Abstract

Anyone who proves that he or she is in a situation of danger and who is a potential victim of a violation of a right set forth in the American or the European Convention on Human Rights may be protected by interim measures. Interim measures in the human rights systems may be defined as an instrument, the purpose of which is to prevent irreparable harm to persons who are in a situation of extreme gravity and urgency, which a favourable final judgment would therefore not be able to undo. They result in protection offered by the State in compliance with the legally binding order of the Inter-American or European Court on Human Rights. While this legal figure is nowadays applied more and more frequently and in most cases the American and European countries have complied with the order of their respective Court of Human Rights, the question that this contribution would like to answer is what the legal consequences of non-compliance are and whether the difference as to the legal basis of the interim measures in both human rights systems has influenced the legal effect that the respective Courts have given to non-compliance with the measures. After an overview of the case-law, it will be shown that in fact each regional system has given different legal consequences to
the incompliance with its interim measures, but paradoxically, the effects are not directly related to the type of legal instrument in which the interim measures are contemplated. The issue is relevant because on the one hand interim measures are mostly adopted in dramatic contexts where the life and personal integrity of human beings are endangered and because a survey of the case-law shows that under the European system the cases of incompliance seem to be on the rise, and on the other hand, because it appears that under the Inter-American system there are many cases in which provisional measures have been issued which will be decided soon on the merits, and therefore during the examination of which it will be decided whether the member States have complied or not with the Inter-American Court’s interim measures and what consequences incompliance entails.

1. INTRODUCTION

Nowadays provisional measures or interim measures are a key instrument for the Inter-American and European Courts of Human Rights to prevent irreparable harm to persons who are in a situation of extreme gravity and urgency. The measures result in protection offered by the State in compliance with an order of the Inter-American or European Court, which may act at the request of a party or on their own motion.

To date, the beneficiaries of interim measures have been, among others, family members of alleged victims, witnesses, journalists, political candidates, human rights defenders, members of indigenous communities, prisoners who live in deplorable conditions, the seriously ill or those on hunger strikes, officials of the justice system, aliens under orders of deportation or extradition and those sentenced to capital punishment. In the vast majority of cases the provisional measures are taken to protect the right to life and/or the right to personal integrity of the above-mentioned persons and groups.

Although this legal figure is applied more frequently and in most cases the American and European countries have complied with the order of their respective regional court of human rights, the question arises of what happens on those occasions that the States refuse to comply?; or in other words: what are the legal consequences of non-abidance? The issue is important, not only because provisional measures are adopted in dramatic contexts where the life and personal integrity of human beings are endangered, but also because on the one hand, under the European system the cases of non-compliance seem to be on the rise, both with founding member States of the Council of Europe and thus old member States to the European Convention on Human Rights (ECHR) and countries that have recently ratified the European Convention, and on the other hand, because it appears that under the Inter-American System there are many cases in which provisional measures have been issued which will be decided soon on the merits.
To meet the objective, we will start by presenting the normative structure regulating the figure of the provisional measure. It will be demonstrated that both human rights systems start off from different points of departure; while in the Inter-American system the measures have a conventional nature, under the European system it only has a regulatory basis. Given this normative differentiation, it will be examined whether this distinction has influenced the legal effect that the respective courts have given to the non-compliance with provisional measures. After an overview of the case-law, we will show that in fact each regional system has given different legal consequences to the non-abidance to provisional measures, but paradoxically, the effects are not directly related to the type of instrument in which they are contemplated.

In this sense, the final question that arises is why the Inter-American Court does not consider the non-compliance with an order for provisional measures as a violation of the American Convention on Human Rights (ACHR), notwithstanding that the legal figure of provisional measures is expressly contemplated therein (Article 63(2) ACHR), while the Strasbourg Court, through a teleological interpretation and after a lengthy jurisprudential debate has concluded that its provisional measures are binding, and therefore that the failure of States to comply with a provisional measure leads to an almost automatic violation of the right to petition of the European Convention (Article 34 ECHR), although the figure of the provisional measure is not mentioned at all in the text of the Convention. This article attempts to answer this question, which in turn allows us in the form of a conclusion to give some indication of the challenges that lie ahead for both regional human rights courts to evolve towards giving better protection to the individual.

2. A REMINDER OF HOW THE PROVISIONAL MEASURES WERE CREATED AND THEIR LEGAL CHARACTER: EXPLICIT CONVENTIONAL BASIS VERSUS REGULATORY BASIS

2.1. INTER-AMERICAN SYSTEM: EXPLICIT CONVENTIONAL BASIS

Unlike under other systems, such as the universal and the European, where provisional measures are provided for in the Statute and/or Rules of Court (for example the International Court of Justice, the UN Human Rights Committee and the European Court of Human Rights, respectively), in the Inter-American system these measures are expressly contemplated in Article 63(2) of the American Convention on Human Rights, which states:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters
it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.¹

Although the language employed in Article 63(2) is clear with respect to the compulsory nature of provisional measures, it is unfortunate that the Proceedings of the Specialised Inter-American Conference do not indicate whether there was any discussion on the scope and nature of provisional measures. These Proceedings contain the debate that took place on the draft American Convention on Human Rights presented by the Inter-American Council of Jurisconsultants, which was responsible for up-dating and completing a draft, taking into account the earlier drafts of the pre-existing Inter-American Commission and drafts presented by Chile and Uruguay. The proceedings may thus be considered as the travaux préparatoires of the American Convention on Human Rights. It may be seen from the Proceedings that the Draft American Convention on the Protection of Human Rights did not provide for the figure of provisional measures in any of its provisions.² It was during the Sixth Meeting of the Second Commission of the Inter-American Conference on 19 November 1969, that the delegate of Costa Rica, José Luis Redondo Gómez, proposed that the Court would be able to act in grave situations and in emergency situations. The delegate held that this function was common in every tribunal in the world. He proposed that there be included a text that would state the following:

The Court shall take the provisional measures that it deems pertinent in emergency situations and when there is sufficient cause that justifies it to protect the right that is claimed to be infringed.³

When the amendment was voted upon, it was rejected by one vote in favour, none against and 16 abstentions. Two days later, on 21 November, during the Third Plenary Session, once again the delegate of Costa Rica, this time José Francisco Chaverri, when Article 63 was being considered, proposed that a paragraph be added, which was nearly the same as that presented previously, with the following text:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters

¹ As it can be seen, the Court can also adopt provisional measures in relation with matters which are not (yet) under its consideration. To be able to adopt such measures, a request is necessary from the Inter-American Commission.
it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.\

According to the minutes of the Third Plenary Session (summary version) the proposal was considered and it was decided to incorporate a paragraph 1 in the text presented. The minutes say nothing about the arguments of the Costa Rican delegate nor as to whether there were comments by the delegates of the other States or the results of the voting. This was the text that was incorporated into the Convention.

Despite the apparent lack of discussion on the incorporation of provisional measures, there can be no doubt whatsoever about the compulsory nature of provisional measures since they are expressly provided for in the American Convention. The language, plus the location of Article 63(2) in Chapter VIII, Section 2 on ‘Jurisdiction and Functions’, permits to conclude that the clear intention of the drafters was to grant true binding force to the provisional measures and not be simple suggestions or indications.\textsuperscript{5} While the Statute of the International Court of Justice and the Rules of the European Court of Human Rights use the word ‘indicate’,\textsuperscript{6} it was preferred that the American Convention express that the Court ‘shall adopt’ such measures as it deems pertinent.\textsuperscript{7}

2.2. EUROPEAN SYSTEM: REGULATORY BASIS

In the European System, a provision on interim measures (Article 35), inspired by Article 41 of the Statute of the International Court of Justice, was included by the

\textsuperscript{4} Ibidem, p. 457.


\textsuperscript{6} Article 73 of the Rules of the International Court of Justice (ICJ), Article 41 of the Statute of the ICJ and Article 39 of the European Court of Human Rights. On this matter it is important to point out that the verb ‘indicate’ used in the Statute of the ICJ generated a widespread doctrinal debate on the ‘binding’ character of the provisional measures leading to the development of an extensive jurisprudence on the subject. In its judgment in the \textit{LaGrand} Case of 27 June 2001, the ICJ concluded that its provisional measures are binding.

