

INTER-AMERICAN HUMAN RIGHTS SYSTEM'S PRECAUTIONARY AND PROVISIONAL MEASURES IN CASES OF EXTRACTIVE INDUSTRIES

Medidas cautelares y provisionales del Sistema Interamericano de Derechos Humanos en casos de industrias extractivas

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Resumen: Este artículo busca analizar los desarrollos, limitaciones y desafíos de una manera alternativa y complementaria, potencialmente más inmediata y efectiva, para proteger los derechos de las personas afectadas por proyectos extractivos: las medidas cautelares y provisionales del Sistema Interamericano de Derechos Humanos. Para hacerlo, este ensayo examinó las 108 medidas provisionales otorgadas por la Corte Interamericana de Derechos Humanos, disponibles en su página web, y las 1.083 medidas cautelares otorgadas por la Comisión Interamericana de Derechos Humanos, accesibles en su página web. En ese sentido, se seleccionaron y analizaron las 10 medidas cautelares y las 2 medidas provisionales relacionadas con el tema objeto de análisis. Luego, este artículo identificó el papel de las medidas cautelares y provisionales en casos de industrias extractivas. Además, el documento estudió otros estándares establecidos por la Corte y por la Comisión en sus medidas, y finalmente, los desafíos para futuras medidas relacionadas con industrias extractivas. Este ensayo concluye que, más allá de los desarrollos creados por el Sistema Interamericano, existen formas de mejorar la efectividad de las medidas provisionales y cautelares en casos de proyectos extractivos.

Palabras clave: Medidas provisionales, medidas cautelares, industrias extractivas, Corte Interamericana de Derechos Humanos y Comisión Interamericana de Derechos Humanos.

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Abstract: This article seeks to analyze the developments, limitation and challenges of an alternative and complementary way, potentially more immediate and effective, to protect the rights of people affected by extractives projects. This way is the implementation of the precautionary and provisional measures of the Inter-American System of Human Rights in cases of extractive industries. In order to do so, this essay examined the 108 provisional measures granted by the Inter-American Court of Human Rights, available at its webpage¹, and the 1.083 precautionary measures granted by the Inter-American Commission on Human Rights, accessible at its webpage². Then, there were selected the ten precautionary measures and two provisional measures related to extractives industries. In addition, this article states the role of the precautionary and provisional measures in this subject. After, the paper studies other standards settled by the Court and the Commission in its measures, and finally, the challenges for future measures related to extractive industries. This essay concludes that beyond the developments created by the Inter-American System, there are many ways to improve the effectiveness of provisional and precautionary measures in cases of extractive projects.

Keywords: Higher education. Quality assurance. Educational policies. Curriculum. Prospects for a quality.

Fecha de recepción: 26 de octubre de 2019
Fecha de aprobación: 19 de diciembre de 2019

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1 Obtained from http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_medidas_provisionales.cfm?lang=en, September 30th, 2019.

2 Obtained from <http://www.oas.org/en/iachr/decisions/precautionary.asp>, September 30th, 2019.

INTRODUCTION

During the last two decades, international community has moved forward to the protection of human rights affected by businesses, including extractives industries. In the last years, the movement is mainly focused on the implementation of the Guiding Principles on Business and Human Rights created by the United Nations in 2011 (Human Rights Council, United Nations, 2011), on the one side, and the creation of new state obligations through a treaty that is now in process of elaboration (Human Rights Council, United Nations, 2019), on the other. At the regional level, the Inter-American System of Human Rights has also achieved some progress in the field of business and human rights (Salazar, 2015). Thus, following the UN Guiding Principles, on June 4 of 2014, the OAS General Assembly adopted the Resolution 2840 (XLIV-O/14) related to the promotion and protection of human rights in business. Furthermore, this regional progress is reflected in important standards regarding prior consultation in indigenous people's cases³, and in multiple public hearings of the Inter-American Commission on Human Rights related to this topic during the last years⁴.

However, one question remains: are the National Action Plans of the UN Guiding Principles; the potential good consequences of a new treaty; the standards settled by the Inter-American Court regarding prior consultation, and the variety of public hearings of the Inter-American Commission enough to protect the rights of hundreds of victims affected by extractive industries in Latin America today? The answer is clearly negative, also considering the new technological challenges proposed by extractives businesses in the world (Makuch & Aczel, 2018).

