Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights

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In the Case of *Cruz Varas and Others* v. *Sweden* (Cruz Varas) two major questions were put before the European Court of Human Rights[2]. The first related to the scope and interpretation of Art. 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment. The second question concerned the failure of the Swedish government to comply with the indication of the European Commission of Human Rights to refrain from expelling the applicant from Sweden to Chile before his application could be reviewed by the Commission. While the issues relating to the Court's decision under Art. 3 are naturally of strong interest to the human rights lawyer, the present discussion will focus more specifically on the question of interim measures: what is the force and effect of indications by the Commission of interim measures?

The question of the scope of the interim measures power of the organs established by the European Convention on Human Rights has an important impact on the degree to which the guaranteed rights can effectively be protected. In *Soering* it was determined that a Contracting State would violate Art. 3 of the Convention if that state were to extradite an indi-

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[2] *Case of Cruz Varas and Others* v. *Sweden*, Judgment of 20 March 1991, Series A, Vol. 201.

vidual within its jurisdiction to another state where the individual faced "a real risk of being subjected to torture or to inhuman or degrading treatment or punishment"[3]. In such a case, liability would be incurred by the Contracting State "by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment"[4]. This reasoning was extended to cases of expulsion by the judgment in *Cruz Varas*. The expulsion or extradition of an applicant before a proper hearing of his or her case can lead to a direct and potentially damaging violation of his or her guaranteed rights. It follows that the question of the force and effect of indications by the Commission of interim measures, requesting that the Contracting State refrain from expelling or extraditing the applicant until the consideration of the application is completed, is of crucial importance to the effective guarantee of such rights.

The Facts

On January 28, 1987, Hector Cruz Varas (the applicant), a Chilean citizen, arrived in Sweden and applied for political asylum[5]. In his initial interrogation, he indicated that he had been involved in various political activities in Chile, all of which were in opposition to the Pinochet regime. Although he claimed to have been arrested and detained three times, he made no allegations of torture in his first interrogation. On April 21, 1988, the decision to expel the applicant and his family was taken by the Swedish National Immigration Board on the ground that the applicant had not established a sufficient basis on which to be considered a refugee under domestic or international law. The applicant appealed the decision to the Government, but submitted no new evidence. The appeal was rejected on September 29, 1988.

Following rejection of the appeal on September 29, 1988, the applicant alleged that he had taken part in anti-Pinochet activities subsequent to his arrival in Sweden and that these activities raised for him the risk of torture should he be expelled to Chile. Notwithstanding these allegations,

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[3] Judgment of 7 July, 1989, Series A, Vol. 161, 1989, para. 91.

[4] *Soering*, para. 91. Michael O'Boyle, Extradition and Expulsion under the European Convention on Human Rights: Reflections on the Soering Case, in: James O'Reilly (ed.), Human Rights and Constitutional Law: Essays in Honour of Brian Walsh (Dublin 1992), 93–108.

[5] He was joined just over five months later by his wife and son, who became the second and third applicants in the case.

the Swedish authorities decided to enforce the expulsion order. The applicant appealed this decision but the appeal was rejected. A subsequent attempt to expel the applicant and his family failed when they did not arrive at the airport for their scheduled flight.

On December 30, 1988, the applicant again alleged that there were impediments to the enforcement of the order. A new interrogation by the police authority took place two weeks later. During the course of this interrogation, Cruz Varas gave lengthy testimony to the effect that he had been tortured by the Chilean authorities on several occasions and that he feared repetition of such torture should he be sent back. He claimed that he had not disclosed these incidents at the first interrogation because he did not trust the police authority and because he had found the experiences to be extremely difficult to talk about. Two subsequent medical examinations tended to support the applicant's allegation that he had been tortured. Nonetheless, the Swedish Government decided to expel the applicant and his family. Cruz Varas was taken into custody by the Police Authority of Varberg on October 4, 1989. He was expelled on October 6, 1989. His wife and son went into hiding in Sweden and were not expelled with the applicant.

The Order for Interim Measures

On October 5, 1989, one day after being taken into custody by the Swedish authorities, the three applicants lodged their application before the European Commission of Human Rights. On October 6, 1989, at 09:00 hours, the Commission issued an interim order pursuant to Rule 36 of its Rules of Procedure. The Order "indicated" to the Swedish Government that "it was desirable in the interest of the Parties and the proper conduct of the proceedings before the Commission not to deport the applicants to Chile until the Commission had had an opportunity to examine the application during its forthcoming session from 6 to 10 November 1989"[6]. The Agent of the Swedish Government was informed by telephone of the interim measures decision on the same day at 09:10 hours. At 12:00, the indication was confirmed by the Commission by telefax. Although the Swedish Board of Immigration was aware of both Cruz Varas' application to the Commission and of the Commission's indication of interim measures, it decided not to stay the enforcement of the expulsion. Cruz Varas was deported to Chile on October 6, 1989, at 16:40 hours.

[6] *Cruz Varas*, para. 56.

The Report of the Commission

The hearing before the European Commission of Human Rights took place on 7 December, 1989. Following this hearing, the Commission decided to maintain its interim order of November 9, 1989[7]. The report of the Commission was issued on June 7, 1990, at which point it was also decided not to extend the interim measures indication any further. The Commission found that there had been no violation of Art. 3 of the European Convention on Human Rights, nor of Art. 8[8]. The Commission nonetheless found, by twelve votes to one, that there had been a breach of the state's obligation under Art. 25(1) of the Convention not to hinder the effective exercise of the right of individual petition.

The Decision of the Court

The European Court of Human Rights determined that there had been no breach of Art. 3 of the Convention in expelling the applicant to Chile. It found (by a vote of eighteen to one) that there were no substantial grounds for believing that expulsion would have exposed the applicant to a real risk of being subjected to inhuman or degrading treatment. The Court was influenced in its decision by the applicant's initial silence as to the incidents of torture which he described eighteen months after his first interrogation, by the changes in the applicant's story, and by his inability to provide substantiation for his allegations. The Court was also influenced by what it considered to be an improvement in the political situation in Chile at the time of the applicant's expulsion. Since the Court

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[7] A second indication, not directly relevant to the present discussion, was made by the Commission following the expulsion of Cruz Varas on October 6, 1989. On November 9, 1989, the Commission made an indication under Rule 36 of its Rules of Procedures that it was "desirable" that Sweden not deport to Chile the two applicants remaining in Sweden until the Commission had examined the matter further. In addition, it was indicated that, "given the failure of the Government to comply with its earlier indication" not to deport Cruz Varas, it should "take measures which will enable this applicant's return to Sweden as soon as possible". The Swedish government communicated this indication to its Board of Immigration, and notified the Commission that the Board was examining a request from Cruz Varas for permission to enter and remain in Sweden.

[8] Art. 3 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The decision of the Commission that there was no torture was by a margin of 8 to 5. Art. 8 concerns the right to respect for private and family life. The applicants had alleged that this right had been violated by Cruz Varas being deported while his family remained in hiding in Sweden. The Commission's finding that this article had not been breached was unanimous.

found that there was no substantial basis for believing that the applicant would be tortured upon his return to Chile, the Court also found that the actual expulsion of the applicant did not violate Art. 3 by causing him intense personal trauma. The determination that there was a lack of substantial basis for his fears meant that the alleged trauma could not exceed the threshold of Art. 3. The Court also found, unanimously, that there had been no breach of Art. 8 of the Convention, regarding the right to respect for the applicant's private and family life. Finally, by a narrow margin of ten votes to nine, the Court determined that there had been no breach of Art. 25(1) of the Convention.