\textsuperscript{7} Having been established in a treaty freely consented to and accepted by the States, they must be complied with in accordance with the principle of \textit{pacta sunt servanda}, which obligates the States to comply in good faith with the provisions of the treaties to which they are parties. Article 26 Vienna Convention on the Law of Treaties of 23 May 1969.
International Juridical Section of the European Movement in the Draft Statute of the European Court, that was added to the Draft European Convention, which held:

a) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

b) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the European Human Rights Commission and to the Secretary-General.8

This draft provision, which was presented to the Committee of Ministers of the Council of Europe on 12 July 1949, was not withheld in the later European Convention. Unfortunately, the travaux préparatoires of the European Convention on Human Rights do not contain any discussion on the matter.9 Some authors have stated that the silence was due to the fact that the system created by the Convention was not conceived to operate in the practical sense that it does today or, in other words, it was not foreseen that the system under the Convention would be developed with the speed and magnitude as has in fact occurred, especially given the events of the Second World War.10

Nonetheless, the need for interim measures became evident very early in the work of the European Commission. In fact, this supervisory organ, shortly after it was established, began to make informal requests to member States that they suspend implementation of the death penalty and deportations and extraditions while it was examining the applications. The first time occurred in 1957 in the first inter-State case that was presented under the system; only two years after the Commission began functioning. On this occasion, the British Government, at the request of Greece, was asked not to execute Nicholas Sampson, who had seized power following a coup on Cyprus, a British Crown Colony, and who had subsequently been captured by the British authorities and sentenced to death.11

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11 Commission, Greece vs the United Kingdom, decision of 2 June 1956, Application No. 176/56. Greece presented two petitions against the United Kingdom on 7 May 1956. The Greek Government
In most of the cases, the States complied with the order of the Commission. Thus, between 1960 and 1970 there was a clear practice of respect for the measures, even though they were not included in any legal document. Given the absence in the European Convention of an express provision on interim measures, and the fact that the measures were taken a few times in practice, the Consultative Assembly of the Council of Europe recommended in 1971 to the Committee of Ministers that an additional Protocol to the Convention be drafted that would enable the supervisory organs under the European Convention to adopt interim measures in the appropriate cases.\textsuperscript{12} The Committee of Ministers did not endorse the Recommendation, believing that it was not necessary in the light of the adequate informal system that had been developed, since in practice the States complied with the measures requested by the Commission.\textsuperscript{13}

Given this climate of confidence, the Commission decided to include interim measures in the 1974 reform of its Rules of Procedure, which codified the practice of some years. Rule 36 of the Rules stated the following:

The Commission or, where it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.\textsuperscript{14}

Given the refusal to include a provision of this type in a protocol, the Consultative Assembly opted in 1977 to recommend to the Committee of Ministers that it invite the member States not to extradite or deport someone to a non-State party to the Convention when the Commission or the Court was examining for example alleged violations of Article 3.\textsuperscript{15} Consequently, the Committee of Ministers on 27 June 1977 submitted that the derogation from the provisions of the Convention notified by the British Government and applied to Cyprus by virtue of Article 15 ECHR was irregular in form and, furthermore, that the conditions required by the Article were not present in this case. It also maintained that a series of emergency laws and regulations in force in Cyprus were incompatible with the provisions of the ECHR. It alleged, in particular, that the legislation providing for the imposition of whipping and various forms of collective punishment was an infringement of Article 3 ECHR which, under Article 15, the contracting parties may not depart from even in time of war or other public emergency. For its part, the British Government denied that it violated the ECHR, relying partly on the definition of the rights and freedoms recognised by the ECHR and partly on the existence in Cyprus of a ‘public emergency threatening the life of the nation’ within the meaning of the aforesaid Article 15. See \textit{Yearbook of the European Convention on Human Rights}, Vol. 2, Martinus Nijhoff, The Hague, 1958–1959, p. 174.


1980 decided to adopt a Recommendation to member States with regard to cases of extradition of persons from a member State to a non-member State to the European Convention. The Recommendation advises the member States ‘to comply with any interim measures which the European Commission of Human Rights might indicate under Rule 36 of its Rules of Procedure, as for instance, a request to stay extradition proceedings pending a decision on the matter’.16

The experience of the European Court with regard to interim measures has been a little different than that of the European Commission, since, although the measures were provided for in 1959 in Rule 34 of its original Rules,17 the Court did not deal with the matter until 30 years later in the Soering Case.18 Rule 34 provided the following:

(Interim measures). 1. Before the constitution of a Chamber, the President of the Plenary Court may, at the request of a Party, the Commission, or any person concerned or proprio motu, bring to the attention of the Parties any interim measure the adoption of which seems desirable. The Chamber, when constituted, or, if the Chamber is not on session, its President, shall have the same right. 2. Notice of these measures shall be immediately given to the Committee of the Ministers.19

Although the legal figure of the provisional measures was formally included in the Rules of the European Court before they were included in the Rules of Procedure of the European Commission, the Court only made use of its competence to issue provisional measures for the first time much later than the Commission. This was because, before the Commission was abolished under Protocol No. 11, interim measures were adopted at the beginning of the case, when the petition was presented to the Commission, which meant that the Court only dealt with the measures when the Commission or State(s) referred the case to the Court. Protocol No. 11 was then drafted and the entire protective system was restructured. The Committee of Ministers again missed an opportunity to introduce a provision on interim measures, even though various bodies such as the Commission,20 Court, Committee on Migration,

17 The first Rules of the European Court of Human Rights established under the former Article 55 of the Convention were adopted on 18 September 1959. The Rules were completely amended on 24 November 1982 and again modified after the entry into force of Protocol No. 11. The current Rules can be found on: www.echr.coe.int/NR/rdonlyres/D1EB31A8–4194–436E-987E-5AC8864BE4F/0/ RulesOfCourt.pdf.
18 ECtHR, Soering vs the United Kingdom, judgment of 7 July 1989, Application No. 14038/88, para. 77. The Court extended the interim measures that the Commission had adopted.
Refugees and Demography of the Parliamentary Assembly\textsuperscript{21} and the Swiss delegation\textsuperscript{22} recommended that interim measures be part of the European Convention.

As in 1949, interim measures were not mentioned in the \textit{travaux préparatoires}. A report of the Commission of Experts states that the proposal was not taken up because it was not considered to be urgent and, therefore, could be dealt with on another occasion. It is possible that the lack of time and the search for consensus in more important matters of the reform were the main reason for this omission.\textsuperscript{23} The Court, expressing its opinion on the draft Protocol, lamented that in the context of the radical change of the Convention’s protection machinery, the opportunity had not been taken to fill at least one obvious gap, specifically the power to indicate interim measures. On this point, the Court referred to Article 63(2) of the American Convention.\textsuperscript{24}

The context that we have just described on interim measures has resulted in a debate on their binding character since there is no express provision regarding them in the Convention but only in the Rules of the former Commission and the Rules of the Court. The controversy, therefore, has focused on determining whether non-compliance of the measures adopted by the Court under Rule 39 (previously Rule 36) is a violation of Article 34 (previously Article 25) of the Convention. In other words, the question that arises is whether the Court among its functions has a system of measures that are binding on the States parties to the European Convention or whether the measures are simple suggestions and whether the failure to comply would lead to some sort of international responsibility.

3. LEGAL EFFECTS OF NON-COMPLIANCE: AGGRAVATION OF THE VIOLATION OF A SUBSTANTIAL RIGHT VERSUS VIOLATION OF THE CONVENTION

3.1. INTER-AMERICAN SYSTEM: DISCOURSE VERSUS LEGAL EFFECT

Throughout its case-law, the Inter-American Court has maintained rhetorically that its interim measures are binding. However, when the Court was faced with a situation of incompliance, it only established the ‘aggravation’ of the substantial right that

\textsuperscript{22} Doc DH-PR(93)17 misc. 3 and Doc. DH-PR(93)20, 22 November 1993.
\textsuperscript{24} Opinion of the Court on Draft Protocol No. 11 to the European Convention on Human Rights, Doc. DH-PR (94)4, 31 January 1994, para. 9.
was found to have been violated by the member State, thus avoiding declaring the procedural violation of the provision on provisional measures that is contemplated in the American Convention. This situation allows us to consider that the Court has simultaneously managed two discourses in connection with the legal figure of provisional measures: a theoretical discourse and another discourse in practice. At the theoretical level, the Court has elevated the provisional measures into a special category, which it has endowed with full legal authority, while at the practical level, it has taken away any legal effect from its provisional measures.

