r 36; the Committee on the Elimination of Racial Discrimination, Rules of Procedure, r 94(3) and the Committee on the Elimination of Discrimination against women, Rules of Procedure, r 63(1).

<sup>19</sup> The Rules of Procedure were adopted by the African Commission during its 2nd ordinary session held in Dakar (Senegal), from 2 to 13 February 1988 and were revised during its 18th ordinary session held in Praia (Cabo-Verde), from 2 to 11 October 1995. The Rules were also revised during its 47th ordinary session held in Banjul (The Gambia), from 12 to 26 May 2010 and entered into force on 18 August 2010.

<sup>20</sup> African Commission, 2010 Rules of Procedure, r 98 (1).

adopt PMs has been contained in Rule 25 of the Commission's Rules of Procedure, which states that

the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.<sup>21</sup>

It is mentioned that the adoption of PMs by the IACmHR requires the existence of a 'serious' and 'urgent situation' that may cause 'irreparable harm' to persons if action is not taken.<sup>22</sup> The adoption of PMs by the African Commission is formulated slightly differently, in that it may adopt PMs in order 'to prevent irreparable harm' to the victim or the victims of the alleged violation as 'urgently' as the situation demands.<sup>23</sup> Although the preconditions for the adoption of interim measures by the two quasi-judicial organs are not exactly similar – there is no specific mention that the African Commission may act in 'serious' situations – in practical terms, the provisions are not necessarily mutually exclusive. In both human rights systems, urgent situations are clearly present when there is an imminent risk to the right to life, the right to personal integrity, the right to health or the right to fair trial of persons deprived of liberty, involving, for example, unlawful death sentences, the risk of torture or serious danger arising from harsh conditions of detention. In addition, the IACmHR may also adopt PMs independently of any pending petition or case.<sup>24</sup> In other words, the Commission has the competence to take PMs on its own initiative or at the request of anybody when it has reliable information about a situation, in order to prevent irreparable harm to a person. This position contrasts clearly with that pertaining to the African Commission, which may only issue PMs in as far as they relate to a matter pending before it.

The lack of a treaty basis of the competence to adopt PMs has given rise to a debate about the legally binding nature of these measures. The legality of PMs to uphold the rights of the petitioner pending finalisation of a submitted case lies partly in the individual complaints procedure itself. Since States have accepted this procedure, they also have to ensure that it operates effectively in practice. Disregarding a PM is therefore *mala fide* and undermines the treaty purpose of providing the possibility of *restitutio in integrum* to victims, as the IACHR held in *James v Trinidad and Tobago*.<sup>25</sup>

<sup>21</sup> IACmHR, 2009 Rules of Procedure, art 25 (1).

<sup>22</sup> Furthermore, the Inter-American Convention on Forced Disappearance of Persons refers in art XIII to the competence of the Commission to grant PMs. The Convention was adopted in Belem Do Para, Brazil, by the OAS on 6 September 1994, entered into force on 28 March 1996.

<sup>23</sup> African Commission, 2010 Rules of Procedure, r 98 (1).

<sup>24</sup> IACmHR, 2009 Rules of Procedure, art 25(1).

<sup>25</sup> IACHR, *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, Merits, Reparations and Costs Judgment of 21 June 2002, paras 33, 84, 197–200. Provisional measures are available at <<http://corteidh.or/medidas.cfm>> accessed 1 January 2014.

Because the competence to order ‘provisional measures’ of the European Court is also not located in the European Convention, but in the Rules of Court, comparative reliance can to some extent be drawn from that Court’s jurisprudence on this issue.<sup>26</sup> In *Mamatkulov and Askarov v Turkey*,<sup>27</sup> the Court reversed its earlier decision in *Cruz Varas v Sweden*,<sup>28</sup> and concluded that the power to order interim measures can be inferred from the right of petition (Article 34 of the European Convention) and are binding under Article 46 (providing for the binding force of the Court’s judgments).<sup>29</sup> Interim measures permit the Court to ‘carry out an effective examination of the application’, ensure that the protection afforded to applicants is effective and not illusory, and allow the Committee of Ministers to perform its function of supervising the final judgment.<sup>30</sup> The judicially binding character of PMs was explicitly confirmed at the beginning of 2006 in a judgment in the *Aoulmi Case*, where the Court for the first time explicitly used the term ‘binding’ (*obligatoire*) to refer to the legal force of PMs.<sup>31</sup>

The competence of the two Courts to issue PMs is less controversial, as it has been provided for explicitly in the African Charter and the American Convention in very similar terms. In fact, the wording of Article 27(2) of the 1998 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights (Court Protocol), mandating the African Court to adopt PMs ‘in cases of extreme gravity and urgency, and when needed to avoid irreparable harm to persons’, very closely corresponds with Article 63(2) of the American Convention. The IACHR has held unequivocally on numerous occasions that compliance with the Court’s provisional measures is mandatory for States, based on the obligation of

<sup>26</sup> For a comparative analysis of the binding force of PM under Human Rights systems, See C Burbano-Herrera and Y Haecq, ‘Letting States off the Hook? The Paradox of the Legal Consequences following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights System’ (2010) 28 *Netherlands Q of HR*, 332–60.

<sup>27</sup> ECHR, *Mamatkulov and Abdurasulovic v Turkey*, decision of 31 August 1999, App no 46827/99 and 46951/99; ECHR, *Mamatkulov and Abdurasulovic v Turkey*, judgment of 6 February 2003, App no 46827/99 and 46951/99; ECHR, *Mamatkulov and Askarov v Turkey*, judgment of 4 February 2005, App no 46827/99 and 46951/99.

<sup>28</sup> ECmHR, *Cruz Varas and Others v Sweden*, report of 7 December 1989, App No 15576/89; ECHR, *Cruz Varas and Others v Sweden*, judgment of 20 March 1991, App no 15576/89 paras 56–60. On this topic, see eg G Cohen-Jonathan, ‘De l’effet juridique des “mesures provisoires” dans certaines circonstances et de l’efficacité du droit de recours individuel: à propos de l’arrêt Cruz Varas de la Cour européenne des droits de l’homme’ [From the legal effect of ‘provisional measures’ in some circumstances and the efficiency of the right of individual petition: on the Cruz Varas judgment of the European Court of Human Rights translation] (1991) *Revue Universelle des Droits de L’Homme* [Universal Review of Human Rights translation] vol 3, No 6, 205–9.

<sup>29</sup> For three examples where a violation of art 34 has been found as a result of the non-compliance with an PM: *Mamatkulov and Askarov v Turkey* (n 27) para 128; ECHR, *Shamayev and 12 Others v Russia and Georgia*, judgment of 12 April 2005, App no 36378/02 para 479; ECHR, *Aoulmi v France*, judgment of 17 April 2006, App no 50278/99 para 112.

<sup>30</sup> *Cruz Varaz and Others* (n 28) para 125.

<sup>31</sup> *Aoulmi v France* (n 39) paras 111–12.

States to 'fulfil their conventional international obligations in good faith',<sup>32</sup> and in conformity with Article 27 of the Vienna Convention on the Law of Treaties of 1969, they cannot for domestic reasons fail to assume their already established international responsibility.<sup>33</sup>

### 3. FREQUENCY OF THE USE OF INTERIM MEASURES

The African Commission may adopt interim measures with respect to all African Union (AU) member States, which have, with the exception of newcomer South Sudan, all become party to the African Charter.<sup>34</sup> During the period 1 January 1993 to mid 2013,<sup>35</sup> according to available information, 22 out of 28 PM<sup>36</sup> requests were granted,<sup>37</sup> which means less than one PM granted annually. As to the small number of requests for PMs by the African Commission, some of the contributing factors could be that their adoption requires a communication pending before the Commission, and that some cases are not publicly accessible because the Commission does not keep a record or list of such requests. It is also not certain how many PMs the Commission has not been allowed to publish on the basis of the application of Article 59 of the Charter.<sup>38</sup> Under this provision, the Commission is required to submit a report on its work during the previous year to each regular session of the Assembly of the Heads of State

<sup>32</sup> See IACHR, *Constitutional Court v Peru*, Provisional Measures, Order of 14 August 2000, "Considering" 14; IACHR, *Luisiana Ríos et al v Venezuela*, Provisional Measures, Order of 2 December 2003, "Considering" 11; IACHR, *Familia Barrios v Venezuela*, Provisional Measures, Order of 30 May 2013, "Considering" 3.

<sup>33</sup> *James et al v Trinidad and Tobago*, Order of 2 December 2003, "Considering" 6; IACHR and *Adrián Meléndez Quijano et al v El Salvador*, Order of 23 March 2007, "Considering" 6.

<sup>34</sup> The AU is an international organization and since South Sudan joined it last year, consisting of 54 African States. Today, 54 of the 55 States are member of the AU. The exception is Morocco, which has withdrawn from the Organization in 1984, after the AU recognised the Western Sahara as a sovereign State.

<sup>35</sup> The African Commission has the competence to adopt PMs since 1988, but the first time that a PM was adopted was in 1993.

<sup>36</sup> The Institute for Human Rights and Development in Africa (IHRDA), an NGO based in Banjul, publishes the decisions of PMs of the African Commission and Court, available at: <<http://caselaw.ihrda.org>>. The Centre for Human Rights of the University of Pretoria also publishes the decisions of PMs on its website available at <[www.chr.up.ac.za/index.php/browse-by-subject/538-interimprovisional-measures.html](http://www.chr.up.ac.za/index.php/browse-by-subject/538-interimprovisional-measures.html)> accessed 1 April 2015. It also publishes the African Human Rights Law Reports (AHLRL) available at <[www.chr.up.ac.za/index.php/publications/ahrlr.html](http://www.chr.up.ac.za/index.php/publications/ahrlr.html)> accessed 1 April 2015.

<sup>37</sup> In total 26 cases were examined. In communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights (in respect of Ken Saro-Wiwa Jr and Civil Liberties Organisation) v Nigeria* ('Saro-Wiwa case') and in App 6/12, *African Commission v Kenya (concerning the Ogiek of Mau Forest Area)* ('Ogiek of Mau Forest Area case') two different decisions of interim measures were adopted in each case.