The Relevant Provisions

The European Convention on Human Rights contains no article governing the indication of provisional measures by either the Commission or the Court. Nonetheless, it provides, in Arts. 36 and 55 respectively, that both the Commission and the Court shall have the power to draw up their own rules and determine their own procedure. Rule 36 of the rules of procedure of the Commission provides for the indication of interim measures:

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[9].

Although the Convention itself is silent as to provisional measures and their nature, it does contain a general obligation of Contracting States, in

[9] Note that the Rules of Court make a similar provision regarding interim measures, also in Rule 36:

(l) Before the constitution of a Chamber, the President of the Court may, at the request of a Party, of the Commission, or the applicant or of any another person concerned, or *proprio motu*, indicate to any Party and, where appropriate, the applicant, any interim measure which it is advisable for them to adopt. The Chamber, when constituted or, if the Chamber is not in session, its President shall have the same power.

Notice of these measures shall be immediately given to the Committee of Ministers.

(2) Where the Commission, pursuant to Rule 36 of its Rules of Procedure, has indicated an interim measure as desirable, its adoption or maintenance shall remain recommended to the Parties and, where appropriate, the applicant after the case has been brought before the Court, unless and until the President or the Chamber otherwise decides or until paragraph 1 of this Rule is applied.

(Rules of Court, as in force at 30 June 1990, Rule 36 as amended by the Court on 26 January, 1989).

Art. 25(1), not to interfere with the effective exercise of the right of petition under the Convention. Art. 25(1) provides that:

The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

These two provisions provide the basis for any argument regarding the binding nature of provisional measures under the system for the protection of human rights governed by the European Convention on Human Rights.

Arguments of the Parties Regarding Interim Measures

The applicants alleged that the disregard by Sweden of the Commission's indication of interim measures constituted a breach of Art. 25 of the Convention. They argued that the effective exercise of a right of petition presupposed that the government would not render meaningless the rights which were the subject matter of the petition. They also argued that the right of petition included both the principle of "equality of arms" and the right to have adequate time and facilities to prepare a defense. The expulsion of the applicant in disregard of an interim indication to the contrary precluded the proper exercise of both of these rights. Finally, and again related to Art. 25(1), the inability of the applicant to appear before the Commission because of his expulsion hindered the effective presentation of his case, thus precluding the proper exercise of the right of petition.

The Government of Sweden argued that the measures indicated by the Commission were not binding upon them. Rather, indications under Rule 36 were to be characterized as "non-binding recommendations". In support of this contention, they argued that the very wording of such indications confirmed their non-binding character. The Government maintained that consistent state practice of obeying such measures was not enough to make binding that which had no binding character. Further, Sweden argued that Art. 25 of the Convention could not be used to strengthen Rule 36, since thus far Art. 25 had been interpreted only as

protecting the right to perform the specific act of lodging a petition: in the present case such a right had not been infringed because the applicant had been able to make his petition to the Commission.

The Interim Measures Question

1. Opinion of the Commission

The Commission chose to interpret both Rule 36 and Art. 25(1) of the Convention in such a way as to give real teeth to its power to indicate interim measures. It began by establishing the authority of the Commission to make indications of provisional measures. Such authority stems from the power of the Commission under Art. 36 of the Convention to draw up its own rules of procedure. The Commission's position was that in certain special cases, particularly in relation to extradition and expulsion, interim measures indicated by the Commission need to be considered as binding in order to make the safeguards against torture and cruel and inhuman treatment "practical and effective". The Commission emphasized that its power to indicate provisional measures had always been used with great restraint, as indeed it had been in the case at hand[10].

According to the Commission, an indication of provisional measures must be seen "in the light of the nature of the proceedings before the Convention organs and of the Commission's role in these proceedings"[11]. The Commission is one of the organs established under Art. 19 of the

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[10] The Commission noted that at the time that Cruz Varas was expelled from Sweden, it was faced with 182 cases in which the question of making a Rule 36 indication arose. The Commission made interim measures indications in only 31 of those cases (Report of the Commission, para. 121). Writing in 1980, Hans Christian Krüger stressed this special application given to Rule 36 by the Commission. He noted that: "The Commission has clearly established that it will in principle utilize Rule 36 only when the measure contemplated by the domestic authorities will produce an irreversible situation and in circumstances in which the facts alleged by the applicant disclose on a *prima facie* basis a breach of the Convention", Hans Christian Krüger, The European Commission of Human Rights", HRLJ 1 (1980), 66, at 75. In Krüger's view this very focused use of Rule 36 by the Commission gave additional weight to interim measures indications. This same point is made by Gérard Cohen-Jonathan in his comment on *Cruz Varas*, see G. Cohen-Jonathan, De l'effet juridique des "mesures provisoires" dans certaines circonstances de l'efficacité du droit de recours individuel: à propos de l'arrêt Cruz Varas de la CourEDH,(1991), R.U.D.H. 3 (1991), 205.

[11] *Hector Cruz Varas, Magaly Maritza Bustamento Lazo and Richard Cruz against Sweden*, Report of the Commission, Application No. 15576/89, adopted on 7 June 1990, paragraph 112.

Convention to "ensure the observance of the engagements undertaken by the High Contracting Parties". Once proceedings are initiated before the convention organs, there are three possible outcomes: a decision of inadmissibility of the application, a friendly settlement, or a binding decision of the Court or the Committee of Ministers. Only the Court and the Committee of Ministers can make binding decisions on the merits of an application. The Commission's role is therefore of a preliminary nature, and, argued the Commission, the Rule 36 power must be seen in that light. Essentially, a Rule 36 indication by the Commission is designed to preserve the positions of the parties until the matter can be declared inadmissible, settled, or channelled to the Court or the Committee of Ministers for a final decision on the merits.

The Commission explicitly steered away from the thorny question of whether interim measures indicated by international tribunals can have a binding effect. In short, it declined to consider whether Rule 36 indications were binding in any general sense. Understandably, it concentrated on the specific question of whether, in the circumstances of the case at hand, the failure of Sweden to comply with the indication constituted a breach of Art. 25(1) of the Convention.

According to the Commission, Art. 25(1) "does not imply a general duty on the State to suspend measures at the domestic level or not to enforce domestic decisions when an individual has lodged an application with the Commission"[12]. Rather, in the opinion of the Commission, special circumstances may arise in which the decision of a state party to enforce a domestic decision could be "in conflict with the effective exercise of the right to petition"[13]. Such a case could arise where the enforcement of domestic law would lead to "serious and irreparable damage to the applicant" and the Commission had given an indication under Rule 36 of its rules of procedure that it was desirable not to enforce that decision[14]. The Commission bolstered its argument under Art. 25(1) of the Convention with a statement from the Court's judgment in *Soering* to the effect that:

In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its

[12] Report of the Commission, para. 117.
[13] Report of the Commission, para. 118.
[14] Report of the Commission, para. 118.

provisions be interpreted and applied so as to make its safeguards practical and effective[15].