Indeed, in its case-law on provisional measures the Court has held that States must comply with everything ordered by way of provisional measure by the Court in its resolutions. In general the language used by the Court is sufficiently clear for States to take all necessary measures to comply and therefore to protect persons who find themselves in a situation of risk. The resolutions on provisional measures in its preambular paragraphs recall that States have ratified the American Convention and accepted the jurisdiction of the Inter-American Court. Its case-law shows that the Court has relied on Articles 1(1), 25, 2, 26, 33, 27, 62(1), 28, 63(2)29 and 68(1)30 of the American Convention to hold that its provisional measures are binding. The Court has also held that the obligation to comply with its decisions corresponds to a basic principle of the law of international responsibility, according to which States must fulfil their obligations under international treaties in good faith (pacta sunt servanda) and, in

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25 Article 1(1) ACHR specifies the obligation of the State parties to respect the rights and freedoms recognised therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. See IACtHR, Caballero Delgado and Santana vs Colombia, order of 7 December 1994, preambular para. 2; IACtHR, Urso Branco Prison vs Brazil, order of 29 August 2002, preambular para. 5; IACtHR, Carlos Nieto Palma vs Venezuela, order of 5 August 2008, preambular para.3.

26 According to Article 2 of the Convention, the State parties undertake to adopt the legislative or other measures as may be necessary to give effect to the rights or freedoms contemplated in the Convention. IACtHR, Blake vs Guatemala, order of 16 August 1995, preambular paras 1 and 3; IACtHR, Ivher Bronstein vs Peru, order of 21 November 2000, preambular paras 1 and 5; and IACtHR, Plan de Sánchez Massacre vs Guatemala, order of the President of 30 July 2004, preambular paras 1 and 4.

27 Pursuant to Article 33 of the Convention, the State parties recognise the Court and the Commission as the competent organs to ensure the object and purpose of the Convention, that is, the protection of human rights, and in the case of the Court, its contentious jurisdiction when it has been accepted. See IACtHR, Liliana Ortega et al. vs Venezuela, order of 4 May 2004, preambular para. 2.

28 Pursuant to Article 62(1), the States declare that they recognise as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the American Convention. See IACtHR, Carpio Nicolle vs Guatemala, order of 4 June1995, preambular para. 1; IACtHR, Mendoza Prisons vs Argentina, order of 22 November 2004, preambular para. 1; and Carlos Nieto Palma vs Venezuela, supra note 26, preambular para. 1.

29 IACtHR, Gutiérrez Soler vs Colombia, order of 27 November 2007, preambular para. 2; and IACtHR, Urso Branco Prison vs Brazil, order of 2 May 2008, preambular para. 2.

30 According to Article 68(1) of the American Convention, the State parties undertake to comply with the judgment of the Court in any case to which they are parties. See IACtHR, James et al. vs Trinidad and Tobago, order of 16 August 2000, preambular para. 10; and IACtHR, Lysias Fleury vs Haiti, order of 2 December 2003, preambular para. 7.
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.\(^{31}\) The measures are, therefore, compulsory even in situations of internal armed conflict.\(^{32}\)

Taking into account the aforementioned articles, the Court has held that compliance with provisional measures does not depend on the discretion or goodwill of States. Provisional measures are binding because they are explicitly set forth in the American Convention, and the States as parties to the Convention have the duty to comply with all the provisions in that treaty.\(^{33}\) This is also true for those who maintain that the Court may only adopt provisional measures with respect to the States that have accepted its contentious jurisdiction,\(^{34}\) because they consider that the measures are binding since the States have made an express declaration in which they recognise

\(^{31}\) Lysias Fleury \textit{vs} Haiti, supra note 31, preambular para. 7; and IACtHR, Luis Uzcátegui \textit{vs} Venezuela, order of 2 December 2003, preambular para. 14.

\(^{32}\) In the cases of the \textit{Communities of the Jiguamiandó and of the Curbaradó vs Colombia} and the \textit{Peace Community of San José de Apartadó vs Colombia}, the Court held that the State must guarantee the protection of the beneficiaries of the measures in the light of the provisions of the American Convention as well as the norms of international humanitarian law. The Court called upon Colombia to ensure that said norms were respected by all the actors of the armed conflict and urged it to guarantee the principle of distinction in international humanitarian law with respect to the members of the Peace Community, who were civilians not involved in the internal armed conflict. See IACtHR, \textit{Peace Community of San José de Apartadó vs Colombia}, order of 17 November 2004, preambular para. 13; and IACtHR, \textit{Communities of the Jiguamiandó and of the Curbaradó vs Colombia}, order of 15 March 2005, preambular paras 15 and 28.


\(^{34}\) While there is no doubt that the Inter-American Commission may order precautionary measures with respect to any member State of the Organisation of American States (OAS), whether or not it has ratified the American Convention, it is not so clear which States are subject to provisional measures ordered by the Court. One school (Faúndez Ledesma) holds that the Court may adopt measures with respect to those States that have ratified the American Convention, while another view (Buergenthal, Nieto Navia, Pasqualucci and Gros Espiell) holds that the Court may adopt them only with respect to States that, in addition to having ratified the American Convention, have accepted its contentious jurisdiction under Article 62 of the Convention. Here it is important to recall that the jurisdiction of the Inter-American Court does not operate \textit{ipso iure}, and a State is not considered to have accepted its jurisdiction by merely ratifying the Convention. The principal difference between the two positions is that one starts with the idea that the adoption of provisional measures is part of the Court’s general function of human rights protection as the organ of supervision of the Convention, while for the other the competence of the Court to adopt provisional measures arises from its contentious jurisdiction. See Faúndez Ledesma, H., \textit{El Sistema Interamericano de Protección de los Derechos Humanos} [The Inter-American System of Human Rights], IIDH, San José, 3\textsuperscript{rd} ed., 2004, pp. 519–529; Nieto Navia, \textit{loc.cit.} (note 5), p. 385; Buergenthal, Th., 'The Inter-American Court of Human Rights', \textit{American University Law Review}, Vol. 76, 1982, pp. 231–245, at p. 241; Buergenthal, Th., 'The Inter-American System for the Protection of Human Rights', in: Meron Th. (ed.), \textit{Human Rights in International Law, Legal and Policy Issues}, Clarendon Press, Oxford, 1984, pp. 439–494, at pp. 465–466; Pasqualucci, \textit{loc.cit.} (note 5), pp. 823–824; and Gros Espiell, H., \textit{Estudios sobre Derechos Humanos II} [Studies on Human Rights], Civitas, Madrid, 1988, pp. 169–171.
as binding the Court’s jurisdiction in all cases concerning the interpretation and application of the Convention. The States are thus committed to comply with all the decisions of the Court, including, naturally, orders of provisional measures.\textsuperscript{35}

So far, Trinidad and Tobago (in 2002) has been the only State that has intentionally disobeyed an order of interim measures, as has been established in a judgment on the merits.\textsuperscript{36} In all the other cases the Court has explicitly decided not to pronounce itself on the incompliance by a State\textsuperscript{37} or maintained the provisional measures, while rendering a judgment on the merits of the case without saying anything about (in) compliance,\textsuperscript{38} and in a last kind of cases, there is no judgment on the merits yet.\textsuperscript{39}

In the aforementioned case, the State effectively implemented the death penalty against two beneficiaries, notwithstanding an interim measure ordered by the Inter-American Court to suspend the implementation. The respondent State argued in the case of the death of Anthony Briggs that, since the Inter-American Commission had decided to publish the reports mentioned in Articles 50\textsuperscript{40} and 51\textsuperscript{41} of the American

\textsuperscript{35} See Articles 62(1) and 68(1) ACHR.