<sup>38</sup> According to art 59(1), all measures taken within the provisions of Chapter III 'Procedure of the Commission' of the African Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

and Government (the Assembly). Unlike the IACmHR, the African Commission has an obligation under Article 59 of the African Charter to keep its protective activities, including requests for PMs, confidential. Consequently, the public only has access to the decisions of cases that are published in the Activity Reports of the African Commission, following the Assembly's decision to authorise their publication. In addition, because the Commission does not consistently include its decisions on PMs in its Activity Reports, *separately*, but only make reference to these measures as part of its decisions on the merits when a communication has been decided finally, a full picture of these is not provided in the official record of activities.

The African Court only has jurisdiction over the 27 States that have ratified the Court Protocol. By 2013, the African Court adopted orders for PMs in three cases. The first was in respect of the bombing of the civilian population of Libya, in early 2011;<sup>39</sup> the second was in respect of the rights of an indigenous community in Kenya's Moi Forest;<sup>40</sup> and the third was in respect of the deceased Libyan President Gaddafi's son.<sup>41</sup>

In the Inter-American system, the IACmHR may request PMs with respect to all 35 Member States of the OAS, and their adoption does not require a case to be pending before the Commission, nor do the measures need to be prompted by a complaint/communication of human rights violations.<sup>42</sup> These practices have permitted the Commission to grant PMs in a significant number of cases and in a great variety of circumstances. The annual reports of the IACmHR show that between 1994<sup>43</sup> and 2012, 771 PMs were granted.<sup>44</sup> This means that almost 43 measures were adopted every year.<sup>45</sup> If the activity rate of the African Commission, which in 24 years has adopted only some 22 PMs, is compared with the rate of the IACmHR, it is possible to conclude without fear of contradiction that the IACmHR has been much more active. However, the lack of data on the PMs that were rejected or not answered by the IACmHR is problematic. With regard to this subject, 3009 requests of PMs were

<sup>39</sup> *African Commission v Libya*, Provisional Measures, Order of 25 March 2011, App 4/2011.

<sup>40</sup> *African Commission v Kenya*, Provisional Measures, Order of 15 March 2013, App 6/2012.

<sup>41</sup> *African Commission v Libya*, Provisional Measures, Order of 15 March 2013, App 2/2013.

<sup>42</sup> IACmHR, 2009 Rules of Procedure, art 25(1).

<sup>43</sup> The Annual Report of 1996 and 1997 refers of PMs adopted in 1994 and 1995.

<sup>44</sup> The Annual Reports have been published since 1970 and PMs have been adopted since 1980. However, it is only since 1996 that the Commission has included in its Report a specific section with information about PMs. Official information on the Commission's early use of PMs is not available. Since its first country reports, the IACmHR has included the critical situation of persons deprived of liberty in the Americas. The first reports were related to the situation in Cuba and Dominican Republic in 1962, 1965 and 1966 respectively. The Commission has also conducted on-site visits in detention centres. In 2004, the Commission formally established the Rapporteurship on the Rights of Persons Deprived of Liberty in the Americas. Documents of the Rapporteurship can be viewed on the Commission's website <[www.oas.org/en/iachr/pdl/default.asp](http://www.oas.org/en/iachr/pdl/default.asp)> accessed 1 January 2014.

<sup>45</sup> There is no official information on the PMs rejected and not responded. With respect to this, the Commission only provides statistics.

received from 1 January 2002 to 31 December 2011.<sup>46</sup> During the same period, 474 measures were adopted, which means that only about 15 per cent of the requests were granted. The other requests were rejected or remained unanswered: there is little solid information on the subject. This lack of information is unfortunate. It appears that the widely held belief that the IACmHR almost always grants PMs is unfounded.

The Court does not have the competence to adopt PMs with regard to all Members States of the OAS. Only States that have ratified the American Convention and accepted the jurisdiction of the Court must comply with PMs. As of 2014, only 23 of the 35 States have ratified the Convention and of them, only 20 have accepted the contentious jurisdiction of the Court. The IACHR has over the years issued many PMs. From 1987 to 2011, the Court adopted 374 PMs, of which 80 were initial order(s) adopted in a case, while 9 requests for PMs were rejected. The others were maintained, broadened, lifted or reinstated.<sup>47</sup> In 2012, the Court received 7 new requests, four of them concerned penitentiary centres in Venezuela.<sup>48</sup>

In both human rights systems, prisoners have been the group of beneficiaries with the highest number of PMs requested. Interim measures granted to protect detainees represent 39 per cent (9 out of 23)<sup>49</sup> of the total of measures adopted by the African Commission,<sup>50</sup> and 27 per cent (210 out of 771) of the total of measures adopted by the IACmHR.<sup>51</sup> One of the three orders for PMs so far adopted by the African Court deals with a situation of detention. The Inter-American Court has over the years ordered numerous PMs to protect detainees, especially in Argentina, Brazil, Peru and Venezuela.<sup>52</sup>

<sup>46</sup> More specifically, this entailed 265 PM in 2005, 314 PM in 2006, 250 PM in 2007, 301 PM in 2008, 324 PM in 2009, 375 PM in 2010 and 422 PM in 2011. There is no official information on the PMs requested in 2002, 2003 and 2004. See IACmHR 2011 Annual Report, 64. The Commission publishes the decisions on PMs and Annual Reports on its website <[www.oas.org/en/iachr/consultation/2\\_measures.asp](http://www.oas.org/en/iachr/consultation/2_measures.asp)> accessed 1 January 2014.>.

<sup>47</sup> See Clara Burbano-Herrera, *Medidas Provisionales en Situaciones de Vida o Muerte, el Caso del Sistema Interamericano de Derechos Humanos* (Editorial Porrúa, Mexico 2012) 12.

<sup>48</sup> IACHR, 2012 Annual Report, 22–3.

<sup>49</sup> The Commission received 28 requests of PMs and it only adopted 23. Some of the PMs were adopted by the Commission on its own motion. In some cases two different decisions of PMs were adopted, See (n 37).

<sup>50</sup> In the African system, PMs have also protected: a political candidate (1 out of 28); non-nationals (2 out of 28); collective groups of people (6 out of 28); equipment of broadcasters (2 out of 28).

<sup>51</sup> In the Inter-American system, PMs have also protected: people with health problems (19 out of 771); all members of human rights NGOs (34 out of 771); entire communities of indigenous people (41 out of 771); journalists (55 out of 771); people suffering from harassment due to judicial procedures (143 out of 771); human rights defenders (149 out of 771). See C Burbano-Herrera and D Rodríguez-Pinzón, 'Provisional Measures Issued by the Inter-American Commission on Human Rights' in Y Haeck and C Burbano-Herrera (eds), *Interim Measures in International Human Rights Law* (OUP forthcoming 2015).

<sup>52</sup> Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court on Human Rights* (2nd edn, CUP 2013) 279–80. See also Burbano-Herrera (n 47) 156–57.

## 4. INTERIM MEASURES PROTECTING PERSONS DEPRIVED OF LIBERTY

Given the often terrible conditions of detention in Africa and the Americas, prisoners have received protection as individuals (Africa and the Americas) and as collectives (the Americas) through PMs. Interim measures have protected clearly identified persons and also groups of very significant sizes, for example, *all* inmates in certain prisons. The following section provides a detailed analysis of the situations in which PMs were requested.

### 4.1. AFRICAN SYSTEM UNDER THE AFRICAN COMMISSION

Detainees in Africa have been protected in a number of instances,<sup>53</sup> including those alleging unlawful arrest,<sup>54</sup> being sentenced to death<sup>55</sup> and being kept in appalling health conditions.<sup>56</sup> Some prisoners have been in custody suffering from oppressive regimes. Especially in recent years, there is a clear concern with regard to suspected terrorists.

The response of the African Commission to request PMs may be divided into two categories in respect of which the Commission (i) granted (explicit) provisional measures,<sup>57</sup> and (ii) launched an ‘urgent appeal’ to the State concerned or voiced and transmitted its ‘concerns’ about the situation (here referred to as adopting

<sup>53</sup> *Saro-Wiwa case* (n 37); Communication 256/2002, *Woods and Another v Liberia*, (2003) AHRLR 125 (ACHPR 2003) (*‘Woods and Another case’*); Communication 250/2002, *Zegveld and Another v Eritrea*, (2003) AHRLR 84 (ACHPR 2003) (*‘Eritrean Detention case’*); Communication 258/2002, *Miss A v Cameroon*, (2004), AHRLR 39 (ACHPR 2004) (*‘Miss A case’*); Communication 269/03, *Interights (in respect of Safia Yakubu Husaini et al) v Nigeria* (*‘Safia Yakubu Husaini case’*); Communication 322/06, *Tsatsu Tsikata v Ghana* (*‘Tsatsu Tsikata case’*); Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* (*‘Egypt Death Penalty case’*) and App 2/2013, *African Commission (in respect of Saif Al-Islam Gaddafi) v Libya* (*‘Gaddafi’s son Provisional Measures case’*).

<sup>54</sup> Communication 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (*‘Nigerian Newspapers Proscription case’*) paras 2, 49; *Gaddafi’s son case* (n 53).

<sup>55</sup> *Egypt Death Penalty case* (n 53).

<sup>56</sup> *Saro-Wiwa case* (n 37); *Nigerian Newspapers Proscription case* (n 54); *Gaddafi’s son Provisional Measures case* (n 53).

<sup>57</sup> Communication 83/92, *Jean Yakovi Degli v Togo* (*‘Togo Detention case’*); *Saro-Wiwa case* (n 37); *Nigerian Newspapers Proscription case* (n 54); Communication 212/98, *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) (*‘Banda case’*); Communication 133/94, *Association pour la Défense des Droits de l’Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000) (*‘Afar case’*); Communication 290/2004, *Open Society Justice Initiative (in respect of Njawe Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006) (*‘Radio Freedom FM case’*); Communication 284/03, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe* (*‘Zimbabwean Daily News case’*) and *Egypt Death Penalty case* (n 53); Communication xx/12, *Centre for Human Rights, University of Pretoria (in respect of David Mendes) v Angola* (*‘Mendes Provisional Measures case’*).