3 For example, one of these standards states: "while the American Convention does not prohibit per se the issuance of concessions for the exploration or exploitation of natural resources in indigenous or tribal territories, the legitimate restriction to the right of community property demands: i) conducting prior tests on the environmental and social impact; ii) conducting consultations with the affected communities regarding the development projects carried out in the traditionally occupied territories; and, when dealing with large-scale development or investment plans, obtain the free, informed and prior consent of the communities, according to their customs and traditions". *Four Ngöbe Indigenous Communities And Their Members*. Provisional Measures regarding Panamá. Order of the Inter-American Court of May 28, 2010, Considering 18.

4 Criminalization of human rights defenders of indigenous peoples and the extractive industry in the United States, Session: 172 Period of Sessions; Date: Thursday, May 9, 2019. Reports of Human Rights Violations and Criminalization of Defenders in the Context of Extractive Industries in Nicaragua, Session: 168 Period of Sessions; Date: Monday, May 7, 2018. Measures to prevent human rights violations by Canadian extractive industries that operate in Latin America, Session: 166 Period of Sessions; Date: Thursday, December 7, 2017. Extractive Industries and the Right to Cultural Identity of Indigenous Peoples in Ecuador, Session: 163 Period of Sessions; Date: Friday, July 7, 2017. Human Rights and Extractive Industries in Peru, Session: 162 Period of Sessions; Date: Thursday, May 25, 2017. Human Rights Situation of Defenders of the Environment in the Context of Extractive Industries in America, Session: 156 Period of Sessions; Date: Monday, October 19, 2015. Human Rights and Extractive Industries in Latin America, Session: 154 Period of Sessions; Date: Thursday, March 19, 2015. Extractive Industries and Human Rights of the Mapuche People in Chile, Session: 154 Period of Sessions; Date: Tuesday, March 17, 2015. Human Rights Situation of Persons Affected by the Extractive Industries in the Americas, Session: 144 Period of Sessions; Date: Wednesday, March 28, 2012.

Extractives industries are part of the large-scale economic projects in expansion in the Americas (Civil society organisations joint report, 2015)⁵. Nowadays, oil, mining and gas projects are fundamental to the economies of many Latin American countries (Inter-American Commission on Human Rights, 2013). According to a report made by the Observatory of Mining Conflicts in Latin America, in recent years, this region has attracted 27% of investment in mining exploration worldwide (Observatory of Mining Conflicts of Latin America, 2014). In this sense, the United Nations has recognized that “extractive industry offers potential for job creation and economic growth which are important elements in promoting an environment conducive to the enjoyment of human rights” (Commission on Human Rights, United Nations, 2005).

Nevertheless, the potential positive impact of these companies on local economies is clouded by serious human rights conflicts (Khoury & Whyte, 2017). In a study of 24 cases located in Chile, Argentina, Perú, Colombia, México, Guatemala, El Salvador, Honduras, Panamá, and Brazil, a coalition of Human rights organizations identified some key problems related to the extraction of natural resources in Latin America (Inter-American Commission on Human Rights, 2013). Some of these problems are environmental affectations, threats and killings of people, forced and involuntary displacement, violation of the right to property, and violation of other economic, social and cultural rights (Inter-American Commission on Human Rights, 2013) (Inter-American Commission on Human Rights, 2015).

This overview shows, in general terms, the several human rights problems faced by people affected by extractives industries in Latin America. At the same time, it recalls the important role that the Inter-American System on Human Rights has overcoming these human rights violations.

METHODOLOGY

This research was developed through the systematic method, with the description of both quantitative and qualitative sources. To begin with, there were examined the 108 provisional measures of the Court, and the 1.083 precautionary measures of the Commission, available at the webpage of both institutions until September 30th of 2019. Then, the author selected and analyzed the two provisional measures and ten precautionary measures that have dealt with conflicts between human rights and extractives projects. In addition, there were studied other standards settled by the measures exanimated, even although there were not related to extractives industries. This last point, because the need of finding complementary standards that could help in the presentation of new applications before the Inter-American System, related to this topic.

RESULTS

This study found that there have been some developments regarding the direct protection of people affected by extractives projects. Specifically, there are two provisional

5 Other large-scale economic projects in the Americas include hydroelectric, agro-industrial, and logging projects and wind farms.

measures and ten precautionary measures that have dealt with conflicts between human rights and extractives projects.