\textsuperscript{36} In that regard, it is important to mention that the Court supervises the implementation of the provisional measures through the organisation of public hearings and the issuance of reports.

\textsuperscript{37} IACtHR, \textit{Luisiana Ríos and Others vs Venezuela}, judgment of 28 January 2009, paras 57–59 and 125.


\textsuperscript{39} It was reported that beneficiaries were killed notwithstanding provisional measures in the cases of the \textit{Peace Community of San Jose de Apartadó vs Colombia}, \textit{Urso Branco Prison vs Brazil}, the \textit{Communities of the Jiguamiandó and of the Curbaradó vs Colombia}, \textit{Eloisa Barrios et al. vs Venezuela}, \textit{Giraldo Cardona vs Colombia}. See \textit{Peace Community of San José de Apartadó Case vs Colombia}, supra note 33, explanatory statements 10, 13(c), 21, order of 15 March 2005, explanatory statement 12, preambular para. 24, order of 2 February 2006, explanatory statement 12(b) (12 beneficiaries were killed), order of 6 February 2008, preambular para. 12 and 19; IACtHR, \textit{Communities of the Jiguamiandó and of the Curbaradó vs Colombia}, order of 17 November 2004, explanatory statements 3(a), 6(d) and 7 (8 beneficiaries were killed) and order of 5 February 2008, preambular 7 and 11; IACtHR, \textit{Eloisa Barrios et al. vs Venezuela}, order of 29 June 2005, explanatory statements 4, 6 and 8, preambular para. 13 (a 16 year old beneficiary had been shot eight times and as a result died a few days later); IACtHR, \textit{Urso Branco Prison vs Brazil}, order of 22 April 2004, explanatory statement 14, order of 7 July 2004, preambular para. 8 (where the Court expresses its great concern that, while the measures were still in effect, people had continued to die in the Urso Branco Prison, notwithstanding the fundamental purpose of the adoption of these measures to protect the life and personal integrity of all the inmates and those who were in the prison buildings) and order of 2 May 2008, preambular para. 10 and enacting part 3; and IACtHR, \textit{Giraldo Cardona vs Colombia}, order of 30 September 1999, explanatory statement 4(c) (two beneficiaries were killed).

\textsuperscript{40} Article 50(1) ACHR. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions on the merits of the case.

\textsuperscript{41} Article 51(1) ACHR. If, within a period of three months from the date of the transmittal of the report of the Commission to the States concerned, the matter has not either been settled or submitted by the Commission or by the State concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions on the merits concerning the question submitted for its consideration.
Convention, there was no case anymore relating to that person before the Inter-American Commission, or capable of being submitted to the Inter-American Court. In this sense, this body had, according to the respondent State, lost all power to adopt interim measures. Thus, the order made after the publication of that Commission report was invalid because the Inter-American Court had no jurisdiction.

In the opinion of the Inter-American Court however, the State was bound by its interim measures, whether the case was sent to it or not, because the situation of extreme gravity and urgency provided the foundations necessary to maintain the measures to protect the rights of the petitioner. It also found that, although, following the publication of the reports on the matter, the proceedings before the Inter-American Commission had ended, the same could not be said with regard to the case of the Inter-American Court, because from the moment that the Court had received the request for interim measures, the case was under its jurisdiction. In this regard, the study of the case had not been completed under the Inter-American System. Once the Inter-American Commission requests interim measures to the Court, the only restriction in Article 63(2) to the jurisdiction of the Court is that the situation of extreme gravity and urgency should continue and that the measures are indeed necessary to avoid damage to the rights of persons. Despite this ruling, the Court did not derive any legal effect from the failure to abide because no judgment was passed on the merits in relation to Anthony Briggs.

Regarding the other beneficiary (Joey Ramiah) who had been executed, the State pointed out that it had not received any order to adopt protective measures in favour of Joey Ramiah. Taking into account these circumstances, in its judgment on the merits in the case of *Hilaire, Constantine and Benjamin et al. vs Trinidad and Tobago* (2002), the Inter-American Court held the State internationally responsible. The Court considered in the judgment that his execution by Trinidad and Tobago was an arbitrary deprivation of the right to life that was ‘aggravated’ because the victim was protected by provisional measures that it had ordered, indicating that his execution should have been stayed pending the resolution of the case under the Inter-American Human Rights system. Joey Ramiah had been found guilty of murder and sentenced to death under the obligatory death penalty act. By order of 25 May 1999, the Court required Trinidad and Tobago to adopt whatever means were necessary to preserve his life so as not to frustrate consideration of the case in the Inter-American system. Notwithstanding the measure of protection expressly ordered by the Court, the State executed the beneficiary on 4 June 1999, thus applying the death penalty.

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42 IACtHR, *James, Briggs, Noel, Garcia and Bethel vs Trinidad and Tobago*, order of 25 September 1999, preambular para. 10 and order of 26 November 2000, preambular para. 10.
43 IACtHR, *Hilaire, Constantine and Benjamin et al. vs Trinidad and Tobago*, judgment of 21 June 2002, paras 33, 84 and 197–200.
45 *Ibidem*, para. 216.
The case of Trinidad and Tobago shows that at a practical level, the decision to give legal effect to a failure of a State to comply with a provisional measure is subject to the referral of the case to the Court and the establishment of a violation of a substantial right. That means that if an incompliance with Article 63(2) does not result in a violation of one of the material rights, the failure to comply would have no legal consequences, the disobeyance would go completely unpunished. In this case, most probably the Inter-American Court will mention in the expositive paragraphs of its judgment that interim measures were taken and not complied with by the State. It will further indicate ‘in its discourse’ that the measures are compulsory as they are provided in the American Convention, but it will at the same time refrain from mentioning them in the resolutive part.

In our opinion, the position taken by the Inter-American Court is contradictory because from a logical point of view it cannot be maintained simultaneously that a legal figure is mandatory but its failure to comply has no legal effects, or that it is compulsory but its legal consequences following incompliance depend upon the violation of another legal provision. That is nonetheless precisely what occurs with the provisional measures under the Inter-American system of Human Rights. One might argue that the Court does give legal effect to its provisional measures in case of non-compliance because the Court ‘aggravates’ the violation of a substantial right that has already been found violated. In a way that is true, however, we must not forget the total lack of legal effect when no violation of a substantial right has been established and, secondly, that in no case and under no circumstances the Court will hold a State in violation of Article 63(2) of the American Convention, which is the provision that expressly provides for provisional measures. The position taken by the Court may be criticised, not only because of the lack of legal rigor with regard to this concrete issue, but also because this position can be considered as a clear signal towards the States that the measures are simple suggestions or indications and not real orders that must be obeyed.

3.2. EUROPEAN SYSTEM: LONG JURISPRUDENTIAL DEBATE

The binding character of provisional measures ordered by the European supervisory organs has been controversial and uncertain throughout the 20th century. In the *Cruz Varas and Others* Case (1991), the Swedish Government was informed by

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telephone that the European Commission had indicated an interim measure to protect the applicants, a Chilean married couple and their young son who alleged that their deportation to Chile would expose them to imminent, serious and irreparable damage in the form of ill-treatment contrary to Article 3 ECHR, whereby Sweden was requested to stay the enforcement of the deportation to Chile until the Commission had had sufficient time to study the application in depth. The Swedes ignored the provisional measure and Mr Cruz Varas was deported to Chile, while his wife and their child went into hiding in Sweden.\(^{47}\)