In certain cases, Rule 36 orders must be obeyed in order to make the rights guaranteed in the Convention "practical and effective". Put more simply, an inquiry as to whether a proposed extradition or expulsion would violate Art. 3 of the Convention would be pointless if such expulsion or extradition were carried out before the decision could be rendered. Thus certain situations might exist where the safeguards under the Convention would not be practical and effective unless bolstered by some additional duty or responsibility of the state to abide by interim rulings. The Commission interpreted Art. 25(1) in such a way as to include in the right of petition the right to make a petition that would not subsequently be made irrelevant by the conduct of the state.

In *Cruz Varas*, the Commission based its finding of a violation of Art. 25(1) on the fact that the deportation of the applicant, despite a Rule 36 indication restraining such deportation, "frustrated [the Commission's] examination and thereby rendered his right of petition ineffective"[16]. The expulsion in disregard of the Rule 36 indication was found to be both "contrary to the spirit of the Convention" and "incompatible with the effective exercise of the right to petition" guaranteed by Art. 25(1).

Sperduti, the sole dissenting member of the Commission on the question of a violation of Art. 25(1), stated that the words "effective exercise" in Art. 25(1) were to be interpreted in light of the particular object of the article. That object, he said, was, first, to recognize the right of recourse to the Commission and, secondly, to assure the freedom to exercise this right. "Effective exercise" was thus limited to the right of petition. In Sperduti's view, the interpretation of the majority of the Commission had the effect of "elevating Rule 36 of the Rules of Procedure into a rule of law which empowers the Commission ... to impose on respondent States obligations additional to those which flow directly from the Convention"[17]. His preference was for a strict literal reading of the Convention.

2. Decision of the European Court of Human Rights

The Court, by a narrow margin, reversed the Commission. While the

[15] *Soering*, para. 87.
[16] Report of the Commission, para. 122.
[17] Report of the Commission, dissenting opinion of Sperduti, p. 32.

Commission had found that Rule 36 orders could form part of the obligation under Art. 25(1) of the Convention, the Court, by a vote of 10 to 9, dismissed the possibility of relying on that or indeed any other provisions in the Convention and, in doing so, stripped the interim measures references of any binding authority. It is important to emphasize that the Court was not without sympathy for the Commission's attempts to give some force to its indications of provisional measures. Indeed, the Court seems to have recognized a need for binding powers in order to properly ensure the protection of certain specific rights under the Convention; however, at the end of the day, it was unable to find a sufficient legal basis for a binding interim measures power.

Interestingly, the Court was as unwilling as the Commission to enter into a consideration of interim measures in international law. It reiterated the statement from *Soering*, relied upon by the Commission, to the effect that the Convention should be interpreted in the light of its special character and that "its safeguards must be construed in a manner which makes them practical and effective"[18]. It then stated that:

While this approach argues in favour of a power of the Commission and Court to order interim measures to preserve the rights of parties in pending proceedings, the Court cannot but note that unlike other international treaties or instruments the Convention does not contain a specific provision with regard to such measures (see, inter alia, Art. 41 of the Statute of the International Court of Justice; Art. 63 of the 1969 American Convention on Human Rights; Arts. 185 and 186 of the 1957 Treaty establishing the European Economic Community)[19].

Thus the Court confined its analysis to the terms of the Convention and the Rules of Procedure. It avoided any recourse to public international law.

In considering the legislative history of the Convention and of the rules of procedure, the Court noted that an interim measures provision had originally been included in a draft Statute of the European Court of Human Rights. That provision was based in substance on Art. 41 of the Statute of the International Court of Justice. However, the provision in question had not been included in the Convention and there was no re-

[18] *Cruz Varas*, para. 94.
[19] *Cruz Varas*, para. 94.

cord of the discussion, if any, regarding its lack of acceptance[20]. The Court's assessment of the legislative history of the interim measures power then jumped forward to 1971, to a Recommendation by the Consultative Assembly of the Council of Europe calling on the Committee of Ministers to draft an additional Protocol to the Convention which would give the Commission and the Court the power to order interim measures under certain circumstances. Significantly, the Committee of Ministers had decided not to conclude any such protocol, partly because of their assessment that the existing practice of the Commission to make informal requests to governments was functioning adequately. It thus seems clear that both the Consultative Assembly and the Committee of Ministers felt that Contracting States should in fact suspend extradition where there were allegations under Art. 3[21]. From this brief account of legislative history, the Court appears to have drawn the implication that while there was a general feeling that states should obey the recommendations of the Commission in cases involving expulsion or extradition relating to Art. 3, there was also a shared feeling that such recommendations were non-binding.

The essential split in the reasoning of the members of the Court occurs precisely on the question of whether Art. 25(1) of the Convention serves as a basis for the binding nature of interim measures in cases of expulsion and extradition. The majority of the Court, by the narrowest of margins, rejected the argument based on Art. 25(1). Observing that Rule 36 is a rule of procedure drawn up by the Commission itself, the majority stated that: "In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties"[22]. The majority also found that the relatively mild wording of Rule 36, which allows the Commission to "indicate" measures which it considers "desirable", and

[20] See, for example, the brief discussion of this point by M.-A. Eissen, Les mesures provisoires dans la Convention Européenne des Droits de l'Homme, R.D.H. 2 (1969) , at 252–253.

[21] See *Cruz Varas* at paragraph 96, where the majority cites the Consultative Assembly's Recommendation 817 (1977) on Certain Aspects of the Right to Asylum, Yearbook of the Convention, Vol. 20 (1977), 82–85, and the Committee of Ministers' Recommendation No. R (80) 9, Yearbook of the Convention, Vol. 23 (1980), 78–79.

[22] Decision of the Court, para. 98.

the equally mild wording of the indications it makes, were indicative of their non-binding nature[23].

The majority observed that the obligations of states under Art. 25(1) are limited to cases of individual petition. The Article does not apply to inter-state actions, although the interest in respecting a Rule 36 decision would be the same in both cases. The implication of this argument is that since Art. 25(1) cannot provide a basis for all potential interim measures indicated by the Commission, it is an insufficient basis for purposes of grounding the Rule 36 power[24].

The question of state practice was raised by the parties and discussed both by the Commission and the Court. The fact that until *Cruz Varas*, Rule 36 orders had always been complied with by Contracting States was used by the applicants as an argument in favour of their binding nature[25]. Indeed, the fact of state compliance was noted by the Commission in its report, although it was not cited as conclusive of the question[26]. The Court, for its part, stated the general rule on state practice – "Subsequent practice could be taken as establishing the agreement of Contracting

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[23] The words "indicate" and "desirable" appeared in the indication made to the Swedish government in this case.

[24] This analysis is perhaps questionable. It would appear that the interim measures power of the Commission has only been used in cases of extradition and expulsion, where an individual has made an application under Art. 3 of the Convention. While this point does not necessarily settle the matter, it does bring one back to the specific limitations set out by the Commission in its own reasoning. The Commission does not argue that Rule 36 itself becomes a part of the Convention because of Art. 25(l), rather, it argues that in some cases, in order for a state to comply with Art. 25(1), it must obey interim measures indications made by the Commission pursuant to their power under Rule 36. Phrased in these terms, the status of inter-state actions does not enter the matter.