The Inter-American Commission on Human Rights studied the first of these cases in 2000⁶. On October 20, 2000, the Commission granted precautionary measures on behalf of the Maya Indigenous Communities and their members regarding the State of Belize. This measure ordered “to take the necessary steps to suspend all permits, licenses, and concessions allowing for the drilling of oil and any other tapping of natural resources on lands used and occupied by the Maya Communities in the District of Toledo, in order to investigate the allegations in this case” (Matter of Maya Indigenous Communities and their members, 2000).

On August 8, 2002, the Commission issued a precautionary measure regarding the State of Suriname to protect twelve Saramaka clans. In this case, “[t]he Petitioners claimed that an estimated 30,000 Brazilian gold miners operated in the Saramaka territory and that as a consequence 20 to 30 tons of mercury had been released into the environment, contaminating the water sources and the fish” (Matter of Twelve Saramaka Clans, 2002). The Commission requested “that the State [should] take the appropriate measures to suspend all concessions, including permits and licenses for logging and mine exploration and other natural resource development activity on lands used and occupied by these clans, until the substantive claims raised in by the petitioner were examined by the Commission” (Matter of Twelve Saramaka Clans, 2002).

Also, in 2002, the Inter-American Court ordered the State of Nicaragua:

“[T]o adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awas Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it, until the definitive delimitation, demarcation and titling ordered by the Court are carried out” (Case of Mayagna (Sumo) Awas Tingni Community, 2002).

In 2004, the Commission granted an interesting precautionary measure to protect the life and personal safety of a person (Oscar González Anchurayco) and other members of the Community of San Mateo de Huanchor in Perú. The petitioners argued that “the living conditions, health, food, farming and livestock of five indigenous campesino communities, comprised of more than 5,000 families, would be severely affected by deposits from an open-air mine in the vicinity of the Rimac River” (Matter of Oscar González Anchurayco and members of the Community of San Mateo de Huanchor,

6 This data corresponds to the information available at the webpage of the Inter-American Commission. In addition, it is relevant to states that until 2012 the Commission did not issue any resolution regarding provisional measures. For that reason, the information available before 2012 regarding provisional measures is not detailed.

2004). The Commission requested the State “to implement a health assistance and care program for the population, particularly for children, to identify the persons who might have been affected by the consequences of pollution and provide the relevant medical care; and to begin transferring the deposits in accordance with the best technical conditions as determined by the relevant environmental impact study” (Matter of Oscar González Anchurayco and members of the Community of San Mateo de Huanchor, 2004).

On July 06, 2004, the Inter-American Court issued a precautionary measure in one of the most important recent cases regarding indigenous people’s rights and extractive industries. The Tribunal adopted, provisional measures to protect the life, freedom of movement, and personal integrity of the members of the Kichwa indigenous community of Sarayaku (Matter of Pueblo indígena de Sarayaku, 2004)⁷. In another resolution regarding the same case, the Court also ordered:

“To enable the members of the Sarayaku Indigenous People to carry out their activities and make use of the natural resources that exist in the territory where they are settled; specifically, the State must adopt those measures tending to avoid immediate and irreparable damage to their lives and personal integrities as a result of third parties’ activities who live near the community or who exploit the natural resources within the community” (Matter of Pueblo indígena de Sarayaku, 2005)⁸.

In 2007 the Commission also granted a measure in the Matter of Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala. The petitioners alleged that “the mining concession was issued and mining began without the prior, complete, free, and informed consultation of the affected communities of the Maya people” (Matter of Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, 2010). This situation led to “grave consequences for the life, personal integrity, environment, and property of the affected indigenous people, since the Tzalá River and its tributaries are the only sources of water for consumption and subsistence activities” (Matter of Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, 2010). After a modification of the measure, the Commission asked the State,

“[T]o adopt the necessary measures to ensure that all beneficiary members of the 18 Mayan communities [would] have access to potable water appropriate for human consumption and household use, as well as for irrigation purposes. Specifically, the IACHR requested the State to take the necessary measures, in order that the 18 beneficiary communities’ water resources are not contaminated by mining activities” (Matter of Communities of the Maya People (Sipakepense and Mam)

7 This case also has precautionary measures of the Inter-American Commission (May 5, 2003).

8 *Matter of Pueblo indígena de Sarayaku*. Provisional Measures regarding Ecuador. Order of the Inter-American Court of Human Rights of June 17, 2005, Order b.

of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, 2010).