According to the European Commission, Sweden had thus decisively obstructed the individual right of petition, which constituted a violation of Article 25(1), \textit{in fine} of the ECHR (now Article 34),\(^{48}\) even if the examination on the merits of the case might not reveal any violation of Article 3 ECHR.\(^{49}\) The European Court, however, rejected the reasoning of the Commission. The Court held that, although Article 25(1) ECHR imposes an obligation upon the States parties not to interfere with the right of the individual to present and pursue a complaint to the Commission, that right was procedural and must therefore be distinguished from the substantive rights of the European Convention. Nevertheless, according to the Court, it must be open to individuals to submit a complaint of alleged infringements of a procedural provision. But Article 25(1) read in conjunction with Rule 36(1) of the (former) Commission's Rules of Procedure or even in conjunction with Articles 1 and 19 of the Convention, did not, in the words of the Court, generate any legal obligations on the part of the States parties to comply with the interim measure indicated by the Commission, particularly because there is no specific provision in the European Convention empowering the Commission to order interim measures.\(^{50}\)

The decision of the (new) European Court in the \textit{Conka and Others} Case (2001) indicated that the Court had not changed its earlier position in the case of \textit{Cruz Varas}
and Others.\(^{51}\) In the *Conka Case*, the applicants, a number of Slovak Roma gypsies, were, after their application for asylum had been refused, rounded up by the Belgian police on a false pretext and, with a view to deportation, were transferred to a closed transit centre in the immediate vicinity of Brussels airport. On 4 October 1999, their lawyer submitted an application to the Court alleging a violation of Articles 3 ECHR (prohibition of torture), 8 ECHR (protection of family life) and 14 ECHR (prohibition of discrimination) as well as Article 4 of Protocol No. 4 (prohibition of collective deportation) and requested the Court to indicate an interim measure. On 5 October, the Belgian Government was notified of the request from the Vice-President of the Third Section of the Court to stay the deportation temporarily. Furthermore, although the application was confirmed by fax, the Belgian authorities decided not to comply with the interim measure indicated by the Court.\(^{52}\)

In its decision on admissibility, the Court expressly referred to its judgment in the *Cruz Varas and Others Case* and labelled the Belgian action as ‘hardly compatible with the will to collaborate in a loyal fashion with the European Court in cases which the state in question considers practicable and reasonable’, and referred as such to the custom of the member States that had been established over the past decades to comply with the interim measures that had been indicated by the Commission.\(^{53}\) Nonetheless, the Court refused to consider the request of the applicants to review its earlier position in the *Cruz Varas and Others Case* and to state that interim measures indicated under Rule 39 were legally binding. The Court repeated that the power to order interim measures could not be inferred from either Article 34, *in fine*, or from other sources. The refusal to comply with an interim measure, which was issued under Rule 39, could only be viewed as ‘an aggravated breach’ of Article 3 which could

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\(^{53}\) *Conka and Others vs Belgium*, supra note 51, with reference to Commission; Commission, *Cruz Varas and Others vs Sweden*, supra note 47; and ECtHR, *Cruz Varas and Others vs Sweden*, supra note 47, paras 100 and 103.
subsequently be laid down by the Court.\[^{54}\] In short, the *Cruz Varas* case-law remained in full force.\[^{55}\]

Some years later, in the *Mamatkulov and Askarov* Case (2003), the Court changes its point of view.\[^{56}\] A Chamber of the Court (First Section) held for the first time (by six votes to one) that its interim measures under Rule 39 are compulsory or legally binding for the State to which they are addressed. If a State does not comply with an interim measure, this may, in view of the special nature of Article 3 ECHR (prohibition of torture), lead to a violation of the right of individual complaint (under Article 34 ECHR), as long as the contested act – *in casu* the extradition – has affected the core of the right of individual application.

In the aforementioned case, the applicants, two Uzbeks, who were members of an opposition party, were arrested at Istanbul airport under an international arrest warrant on suspicion of involvement in terrorist activities in their home country. The Uzbek authorities asked for their extradition. They stated, among others, that, if extradited to Uzbekistan, their lives would be at risk (Article 2 ECHR) and they would be in danger of being subjected to torture (Article 3 ECHR). The President of the First Section indicated to the Turkish Government that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had had an opportunity to examine further the applications. On 19 March 1999, the Turkish Government issued a decree for the applicants’ extradition and handed information to the Court on the guarantees obtained by the Uzbek Government. Notwithstanding the decision of the Chamber, the applicants were extradited on 27 March.\[^{57}\]

In its Chamber judgment, the European Court first stated that the European Convention was ‘a living instrument that had to be interpreted in the light of the

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\[^{54}\] Commission, *Cruz Varas and Others vs Sweden*, supra note 46; and ECtHR, *Cruz Varas and Others vs Sweden*, supra note 46, paras 102–103.

\[^{55}\] The aspect of the complaint that relates to the binding force of interim measures was declared inadmissible by the Court and therefore did not qualify to be re-examined under a possible request for a re-hearing (under Article 43(1) ECHR).


\[^{57}\] *Mamatkulov and Abdurasulovic vs Turkey*, decision of 31 August 1999 and judgment of 6 February 2003, supra note 57; and *Mamatkulov and Askarov vs Turkey*, supra note 57, paras 1–5 and 25–36.
present-day conditions'. This was also valid with regard to procedural provisions such as Article 34 ECHR (right of individual application).\textsuperscript{58} \textit{In casu}, the applicants' representatives had not been able to contact the applicants, who had thus been deprived of the possibility of having further inquiries carried out to obtain evidence in support of their allegations.\textsuperscript{59} The Court distinguished the current situation from its earlier case-law and pointed to the fact that it was not bound by that case-law, on the condition that there was a good motivation available.\textsuperscript{60} Of crucial importance in the eyes of the Court, was that the European Convention had to be interpreted and applied in a way that made the guarantees effective and not theoretical or illusory. The interpretation of the scope of interim measures could not be seen apart from the proceedings to which they related or the decision on the merits they sought to safeguard.\textsuperscript{61} Accordingly, by failing to comply with the interim measures indicated by the Court, Turkey had violated its obligations under Article 34 ECHR.\textsuperscript{62} In its final judgment in the case of \textit{Mamatkulov and (Abdurasulovic) Askarov vs Turkey} (2005),\textsuperscript{63} the Grand Chamber of the European Court largely endorsed (with 13 votes against 4)\textsuperscript{64} the first judgment passed by the Chamber.\textsuperscript{65}

But the violation of Article 34 ECHR seemed by no means a mechanical or automatic consequence of the finding of the incompliance with the interim measure,

\begin{itemize}
  \item \textsuperscript{58} \textit{Ibidem}, \textit{Mamatkulov and Askarov vs Turkey}, supra note 57, para. 94.
  \item \textit{Ibidem}, para. 96.
  \item \textit{Ibidem}, paras 104–105.
  \item \textit{Ibidem}, para. 105.
  \item \textit{Ibidem}, paras 109–111.
  \item Some judges considered that the Court was legislating in defiance of a clear intention of the member States. See Dissenting Opinion of Judges Callisch, Turmen and Kovler in \textit{Mamatkulov and Abdurasulovic vs Turkey}, decision of 31 August 1999 and judgment of 6 February 2003, supra note 57; and \textit{Mamatkulov and Askarow vs Turkey}, supra note 57.
  \item \textit{Mamatkulov and Abdurasulovic vs Turkey}, decision of 31 August 1999 and judgment of 6 February 2003, supra note 57; and \textit{Mamatkulov and Askarow vs Turkey}, supra note 57, para. 128.
\end{itemize}
as is shown by the European Court’s case-law, for the finding of a violation of Article 34 ECHR depends on the evaluation whether the non-compliance with the measure indicated has in casu encroached upon the core of the right of application. Consequently, the Court has been deciding on this aspect on a case-by-case basis. In the Öcalan vs Turkey case (2003–2005) for example, the Court had asked Turkey, among other, to take all necessary measures to protect the rights under Article 6 ECHR of the PKK-leader Abdullah Öcalan, who had been arrested in Kenya and brought before a Turkish court where he faced the death penalty, and inform the Court on the measures taken in that regard. This request for information was, however, set aside by the Turkish Government. In its judgment the Grand Chamber of the European Court confirmed its position on the binding force of provisional measures, but held that in casu there was no violation of the individual right of application (Article 34 ECHR). The Court ruled in this case that the non-compliance with an interim measure by a State should be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his right, and as such is to be considered incompatible with Article 34 ECHR. In that regard, the Grand Chamber referred to its previous judgment in the case of Mamakulov and Askarov vs Turkey (2005), but it nevertheless concluded that although regrettable, the Turkish Government’s failure to supply the information requested by the Court earlier did not, in the special circumstances of the case, prevent the applicant from setting out his complaints about the criminal proceedings that had been brought against him. Consequently, he has not been obstructed in the exercise of his right of individual application.