‘implicit provisional measures’).<sup>58</sup> From 1988 until 2013, the African Commission received seven requests for PMs in respect of detained persons. Of these requests, the Commission *explicitly* granted six<sup>59</sup> while it rejected one.<sup>60</sup> Furthermore, on one occasion, the Commission adopted PMs on its own initiative;<sup>61</sup> and in two cases PMs were adopted, but there is no information to indicate whether the Commission acted on its own motion or following a request.<sup>62</sup>

Cases were related to political prisoners and human rights defenders: one case involved Togo,<sup>63</sup> two cases involved Nigeria,<sup>64</sup> one case related to presumed terrorists condemned to death in Egypt<sup>65</sup> and one case related to a person arbitrary detained in Libya.<sup>66</sup> Additionally, the Commission granted *implicit provisional measures* in four cases: two cases related to persons unlawfully arrested, including one case involving three journalists in Liberia and one case involving eleven former government officials in Eritrea; and two cases related to persons sentenced to death penalty, including one case in Nigeria and one case in Burundi.

#### 4.1.1. Prisoners sentenced to death, tortured and ill-treated

The African Commission granted PMs in order to protect persons sentenced to death in four cases. In such cases, the Commission usually requests the State to suspend the implementation of the death penalty, pending the outcome of the consideration of the complaints before the Commission.

In an infamous case related to Nigeria, the Commission ordered the protection of Saro-Wiwa, the president of the Movement for the Survival of the Ogoni People (MOSOP) and other members of MOSOP.<sup>67</sup> In this case, the Commission adopted

<sup>58</sup> These implicit PMs call special attention due to the fact that, although the Commission does not explicitly mention the term ‘provisional measures’ or the rule that contemplates this legal tool, the formulation is very similar. The Commission requests the States to act in a certain manner, while clarifying that the order given does not prejudice the merits of the communication. See Clara Burbano-Herrera and Frans Viljoen, ‘Provisional Measures Issued by the African Commission and African Court on Human and People’s Rights’ in Y Haeck and C Burbano-Herrera (eds), *Interim Measures in International Human Rights Law* (OUP forthcoming 2015). The early UN Human Rights Committee case law involving requests for information also connotes implicit provisional measures. See Rieter (n 7) 338–43.

<sup>59</sup> *Saro-Wiwa* case (n 37); *Egypt Death Penalty* (n 53); *Woods and Another* case (n 53); *Eritrean Detention* case (n 53); *Miss A* case (n 53); *Safia Yakubu Husaini* (n 53).

<sup>60</sup> *Tsatsu Tsikata* case (n 53).

<sup>61</sup> *Nigerian Newspapers Proscription* case (n 54).

<sup>62</sup> *Togo Detention* case (n 57) and *Gaddafi’s son Provisional Measures* case (n 53).

<sup>63</sup> *Togo Detention* case (n 57).

<sup>64</sup> *Saro-Wiwa* case (n 37) and *Nigerian Newspapers Proscription* case (n 54).

<sup>65</sup> *Saro-Wiwa* case (n 37) and *Egypt Death Penalty* case (n 53).

<sup>66</sup> *Gaddafi’s son Provisional Measures* case (n 53) para 3.

<sup>67</sup> See Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 325; GJ Naldi, ‘Interim Measures of Protection in the African System for the Protection of Human and Peoples’ Rights’ (2002) 2 AHRLR 6–7.

PMs on two occasions. The first PM was issued in November 1994, requesting the Nigerian government not to cause irreparable prejudice towards Saro-Wiwa.<sup>68</sup> According to the communication, Mr Saro-Wiwa had been detained because of his political work. He had been severely beaten during his detention and held in very poor conditions. The second request was granted one year later. Taking into account that the beneficiaries were sentenced to death while the case was pending before the African Commission, the Commission asked Nigeria that the death sentences be delayed until the Commission had finalised its mission and spoken with the competent authorities.<sup>69</sup>

The Commission also protected presumed terrorists sentenced to death by hanging, after being accused of bombings in Egypt in 2004 and 2005.<sup>70</sup> According to the complainants, agents of the Egyptian Intelligence Service had subjected the victims to various forms of torture and ill-treatment during their detention, in order to obtain their confessions.<sup>71</sup> The Commission's PMs requested the Egyptian government to suspend the executions while the communication was before the Commission.<sup>72</sup>

Implicit provisional measures were granted in the *Bwampamye* case in which the victim had been sentenced to death without the assistance of his lawyer. The beneficiary had been condemned for having incited the population to commit crimes, and for having under the same circumstances organised an attack geared towards provoking massacres and setting up barricades with a view to hindering the enforcement of public order.<sup>73</sup> In this case, the Chairperson of the Commission decided on his own motion to appeal to the Burundian Head of State, requesting a stay of the execution pending the determination of the communication.<sup>74</sup>

Provisional measures were also granted in order to protect a Nigerian woman sentenced to death by stoning, by a *sharia* court, for the alleged crime of adultery. The complainants alleged that the right of legal representation in the *sharia* courts was very limited, and even when legal representation was allowed, only lawyers who were Muslims could practice in these courts.<sup>75</sup> The Chairperson of the Commission addressed an urgent appeal to the President of Nigeria, urging him to suspend further implementation of the *sharia* penal statutes and decisions, including the case of Ms

<sup>68</sup> *Saro-Wiwa* case (n 37) para 19.

<sup>69</sup> *ibid* para 29.

<sup>70</sup> *Egypt Death Penalty* case (n 53) paras 3–4, 9, 38, 40, 42.

<sup>71</sup> *ibid* para 7.

<sup>72</sup> *ibid* paras 78, 101.

<sup>73</sup> Communication 231/99, *Avocats Sans Frontières (in respect of Bwampamye) v Burundi*, (2000) AHRLR 48 (ACHPR 2000) ('*Bwampamye* case') paras 2, 5.

<sup>74</sup> *ibid* paras 2, 15, 17.

<sup>75</sup> The complainants requested to withdraw the case. They could not obtain the information to prepare their written submissions on admissibility. The Commission closed the file. See *Safia Yakubu Husaini* case (n 53) paras 2, 7.

Yakubu, pending the outcome of the consideration of the complaints before the Commission.<sup>76</sup>

#### 4.1.2. *Prisoners unlawfully arrested and ill-treated*

Cases related to prisoners who have been ill-treated, kept in appalling conditions and unlawfully arrested have also been submitted before the African Commission. In these cases, States are requested to intervene in the matter, pending the outcome of the consideration of the complaint before the Commission. The African Commission requests the State concerned, in general terms, to guarantee the rights of the beneficiary and to avoid irreparable damage.

In a case related to a Togolese prisoner, the complainants alleged that Corporal Bikagni had been subjected to torture and maltreatment. Under duress, he confessed that he had planned a coup against the government.<sup>77</sup> The Commission requested the Togolese government '(to) ensur(e) [...] the security of the victim and to avoid irreparable damage prejudice to be inflicted on the victim of the alleged violations'.<sup>78</sup> In another case, it was alleged that eleven former Eritrean government officials had illegally been arrested due their political opinions in 2001. The complainants requested PMs following the subsequent announcement by the government that they had been detained 'because of crimes against the nation's security and sovereignty', and the government's refusal to allow them access to their families and lawyers.<sup>79</sup> The African Commission wrote letters appealing to the President of Eritrea, in May 2002, 'urging him to intervene in the matter being complained of, pending the outcome of the consideration of the complaint before the Commission'.<sup>80</sup> In October 2002, the Commission reminded the State that 'it was the responsibility of the member state's general public prosecutor to bring any accused persons before a competent court of law in accordance with the rules guaranteeing fair trial under relevant national and international instruments';<sup>81</sup> and in June 2003, it appealed to the Eritrean President 'to intervene in this matter and urge the authorities holding the individuals to release them or bring them before the courts in Eritrea'.<sup>82</sup>

In the *Woods* case, implicit PMs were issued to protect three journalists of the independent 'Analyst' newspaper in Monrovia (Liberia). The journalists had allegedly been arbitrary arrested and detained without charge.<sup>83</sup> Four months after the persons

<sup>76</sup> *ibid* para 10.

<sup>77</sup> Communication on unlawful detention. *Togo Detention* case (n 57) para 1.

<sup>78</sup> *ibid* para 5.

<sup>79</sup> *ibid. Eritrean Detention* case (n53) paras 10, 15, 19 and 54.

<sup>80</sup> *ibid* para 10.

<sup>81</sup> *ibid* paras 10, 15.

<sup>82</sup> *ibid* para 19.

<sup>83</sup> *Woods and Another* case (n 53) paras 2, 9.

had been jailed and after a request for PMs was submitted, the African Commission *appealed* to the President of Liberia, [...] respectfully urging him to intervene in the matter being complained of, pending the outcome of the consideration of the case before the Commission.<sup>84</sup> The complainants had requested the Commission to order the authorities to immediately release the journalists.<sup>85</sup> In this matter, it was not appropriate to order the authorities to release the journalists, because this would lead to prejudging the case on the merits, and this goes against the purpose of PMs. However, the Commission could also adopt specific PMs by, for example, asking the State for information about the legal situation of the beneficiaries as to the allegations.<sup>86</sup> In a recent case, the *African Commission v Libya*,<sup>87</sup> the Commission had, in 2013, issued PMs requesting Libya to ensure that a detainee, Saif Al-Islam Gaddafi, Colonel Gaddafi's son, be provided access to a lawyer, be allowed to receive visits, and that his personal integrity be guaranteed.<sup>88</sup>

#### 4.2. AFRICAN SYSTEM UNDER THE AFRICAN COURT

The Court may order PMs in respect of cases pending before it, or it may be approached with a specific request to order such measures. Non-compliance with the Commission's interim measures may result in a referral of that matter to the African Court.<sup>89</sup> This is exactly what transpired in respect of the *Gaddafi's son* case. Some ten months after the Commission had issued its request for PMs in this matter, it referred the case to the Court for its determination on the merits.<sup>90</sup> Although the Commission did not explicitly request the Court to adopt PMs, one of the reasons for the referral was the non-compliance by the State with the PMs.<sup>91</sup> The Court ordered that the State refrain from any 'judicial proceedings, investigations or detention' that could cause irreparable harm to Saif Al-Islam Gaddafi, or harm his physical and mental integrity or his health.<sup>92</sup> Of the three mentioned cases before the Court, this is the only one of relevance to the rights of detainees.