Other provisional measures adopted by the Commission about extractive industries was the Matter of Inhabitants of the community of Omoa regarding Honduras. According to the petitioners, “approximately 8,000 inhabitants of Omoa [were] at risk because of the liquid petroleum gas storage facility operated by the Gas del Caribe company within the Omoa city limits” (Matter of Inhabitants of the community of Omoa, 2011). In this opportunity, the Commission requested the State “to take the steps necessary to ensure the Gas del Caribe company’s effective observance of the environmental regulations and laws in place in Honduras, and to adopt the measures needed to reduce the danger to the lives and [integrity] of the inhabitants of the community of Omoa to an acceptable level” (Matter of Inhabitants of the community of Omoa, 2011).

In 2017, provisional measures were granted by the Inter-American Commission on Human Rights in the matter of Residents of the Community of Cuninico regarding Peru. In this case, human rights’ violations were related to crude oil spills in the Peruvian Amazon. As a result, the Commission ordered to:

- i. make the necessary medical diagnoses to determine the levels of contamination by heavy metals or other substances that the beneficiaries would have, in order to provide adequate medical care, according to the international standards applicable in the matter, with special attention in children;
- ii. ensure that community members have access to water free of pollutants and adequate food in nutritional and cultural terms and within levels considered acceptable by international organizations such as the World Health Organization (WHO) or the Pan American Organization of the Health (PAHO) (Matter of residents of the Community of Cuninico et al, 2017).

Also in 2017, the Commission issued the provisional measures No. 113-16, “Tres Islas” Native Community of Madre de Dios regarding Peru. In this measure, the Commission protected a group of people affected by mining activities which caused the presence of mercury in their bodies, and in their sources of water and soil (Matter of Tres Islas” Native Community of Madre de Dios, 2017). In this matter, Commission’s orders were the same of the Community of Cuninico regarding Peru (2017).

In 2018, there was issued another provisional measure regarding extractives industries: Jani Silva, Hugo Miramar and Saúl Luna (Leaders of the Perla Amazónica Peasant Reserve Zone) regarding Colombia. This case not only involves damages by an extractive project in the municipality of Puerto Asís (Putumayo), but also risks arising from armed groups. For that reason, Commission’s orders were general, focusing in the protection of life and integrity of the petitioners (Matter of Jani Silva, Hugo Miramar and Saúl Luna (Leaders of the Perla Amazónica Peasant Reserve Zone), 2018).

There are other precautionary measures granted by the Commission related to human rights defenders who work in the protection of rights violated in the context of extractives industries (Matter of Américo de Grazi, 2016) (Members of COPINH, Berta Cáceres' relatives and other, 2016) (Matter of Margarita Pérez Anchiraico, Chair of the Committee for those Affected by Mining in Mayoc, 2006) (Matter of priest Marco Arana and attorney Mirtha Vásquez and other members of the organization "Group of Integral Education for Sustainable Development" (GRUFIDES), 2007) (Matter of Yaku Pérez Guartambel, 2018) (Matter of Germán Chirinos Gutiérrez, 2018).

DISCUSSION

A. *Overview of the precautionary measures of the Inter-American Commission and the provisional measures of the Inter-American Court.*

Although the purpose of this study is not to analyze in detail the formal requirements of the precautionary and provisional measures, there are plenty of studies that have done that (Burbano-Herrera, 2010) (Sandoval, 2013) (Contreras-Garduño, 2014), it is necessary to present an outline of its main characteristics (similarities and differences) in order to understand the importance of each one in cases of extractive industries.

Both the precautionary and provisional measures are part of the preventive function of the Inter-American System of Human Rights⁹. Generally speaking, these kinds of measures are framed in the individual complaint's procedure and were created to avoid irreparable harm to persons who are in situations that are grave and urgent¹⁰ (Matter of B, 2013). They both share some elements. For example, both the Commission and the Court have stated that precautionary and provisional measures have a dual nature: precautionary and protective (Matter of María Lourdes Afiuni, 2010) (Case of Herrera Ulloa v. Costa Rica (Periódico "La Nación"), 2001) (Resolution 32/2015, 2015).