Earlier, a Chamber of the European Court (First Section) had already come to the same conclusion, that there has not been a violation of Article 34, while at the same time confirming the binding force of interim measures. The Court stated that, in the special circumstances of the case, the Government’s refusal to provide the Court with the requested information did not amount to a violation. In fact, these complaints, which mainly concerned Article 6 ECHR (right to a fair trial), were examined by the Court, which subsequently found a violation with regard to those issues.

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66 For three examples where a violation of Article 34 has been found as a result of the non-compliance with an interim measure, see Mamakulov and Abdurasulovic vs Turkey, decision of 31 August 1999 and judgment of 6 February 2003, supra note 57; and Mamakulov and Askarov vs Turkey, supra note 57, para. 128; ECtHR, Shamayev and 12 Others vs Russia and Georgia, decision of 16 September 2003, Application No. 36378/02 and ECtHR, Shamayev and 12 Others vs Russia and Georgia, judgment of 12 April 2005, Application No. 36378/02, para. 479; and ECtHR, Aoulmi vs France, judgment of 17 January 2000, Application No. 50278/99, para. 112.

67 Reference may be made to ECtHR, Öcalan vs Turkey, decision of 14 December 2000, Application No. 46221/99 and ECtHR, Öcalan vs Turkey, judgment of 12 May 2005, Application No. 46221/99, para. 201; and (foremost) Shamayev and 12 Others vs Russia and Georgia, decision of 16 September 2003 and judgment of 12 April 2005, para. 472, supra note 67.

68 Öcalan vs Turkey, decision of 14 December 2000 and judgment of 12 May 20005, supra note 68.

69 Öcalan vs Turkey, judgment of 12 May 2005, supra note 68, para. 201.

70 Ibidem, para. 241.
The juridical binding character of interim measures has explicitly been confirmed at the beginning of 2006 in a judgment in the *Aoulmi Case*,71 where the Court for the first time explicitly used the term ’binding’ *(obligatoire)* to refer to the legal force of interim measures.

The problem as to the possible lack of immediate legal consequences for a State unwilling to abide by an interim measure issued by the European Court, has seemingly been definitively resolved by the *Olaechea Cahuas Case*,72 where the Spanish authorities did not comply with a interim measure concerning the staying of the extradition (on 7 August 2003) by Spain to Peru of a Peruvian national, Adolfo Olaechea Cahuas, an alleged member of *Sendero Luminoso* (the Shining Path) in Europe, who was sought in his home country for support to terrorist activities of the above-mentioned Maoist guerrilla group.

While in earlier cases (*Mamatkulov and Askarov, Shamayev, Aoulmi*), the petitioners’ right of application after their extradtion or deportation had been effectively hindered by the fact that all contact of the lawyers with their clients had come to a halt, the situation was not the same in the *Olaechea Cahuas* Case, as the applicant, once he was on Peruvian soil, had been released provisionally after three months on the condition that he would not leave Lima, his city of residence, during the judicial investigation.73 Moreover, during the whole Peruvian procedure, the applicant had been in contact with his London-based lawyer. This prompted the Spanish authorities to conclude that there could not have been any kind of hindrance to the right of application.74 However, the Court did not agree with this reasoning and acknowledged that non-compliance by a respondent State with whatever interim measure adopted by the Court would indeed lead to a violation of the European Convention, that is the right of application under Article 34, independently of the establishment *post facto* of the existence of a hindrance of the effective exercise of the right to individual application.

The State’s decision as to whether it complies with the measure cannot be deferred pending the hypothetical confirmation of the existence of a risk of irreparable damage. Failure to comply with an interim measure because of the existence of a risk is in itself a serious hindrance, at that particular time, of the effective exercise of the right of individual application.75 In the end, the Court applied the only logical juridical consequence resulting from the above-mentioned assessment of how one can arrive

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72 ECtHR, *Olaechea Cahuas vs Spain*, judgment of 10 July 2006, Application No. 24668/03.

73 *Ibidem*, paras 7–17.

74 *Ibidem*, paras 76–79.

75 *Ibidem*, para. 81.
at a ‘serious hindrance’ of the effective exercise of the right of individual application, by holding that ‘in failing to comply with the interim measures indicated under Rule 39 of its Rules of Court, Spain failed to honour its commitments under Article 34 of the Convention’. The Chamber came to its conclusion unanimously, without any concurring or dissenting opinions.

Nowadays, the European Court is developing its case-law in relation to the legal consequences for a State that has complied with an interim measure, but not immediately. The European Court in a number of recent judgments seems to be particularly strict as to the timeliness of compliances and holds States that have not complied (almost) immediately with interim measures, fully responsible under Article 34 (right of individual application).

Arguments from the respondent State tending to escape its international responsibility and condemnation by indicating that they had not had the necessary time to put into place the measures that are necessary to avoid the damage are being scrutinised by the Court with utmost strictness, as is illustrated in the Paladi Case concerning compliance with an interim measure by the State only four days after the measure had been issued. In fact, on the evening of 10 November 2005, the Court had indicated an interim measure by fax to the Moldovan Government, stating that the applicant, who suffered from different diseases and had been committed to a specialised neurological health centre, should not be transferred from that centre to the prison hospital until the Court had had the opportunity to examine the case. On 11 November 2005, a Deputy Registrar of the Court tried unsuccessfully several times to contact by telephone the Government Agent’s Office in Moldova. The applicant was transferred to the prison hospital on that same day. On 14 November, following requests by the applicant’s lawyer and the Agent of the Government, the domestic court finally ordered the applicant to be transferred back to the neurological centre.

In its Chamber judgment, the European Court considered that ‘the failure of the domestic authorities to comply as a matter of urgency with the interim measure indicated by the Court in itself jeopardised the applicant’s ability to pursue his application before the Court and was thus contrary to the requirements of Article 34 of
the Convention’.\textsuperscript{82} Indeed, there were ‘serious deficiencies at each stage of the process of complying with the interim measures, starting with the absence, in the Government Agent’s Office, of officials to answer urgent calls from the Registry and continuing with the lack of action taken by that office between the morning of 11 November 2005 and the afternoon of 14 November 2005’, coupled with ‘the Centru District Court’s failure to deal urgently with the issue when it was asked to do so on 11 November 2005 by the applicant’s lawyer’. Finally, ‘the refusal for six hours to admit the applicant to the Republican Neurological Centre (RNC) despite the Court’s interim measures and the domestic court’s decision is also a matter of concern’.\textsuperscript{83} The Court noted that the applicant was in a serious condition, which, as appeared from the documents available at the relevant time, put his health at immediate and irremediable risk. That risk was the very reason for the Court’s decision to indicate the interim measure. Fortunately, no adverse consequences to the applicant’s life or health resulted from the delay in implementing that measure. The European Court consequently found that ‘[i]n the light of the very serious risk to which the applicant was exposed as a result of the delay in complying with the interim measure and notwithstanding the relatively short period of such delay’, there had been a violation of Article 34 of the Convention.\textsuperscript{84}

The Grand Chamber, whom the case was referred to by request of the respondent State, arrived at the same conclusion. However, on this occasion, the Grand Chamber, after a lengthy debate (resulting in a vote of 9\textsuperscript{8} versus 8) presented a clearer and more developed view with regard to the underlying motives why a late compliance with a provisional measure violates Article 34 of the Convention. In that judgment, the Court began by indicating that its role was not to examine whether the decision of the Chamber to adopt interim measures was correct or not. At that stage of the proceedings, it was for the Government to demonstrate to the Court that the interim measures were complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation.\textsuperscript{85} That means that, as a general rule, a late incompliance with an interim measure will automatically result in a violation of the Convention, unless three conditions are cumulatively met: a) there were objective obstacles; b) the State took all reasonable steps to remove those obstacles; and c) the State kept the Court informed. Having completed the test, the Grand Chamber found that in casu none of the above-mentioned constitutive criteria for a situation to be deemed exceptional had been met and that therefore the State had violated Article 34 of the European Convention. Finally, the Grand Chamber held that the fact that, ultimately, the risk did not materialise and that information obtained subsequently suggests that the risk may have been exaggerated does not