<sup>84</sup> *ibid* para 11.

<sup>85</sup> *ibid* para 8.

<sup>86</sup> *ibid*. In November 2003, the communication was declared inadmissible due to non-exhaustion of local remedies.

<sup>87</sup> Information about the Commission's granting of PMs may also be revealed from the decision of the African Court, if the Commission subsequently refers the matter to the Court. See *Gaddafi's son Provisional Measures* case (n 53) ordered on 15 March 2013.

<sup>88</sup> *Gaddafi's son Provisional Measures* case (n 53) para 15.

<sup>89</sup> African Commission, Rules of Procedure, Rule 118(2).

<sup>90</sup> *African Commission v Libya* (n 41).

<sup>91</sup> The matter was referred under Rule 118(2); although Rule 18(3) (referring to 'serious or massive violations') is also invoked, this basis is much less clear and persuasive, given that a single person's limited right to fair trial process is at stake.

<sup>92</sup> *African Commission v Libya* (n 41) para 20(1)-(4).

### 4.3. INTER-AMERICAN SYSTEM UNDER THE INTER-AMERICAN COMMISSION

From 1996 to 2012, the IACmHR protected persons deprived of liberty on 210 occasions. Beneficiaries have been persons sentenced to death (139 out of 771), prisoners with health problems and without access to medical care (25 out of 771), and detainees being kept in deplorable prison conditions, some of whom have been mistreated by prisons officers. In these cases, the complainants allege that the right to life (Article 4 of the American Convention), the right to personal integrity (Article 5) or the right to a fair trial (Article 8), are in extreme danger of being violated. The great majority of the beneficiaries are men. Women received protection on very few occasions, for example only in two cases a precautionary measure protected women sentenced to death.<sup>93</sup> Furthermore, persons deprived of liberty were protected collectively in 21 cases.

#### 4.3.1. Prisoners Sentenced to Death

The Inter-American Commission has protected detainees sentenced to death on several occasions, despite the fact that the American Convention authorizes the death penalty in exceptional circumstances.<sup>94</sup> In these cases, the complainants alleged violations of the American Declaration or the American Convention.<sup>95</sup> Petitioners argued irregularities in the criminal proceedings;<sup>96</sup> that non-national prisoners did not receive consular assistance,<sup>97</sup> that lethal injection caused extreme and unnecessary suffering<sup>98</sup> and that cruel and unusual punishment is caused by the incarceration on death row for a long period.<sup>99</sup>

<sup>93</sup> IACmHR, Case 11.837, *Idravani (Pamela) Ramjattan v Trinidad and Tobago*, Precautionary Measures, Order of 21 November 1997; IACmHR, Cases 12.082 and 12.093, *Alfred Frederick and Natasha De Leon v Trinidad and Tobago*, Precautionary Measures, Order of 21 January 1999.

<sup>94</sup> American Convention, art 4(2)-(6). See also Protocol to the American Convention to Abolish the Death Penalty adopted in Asunción, Paraguay, by the OAS on 8 June 1990, enters into force when the State concerned deposits its ratification. State parties undertake that they will not apply the death penalty, although a reservation is possible to allow for its application in times of war.

<sup>95</sup> For a study of the death penalty in the Commonwealth Caribbean see B Tittlemore, 'The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections 13' (2004) *Wm & Mary Bill Rts J* 445.

<sup>96</sup> See eg IACmHR, *Tracy Lee Housel (USA)*, Precautionary Measures, Order of 27 February 2002 and IACmHR, PM 184/10, *David Powell (USA)*, Precautionary Measures, Order of 14 June 2010.

<sup>97</sup> IACmHR, *José Ernesto Medellín (USA)*, Precautionary Measures, Order of 6 December 2006.

<sup>98</sup> See eg IACmHR, *Humberto Leal García (USA)*, Precautionary Measures, Order of 30 January 2007; IACmHR, *Rubén Ramírez Cárdenas (USA)*, Precautionary Measures, Order of 30 January 2007.

<sup>99</sup> For example in the *James Willie Brown* matter the beneficiary had been waiting on death row since 1975 and the PMs were only adopted in 2002. IACmHR, *James Willie Brown (USA)*, Precautionary Measures, Order of 18 November 2002. In the *Robert Karl Hicks* matter the beneficiary had been waiting on death row since 1986 and the PMs were adopted in 2004. IACmHR, *Petition P508/04, Robert Karl Hicks (USA)*, Precautionary Measures, Order of 28 June 2004.

Prisoners sentenced to death represent 18 per cent of the total of the beneficiaries (139 out of 771). They were always persons clearly identified. Almost half of the prisoners were in jail in US (65 out of 139), and the other half in Trinidad and Tobago (41 out of 139) and Jamaica (20 out of 139). This means that most of these PMs apply to Member States of the OAS, which are exclusively under the supervision of the Commission.<sup>100</sup> The United States has not ratified the American Convention, Jamaica has ratified the American Convention but has not accepted the contentious jurisdiction of the IACHR, and Trinidad and Tobago denounced the American Convention in 1998. With the exception of a few foreigners,<sup>101</sup> most of the beneficiaries have been nationals, some of whom were in a special condition of vulnerability as they suffered mental problems,<sup>102</sup> or they were under eighteen years of age when they committed the crime.<sup>103</sup>

#### 4.3.2. *Detainees being kept in Deplorable Health Conditions*

Detainees in precarious health conditions received protection on 25 occasions. The situations are particularly problematic because the medical care that ill prisoners need can only be provided by the State. The health of the prisoner depends totally on the will of the State authorities.<sup>104</sup> Petitioners usually claim that the prisoners are seriously ill, and that there is a high probability of serious repercussions on their right to life and personal integrity. Furthermore, the illness frequently needs special treatment, a long term care that is not always easy to realise within prison, and its costs are very high. Some inmates have cancer,<sup>105</sup> a tumour,<sup>106</sup> diabetes or kidney disease,<sup>107</sup> or they are living with HIV or suffering from AIDS.<sup>108</sup>

<sup>100</sup> See text accompanying notes 42–44.

<sup>101</sup> See IACmHR, Case 12.333, *Miguel Ángel Flores (USA)*, Precautionary Measures, Order of 25 October 2000; IACmHR, Petition P0353.2001, *Gerardo Valdez Maltos (USA)*, Precautionary Measures, Order of 14 June 2001.

<sup>102</sup> See eg IACmHR, Petition 1282/06, *Guy LeGrande (USA)*, Precautionary Measures, Order of 27 November 2006; IACmHR, PM 465/11, *Virgilio Maldonado Rodríguez (USA)*, Order of 21 December 2011.

<sup>103</sup> In the *Michael Domingues* case, the Commission confirmed the customary nature of the prohibition on juvenile executions to ensure that capital punishment is not imposed upon persons who, at the time their crime was committed, were under 18 years of age. IACmHR, Case 12.285 *Michael Dominguez v USA*, Report No 62/02 of 22 October 2002 para 85.

<sup>104</sup> See eg IACmHR, *Jorge Luis García Pérez-Antúnez (Cuba)*, Precautionary Measures, Order of 24 April 2001.

<sup>105</sup> See eg IACmHR, Case 11.698, *Ana Maria Lopez (Peru)*, Precautionary Measures, Order of 27 November 1997.

<sup>106</sup> See eg IACmHR, *Francisco Chaviano González (Cuba)*, Precautionary Measures, Order of 6 December 2002.

<sup>107</sup> See eg IACmHR, *Luis Williams Pollo Rivera (Peru)*, Precautionary Measures, Order of 27 July 2005.

<sup>108</sup> See eg IACmHR, Petition P950/05, *Andrea Mortlock (USA)*, Precautionary Measures, Order of 19 August 2005.

Complainants usually allege that the State involved does not offer access to medical care,<sup>109</sup> or the medical treatment offered is not adequate.<sup>110</sup> It has also been mentioned that prisoners are held without proper sanitary conditions.<sup>111</sup> Most of the requests were directed to Cuba (7 PM)<sup>112</sup> and Peru (5 PM),<sup>113</sup> while Colombia<sup>114</sup> and Mexico<sup>115</sup> had two requests each, and Argentina,<sup>116</sup> Guatemala,<sup>117</sup> Jamaica,<sup>118</sup> Suriname,<sup>119</sup> the US,<sup>120</sup> Brazil,<sup>121</sup> the Dominican Republic<sup>122</sup> and Venezuela<sup>123</sup> one request each.

As a result of the traditional difficulty to request protection of economic and social rights, complainants often request their protection by linking these rights to civil rights, such as the right to life (Article 4) and the right to humane treatment (Article 5).<sup>124</sup> In this regard, the IACmHR protected the right to health, independently of the right to life and the right to humane treatment, in two cases only.<sup>125</sup>

<sup>109</sup> See eg IACmHR, *Luis Miguel Sánchez Aldana (Suriname)*, Precautionary Measures, Order of 11 November 2004.

<sup>110</sup> See eg IACmHR, PM 393/10, *Luis Álvarez Renta (Dominican Republic)*, Precautionary Measures, Order of 15 December 2011.

<sup>111</sup> See eg IACmHR, *Carlos Mario Gómez Gómez (Colombia)*, Precautionary Measures, Order of 19 November 2007.

<sup>112</sup> See eg IACmHR, PM 50/09, *Alejandro Jiménez Blanco (Cuba)*, Precautionary Measures, Order of 18 March 2009; IACmHR, PM 484/11, *José Daniel Ferrer García (Cuba)*, Precautionary Measures, Order of 5 November 2012.

<sup>113</sup> See eg IACmHR, *Wilson García Asto (Peru)*, Precautionary Measures, Order of 4 April 2002; IACmHR, Case 11.167, *Francisco Xavier Morales Zapata (Peru)*, Precautionary Measures, Order of 29 October 1998.

<sup>114</sup> IACmHR, PM 304/08, *Diomedes Meneses Carvajalino (Colombia)*, Precautionary Measures, Order of 9 April 2010; *Carlos Mario Gómez Gómez* matter (n 111).