[25] Although the Commission refers to prior State compliance as being total (para. 121), the Court refers to it as "almost total compliance" (para. 100). Perhaps the better formulation of this statement is that of Hans Christian Krüger, to the effect that: "there has been no case where the indication given has deliberately been ignored by a Contracting State", Krüger, *supra* note 10, 66, at 75. This distinction is necessary since the only "breaches" of Rule 36 indications prior to *Cruz Varas* occurred in cases where the deportation/extradition proceedings were so far advanced at the time of the indication that they could not be stopped. These exceptions are described by Gérard Cohen-Jonathan as "quelques très rares discordances en matière d'extradition". Cohen-Jonathan states the general rule that "jamais aucun Etat contractant n'a omis de donner suite à une indication donnée par la Commission dans des affaires d'expulsion", Cohen-Jonathan, *supra* note 10, 207, and footnote 21. Note that in a case roughly contemporaneous with *Cruz Varas*, the Swedish government also deliberately disregarded an interim measures indication: *Abdel-Qader Hussein Yassin Mansi against Sweden*, Application No. 15658/89, Report of the Commission, 1 March 1990. A settlement was later reached in the *Mansi* Case.

[26] Report of the Commission, para. 121.

States regarding the interpretation of a Convention provision" – but added the proviso that such state practice could not serve "to create new rights and obligations which were not included in the Convention"[27]. Arguably, however, the issue was not so much one of state practice, highly relevant though that practice was, but, rather, whether the rights and obligations in question flowed from an interpretation of the Convention, or whether they merely stemmed from a rule of procedure. The Commission, having made it clear that the issue was one of interpretation of Art. 25(1), was careful to avoid the suggestion that Rule 36 was being elevated to the status of a Convention article.

In the view of the Court, the attempts of the Consultative Assembly regarding an additional protocol on provisional measures, their subsequent recommendation to the Committee of Ministers to call on Contracting States to comply with Rule 36 indications, and the ensuing Recommendation of the Committee of Ministers to the governments of Member States, all suggested that subsequent state practice "cannot have been based on a belief that these indications gave rise to a binding obligation"[28]. Rather, compliance was characterized by the Court as "good faith co-operation with the Commission in cases where this was considered reasonable and practicable"[29].

As indicated, the Court, like the Commission, found it unnecessary to examine relevant principles and rules of international law. It confined its analysis to Rule 36 and Art. 25(1) of the Convention, deciding that the first could have no binding force, and that the second could not be interpreted in such a way as to give such force to a mere rule of procedure. The Court was aware that compliance with Rule 36 indications was often crucial to the proper safeguarding of the rights of an applicant and noted that such indications were only made by the Commission in exceptional circumstances. However, it was unwilling to interpret the Convention in such a way as to give force to these interim orders. Instead, it merely indicated that when a state, having failed to comply with an interim order of the Commission, expels an applicant claiming a violation of Art. 3, any subsequent finding that there was a violation of Art. 3 will be seen to have been "aggravated by the failure to comply with the indication"[30].

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[27] Decision of the Court, para. 100.

[28] Decision of the Court, para. 100.

[29] Decision of the Court, para. 100.

[30] Decision of the Court, para. 103. This certainly will be an "aggravation", since it is the act of expulsion, to be restrained by a Rule 36 order, which results in the breach of the Convention. Applicants in expulsion and extradition cases are not claiming that their rights

In marked contrast with the findings of the majority, the nine dissenting judges held that Sweden's failure to comply with the interim measures indication constituted a breach of Art. 25(1) of the Convention. They stated that, "The protection under the Convention would be meaningless if a State had the right to extradite or expel a person without any prior possibility of clarification – as far and as soon as possible – of the consequences of the expulsion"[31]. The dissenting judges rejected an interpretation of Art. 25(1) that would give an individual the right to petition but allow the Contracting State to expel or extradite the applicant immediately afterwards. Instead they opted for a broad interpretation of that Article which would presuppose and include "the right of the individual to be afforded, at the least, an opportunity to have the application considered more closely by the Convention organs and to have his basic rights finally protected if need be"[32].

For the dissenting judges, Art. 25(1), by itself, does not freeze matters as of the time of the application in expulsion and extradition cases: governments are still able to proceed with their standard procedures for processing and deciding the case before them, including the taking of a decision to expel or extradite and to carry out that decision. Nevertheless, the Rule 36 order serves a key function in such cases: it indicates to the Government that the Commission considers an application to be of "great importance under the Convention and that it will investigate the matter speedily"[33]. In such circumstances, the Rule 36 indication should be considered to bind the state since it is the only way in which the applicant's rights can be protected from a potential violation. The dissenting judges stated that in their view it was "implicit in the Convention that in cases such as the present the Convention organs have the power to require the parties to abstain from a measure which might not only give rise to seri-

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have already been breached by the respondent State, rather, they claim that their rights will be breached if expelled or extradited. The disregard of the indication of the Commission is not just an aggravation of a breach of Art. 3, it is the act by which Art. 3 is breached. One commentator observes that the theory of aggravated circumstances "semble conforme à la théorie de la responsabilité des Etats en droit international", see Dean Spielmann, Les mesures provisoires et les organes de protection prevus par la Convention européenne des droits de l'homme, forthcoming, Mélanges Velu (1991), 28, and ffn. 103 and 104.

[31] Dissenting Opinion of Judges Cremona, Thor Vilhjalmsson, Walsh, Macdonald, Bernhardt, De Meyer, Martens, Foighel and Morenilla, para. 1.

[32] Dissenting Opinion, para. 2.

[33] Dissenting Opinion, para. 3.

ous harm but which might also nullify the result of the entire procedure under the Convention"[34].

The dissenting judges acknowledged the fact that the Convention contains no express provisions on interim measures. Nevertheless, they found that this fact was not conclusive of the issue. The silence of the Convention did "not exclude an autonomous interpretation of the European Convention with special emphasis placed on its object and purpose and the effectiveness of its control machinery"[35]. Their preference was for an interpretation of the Convention consistent with its continuing evolution as a creative instrument for the protection of human rights in Europe.

In the discussion that follows several possible sources for a power of the Commission will be considered to indicate binding provisional measures in cases of extradition or expulsion. None of these sources are exclusive: in some ways they all build upon and contribute to one another. The discussion begins with a consideration of interim measures in international law, not so much because it is an obvious place to look for a solution but rather because it provides a useful understanding of some of the foundations of interim measures powers in international law in general and Rule 36 in particular. In a sense, therefore, the discussion moves from the more general to the more specific, from principle to Convention.

International Law

1. Interim Measures Powers of International Courts and Tribunals

The question of the power of international courts and tribunals to order interim measures is by no means exclusive to the European Commission of Human Rights. The issue arose particularly at the time of the creation of international arbitral tribunals following the First World War and the establishment of the Permanent Court of International Justice[36].

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[34] Dissenting Opinion, para. 3.

[35] Dissenting Opinion, para. 5.