\textsuperscript{82} Ibidem, para. 99.
\textsuperscript{83} Ibidem, para. 97.
\textsuperscript{84} Ibidem, para. 100.
\textsuperscript{85} ECtHR, Paladi \textit{vs} Moldova, judgment of 10 March 2009, Application No. 39806/05, para. 92.
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alter the fact that the attitude and lack of action on the part of the authorities were incompatible with their obligations under Article 34 ECHR. In this regard, the Court concluded that domestic authorities did not fulfil their obligation to comply with the interim measure at issue and that in the circumstances of the case there was nothing to absolve them from that obligation.\textsuperscript{86}

4. \textbf{CONCLUSION: NEED TO CONSOLIDATE THE STRONG PROTECTIVE VISION (EUROPEAN SYSTEM) VERSUS NEED TO DEVELOP LEGAL ARGUMENTS (INTER-AMERICAN SYSTEM)}

Although the legal figure of the interim measures has been included in the legal texts of both systems, the principal difference between them is that while in the Inter-American system it is included in its principal legal instrument, the American Convention on Human Rights (Article 63(2)), in the European System it can only be found in the Rules of Court (Article 39). This difference has resulted in a debate in the European system as to their binding character; some argue that the lack of this figure in the European Convention is a clear indication that the measures are not true orders that must be followed by the States parties, while others deduce the binding character from a teleological interpretation of the Convention.

Indeed, the case-law under the European System shows that there are two interpretations on this controversial topic: one favours State sovereignty and argues for the judicial restraint of the Court regarding its jurisdiction and the other, more progressive, argues for judicial activism and favours the effective protection of rights and tends to regard the European Convention from an evolutive, dynamic or teleological perspective. The first trend favours State discretion. The Convention’s silence is frequently invoked as an argument to deny binding force to provisional measures. In addition, the language that provides for them in the legal texts states that their adoption would be ‘desirable or advisable’. In this regard, some European Court judges and some legal doctrine, argue that, given the persistent refusal of member States to include a provision in the European Convention making interim measures binding, the departure of the Court in the \textit{Mamatkulov and Askarov} Case from its own case-law is an illustration that the majority of the Court have been legislating in

\textsuperscript{86} \textit{Ibidem}, paras 102–105. See also especially the Partly Dissenting Opinion of Judge Malinverni, joined by Costa, Jungwiert, Myjer, Sajó, Lazarova Trajkovska and Karakaş in \textit{ibidem}, sub para. 3, who basically argue that a short delay in complying with an interim measure – in cases other than expulsion or extradition cases – may in some cases expose the applicant to a real risk and amount to hindrance to the effective exercise of Convention rights, but such delay does not automatically expose an applicant to an immediate or particularly severe risk to his life or health and therefore does not automatically lead to the establishment of a violation of Article 34 ECHR.
Letting States off the Hook?

defiance of a clear intention of these member States. The second trend, on the other hand, is more protective of the individual and, thus, understands that the reach of the legal obligations assumed by the States parties goes beyond the strict language of the European Convention.

The analysis of the case-law shows that while the former European Commission had originally held that the failure to comply with one of its interim measures amounted to a violation of the right to individual application under Article 34 (former Article 25) of the European Convention (Cruz Varas), the European Court on the contrary on two occasions (Cruz Varas; Conka) held that the power to order interim measures could not be inferred from either the obligation not to obstruct the right to individual application under Article 34 (the right being procedural rather than substantive), or from any other (international) source. A failure on the part of a respondent State to comply with an interim measure indicated by the European Court could only constitute an ‘aggravated liability (or breach)’, in case a substantial provision was post facto deemed to be violated, that is if, apart from the above-mentioned non-compliance, a violation of a material right were established, then the non-compliance with the interim measure would constitute a kind of reason or motive that would worsen, that is ‘aggravate’, the responsibility of the State for the violation of the substantial right concerned.

In subsequent cases, however, against Turkey (Mamatkulov and Askarov; Öcalan), Russia and Georgia (Shamayev), France (Aoulmi) and Spain (Olaechea Cahuas), the European Court has changed its view and has held that its interim measures are legally binding. Moreover, while at the outset non-compliance by a State with a interim measure ‘could’ lead to an autonomous finding of a violation of the right of individual application (Mamatkulov and Askarov; Öcalan; Shamayev; Aoulmi), it is now accepted that such non-compliance virtually ‘automatically’ leads to a finding of a violation of the right of individual application (Olaechea Cahuas). The latter is also true even if a State has complied with an interim measure, but not immediately (Paladi). The only way for a respondent State to escape its responsibility under Article 34 ECHR is if compliance was prevented by an objective impediment and the State manages to prove that it took all reasonable steps to remove the impediment and to keep the Court informed (Paladi).

It has taken the European Court around 15 years to issue a clear judgment on the legally binding character of an interim measure and its consequences in case of non-compliance by the State to whom it is directed. The recent case-law of the European Court can certainly be seen as truly historic as to the legal consequences of the binding force of provisional measures indicated (one may now safely say ‘ordered’) by the European Court. Respondent States that do not conform to a provisional measure issued by the Strasbourg Court, will find their inaction virtually automatically interpreted as a violation of the right of individual application under Article 34 of the European Convention, whatever the outcome of the assessment of the Court.

regarding the materialisation of the violation of the substantive right(s) invoked by the applicant.

This is an interpretation that we share because, while it is true that the European Convention, unlike the American Convention, does not include a specific provision on the matter, it has to be understood that its interpretation and application in concrete cases should be in the direction of providing the Court with the necessary authority to ensure the effectiveness of the protection of the rights that it must safeguard. From our point of view, the binding character came not from this provision, but rather from the fact that its non-compliance could affect the entire system of protection and the rights specifically included in the European Convention. Although it is true that this figure was not included in the Convention, the silence on its exclusion in the travaux préparatoires cannot be interpreted as a clear intention to wrest from them their binding character because there was simply no discussion on the topic.

It is noteworthy that, although theoretically the case-law in the Inter-American system is consistent with the compulsory nature of the measures, the practical implication of their breach (in the only case in which there was non-compliance with the judgment on the merits) does not reasonably correspond to what should be concluded from the theoretical possibility. In fact, although the jurisprudence in the Inter-American system has consistently indicated that interim measures are binding, their non-compliance only results in aggravating the violation of a substantial right if there is a violation, but in no case the violation of the article that authorises them (Article 63(2) ACHR). From the standpoint of comparative law, this situation shows, on the one hand, that the case-law under the Inter-American system – which does not link incompliance with a provisional measure with a violation of a Convention provision – is at the first stage of the jurisprudence of the European system that was developed during the period 1950–2003 and, on the other hand, that today the legal effects of non-compliance are much less severe than today in the European system, where the compulsory nature of interim measures and the legal consequences in case of incompliance have been the result of an arduous jurisprudential debate. The current legal situation under the Inter-American system consequently seems unsound and illogical.

No doubt, many positive comments could be made about the work of the Inter-American Court of Human Rights with regard to its provisional measures. However, as regards the legal effect that the Court has granted them, they leave much to be desired. In its work, the Inter-American Court not only has not given full legal effect to the failure to comply with the measures, but it has also not offered sound legal arguments for reaching that decision. Thus, unlike the road travelled by the current and former supervisory organs under the European system, which, since they started to function, have only after strong and lengthy legal debate developed interesting opinions and judgments with regard to the legal force of provisional measures, none of this can be found in the Inter-American system.
Of course, one could argue that it is not easy to give legal effects to measures which must be taken in difficult cases, that is in situations where the borderline between compliance and incompliance is difficult to establish. This is, for example, the fact in matters relating to persons who are in serious danger inside a prison. In such cases, the State party may take various measures in order to protect the rights of detainees, such as reducing the prison population, improving the prison infrastructure, and so on. The problem remains that, despite these measures, serious violations continue to occur, since these measures alone are not sufficient to end the situation of extreme gravity. Indeed, fights between inmates continue to happen, resulting in many wounded and dead, and overcrowding and sanitary problems in prisons remain unresolved. The point is that such situations not only require the adoption of short-term actions, but also medium and long term actions, including for example, the adoption and implementation of a State policy that involves greater public spending in the prison system and changes to criminal policy. Therefore, actions of the various branches of government (executive, legislative, judiciary) are needed in order to bring the rights of prisoners in line with international minimum standards.