Thus, "[r]egarding the protective nature, the measures seek to avoid irreparable harm and preserve the exercise of human rights. Regarding their precautionary nature, the measures have the purpose of preserving a legal situation being considered by [the Commission or the Court]" (Resolution 32/2015, 2015). As a result, these measures

9 This essay states that the Inter-American System has a preventive role. Other mechanisms that can be part of the preventive function of the Inter-American System are the public hearings, and country reports of the Inter-American Commission, and in some way the reparations ruled by the Inter-American Court when those pretend to guarantee the non-repetition of human rights violations. See, among others, Rieter, Eva Rozemarijn, Preventing Irreparable Harm Provisional Measures in International Human Rights Adjudication, dissertation, Intersentia: 2010.

10 The criteria for seriousness, extreme gravity or urgency will depend on the nature of the measure and on the body that issues it. For example, the Court has stated that "[r]egarding the requirement of 'gravity', in order to adopt provisional measures, the Convention requires that this be 'extreme'; in other words, that it is at its highest or most intense level. The 'urgent' nature means that the risk or threat involved must be imminent. Lastly, as regards the damage, there must be a reasonable probability that it will occur, and it should not relate to legal interests or rights that can be repaired". *Matter of L.M.*, Provisional measures with regard to Paraguay. Order of the Court of July 1, 2001, Considering 6.

“become a true jurisdictional guarantee of a preventative nature” (Case of Herrera Ulloa v. Costa Rica (Periódico “La Nación”), 2001) (Case of De La Cruz Flores, 2010) (Matter of Centro Penitenciario de Aragua “Cárcel de Tocarón.”, 2010) (Matter of María Lourdes Afiuni, 2010).

In addition, both the provisional and precautionary measures have a prima facie standard. It means that although the facts “do not have to be fully proven, a minimum degree of detail and information is necessary so as to allow the Court [or the Commission] to assess prima facie a situation of extreme gravity and urgency” (Matter of Children Deprived of Liberty in the “Complejo do Tatuapé” of FEBEM, 2006).

According to the article 63.2 of the American Convention, the Inter-American Court has the power to adopt provisional measures in “cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons” (American Convention on Human Rights)¹¹. Regarding the active legitimation, only the Inter-American Commission can request a provisional measure in a case not yet submitted to the Court¹². In cases under consideration of the Court, the victims of such cases can also request these measures. In addition, the Court also has the right “motu proprio” to grant provisional measures without previous request.

In cases of extractives industries, this limitation in the active legitimation implies that victims of these kinds of projects cannot demand a provisional measure directly to the Court, unless they already have a case before the Court. Having into account that the Court only has the possibility to resolve some cases every year, victims of extractive projects depend on the discretion of the Commission to the request of precautionary measures.

In the case of the Inter-American Commission, the article 25 of the Commission's Rules of Procedure states “[...] the Commission may, on its own initiative or at the request

11 The Inter-American Court has said that “[t]he three conditions required by Article 63(2) of the Convention for the Court to be able to order provisional measures must co-exist in any situation in which they are requested”. *Case of Carpio Nicolle et al.*, Provisional measures with regard to Guatemala. Order of the Inter-American Court of Human Rights of July 6, 2009, Considering 14. *Matter of B.* Provisional Measures regarding El Salvador. Order of the Inter-American Court of May 29, 2013, Considering 6.

12 “[...] [G]iven the tutelary nature of provisional measures, in exceptional cases and even when there is no specific adversarial case before the Inter-American system, it is possible for the Court to order them in situations in which, prima facie, the grave and urgent infraction of human rights could take place. To do so, the Court must weigh the problem in question, the effectiveness of State actions given the situation described, and the degree of lack of protection faced by individuals for whom the measures are requested in the event that the measures are not adopted. To do so, it is necessary for the Inter-American Commission to have presented sufficient grounds that meet the aforementioned standards and for the State to have failed to clearly and sufficiently demonstrate the effectiveness of the specific measures that it has adopted domestically”. *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center.* Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of February 8, 2008, Considering 9; *Matter of Guerrero Larez.* Provisional Measures regarding Venezuela. Order of the Inter-American Court of Human Rights of November 17, 2009, Considering 8, and *Matter of Centro Penitenciario de Aragua “Cárcel de Tocarón.”* Provisional Measures regarding Venezuela. Order of the Court of November 24, 2010, Considering 7

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” (Commission’s Rules of Procedure).