[36] The first interim measures order by an international tribunal appears to have been made in 1908 by the now defunct Central American Court of Justice (Jerzy Sztucki, Interim Measures in the Hague Court: An Attempt at a Scrutiny [Deventer 1983], at 3). This court obtained its power to order interim measures by virtue of Art. 18 of its statute. The power existed from the moment an action was started to the moment judgment was rendered, and enabled the court to fix the situation in which the parties were to remain, in

The rules of procedure of almost all Mixed Arbitral Tribunals established by treaty after World War I contained provisions which allowed for interim measures to be ordered[37]. Even those few tribunals without explicit interim measures powers seemed to have assumed an implicit authority to make such orders[38].

The interim measures power of the International Court of Justice is the most widely discussed and debated in international law[39]. This, of course, is due to the status and importance of the ICJ and to the fact that many other tribunals have relied on the wording of Art. 41 in drafting their own statutes or rules of procedure. It is also due to the volume of jurisprudence which the ICJ has developed on this question over the relatively long years of its history. The rules of procedure of the Court

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order not to aggravate the harm and to maintain the status quo until the final decision. See Åke Hammarskjöld, Quelques aspects de la question des mesures conservatoires en droit international positif, ZaöRV 5 (1935), 5, at 6.

[37] Out of 34 sets of rules of procedure, only three, those of the Anglo-German, Japanese-German, and Japanese-Australian tribunals, did not contain an explicit interim measures power. See M. H. Mendelson, Interim Measures of Protection in Cases of Contested Jurisdiction, British Year Book of International Law, Vol. 46 (1972/73), 259, at 264; Bin Cheng, General Principles of Law – As Applied by International Courts and Tribunals (London 1953), at 268.

[38] For example, the British-German Mixed Arbitral Tribunal had no interim measures provision in its rules of procedure; nevertheless, in the *Gramophone Co., Ltd* Case, I.T.A.M. (1922), 857, such measures were still ordered.

[39] The Statute of the Permanent Court of Justice provided for interim measures orders in Art. 41, which was the predecessor of the current Art. 41 of the Statute of the International Court of Justice. According to the legislative history of the article, the early drafts of the statute of the court contained no mention of provisional measures. The matter does not appear to have been considered until a memo to the Comité de juristes drew attention to the question (Hammarskjöld, *supra* note 36, at 6). After some deliberation a provisional measures power was inserted into the draft statute. The early version of this power used the word "suggest" in the English text in referring to the power of the court to make indications. This word was changed to "indicate" which was felt to be a stronger term. In commenting on the history of this provision, Åke Hammarskjöld notes that the article was inserted into the statute after careful consideration, and that its wording was deliberately chosen, although there was some debate as to whether the correct term should be "order". It was decided that "order" was too strong a term given that the court lacked the means to enforce such orders: Hammarskjöld, ibid., at 10. For the Court's most recent rulings see Passage through the Great Belt (*Finland* v. *Denmark*), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, 12, reviewing the purpose of provisional measures, the meaning of "surrounding circumstances", the need for urgency, and, the separate opinion of Judge Shahabuddeen, the existence of the right sought to be preserved; see too Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamchiriya* v. *United States of America/United Kingdom*), Order of 14 April 1992.

which, before 1978 only contained one article on interim measures, now provide a fairly comprehensive codification of the experience of the ICJ[40]. Nevertheless, the jurisprudence of the International Court of Justice has not had the effect of settling the law on interim measures in international law "across the board", so to speak. For one thing, the Court limits itself rather specifically to the interpretation of its own statutory provision. Further, the law and practice of the ICJ still leave open the question of the degree to which such recommendations are binding. The decisions of the Court and the opinion of scholars are equally equivocal in this regard[41].

Art. 41 of the Statute of the ICJ has been influential in the drafting of numerous other provisions on interim measures that appear in a variety of statutes and rules of procedures. It would be fairly safe to generalize that most international arbitral bodies have some form of interim measures power, although that is the point at which generalization would end. The wording, interpretation, use, scope, and structures surrounding such provisions vary enormously. Examples of international organs with interim measures powers include: the UN Security Council[42]; the Council of the Organization of American States[43]; the European Court of Justice[44]; the College of Arbitrators of the Benelux Union[45]; the Court of Justice of the Benelux Union[46]; the Inter-American Court of Human Rights[47]; the

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[40] Shabtai Rosenne, Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice (The Hague 1983).

[41] For example, Rosenne suggests that there may be some sort of obligation to comply with interim measures orders of the ICJ: Shabtai Rosenne, The Law and Practice of the International Court, Vols. 1 and 2 (Leyden 1965), at 427. Other authorities are more definite in their opinions: Hambro, for example, argues that such measures are binding: Edvard Hambro, The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice, in: Walter Schätzel/Hans-Jürgen Schlochauer (eds.), Rechtsfragen der Internationalen Organisation – Festschrift für Hans Wehberg zu seinem 70. Geburtstag (Frankfurt am Main 1956), 152–171, while Gross argues that they are not: Leo Gross, Some Observations on Provisional Measures, in: Yoram Dinstein (ed.), International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne (Dordrecht 1989), 307.

[42] The power is expressed in Art. 40 of the Charter of the United Nations.

[43] Art. XVI of the Pact of Bogota, 30 April 1948, UNTS 30, 88.

[44] Art. 186 of the EEC Treaty of March 25, 1957. See further Christine Gray, Interim Measures of Protection in the European Court, European Law Review 4 (1979),80.

[45] Art. 46(2) of the Treaty establishing the Benelux Union, 3 February 1958.

[46] The interim measures power in this case is provided for in Art. 50 of the Rules of Procedure, adopted on 1 March 1975.

[47] Art. 63(2) of the American Convention on Human Rights, 22 November 1969, and Art. 24 of the Rules of Procedure of the Court, 1 August 1991.

UN Commission on International Trade Law[48]; the UN Committee on Human Rights[49]; the Law of the Sea Tribunal and the Sea-Bed Disputes Chamber[50]. This list is far from exhaustive[51]. Nevertheless, despite the proliferation of tribunals and interim measures powers – or perhaps because of it – there is no general rule which can be drawn from them regarding the nature and obligatory character of such measures. Sztucki stresses the impossibility of generalizing about interim measures in international law given the differences in their character and function, and the fact that such powers are exercised by international organs of judicial, quasi-judicial, and political character. He summarizes the situation as follows:

No strict functional relationship can be established between these factors and the specific shape given to interim protection in various statutory and/or regulatory instruments, but the influence of these factors cannot be contested. To this, a number of "unbound" and more or less accidental varieties and peculiarities must be added. The result is that the existing patterns of provisional measures represent a fairly colourful mosaic of not always insignificant details – a mosaic abounding in nuances[52].

Interim measures in international law differ as to the nature of the body which issues them, the conditions under which requests can be made, the conditions under which requests will be granted, whether the tribunal can indicate the measures proprio motu, whether security deposits are required, and so on. Perhaps the most important difference is the degree to which such measures are regarded as binding, and the available means of enforcement. In view of this confusing array of situations and possibilities, it is not surprising that both the European Court and the Commission avoided generalizations based on analogies to other international tribunals and their rules and statutes. The differences do seem to be too significant to warrant general comparison. Nevertheless, it is useful to consider the situations that prevail in the two other main systems for the international adjudication of human rights.