When taking a look at the case-law, one will agree that the one case in which – until now – the Inter-American Court has ruled on the merits, and in which a breach of an order for provisional measures has been established, was ‘a relatively easy’ case. It concerned a relatively easy case because there were no external factors that could affect the desired result and the compliance with the provisional measure issued did not require medium or long-term action on behalf of the respondent State. Indeed, only one action was required from the State to comply with the measure, that is the State had to suspend the implementation of the death penalty upon the beneficiaries, pending the examination of the complaint under the Inter-American system.

In this case, the State was asked to suspend the death penalty because the Court was presented with *prima facie* evidence from which it could be assumed that in the domestic judicial proceedings some rights and freedoms under the American Convention had been violated. Precisely the fact that it was a relatively easy case, where the deduction of the incompliance was rather simple, makes it difficult to understand the decision taken by the Inter-American Court. The Court held that the incompliance by the State implied an ‘aggravation’ of the violation of the substantive provision (Article 4 ACHR), but not the violation of the provision contemplating the legal figure of the interim measures (Article 63(2) ACHR). It is worth mentioning that if the Court had not even found a violation of Article 4 of the American Convention, it would not have given any type of effect whatsoever to the non-compliance with the provisional measure either.

In the context described above it is pertinent to question what motives could lie behind the decision and interpretation given by the Inter-American Court on the legal effects of its provisional measures. Why did the Court not find the State concerned in violation of Article 63(2) of the American Convention? In our view, three hypotheses could explain the decision by the Court.
Firstly, the decision of the Inter-American Court may be motivated by political reasons. Indeed, the members of the Court might not be thinking that much in terms of legal arguments, but more in terms of the real possibility that their orders for provisional measures are complied with, especially given the fact that they know from experience that the vast majority of cases are ‘difficult cases’. In this hypothesis, the Court, being genuinely concerned about the possibility of giving real protection to rights through provisional measures, and taking into account that in many cases, the economic possibilities (as to prisons) and the social possibilities (as to armed conflict) of States to comply were scarce, or at least difficult to evaluate, therefore chose to refrain from initiating a judicial precedent under which a State would be declared internationally responsible and therefore condemned for the incompliance with a provisional measure. In addition, the Inter-American Court has avoided to create a doctrine or interpretation that would attract new cases in the future, as such a doctrine might indeed ‘open the door’ for applicants and non-governmental organisations (NGOs) to start systematically requesting the Court to find States in violation of Article 63(2) ACHR, thus forcing the Court to spend more time and human resources on these decisions, time which the Court might think preferable should be used to work and decide on the alleged violations of the more classical substantial rights and freedoms. However, the absence of a doctrine might also be the result of an internal political decision within the Court, given that the Court has developed a specific procedure around the figure of provisional measures. The Court has, for example, held public hearings, has enabled the beneficiaries to submit their comments directly, and in many cases has requested that the measures are implemented in common agreement between the State and the other party. In this context, the Court might fear that by declaring the States internationally responsible for violations of its provisional measures, such decisions could have an adverse effect on the behaviour of States with regard to the current procedure in place: States, rather than taking the Court’s orders more seriously, might then decide not to report to the Court on the follow-up given to the order, might stop to attend the public hearings organised in that regard and, in general, might decide to give less or no importance to this figure, making it lose the power and impact it has gained in practice over the years.

Secondly, the reluctance of the Inter-American Court to hold that States have violated Article 63(2) of the American Convention may be due to the fact that the Inter-American Court considers this Article 63(2) to be a procedural provision – as the old European Court once did – and not a substantive right in itself, and therefore does not permit it to find States internationally responsible in case of non-compliance with the provision. Indeed, this idea leads us to think that perhaps the Inter-American Court has tried to follow the case-law of the European Court of Human Rights (until 2002), without noticing the significant existing differences in both human rights systems, especially in relation to the instrument that provides the provisional measures.

Finally, it may be that the Inter-American Court has not been aware of the situation. While the judges of the current Court have at no moment expressed an opinion on
the issue, from a number of talks with members of the Secretariat of the Court, in combination with the wording and contents of the judgment discussed above (case of Trinidad and Tobago) and an exhaustive examination of the wording and analysis of the resolutions on provisional measures, we can deduce that the Court has not really been aware of the legal debate behind the failure of a State to comply with a provisional measure. This may be due to the fact that it has focused in its work on issues it considers more important, such as the decisions on the merits in contentious cases where traditional substantive rights such as the right to life or physical integrity have allegedly been violated.

Ultimately, in this whole scenario, the discourse seems to suggest that under the Inter-American system, the purpose of provisional measures is not so much to prevent the violation of the rights of persons in a situation of extreme gravity and urgency, because this would somehow suppose the need for the Inter-American Court to interfere with the often structural problems the vast majority of American States are currently facing, but rather to act or to be an instrument of political denunciation. Certainly for people who are in a situation of extreme gravity and urgency and for human rights organisations that are working actively in the field of human rights at the regional level in the Americas, the adoption of provisional measures and the possible ensuing international denunciation of States through the Inter-American Court in connection with their case, somehow represents a victory, but for the moment being, the doubt remains whether this is really the objective of these protective measures.

Whatever the reason, the need for the Inter-American Court to have an explicit and elaborate legal reflection on this point should be underlined, because the Court as a judicial organ under the Inter-American System is governed by the American Convention on Human Rights. It is primarily this document that is the benchmark or the key instrument dealing with the competence as to provisional measures and according to this document, provisional measures are compulsory. If, for the Inter-American Court, both the legal instrument contemplating the instrument of provisional measures and the language used in the conventional provisional are not sufficient to lead to a condemnation of a State, holding that State internationally responsible for incompliance of Article 63(2) ACHR, the Court should at least provide objective legal grounds to allow the parties in the case, the citizen in general and also the academic community, to understand that legal interpretation. As such, the problem with the issue of provisional measures under the Inter-American System is not only that no real legal effects arise from the failure to abide by a provisional measure, but also the absence of full and sound reasoning for such a conclusion. At this point it is worth indicating that it is extremely strange that Latin-American NGOs and even the other supervisory organ under the Inter-American system, that is the Inter-American Commission, the work of which can be characterised as serious and responsible, have not pronounced themselves in relation to this important legal issue. Indeed, the lack of legal discussion in this regard is surprising and striking, not only because it concerns a mechanism contemplated directly in the American Convention,
but also because every day provisional measures become more and more prominent in the international human rights systems, both at the regional and universal level.

It is important that the case-law of the Inter-American Court starts to grant the legal effects that may logically be concluded from the debate on the legal nature of provisional measures or to indicate the motives why it does not deduce legal effects to a protection mechanism that is explicitly contemplated in the American Convention. With respect to the European system, it is necessary that it continues to develop the interpretation of the European Convention and consolidates its case-law on provisional measures in some more Grand Chamber judgments (preferably supported by more judges than has been the case in its most recent Grand Chamber judgments), so that non-compliance of interim measures produces an almost automatic violation of Article 34 ECHR.

The absence of true legal effect given to provisional measures by the Inter-American Court and the lack of decisions that endorse its position on the legal consequences of non-compliance by States with provisional measures go against the very credibility of the institution because its decisions may begin to be perceived by individuals and other social actors as decisions that are simply theoretical (in the case of the Inter-American system) or are for the moment being still more or less isolated decisions rather than the collective work of a united Court (in the case of the European system).