The first difference from the provisional measures is that the precautionary measures do not have a conventional base. It means that the American Convention does not speak about provisional measures leaving the job to the Commission’s Rules of Procedure. This fact has both negative and positive consequences in cases of extractives industries. It is positive because the Commission can order precautionary measures to a wider number of states (Member States that have ratified the Charter of the Organization of American States, and the American Declaration of the Rights and Duties of Man)¹³. This fact is fundamental in cases of extractive industries because it means that the Commission, different from the Court, has the power to request precautionary measures to powerful home states such as The United States of America.

However, not having conventional nature implies that some countries consider that provisional measures are not binding (Rodríguez-Pinzón, 2013)¹⁴. Having in mind the powerful economic interest of oil, mining and gas companies, this argument can lead that states do not complying with the measures ordered by the Commission.

B. Positive and negative aspects of the developments made by the Inter-American System of Human Rights in cases of extractives industries

Those cases involving extractive industries indicate that this issue is not entirely irrelevant neither to the Court or the Commission. These measures show an advance in the protection of people affected by extractive industries since 2000. While the precautionary measures of the Commission have protected an important variety of rights such as the right life, right to integrity, right to water, right to health, right to prior consultation, and rights to children; the provisional measures have recognized that activities of third parties can led to violations of human rights.

However, there is a long way to go. First, there have been only ten precautionary measures and two provisional measures directly related to the conflicts between extractive industries and human rights. This is a surprise having into account the claims of human rights organizations in the public hearings of the Inter-American Commission on this regard. Some hypothetical reasons for this fact are: (i) local organizations that report these cases in the countries do not know about the existence of these mechanisms at the

13 Even if they have not ratified the American Convention on Human Rights.

14 For example, “[t]he U.S. has consistently stated that the orders are not legally binding, rejecting precautionary measures in many cases”. *Inter-American Commission Amends Precautionary Measure Rules and Expresses Concern for United States’ Continued Failure to Comply in Death Penalty Cases*, retrieved January 30, 2015, from <http://hrbrief.org/2013/10/inter-american-commission-amends-precautionary-measure-rules-and-expresses-concern-for-united-states-continued-failure-to-comply-in-death-penalty-cases/>.

Inter-American level; (ii) in the case of the precautionary measures, the Commission has rejected the requests of these type of measures. It is very hard to know because before 2012 the Commission did not issue resolutions of precautionary measures. In the case of the Court (iii), the formal requirements to access to the provisional measures are so difficult to fulfill that victims and organizations are not capable to request a provisional measure, and in consequence, the Court does not have had the opportunity to analyze these kinds of cases.

Second, there is not a deep examination of the requirements of gravity (seriousness), urgency, and irreparable damage in relation to the extractive projects. This makes it difficult for human rights organizations to have clear parameters to go before the Inter-American System with requests of precautionary and provisional measures. In the case of the Commission, this situation is understandable because of the lack of resolutions before 2012. However, in the case of the Court, resolutions such as the Sarayaku case (2004) are limited to repeat general paragraphs of previous cases without analyzing the real problem behind the request of protecting the rights of life and integrity.

For those reasons, the standards settled by the Inter-American Systems in these measures do not seem to be enough to advance in the prevention of violations caused by extractives industries through the implementation of precautionary and provisional measures. Because of this, the following section seeks to find other standards established by the Court and the Commission in its measures, different from related to extractive industries.

C. Other standards settled by the court and the commission in its measures: an opportunity to protect the rights of people affected by extractives industries

Considering the few existing measures directly related to extractive industries, there is necessary to study standards developed by the Court and the Commission in other provisional and precautionary measures. This essay finds two main groups of standards that can be used by human rights organizations in order to achieve the implementation of provisional and precautionary measures in cases of extractive projects: i) the protection of other rights beyond the right to life and the right to personal integrity: the right to health, right to environment, and right to property; and ii) measures granted for violations committed by particulars.

- i. Protection of other rights beyond the right to life and the right to personal integrity: the right to health, right to environment, and right to property

This essay found that most of the provisional and precautionary measures exclusively protect the rights to life and personal integrity. However, there are some cases where the Court and the Commission have referred to the importance of protecting other rights like the right to health (Matter of Diego Esquina Mendoza and other persons, 1998) and the right to environment (Case of Mayagna (Sumo) Awas Tingni Community, 2002),

or have protected other rights of the American Convention such as the right to property (Matter of Indigenous Communities of the Xingu River Basin regarding Brazil, 2011). These three rights are particularly important in cases of extractive industries because of the impact these projects have on them.