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[48] Art. 26 of the UNCITRAL Arbitration Rules, 28 April 1976.

[49] Rule 86 of its Rules of Procedure, 1977.

[50] Art. 290 of the Law of the Sea Convention, and Art. 25 of Annex VI to the Convention.

[51] For more detailed account of interim measures in international tribunals and arbitral bodies, see Sztucki, *supra* note 36, at 4–10.

[52] Sztucki, ibid., at 13.

a. The Inter-American System of Human Rights Protection

The Inter-American system for the protection of human rights, like the European system, consists of a Human Rights Commission and a Court of Human Rights. However, the history of the Inter-American system reveals some notable differences between the two systems. The Inter-American Commission on Human Rights was formed in 1959, as an organ of the Organization of American States. Although it quickly developed into an important and influential organ for the protection of human rights, this was largely through a process of self-definition and assertion. The Inter-American Court of Human Rights evolved at a much later date. It was established by the American Convention on Human Rights, which came into force in 1978. The Convention also incorporated the Inter-American Commission, in a somewhat modified form, into the general scheme of human rights protection.

Thus the Inter-American Commission on Human Rights fulfils two distinct mandates, as an OAS organ and as a part of the system for the protection of human rights under the Convention[53]. Although both mandates are related to human rights, the Commission actually serves two different constituencies, because not all members of the Organization of American States have ratified the Convention. Since the operations of the Inter-American Commission on Human Rights were for a long time distinct from those of the Court, extensive parallels cannot be made with the European system. Nevertheless, the Inter-American Commission on Human Rights does have the power to indicate interim measures. This power is provided for in Art. 29 of its Rules of Procedure. In practice, the interim measures power is used in much the same circumstances as in Europe: primarily in cases of extradition or expulsion[54]. The question of the mandatory nature of such indications does not appear to feature in the literature on the subject.

It is interesting to observe that in the Inter-American system the right of individual complaint is mandatory to the Convention, while the right of state complaint is optional. This is the reverse of the situation under the European Convention and it is not the only "evolutionary" trait which can be seen when comparing the American with the European

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[53] Thomas Buergenthal, The Inter-American System for the Protection of Human Rights, in: Theodor Meron (ed.), Human Rights in International Law: Legal and Policy Issues, Vol. II (Oxford 1984), 439–494, at 452.

[54] Daniel O'Donnell, Protección internacional de los derechos humanos (Lima 1988), 461.

Convention[55]. Unlike the European Convention, the American Convention on Human Rights gives the Court, in Art. 63(2), a specific interim measures power. This power has been described as more refined (*mas afinado*) than the corresponding power of the European Convention organs. Rather than being based on provisions similar to those in Rule 36 of the Rules of Procedure of the European Court of Human Rights, it is based on Art. 41 of the Statute of the International Court of Justice and on Rules 73–78 of the Rules of Procedure of that Court[56]. The Rules of Procedure of the Inter-American Court elaborate upon the exercise of the interim measures power in Art. 24, paragraphs one through five. The decision not to leave the regulation of interim measures to Convention Organs, as in the European system, is interesting, given the relative similarity of the objectives and mandates of the two systems in question. It is likely that the drafters of the American Convention on Human Rights, from a consideration of twenty years of practice of the European human rights institutions, considered that a binding interim measures power was an important part of any scheme for the effective protection of human rights.

In actual practice there exists little jurisprudence or information regarding this power of the Court, mainly because of the Court's relatively limited experience but also because of the fact that a large part of its work involves the giving of advisory opinions. In the last several years, however, the Court has adopted provisional measures in several cases not yet submitted to its jurisdiction. Under Art. 63(2) of the American Convention and 23(2) and (4) of the Rules of Procedure[57], the President of the Inter-American Court issued an Order of June 5, 1990 requiring the government of Peru to respect provisional measures requested by the Inter-American Commission in the *Bustios-Rojas* Case[58]. The measures ordered the protection of a journalist who survived an assassination at-

[55] Indeed, the American Convention contains a longer enumeration of protected rights than does the European Convention, and it has been observed that: "many of its provisions establish more advanced and enlightened guarantees than does its European counterpart", see Buergenthal, *supra* note 53, at 442.

[56] Hector Gros Espiell, El procedimento contencioso ante la Corte Interamericana de Derechos Humanos, en: La Corte Interamericana de Derechos Humanos: Estudios y Documentos (San Jose 1986), 83.

[57] The Court recently revised its Rules of Procedures and the new Rules entered into force on August 1, 1991. The Rule under which the Court issued the provisional measures in the *Bustios-Rojas* and *Chunimá* Cases is now Rule 24(2) and (4).

[58] The provisional measures ordered by the President of the Court were later confirmed and ratified by the Court on August 8, 1990.

tempt, the widow of a journalist killed in the same attempt, and several named witnesses to the event. On July 29, 1991 the President of the Court required similar provisional measures of the government of Guatemala in the *Chunimá* Case with the intention of protecting threatened members of several non-governmental organizations in Guatemala and witnesses to earlier attempts and attacks on other non-governmental organization members[59]. In both cases, the Court considered the provisional measures to be binding, and neither the Government of Peru nor the Government of Guatemala argued that it was not bound to respect the Orders of the Court.

b. The International Human Rights Committee

The other main international organ for the protection of human rights is the International Human Rights Committee. This Committee was established under the Optional Protocol of the International Covenant on Civil and Political Rights. Although it does not exercise the same judicial functions as the European Convention organs, in actual practice its functions regarding individual applications are not dissimilar to those of the European Commission on Human Rights[60].

The Committee, which has been operating since 1977, screens individual applications to decide on their admissibility. Its decisions on the merits of admissible applications are similar to the reports of the European Commission[61]. Although the Optional Protocol is silent as to provisional measures, the Rules of Procedure of the Committee provide, in Rule 86, that the Committee may inform the State Party concerned of whatever interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. The final version of Rule 86 is weaker than the draft rule, which gave the Committee or a Working Group the power to "request the State party concerned to take interim measures"[62].

The Committee has exercised this interim measures power in a number

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[59] The provisional measures ordered by the President were later confirmed and ratified by the Court on August 1, 1991.

[60] Alfred de Zayas/Jakob Th. Möller/Torkel Opsahl, Application of the International Covenant on Civil and Political Rights Under the Optional Protocol by the Human Rights Committee, German Yearbook of International Law, Vol. 28 (1985), 9, at 11.

[61] de Zayas/Möller/Ophsahl, ibid., at 11.

[62] Draft Rule 86, Doc. CCPR/C/L.2 and Add. 1 and 2, in: Yearbook HRC II, p. I, at 7.

of cases, including cases on extradition or expulsion[63]. Unfortunately, the record of state compliance with these non-binding measures is low: "it seems that the experience to date does not reveal any great degree of success where interim measures have been indicated"[64]. One commentator attributes this lack of compliance to the attitude of states under the Optional Protocol, and expresses optimism that "as the Committee gains the confidence of States, so the degree of compliance will increase"[65]. Another commentator asserts that "in practice the rule on interim measures has been used on a number of occasions to useful effect"[66]. In any event, compared to the European Commission, the Human Rights Committee is a more recent organ, functioning within a less clearly defined jurisdictional system for the protection of human rights.