<sup>115</sup> IACmHR, *Mariano Bernal Fragoso (Mexico)*, Precautionary Measures, Order of 11 September 2003; IACmHR, PM 351/11, *Ananías Laparra Martínez (Mexico)*, Precautionary Measures, Order of 18 January 2012.

<sup>116</sup> IACmHR, PM 425/11, *X (Argentina)*, Precautionary Measures, Order of 18 November 2011.

<sup>117</sup> IACmHR, *Diego Esquina Mendoza and others (Guatemala)*, Precautionary Measures, Order of 8 April 1998.

<sup>118</sup> IACmHR, *Anthony McLeod (Jamaica)*, Precautionary Measures, Order of 2 October 2002.

<sup>119</sup> *Luis Miguel Sánchez Aldana* matter (n 109).

<sup>120</sup> *Andrea Mortlock* matter (n 108).

<sup>121</sup> IACmHR, *People deprived of their freedom at Professor Aníbal Bruno Prison (Brazil)*, Precautionary Measures, Order of 4 August 2011.

<sup>122</sup> *Luis Álvarez Renta* matter (n 110).

<sup>123</sup> IACmHR, *Raúl Jose Díaz Peña (Venezuela)*, Precautionary Measures, Order of 31 October 2005.

<sup>124</sup> J Cano, 'The protection of ESCR in the Inter-American System through the use of Precautionary and Provisional Measures' (2007) 45 *Revista IIDH* 67.

<sup>125</sup> See eg IACmHR, Petition P0416/2001, *Isabel Velarde Sánchez (Peru)*, Precautionary Measures, Order of 28 August 2001 and IACmHR, *Seven-year-old child (Jamaica)*, Precautionary Measures, Order of 22 September 2003.

### 4.3.3. *Detainees being kept in Appalling Conditions*

Taking into account that in the Americas several detention centres have structural problems that affect the entire population of persons deprived of liberty, the Commission has requested States to implement PMs in a collective dimension. As such, in those cases prisoners are seen as a group or collective that is potentially at risk.

Sometimes a situation of extreme gravity and urgency is created when the detainees are not separated in categories; for example, convicted and pre-trial inmates,<sup>126</sup> members of armed groups and common prisoners,<sup>127</sup> members of different armed groups (guerrilla and paramilitary)<sup>128</sup> or minors and adults.<sup>129</sup>

In other cases, the situation of danger is due to a lack of control of the prisoners by the prison officials, involving deplorable conditions of detention and high levels of violence.<sup>130</sup> For example, in the *Inmates in the Urso Branco prison matter*, it was alleged that there were several conflicts between groups of inmates, as well as a massacre among the prisoners resulting in the deaths of over 30 inmates.<sup>131</sup> Other matters are concerned with detainees who suffer from overcrowded conditions.<sup>132</sup> In one case, it was mentioned that there were 1000 detainees, including young offenders, in cells with a capacity of 205 persons.<sup>133</sup> Usually, under such circumstances, infectious diseases spread easily, the level of violence among inmates increases, and adequate medical care is not provided.

The IACmHR pays special attention to requests related to imprisoned children because of their specific dependency and because children are particularly vulnerable to violence under penitentiary circumstances.<sup>134</sup> As a result, the Commission

<sup>126</sup> See eg IACmHR, *Convicted and tried inmates committed to the Penitentiary of Mendoza and its offices (Argentina)*, Precautionary Measures, Order of 3 August 2004.

<sup>127</sup> See eg IACmHR, *108 inmates in the Maximum Security Prison at Kilometer 14 (Colombia)*, Precautionary Measures, Order of 18 March 2004.

<sup>128</sup> In a matter regarding Colombia it was mentioned that '[...] On 27 April 2000, prisoners belonging to paramilitary groups detained in cellblock 5 launched a violent attack on prisoners in cellblock 4, killing 47 inmates and injuring 17 others'. IACmHR, *Political prisoners in buildings 1 and 2 of the National Model Prison in Bogotá (Colombia)*, Precautionary Measures, Order of 11 May 2000.

<sup>129</sup> See eg IACmHR, Case 11.491, *Minors in the San Pedro de Sula prison (Honduras)*, Precautionary Measures, Order of 22 October 1996.

<sup>130</sup> See eg IACmHR, PM 104/12, *Penitentiary Services Buenos Aires Province (Argentina)*, Precautionary Measures, Order of 13 April 2012.

<sup>131</sup> The 47 survivors were at risk of being killed. See IACmHR, *Inmates in the Urso Branco prison (Brazil)*, Precautionary Measures, Order of 14 March 2002.

<sup>132</sup> See eg IACmHR, PM 144/07, *Detainees at Toussaint Louverture Police Station in Gonaïves (Haiti)*, Precautionary Measures, Order of 16 June 2008.

<sup>133</sup> IACmHR, *Men deprived of freedom in the cells located in the basement of POLINTER Police District in Rio de Janeiro (Brazil)*, Precautionary Measures, Order of 11 November 2005.

<sup>134</sup> The American Declaration and Convention provide protection for children but do not define the term. The Inter-American Court and Commission have indicated that the definition of a child is based on the provisions of art 1 of the UN Convention on the Rights of the Child. In that regard

has granted PMs, of both a collective and individual character. During the period under examination, the Commission protected in total 225 children detained in a re-education centre in Paraguay,<sup>135</sup> 62 minors detained in Guatemala<sup>136</sup> and minors detained in five institutions in Brazil.<sup>137</sup>

The approximately 254 detainees held at Guantanamo Bay, Cuba, are also included in this category. These detainees were transported by the US following their capture in Afghanistan on 12 January 2002. The US refused to consider these detainees as prisoners of war until a competent tribunal determined otherwise, which means that the detainees were held arbitrarily and incommunicado for a prolonged period of time and they had been interrogated without legal counsel.<sup>138</sup> The Commission requested the US, two months after they began transferring to its naval base persons captured in connection with US-led military operation against terrorism,<sup>139</sup> to take 'urgent measures necessary to determine the legal status of the detainees at Guantanamo Bay'.<sup>140</sup> The request concerned 254 male prisoners of 25 different nationalities. Since that time, PMs have been maintained, reiterated<sup>141</sup> and broadened.<sup>142</sup> In 2013, the Commission required the US to close the detention facility.

#### 4.4. INTER-AMERICAN SYSTEM UNDER THE INTER-AMERICAN COURT

##### 4.4.1. *Prisoners Sentenced to Death*

As of 2013, the Court has only requested in three cases that all necessary measures be taken to preserve the life and physical integrity of certain persons on death row. One

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'child' refers to any person who has not yet turned 18 years of age. See IACHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of 28 August 2002 para 42; IACHR, *The "Street Children" v Guatemala* Judgment of 19 November 1999 para 188; IACHR, *Bulacio v Argentina* Judgment of 18 September 2003 para 133.

<sup>135</sup> IACmHR, Petition 11.666, *255 minors who were previously being held at the Panchito López Reeducation Center for Minors (Paraguay)*, Precautionary Measures, Order of 8 August 2001.

<sup>136</sup> IACmHR, *62 children held in the Juvenile Center of Provisional Confinement (Guatemala)*, Precautionary Measures, Order of 24 November 2004.

<sup>137</sup> See eg IACmHR, *Minors detained in the Instituto Padre Severino and others (Brazil)*, Precautionary Measures, Order of 20 May 1996; IACmHR, PM 224/09 *Adolescents Deprived of Liberty in the Socio-Educational Internment Facility (UNIS) (Brazil)*, Precautionary Measures, Order of 25 November 2009.

<sup>138</sup> IACmHR, *Detainees being held by the United States at Guantanamo Bay, Cuba (USA)*, Precautionary Measures, Order of 12 March 2002.

<sup>139</sup> See Brian D Tittmore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism', (2006) 6(2) *Human Rights L Rev* 378–402.

<sup>140</sup> *Detainees being held by the United States at Guantanamo Bay, Cuba (USA)* matter (n 138).

<sup>141</sup> The PM was reiterated on 23 July 2002, 18 March 2003, 29 July 2004 and 28 October 2005.

<sup>142</sup> The PM was broadened on 29 July 2004, 28 October 2005, 20 August 2008 (PM 211–08) and 23 July 2013 (PM 259/13). See also IACmHR, *Omar Khadr (USA)*, Precautionary Measures, Order of 21 March 2006.

case related to Barbados,<sup>143</sup> one to Guatemala,<sup>144</sup> and one to Trinidad and Tobago.<sup>145</sup> In the latter case, the Court ordered PMs in respect of more than 30 persons sentenced to death and awaiting execution. The Court eventually found that the right of these detainees to life, to a fair trial and judicial protection, and to humane treatment had been violated.<sup>146</sup> Pending the finalisation of the case on its merits,<sup>147</sup> the Court, at the request of the Commission, broadened on seven occasions the PMs.<sup>148</sup> It is a testimony to the persistence of the Court, and the credibility of the PMs procedure that the State only executed two of the beneficiaries of these measures, despite the fact that Trinidad and Tobago denounced the Convention with effect from May 1999.<sup>149</sup>

It is important to mention the *Boyce and Joseph v Barbados* case in which PMs were adopted to protect four persons sentenced to death. In this case, the orders had already been read out and the executions were scheduled four days after the request. In view of the urgency of the matter, PMs were adopted the same day that they were requested.<sup>150</sup>

#### 4.4.2. Detainees being kept in Appalling Conditions

A significant number of persons deprived of their liberty benefited from the Court's provisional measures, including those in prisons,<sup>151</sup> and also in mental hospitals and institutional child care.<sup>152</sup> States have been requested to conform prison conditions

<sup>143</sup> IACHR, *Boyce and Joseph v Barbados*, Provisional Measures, Order of 24 November 2004.

<sup>144</sup> IACHR, *Fermín Ramírez v Guatemala*, Provisional Measures, Order of 12 March 2005.

<sup>145</sup> *James et al v Trinidad and Tobago* (n 33).

<sup>146</sup> *Hilaire, Constantine and Benjamin v Trinidad and Tobago* (n 25).

<sup>147</sup> *James v Trinidad and Tobago* (n 33).

<sup>148</sup> *Burbano-Herrera* (n 47) 173.

<sup>149</sup> *Pasqualucci* (n 52) 296.