Furthermore, the recognition of other rights is especially important in the case of provisional measures because some rights affected by extractive industries, such as the right to the environment or the right to health, are not directly justiciable before the Inter-American Court¹⁵. As a result, the recognition of these rights in the jurisprudence of the Commission and the Court provides additional arguments to victims and human rights organization to request the protection of these kinds of rights (economic, social, cultural, and environmental rights) in connection with other civil rights.

ii. Measures granted for violations committed by particulars

Human rights violations resulting from extractive industries imply, generally, the presence of a company. The existence of this “third party”¹⁶ is the foundation of important international instruments in the field of business and human rights such as the UN Guiding Principles on Business and Human Rights. For that reason, it is fundamental for victims of extractive projects that the organs of the Inter-American System recognize that States are not only responsible for its own acts, but for preventing, investigating and sanctioning the violations committed by particulars, such as private companies.

Thus, the Court has recognized in its provisional measures that “[t]o effectively ensure the rights set forth in the American Convention, the State Party has the obligation to protect all persons under its jurisdiction, both with respect to actions by its own agents and regarding actions by private third parties (Matter of Carlos Nieto et al, 2004) (Case of Carpio-Nicolle et al, 2004) (Matter of “Globovisión” Television Station, 2004). In addition, the Commission has stated in its precautionary measures that States also have obligations for particular actions. For example, in the precautionary measure of “La Oroya” where many people are affected by a particular complex of metallurgical companies, the Commission granted measures asking the State “to adopt the appropriate measures for making a specialized medical diagnosis of the beneficiaries, provide specialized and adequate medical treatment for those persons whose diagnosis shows that they are at risk of facing irreparable harm to their personal integrity or life” (Matter of Community of La Oroya, 2007).

15 The Convention does not contain a particular article about these rights, and for that reason, the Court does not have competence to declare the violation of them. However, this is a controversial topic even inside the Inter-American Court. Cf. Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot to the judgment of the Inter-American Court of Human Rights in the Case of Suárez Peralta v. Ecuador, May 21, 2013, and Concurring Opinion of Judge Humberto Antonio Sierra Porto to the judgment of the Inter-American Court of Human Rights in the Case of Gonzales Lluay et al. v. Ecuador, September 01, 2015

16 Traditionally, States have been the main responsible for the guarantee and protection of human rights. However, the field of business and human rights has introduced a new actor in this relation (States – victims): the companies.

D. *Challenges for future measures related to extractive industries*

- i. The backlash of states in the process of implementation: the example of the precautionary measure of Belo Monte

One of the main challenges for future measures related to extractive industries is to avoid the backlash (Soley & Steininger, 2018) of states in the process of implementation (Orozco, De Zela, & Rabasa, 2014). In this scenario, the precautionary measure 382/10 of the Indigenous Communities of the Xingu River Basin regarding Brazil offers the best example (Kweitel & Cetra, 2014). On April 1, 2011, the Inter-American Commission requested the State of Brazil “immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until certain minimum conditions are met” (Matter of Indigenous Communities of the Xingu River Basin regarding Brazil, 2011). In addition, the Commission asked the State to:

“(1) conduct consultation processes, in fulfillment of its international obligations—meaning prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement—in relation to each of the affected indigenous communities that are beneficiaries of these precautionary measures; (2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to the project’s Social and Environmental Impact Study, in an accessible format, including translation into the respective indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics among the indigenous communities being granted the precautionary measures as a consequence of the construction of the Belo Monte hydropower plant. This includes any diseases derived from the massive influx of people into the region as well as the exacerbation of transmission vectors of water-related diseases such as malaria” (Matter of Indigenous Communities of the Xingu River Basin regarding Brazil, 2011).

In response, the Brazilian government withdraws Brazil’s OAS ambassador and suspends annual dues to OAS (Cassel D. , 2014)¹⁷. Although on July 29, 2011, the Commission evaluated the precautionary measure and modified its aim, this fact contributes to a process of weakening the Inter-American System led by some countries of the region like Ecuador and Venezuela. Regarding this topic, some authors think that,

“[a]s a matter of textbook international human rights law, the Commission’s request was impeccable. The human rights impacts of the dam on local indigenous communities appear to be grave. But as a matter of diplomacy, the Commission’s request was regrettable. President Rousseff was predictably furious. In defiance of the Commission’s request, Brazil proceeded to grant a full construction license

17 *Timeline of the Controversial Belo Monte Megadam in Brazil, American Scientist*, retrieved January 30, 2015, from <http://www.americanscientist.org/blog/pub/timeline-of-the-controversial-belo-monte-megadam-in-brazil>.

for the dam. Ominously, Brazil withdrew its Ambassador from the OAS, withdrew its candidate for the Inter-American Commission, and reportedly withheld its financial contribution to the OAS” (Cassel D. , 2013).