The Committee is extremely firm about the central importance of the right of effective individual petitions. In a 1980 interim decision it stated that: "If governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless"[67]. The

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[63] See de Zayas/Möller/Opsahl, *supra* note 60, at 15. Another commentator observes that the majority of interim measures indications concern the state of health of the alleged victim: P.R. Ghandhi, The Human Rights Committee and the Right of Individual Communication, British Year Book of International Law, Vol. 57 (1986), 201.

[64] Ghandhi, ibid., at 207. Cohen-Jonathan has a different view: he states that "hormis quelques très rares exceptions, on constate que les Etats ainsi sollicités ont suivi les indications du Comité de New York ...", Cohen-Jonathan, *supra* note 10, 206. In two recent cases concerning the extradition of individuals who faced the death penalty in the United States, the government of Canada disregarded the request of the Human Rights Committee to postpone extradition until it had heard the appeal of Charles Ng and Joseph Kindler. The Canadian Minister of Justice was quoted as saying: "'It is all very well for people to talk of those principles of the UN committee, and I didn't thumb my nose at it at all ... I had to make a judgment call, and I determined that my greater obligation was to serve the cause of justice by surrendering them' to U.S. authorities". Minister Campbell also observed that "The decision [of the U.N. Human Rights Committee] is not binding", see David Shoalts, Outcome of UN Appeal won't Affect Extradition, Globe and Mail, Toronto, Monday, October 7, 1991, at 4. See further William A. Schabas, Kindler and Ng: Our Supreme Magistrates Take a Frightening Step into the Court of Public Opinion, Revue du Barreau 51 (1991), 673–692.

[65] Ghandhi, *supra* note 63, at 207.

[66] D. McGoldrick, The Human Rights Committee (Oxford 1991), 131–132. McGoldrick refers to several cases and concludes that "the action taken by the Committee was effective, even if it could not change political systems or situations from one day to the next", at 213.

[67] *Sendic* v. *Uruguay*, Comm. no. R. 14/63, regarding allegations of arbitrary detention and torture. The Committee went on to state that: "The contention that the International Covenant and the Protocol apply only to states, as subjects of international law, and that,

position of the Committee in this regard has been compared with the rights protected by Art. 25 of the European Convention:

The Committee was obviously right to conduct such a bold defence of the victim's right to uninterrupted access to, and communication with, the Committee, otherwise the right of individual petition is rendered nugatory. It is interesting to note by way of comparison that Art. 25 of the European Convention on Human Rights, which enshrines the right of individual application to the Strasbourg institutions, also extracts from those High Contracting Parties who recognize the right an undertaking "not to hinder in any way the effective exercise of this right"[68].

The Committee's strong defence of the right of petition indicates the central role which that right plays within its particular system of human rights protection. It is significant that the Committee links a state's act of ratifying the Optional Protocol as automatically precluding it from certain forms of conduct.

2. General Principles of International Law

In *Cruz Varas*, the Court and the Commission both stressed the absence of a "clear rule" in international law. In this regard, and to the extent that the individual situations are so vastly different, there certainly does not seem to be any clear rule of applicable international law. Nevertheless, the absence of a clear rule does not negate the presence of certain general principles. Such principles are based predominantly upon the intrinsic nature of courts and the nature of the act of submitting oneself to the jurisdiction of a court. These principles are both useful and interesting for purposes of furthering our understanding of the nature of interim measures and their role in international law. I will refer to two such principles. The first concerns the inherent power of courts to order interim measures. While this does not address the question of the binding nature of such measures, it does propose that the power to order interim measures does not need to be found in a convention or statute. The second principle addresses the question of the binding character of such measures.

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in consequence, these instruments are not directly applicable to individuals is devoid of legal foundation in cases where a state has recognized the competence of the Committee to receive and consider communications from individuals under the Optional Protocol. That being so, denying the individuals who are victims of an alleged violation of their rights to bring the matter before the Committee is tantamount to denying the mandatory nature of the Optional Protocol".

[68] Ghandhi, *supra* note 63, at 241.

3. Inherent Power of Courts to Order Interim Measures

The argument that international courts have an inherent power to order interim measures implies that the power does not need to be grounded in a convention or statute in order to exist. This point was made by Sir Gerald Fitzmaurice of the International Court of Justice when he wrote that: "Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court – or of any court of law – being able to function at all"[69].

The argument for the inherent power of a court to indicate interim measures is supported in practice by instances where the interim measures power of that court or tribunal is expressed only in the rules of procedure drawn up by that institution[70]. This is the case with both the Commission and the European Court of Human Rights. Interestingly, it has been suggested that the inherent powers argument is strongest where the tribunal in question has been given free rein to draw up its own rules of procedure. Sztucki observes that:

Usually, however, such an authorisation [to establish their own rules of procedure] is included in the statutory, or equivalent, instrument; and this is true of all cases in which international tribunals themselves laid down rules concerning interim protection. Such an authorisation means that the States which establish a tribunal are apparently ready to accept in advance any solution which the tribunal itself may give to certain questions not regulated or reserved in the constitutive instrument of the tribunal in question. The concept of "implied powers" as denoting implied consent fits most adequately these very situations[71].

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[69] Separate Opinion of Sir Gerald Fitzmaurice in the *Northern Cameroons* Case, ICJ Reports 1963, 103. See too Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. 2 (Cambridge 1986), 533ff., esp. 541ff.

[70] Sztucki makes this point, *supra* note 36, 63. And note that the Iran-United States Claims Tribunal has frequently referred to its inherent power to order interim measures to ensure that the Tribunal's jurisdiction and authority "are made fully effective": J.J. van Hof, Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal (Deventer 1991), 178, 182, 183. See too David Caron, Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal, ZaöRV 46 (1986), 465.

[71] Sztucki, *supra* note 36, at 64–65. This position is supported, in the case of the European Court of Human Rights, in a commentary by M.-A. Eissen on the interim measures power under the European Convention on Human Rights. Eissen observes that: "... on a soutenu 'que si un traité portant création d'un tribunal arbitral laisse à celui-

The "inherent powers" argument is important from the point of view of determining the force of interim measures within the context of the European system for the protection of human rights. One of the arguments of the majority of the Court against the binding force of Rule 36 orders was that, since these orders were not provided for in the Convention, they could not create an additional obligation on member states. The inherent powers argument suggests that by giving discretion to the Court and the Commission to fix their own rules of procedure, member states tacitly consented to abide by the rules which would be so formulated[72].