<sup>150</sup> *Boyce and Joseph v Barbados* (n 143) "Having Seen" 4, "Decides" 1. The Court's time frame depends on the circumstances of the case. See *Burbano-Herrera* (n 47) 96.

<sup>151</sup> See IACHR, *Cesti Hurtado v Peru*, Provisional Measures, Order of the President of the Court of 29 July 1997; IACHR, *Urso Branco Prison v Brazil*, Provisional Measures, Order of 25 November 2009, "Having seen" 1; IACHR, *Mendoza Prisons v Argentina*, Provisional Measures, Order of the 17 October 2008, "Having seen" 1; *Gallardo Rodriguez v Mexico*, Provisional Measures, Order of 18 February 2002, "Having seen" 1; IACHR, *Loayza Tamayo v Peru*, Provisional Measures, Order of 13 September 1996, "Having seen" 3 "Decides" 1; IACHR, *Suarez Rosero v Ecuador*, Order of 28 June 1996, "Having seen" 5; IACHR, *Penitentiary Center of the Central Occidental Region (Uribana Prison) v Venezuela*, Provisional Measures, Order of 2 February 2007, "Having seen" 1–2; IACHR, *Yare I and Yare II Capital Region Center v Venezuela*, Provisional Measures, Order of 30 March 2006, "Having seen" 1–2; IACHR, *Capital El Rodeo I and El Rodeo II Judicial Confinement Center v Venezuela*, Provisional Measures, Order of 8 February 2008, "Having seen" 1–2; IACHR, *Monagas Judicial Confinement Center ("La Pica") v Venezuela*, Provisional Measures, Order of 9 February 2006, "Having seen" 1, 3; IACHR, *Persons imprisoned in the "Dr Sebastiao Martins Silveira" Penitentiary in Araraquara, Sao Paulo v Brazil*, Provisional Measures, Order of 30 September 2006, "Having seen" 4; IACHR, *Children Deprived of Liberty in the "Complexo do Tatuape of FEDEM v Brazil*, Provisional Measures, Order of 3 July 2007, "Having seen" 1–2.

<sup>152</sup> *Pasqualucci* (n 52) 279.

to the minimum international standards<sup>153</sup> and to give adequate medical attention to inmates when their health is in danger.<sup>154</sup> In *Loayza Tamayo v Peru*, the Court requested PMs to protect a woman who was serving a sentence of 20 years. It was stated that Ms. Loayza spent 23.5 hours a day in an extremely small, damp and cold cell. She was not allowed to have a radio or magazines, nor could she receive visitors.<sup>155</sup> In *Cesti Hurtado v Peru*, it was concluded that the health of a detainee was in grave danger since he was not allowed to receive medicine for a heart problem that he had had for numerous years.<sup>156</sup> In these cases, the Court adopted PMs to avoid irreparable damage to the physical, psychological and moral integrity of the detainees.

In the matter probably involving the most comprehensive PMs and number of beneficiaries, the *Matters of Certain Venezuelan Penitentiary Centres*,<sup>157</sup> the IACHR from 2006 started engaging with the conditions of detention in a number of prisons in Venezuela. In its orders, the Court requires the State to take immediate measures to ensure that no further detainee is killed or treated inhumanely. However, the Court goes much further by requiring measures of a more general and far-reaching nature, such as the separation of ‘accused’ from ‘convicted inmates’, the provision of health care to all inmates, the reduction of overcrowding, the provision of adequately trained staff, and most comprehensive in scope, ensuring that prison conditions conform with ‘applicable international standards’. By the beginning of 2014, this matter was still being supervised by the Court, as violent acts culminating in the deaths of many inmates still persist.

A practice has evolved that the IACmHR refers matters in which it has issued PMs to the IACHR, if the States do not comply with the measures ordered. The case law shows that from 1987 to 2011, 65 out of 80 PMs were adopted by the Court at the request of the Commission, and 43 of these cases (54 per cent) had previously received PMs.<sup>158</sup> One such case concerned children and adolescents deprived of their liberty in

<sup>153</sup> IACHR, *Re the Socio-Educational Internment Facility v Brasil*, Provisional Measures, Order of 20 November 2012.

<sup>154</sup> Burbano-Herrera (n 47) 156–57.

<sup>155</sup> *Loayza Tamayo v Peru* (n 151) “Having seen” 3. In the same case See Order of 2 July 1996, “Having seen” 4, 7.

<sup>156</sup> *Cesti Hurtado v Peru* (n 151) “Considering” 7.

<sup>157</sup> On 6 September 2012 the Court decided to join the processing of some matters and to establish that, thereafter, the joint PMs would be known as the “Matters of certain Venezuelan prisons”. The Orders of the IACHR of 24 November 2009, *Re the Monagas Judicial Detention Center (“La Pica”) v Venezuela* (n 151); *the Penitentiary Center of the Capital Region Yare I and II (Yare Prison) v Venezuela* (n 151); *the Penitentiary Center of the Central Occidental Region (Uribana Prison) v Venezuela* (n 151); *the Capital Detention Center El Rodeo I and II v Venezuela* (n 151) of 15 May 2011, in the matters of the Penitentiary Center of Aragua “Tocorón Prison” and of the Ciudad Bolívar Judicial Detention Center “Vista Hermosa Prison,” as well as of 6 September 2012, the Penitentiary Center of the Andean Region. See IACHR, *Certain Penitentiary Centers of Venezuela, Penitenciaría Center of the Central Occidental Region (Uribana Prison) v Venezuela*, Provisional Measures, Order of 13 February 2013.

<sup>158</sup> When the matter is under consideration of the Commission, only the Commission is competent to request the Court PMs. If, however, the case has been submitted to the Court, the Commission, the

the ‘Complexo de Tatuape’ of FEBEM (Brazil). In this case, the Commission in 2004, issued PMs addressed to uphold the rights of the children and adolescents detainees. Because the situation did not improve, and the children were subjected to increasing dangers, the Commission directed a request for PMs to the Court.<sup>159</sup>

## 5. COMPLIANCE

Although compliance with international, including regional human rights standards, generally, has received increasing attention from treaty bodies, international organisations, and academics, this aspect is in many respects the Achilles’ heel of international human rights protection.<sup>160</sup> Compliance by States is compromised by many factors including a lack of political will, geopolitical factors, ignorance and weak civil society engagement with international human rights in many countries. Below, the problems experienced concerning PM compliance, specifically, are scrutinised.

### 5.1. AFRICAN SYSTEM

The African Commission has granted PMs on some 22 occasions. The responses of Member States, in respect of which PMs have been adopted, are diverse. Certain States sometimes replied with expressions of goodwill,<sup>161</sup> while others have responded by justifying their failure to comply.<sup>162</sup> In many cases it is (virtually) impossible to establish whether the State concerned complied with the order. Those that allow for an assessment of State compliance reveal erratic and limited compliance.

The 2010 African Commission Rules require States to report back on the implementation within 15 days of being informed of the PMs.<sup>163</sup> If the African Commission would vigorously and consistently follow-up non-compliance, this requirement may play an important role to improve State compliance.

According to the scarce information available at present, States have complied with these orders in at least some instances. In some cases, death penalty orders were suspended pending the final decision of the African Commission. This was the case

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alleged victims, their next of kin and their representatives may request PMs. The Court may also adopt PMs on its own motion. See art 63(2) American Convention. Articles 27(1)(2)(3) Court Rules of Procedure and art 25(12) and 76 of the Commission’s Rules of Procedure.

<sup>159</sup> IACHR, 2005 Annual Report, 41–2.

<sup>160</sup> See eg B Simmonds, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009); F Viljoen, ‘State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights 1997–2004’ (2007) 101 AJIL 1.

<sup>161</sup> *Egypt Death Penalty* case (n 53) para 78.

<sup>162</sup> *Saro-Wiwa* case (n 37) para 32. In the *Radio Freedom FM* case after the complainants made oral submissions on the failure of the State to comply the State delegates indicated that they had not been made aware of the request and the head of delegation offered his good offices with a view to facilitating an amicable solution of the matter. See *Radio Freedom FM* case (n 57) para 14.

<sup>163</sup> Rule 98(4).

in Burundi,<sup>164</sup> Egypt,<sup>165</sup> and Nigeria.<sup>166</sup> In a case related to a detainee from Togo who was subjected to torture and ill-treatment, there was also information of State compliance.<sup>167</sup> The case of Ms Hussaini deserves special mention. Since it is the only case in the African system where the individualised beneficiary of a PM is a woman.<sup>168</sup> The victim was a Nigerian nursing mother sentenced to death by stoning by a *sharia* court, for the alleged crime of adultery.<sup>169</sup> Three months after the request of the 'urgent appeal' was notified to Nigeria, the Federal Court of Appeal in Nigeria overturned the death sentence imposed on Safiya by the lower *sharia* court.<sup>170</sup> There was also information of compliance in the *Miss A* case. The Commission had asked Cameroon to ensure that appropriate medical care was provided to two detainees.<sup>171</sup> The case was positively resolved when Cameroon sent a letter to the Commission, in which it held that the first person, Mr Ningo, had been acquitted and freed in November 2003 'for lack of criminal charges', while the second person, Mr Philip, had been freed in March 2003 'for non-proven facts'.<sup>172</sup>

As already mentioned, it is not always possible to establish whether PMs were implemented because: (i) after the adoption of the measures, the Commission makes no further mention of them; (ii) it is often not possible to deduce from the decision on the merits of the communication if the measures were implemented; and (iii) often, when the case is still under consideration before the Commission, and due to the principle of confidentiality,<sup>173</sup> there is no information about their implementation either from the Commission or from the complainants. However, the analysis of the little information obtained shows that the compliance rate of PMs under the African system is and remains a problem. For example, in cases related to the death penalty, the government of Nigeria executed nine persons condemned to death, despite the PMs issued by the African Commission to suspend their execution.<sup>174</sup> In Eritrea, although the Commission on several occasions had drawn the attention of the Eritrean President to the dimension of the violation of human rights and the deplorable attitude of the authorities towards 11 former Eritrean government officials who had been illegally arrested without charge and held incommunicado,<sup>175</sup> the PMs adopted did not result in any action being taken on the part of the Eritrean

<sup>164</sup> *Bwampamye* case (n 73) paras 15, 17.