Although the Belo Monte case is not about an extractive industry, it helps to understand the importance of the large-scale economic projects for countries. In this sense, one important challenge for the Inter-American System is to balance legal arguments with strategies that take into consideration public policy, diplomacy, and economic aspects, among others (Madsen, Cebulak, & Wiebusch, 2018).

- ii. The use of other principles of international law such as the precautionary principle in the context of new technological developments

The development of new technological developments should involve the development of legal innovations. However, it is not the reality. For that reason, this essay argues that the existence of new technological developments such as the hydraulic fracturing or fracking, should led to the implementation of other principles of international public law such as the precautionary principle.

The precautionary principle has been one of the central cores of environmental law in the last decades. Although many authors have claimed for its ineffectiveness, its importance for international public law is undeniable¹⁸. According to the precautionary principle, “in cases where there are threats to human health or the environment the fact that there is scientific uncertainty over those threats should not be used as the reason for not taking action to prevent harm” (Fisher, 2001, pág. 316). The Rio Declaration states that “the principle applies where there are ‘threats of serious or irreversible environmental damage’ and where there is scientific uncertainty over those threats” (Fisher, 2001, pág. 318).

In the case of the Inter-American Systems of Human Rights, there have been precedents where principles of international public law has been applied. For example, in a decision (Case of Wong Ho Wing v. Peru, 2015), the Inter-American Court applied the Principle of Non-Refoulement stated in the article 3 of the of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁹. As a result, it is possible for the Court and the Commission to use other principles of international law to interpret the articles of the American Convention in order to protect the rights of vulnerable people affected by extractives projects in the Americas.

- iii. The use of other mechanisms available in the Inter-American System

Finally, it is important to mention that the implementation of provisional and precautionary measures should not be seen as a panacea. Instead, the use of the other

18 This principle is included in several international public law instruments such as The Rio Declaration.

19 According to this article, No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

mechanisms available at the Inter-American level such as the public hearings, the annual report and the country reports of the Inter-American Commission, and the in loco visits of the Inter-American Court are all complementary mechanisms to prevent violations originating by extractives industries. Besides, the creation of the Special Rapporteur for Economic, Social, and Cultural Rights at the Commission also gives an opportunity to work in the prevention of these violations.

CONCLUSIONS

- There are only a few measures related to extractive industries in the continent. However, these measures constitute an important step in the process of protection of human rights affected by extractive industries.
- This study found that there are some important standards that offer an opportunity to human rights organizations to request precautionary and provisional measures in cases of extractive industries. Some of the most relevant standards are the recognition of other rights such as the right to health and the right to environment.
- Human rights organizations must be careful with proving the requirements of gravity and urgency in the request of a provisional or a precautionary measure. In the case of the Court, it is proven that the Tribunal goes beyond the traditional rights to life and integrity when it has enough evidence²⁰.
- In some cases, the Inter-American Court takes a long time to analyze the validity and relevance of its provisional measures. Thus, it may take years without an analysis of the requirements of urgency and gravity. In the case of extractive industries, the Court would need to be more effective. The projects related to the economy of a country, are also linked to the guarantee of other rights such as the economic, social, and cultural rights.
- The Inter-American Court has not protected directly the right to environment through its provisional measures. However, this right has been stated in some measures²¹. This makes sense having in mind that the Convention does not contain a particular article about the right to environment, and for that reason, the Court does not have competence to declare the violation of this right. In addition, this lack of interest about the right to environment is related to the conservative jurisprudence of the Court in cases different from civil and political rights.

²⁰ One of these examples is the *Matter of B*. Provisional Measures regarding El Salvador. Order of the Inter-American Court of May 29, 2013

²¹ For example, the *Case of Mayagna Awas Tingni Community*. Provisional Measures regarding Nicaragua. Order of the Inter-American Court of September 6, 2002, Order 1.

SOURCES OF FUNDING

This paper has not received specific aid from public sector agencies, commercial sector or non-profit entities.

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