<sup>165</sup> *Egypt Death Penalty* case (n 53).

<sup>166</sup> *Safia Yakubu Husaini* case (n 53).

<sup>167</sup> *Togo Detention* case (n 57) para 6.

<sup>168</sup> *Safia Yakubu Husaini* case (n 53) paras 2, 14–6.

<sup>169</sup> *Ibid* paras 2, 3.

<sup>170</sup> *Ibid* paras 14–5, 20, 22. The complainants requested to withdraw the case because they could not obtain information to prepare the written submissions on admissibility. The file was closed.

<sup>171</sup> *Ibid*.

<sup>172</sup> *Ibid* paras 15–6.

<sup>173</sup> African Charter, art 59.

<sup>174</sup> *Saro-Wiwa* case (n 37) paras 29, 103, 114–15.

<sup>175</sup> *Eritrean Detention* case (n 53) para 2.

authorities.<sup>176</sup> When the Commission decided on the merits of the communication in November 2003, the beneficiaries' whereabouts were still unknown. And, in the *Botswana Death Penalty* case in which a South African woman was convicted of murder and sentenced to death, the authorities argued that they had never received the request of PMs.<sup>177</sup>

The lack of implementation by Libya of the Court's order in the case of Gaddafi's son, prompted the Court to draw the attention of the AU Assembly to Libya's failure to report back to the Court on measures taken.<sup>178</sup> It called on the Assembly to 'express itself' on the matter; to call on Libya to comply immediately and to inform the Court within 14 days of the measures it has taken to comply with the Court's order; and to take all other appropriate measures to ensure that Libya fully complies. There is however no indication that the Assembly has taken any action in response to this call.

## 5.2. INTER-AMERICAN SYSTEM

As to the matter of compliance, States in the Americas sometimes protect a few beneficiaries but not all of them, States comply with certain issues but not with others, or States comply with the requests within certain periods of time but in others they do not. For example, the US has suspended executions of the death penalty of some beneficiaries,<sup>179</sup> but it has also executed beneficiaries sentenced to death.<sup>180</sup>

The IACmHR has published information on PMs issued to suspend death penalty orders in 43 instances. This figure corresponds to one third of the measures adopted. According to this information, fourteen orders of execution were suspended,<sup>181</sup>

<sup>176</sup> Ibid "Findings". The Commission found violations of the right not to discriminate (art 2), the right to liberty and security (art 6), the right to a fair trial (art 7(1)) and the right to information and freedom of expression (art 9(2)) of the African Charter.

<sup>177</sup> The Commission did not, as a matter of fact, find a failure to abide by the PM, mentioning that 'in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana'. Communication 240/2001, *Interights and Others (in respect of Bosch) v Botswana*, (2003) AHRLR 55 (ACHPR 2003) ('*Botswana Death Penalty case*') paras 1–2, 50.

<sup>178</sup> See, African Court 'Interim Report of the African Court on Human and Peoples' Rights Notifying the Executive Council of Non-Compliance by a State, in accordance with art 31 of the Protocol', <[www.african-court.org/en/images/documents/Reports/AFCHPR\\_Interim\\_Report\\_\\_Non-compliance\\_by\\_a\\_State\\_-\\_Libya.pdf](http://www.african-court.org/en/images/documents/Reports/AFCHPR_Interim_Report__Non-compliance_by_a_State_-_Libya.pdf)> accessed 1 April 2015.

<sup>179</sup> See eg IACmHR, Case 12.243, *Juan Raúl Garza (USA)*, Precautionary Measures, Order of 27 January 2000 and *Heriberto Chi Aceituno (USA)*, Precautionary Measures, Order of 28 September 2007.

<sup>180</sup> See eg IACmHR, Petition 12.351, *José Jacobo Amaya Ruíz (USA)*, Precautionary Measures, Order of 15 December 2000; IACmHR, Petition 12.381, *Robert Bacon Jr (USA)*, Precautionary Measures, Order of 25 April 2001.

<sup>181</sup> See eg IACmHR, Case 12.254, *Victor Saldaño (USA)*, Precautionary Measures, Order of 13 March 2000; IACmHR, Petition P1246/05, *Jaime Elizalde (USA)*, Precautionary Measures, Order of 1 November 2005.

in three cases the sentence was commuted,<sup>182</sup> on two occasions the inmates were released.<sup>183</sup> This means that less than half of the measures were complied with.<sup>184</sup> All orders to suspend the death penalty were connected with the United States.

Because of the lack of reporting provided by the Commission, it is not possible to have a complete evaluation of compliance, as it is often not clear what actually happened with the beneficiaries.<sup>185</sup> However, the information found indicates that beneficiaries sentenced to death were executed in 26 cases.<sup>186</sup> With the exception of one case, the beneficiaries were all executed in the US.<sup>187</sup>

The Commission requested the protection of inmates who were in terrible health condition in 25 matters. Whether the States have actually complied with these requests is hard to say because the Commission only provided clear information about the compliance in three cases. In these three cases, it was reported that the States provided the inmates with medical treatment outside prison.<sup>188</sup> In six cases, the Commission only indicated that it continues to monitor the situation of persons under protection.<sup>189</sup> Furthermore, the Commission has not presented information about compliance in 15 cases.<sup>190</sup>

With regard to the compliance of PMs by the IACHR, depending on the factual situation of each case and the willingness of each State, the measures ordered by the Court are complied with in many different ways. The protection given by the States in cases related to prisons has aimed to improve the conditions of detention through prison reforms,<sup>191</sup> to contract new prison guards,<sup>192</sup> to organise

<sup>182</sup> IACmHR, Case 11.884, *Whitley Dixon (Jamaica)*, Precautionary Measures, Order of 9 March 1999, and *Idravani (Pamela) Ramjattan* case (n 93).

<sup>183</sup> IACmHR, *Teodoro Cabrera García and other (Mexico)*, Precautionary Measures, Order of 8 November 2001 and *Francisco Chaviano González* matter (n 106).

<sup>184</sup> Burbano-Herrera and Viljoen (n 58).

<sup>185</sup> Burbano-Herrera and Rodríguez Pinzón (n 51).

<sup>186</sup> See eg IACmHR, *Walter Mickens (USA)*, Precautionary Measures, Order of 7 June 2002; IACmHR, Petition P187/05, *Stephen Mobley (USA)*, Precautionary Measures, Order of 28 February 2005.

<sup>187</sup> Mr Mitchell was executed on 6 January 2000. See IACmHR, Cases 11.872 and 11.832, *David Mitchell and John Junior Higgs (Bahamas)*, Precautionary Measures, Order of 17 December 1999.

<sup>188</sup> *Mariano Bernal Fragoso* matter (n 115), *Jorge Luis García Pérez-Antúnez* matter (n 104) and *Wilson García Asto* matter (n 113).

<sup>189</sup> *255 minors who were previously being held at the Panchito López Reeducation Center for Minors* matter (n 135), *Detainees at Toussaint Louverture Police Station in Gonaïves* matter (n 132), *Luis Williams Pollo Rivera* matter (n 107), *Luis Miguel Sánchez Aldana* matter (n 109), IACmHR, *Adolescents in the Public Prison of Guarujá (Brazil)*, Precautionary Measures, Order of 26 October 2007; IACmHR, *Persons detained in the 76th Police Precinct in Niterói (Brazil)*, Precautionary Measures, Order of 19 October 2006.

<sup>190</sup> See eg *Luis Álvarez Renta* matter (n 110), *Ananías Laparra Martínez* matter (n 115) and *Alejandro Jiménez Blanco* matter (n 112).

<sup>191</sup> *Persons imprisoned in the Dr Sebastiao Martins Silveira Penitentiary in Araraquara, Sao Paulo v Brazil* (n 151).

<sup>192</sup> *Children Deprived of Liberty in the “Complexo do Tatuape” of FEBEM v Brazil* (n 151).

pedagogical activities,<sup>193</sup> to confiscate arms<sup>194</sup> and to transfer beneficiaries to other detention centres.<sup>195</sup> Additionally, a number of States have organized new trials, which have resulted in the modification of the punishment to which the beneficiaries had been condemned at the outset. In this sense, in the *Suarez Rosero v Ecuador*, the *Loayza Tamayo v Peru*, the *Gallardo Rodriguez v Mexico* and the *Cesti Hurtado v Peru* cases, the States decided to comply with the PM, thereby ordering the liberation of the beneficiaries.<sup>196</sup> In *James, Briggs, Noel, Garcia and Bethel v Trinidad and Tobago*, the State, in complying with the PMs, ordered a new trial that resulted in the reduction of two death sentences to four years in prison for two of the beneficiaries and the reduction of the death sentence to seven years in prison for another beneficiary.<sup>197</sup> In this same case, but with respect to other beneficiaries, Trinidad and Tobago suspended the execution of some sentences while the cases were being resolved in the Inter-American system. In those cases, death sentences were suspended for 39 condemned men. An important case to be mentioned is *Persons imprisoned in the "Dr Sebastiao Martins Silveira" Penitentiary in Araraquara, Sao Paulo v Brazil*. Here, the Court lifted the PM because the condition of detention had improved and the situation of extreme gravity and urgency had ceased for the prisoners.<sup>198</sup>

Non-compliance with PMs issued by the IACHR has also occurred on numerous occasions. Most of these cases are related to PMs adopted collectively, for example, in *Mendoza Prisons case v Argentina* six inmates were killed while the measures were in force;<sup>199</sup> in *Monagas Judicial Confinement Center ("La Pica") v Venezuela* three beneficiaries were killed;<sup>200</sup> in *Children Deprived of Liberty in the "Complexo do Tatuape" of FEBEM v Brazil* two beneficiaries were killed.<sup>201</sup> The *Urso Branco Prison v Brazil* case is of special concern because of the number of beneficiaries who were killed and also for the manner in which it occurred: some of the bodies were cut up

<sup>193</sup> Ibid.

<sup>194</sup> Ibid.

<sup>195</sup> IACHR, *Millacura Llaipen et al case v Argentina*, Provisional Measures, Order of 13 February 2013.

<sup>196</sup> *Suárez Rosero v Ecuador* (n 151) "Having Seen" 7, "Considering" 13, "Decides" 1; *Loayza Tamayo v Peru* (n 151), Order of 11 November 1997, "Having Seen," 6, 7 "Decides" 1; *Gallardo Rodríguez v Mexico* (n 151), Order 14 February 2002, "Having Seen" 4, "Considering" 6, "Decides" 1. In this case, the President of Mexico signed an agreement that reduced the jail sentence of the beneficiary and freed him; *Cesti Hurtado v Peru* (n 151), Order of 19 November 1999, "Having Seen" 4, "Considering" 3.

<sup>197</sup> *James and others v Trinidad and Tobago* (n 33), Order of 3 September 2002, "Having Seen" 6; Order of 28 February 2005, "Having Seen" 4, "Considering" 10.

<sup>198</sup> *Persons imprisoned in the "Dr Sebastião Martins Silveira" Penitentiary in Araraquara, São Paulo v Brazil* (n 151), Order of 25 November 2008, "Having Seen" 10–11.

<sup>199</sup> *Mendoza Prisons v Argentina* (n 151), Order of 18 June 2005, "Having Seen" 15(a)-(b), 25(b), "Considering" 8.

<sup>200</sup> *Monagas Judicial Confinement Center ("La Pica") v Venezuela* (n 151) "Considering" 11.

<sup>201</sup> *Children Deprived of Liberty in the "Complexo do Tatuape" of FEBEM v Brazil* (n 151), Order of 4 July 2006 "Considering" 6.

and pieces were thrown at the authorities and at other persons who were present in the jail.<sup>202</sup>

Realising that the inclusion of PMs in its annual report to the OAS General Assembly has very little political effect and did not in any way strengthen compliance,<sup>203</sup> the Court adopted a practice of remaining engaged with its orders for PMs by issuing ‘orders on monitoring provisional measures’. In 2012, it ordered the highest number ever of orders pertaining to the monitoring or supervision of PMs, namely 28.<sup>204</sup> Especially matters not related to pending cases often stay under the Court’s jurisdiction for many years. The Court monitors compliance with PMs by requiring States, beneficiaries and the Commission to submit reports, and may convene public or private hearings.<sup>205</sup> It also publishes information about these procedures on its website. By the end of 2012, the Court was monitoring 31 PMs.<sup>206</sup> This number is slightly lower than the peak of 46 PMs that the Court had under its supervision in 2006 and 2010.<sup>207</sup> One of these cases was the *Matter of Certain Venezuelan Penitentiary Centres*, in which the Court has made numerous orders on maintaining and monitoring compliance with PMs.

## 6. CONCLUSIONS

Analysing the case law of international human rights bodies is interesting, not only because it permits comparisons of the evolution of the jurisprudence of the quasi-judicial organs under examination, but also because the case law is a mirror of the problems within society. The study of the PMs issued by the African and the Inter-American Commissions and Courts with regard to prisoners shows that detainees are in many cases kept in undignified conditions, which goes against the core of human rights treaties. Beneficiaries of PMs have included political prisoners, human rights defenders, presumed terrorists, ordinary criminals, ill persons and minors. Interim measures have protected persons sentenced to death without due process, prisoners with health problems and without access to medical care, and in general prisoners being kept in appalling prison conditions. In the circumstances mentioned above, through PMs, States are requested to suspend death penalty orders to improve the prison conditions of the detainees, and to allow ill prisoners to receive medical treatment in a prison hospital or in a specialised institution. States comply with the requests given by the African and the Inter-American Commission and Court in some matters. In these matters, the rights of the persons deprived of their liberty were

<sup>202</sup> *Urso Branco Prison v Brazil* (n 151), Order of 22 April 2004, “Having Seen” 14. In the same case, Order of 7 July 2004, “Considering” 8.

<sup>203</sup> Pasqualucci (n 52) 293.

<sup>204</sup> IACHR, 2012 Annual Report, 20.

<sup>205</sup> Pasqualucci (n 52) 293–94.

<sup>206</sup> IACHR, 2012 Annual Report, 20.

<sup>207</sup> *ibid* 21.

protected, especially the right to life, the right to personal integrity, the right to due process and the right to health.

The study of the case law also shows that negative factors are constantly present and this prevents PMs to have the desirable results.

One of the problems pertaining to the Commissions in both human rights systems is the lack of publication of all requests for PMs. In the African system, it is (virtually) impossible to establish exactly how many PMs have been adopted by the African Commission, and whether the State concerned complied with the request. The lack of exact numbers is due to the fact that the African Commission does not keep a register of the PMs it has adopted or rejected, a factor further exacerbated by the requirement that the Commission's findings remain confidential until their publication has been approved by the AU Assembly (or, in practice, the Executive Council). With regard to the Americas, PMs issued by the IACmHR to protect persons deprived of liberty have been adopted on 210 occasions until now, but there is no information about the measures which have been rejected or not yet decided.<sup>208</sup> It would be good if petitioners, in the African system and in the Americas, developed ways to communicate with and inform each other and the international community about their requests for PMs. A free flow of information on the issue of interim measures is important in order to permit individual and social accountability in time, as currently it is made virtually impossible to criticise or condemn contemporaneous regimes blatantly violating human rights. A timely condemnation before the violations of human rights have happened could be useful in order to pressure States for the compliance of PMs or to shame States which do not implement them.<sup>209</sup>

Another negative factor is the lack of follow-up reporting by these Commissions. As a result, it is not possible to have a complete evaluation of compliance, as it is often not clear what happened with the beneficiaries. Furthermore, there are numerous instances in both the Inter-American and the African systems in which the respondent States have refused to comply with PMs.<sup>210</sup> If States do not implement interim measures, the effectiveness of these measures leaves much to be desired. With regard to the suspension of orders of execution, the IACmHR has published information on one-third of the measures adopted of which less than half were complied with.<sup>211</sup> It was reported that prisoners in America and in Africa were executed despite the request for PMs.

While there is evidence that the two regional systems have *protected* persons deprived of liberty, there is still a long road ahead with regard to ensuring respect for

<sup>208</sup> According to art 25(7) of the amended 2013 Commission's Rules of Procedure only the decisions granting, extending, modifying or lifting precautionary measures shall be adopted through reasoned resolutions.

<sup>209</sup> Burbano-Herrera and Viljoen (n 58).

<sup>210</sup> *Saro-Wiwa* case (n 37) in regard to Nigeria; *Banda* case (n 57, in regard to Zambia and *Zimbabwean Daily News* case (n 57) in regard to Zimbabwe.

<sup>211</sup> Burbano-Herrera and Viljoen (n 58).

human rights. The Commissions have granted such measures with the aim to enhance their *preventive* mandate by protecting persons in situations of danger of serious harm in violation of the human rights norms. However, there is still room for improvement which will require good faith efforts by the States, civil society, academia and other stakeholders of the system for the benefit of persons under threat.

The Inter-American Commission and Court have dealt not only with PMs benefitting individuals, but also directed them at large groups of people. In the process, not only the threats to individuals, but also general systemic issues were addressed. Surprisingly perhaps, given the foregrounding of collective ‘peoples’ rights in the African Charter, the African system has by contrast adopted measures much more focused on the individual. Through continuous supervision of its PMs, the IACHR has also aimed to fill the gap left by the lack of political backing from the political organs of the OAS. However, it should not escape attention that the two States that feature very prominently in the Commission and the Court’s jurisprudence on PMs, Trinidad and Tobago and Venezuela, have both denounced the Convention.

Although the situation of detainees in Latin America and Africa seems different in that fewer reports of extreme forms of prison violence emanate from African prisons, there are also many shared characteristics. African prisons perennially suffer from problems of overcrowding, lack of basic sanitation, and a failure to separate children from adults and convicted prisoners from detainees awaiting trial.<sup>212</sup> As the African system, and in particular the African Court, forges a role of effectively complement to national protection of persons held in detention facilities, it could gain considerably from being inspired and drawing from the Latin American experience.

The argument is not that these regional institutions should replace the national system or other regional or global processes. At the African regional level, for example, the African Commission’s Special Rapporteur on Prisons and Conditions of Detention also has a very important role to play in addressing situations of danger to detainees. This Special Rapporteur undertakes visits to inspect prisons and other places of detention in countries party to the African Charter, and may issue urgent appeals to States. A major drawback constraining the Rapporteur’s potential role is the requirement that such visits can only take place with the consent of the States, making it likely that detainees most at risk may not be affected by this procedure. Even if a report is written and recommendations or urgent appeals are adopted, the recommendations are as a matter of international law not formally binding. Although States have sometimes responded positively and adopted some of the suggested changes, the AU political organs have not put any pressure on States to act more decisively. The equivalent institution in the OAS is the Rapporteur on the Rights of Persons Deprived of their Liberty. This Rapporteur has a similar mandate to that of

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<sup>212</sup> See Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa (n 2).

the African, but may 'visit detention centres or facilities in which juveniles are held in custody, even without prior notice to the correctional authorities'.<sup>213</sup>

The European system may also be of increasing relevance, as it comes to terms with systemic violations through its 'pilot judgments' procedure. In fact, a closer convergence between the three systems is emerging in many respects, and is also likely to happen in relation to interim measures. At the global level, the UN Convention on Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment and its Optional Protocol instituting the Sub-Committee on Prevention of Torture, are obviously also of relevance, as well as the UN Special Rapporteur on Torture.<sup>214</sup> The main advantage of the African and Inter-American systems is the closer connection between the system and those affected, and the possibility of binding legal measures adopted by a court.

Measures that exist at the international (regional or global) level are always supplementary to what exists at the national level. It is up to State institutions, National Human Rights Institutions and specialised prison inspection bodies (if they exist), NGOs, other civil society organs, including the media, lawyers and others to ensure better protection for one of the most vulnerable groups in our societies. Should these domestic measures fall short, this article has shown that the regional systems have a significant role to play in protecting these persons and their rights, and at the very least, to break the shield behind which detainees' rights are concealed, to ensure greater public scrutiny and accountability.

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<sup>213</sup> Mandate of the Rapporteur.

<sup>214</sup> See Eva Rieter, 'Interim Measures Issued by the UN Committee on the Prevention of Torture (CAT)' in Y Haeck and C Burbano-Herrera (eds), *Interim Measures in International Human Rights Law* (OUP forthcoming 2015).