It must be admitted that the "inherent powers" argument does not reflect a fixed rule of international law; indeed it is the subject of controversy. Limitations to the theory have been proposed. In general terms, these limitations take into account certain differences between domestic courts (where inherent powers are more generally recognized) and international courts and tribunals. Indeed, Sir Gerald Fitzmaurice amended his own broad statement on the subject in a later judgment in which he stated that "Where a sovereign State is concerned, ... it is not possible to rely on any theory of implied or inherent powers"[73]. While this statement underlines the main problem of the inherent powers theory in international law, it does not close the door on the argument. In fact, the theory has particular importance for the case under discussion here. The very particular nature of Art. 25(1) requires states to concede a mea-

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ci le pouvoir d'établir lui-même sa procédure et si ce tribunal adopte un règlement prévoyant des mesures conservatoires, les Etats contractants, bien que ne les ayant pas eux-mêmes directement stipulées, ne pourront s'insurger contre elles'. Cette opinion nous parait fondée aussi longtemps que le tribunal se contente d'inviter un Etat à prendre des mesures provisoires, sans s'arroger un pouvoir de décision que son statut, par hypothèse, ne lui confere pas expressément", Eissen, *supra* note 20, at 253. Thus it would seem, on Eissen's view, that the Court may assume the procedural power to order interim measures. It is only prevented from assuming powers of *decision* (i.e. jurisdiction), which have not been accorded to it by its Statute or Convention.

[72] The inherent powers argument receives support from several commentators: Pierre Pescatore, Les mesures conservatoires et les référés, in La juridiction internationale permanante. Actes du colloque de Lyon des 29, 30 et 31 mai 1986 (Paris 1987), 322–323; Karin Oellers-Frahm, Die einstweiliqe Anordnung in der internationalen Gerichtsbarkeit (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 66) (Berlin 1975), 122–141; Karin Oellers-Frahm, Interim Measures of Protection, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 1 (Amsterdam, New York, Oxford 1981), 69, and note on *Cruz Varas* by Karin Oellers-Frahm, in Europäische Grundrechte Zeitschrift (1991), 197.

[73] Dissenting opinion in the *Namibia* Case, ICJ Reports 1971, 267.

sure of sovereignty when they accept the jurisdiction of Convention organs on matters of individual petition. Thus, in a sense, states which submit to Art. 25(1) of the Convention have, to that extent, given up the special status of "sovereign entities" which might otherwise serve to limit the inherent power of courts to indicate interim measures[74].

The degree to which the "inherent powers" argument is effective may well depend on the nature of the tribunal in question. It also may have a great deal to do with the "constituency" represented by the tribunal. Sztucki emphasizes that specific factors relating to the particular legal system and the intentions of the parties to the convention in question may be significant in determining the extent to which such a power can be found to be inherent[75]. He is reluctant to extend the inherent powers argument to a court such as the ICJ, because it represents "the principal legal systems of the world". By contrast, the European system for the protection of human rights operates within a community which, to a much greater degree, shares common legal traditions and philosophies and has established, and is establishing for itself a certain basic understanding of human rights and acceptable standards of conduct. The community also shares a generally uniform approach to and understanding of international law. As such, it is perhaps well suited to recognize and accept the "inherent powers" argument. The strict approach of the majority of the Court has been criticized as a regression in the face of its former interpretations of the convention, "notamment celle qui met l'accent sur l'effectivité des droits de l'homme"[76]. The past emphasis by the Court on an effects-oriented interpretation of the Convention suggests the appropriateness of the implied powers argument in seeking grounds on which to base the interim measures power.

In Cruz Varas the majority of the Court drew back from finding an obligation on Sweden to comply with the Rule 36 order, in part because the Court interpreted the power as stemming only from a rule of procedure, which, it said, was not sufficient to create a binding obligation. The inherent powers argument provides a basis for the power of international organs to order interim measures when that power is not to be found in a statute or convention. In this sense, the argument responds to one of the

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[74] It will be remembered that the right of individual petition provided for in Art. 25(l) is not mandatory to the Convention but comes into effect only after states have made the declaration referred to in its text.

[75] Sztucki, *supra* note 36, at 66–67.

[76] Cohen-Jonathan, *supra* note 10, at 209.

objections of the majority of the Court. In contrast, the inherent powers argument was clearly in contemplation of the dissenting judges when they wrote that it was, in their view, "implicit in the Convention that in cases such as the present the Convention organs have the power to require the parties to abstain from a measure which might not only give rise to serious harm but which might also nullify the result of the entire procedure under the Convention"[77]. However, while the inherent powers argument provides a basis for the power to order interim measures, it does not necessarily provide the grounds on which such measures should be binding or obligatory[78].

4. Contempt of Court

The binding character of interim measures is perhaps better dealt with by an argument based on the theory of "contempt of court". This theory is not a new one, although it has been expressed with varying degrees of force over the years[79]. In essence, the argument relies on the special nature of the judicial institution and the respect to which it is entitled. In its different formulations, it also raises questions of good faith and the dignity of the court. The argument is premised on the fact that the parties have freely submitted themselves to the jurisdiction of the adjudicative body in question. The fact of their submission to jurisdiction is said to preclude certain forms of behaviour. For example, Manley O. Hudson observed, in a relatively mild statement, that "good faith would seem to require that neither of the parties should attempt to alter the situation existing in such a way as to add to the difficulties of the tribunal"[80]. Shabtai Rosenne draws an analogy between the initiation of court proceedings and provisional measures themselves:

There is sometimes said to exist a generally recognized principle according to which the institution of judicial proceedings itself operates as a provisional measure of protection, since the parties are under an implied

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[77] Dissenting Opinion, para. 3.

[78] Nevertheless it is an important factor in considering the binding character. Spielmann observes: "La théorie des pouvoirs inhérents conserve cependant son intérêt étant donne qu'elle est intimement liée à la question de l'effet juridique qu'on doit accorder à de telles mesures", see Spielmann, *supra* note 30, at 12.

[79] The theory is one which appears to be gaining force: see Oellers-Frahm, Die einstweilige Anordnung ..., *supra* note 72, 110–111.

[80] Manley O. Hudson, International Tribunals: Past and Future (New York 1972, reprinted from 1944 ed. [Washington 1944]), at 96.

obligation, until the Court has reached its decision in the case, to refrain from any steps which might have a prejudicial effect on the execution of the Court's final decision, or which might exacerbate the dispute[81].

On this view, the obligation to refrain from prejudicial acts would appear to be contemporaneous with the commencement of proceedings. In the case of individual petitions to the Convention organs, the filing of a petition initiates such proceedings. Consequently, a state's acceptance of Art. 25(1) constitutes its automatic submission to the jurisdiction of the Commission and the Court as regards such petitions.

The obligation of parties who have submitted to the jurisdiction of an adjudicative body can be more strongly phrased. Parties who submit to the jurisdiction of a court have the implied obligation not to act in such a way as to render the judgment of the court meaningless. As Edvard Hambro argued, it is against the dignity of the court to render decisions which the parties are free to accept or ignore[82].

It is from this argument regarding the "dignity" of the court that contempt of court analogies can be drawn. Indeed, one author has argued that an international law of contempt of court has in fact emerged[83]. In his opinion, the elements of good faith and submission to jurisdiction combine to form a general obligation "to refrain from conduct incompatible with the proper functioning of the judicial process. This general obligation results directly from the decision to seek judicial relief. It is but an emanation from the duty to exercise the right to judicial or arbitral relief in good faith"[84]. The good faith obligation is particularly apparent where the conduct of one of the parties could render the final judgment of the court completely meaningless. Stein goes on to emphasize that "a judgment that cannot be executed is one that detracts from the reputation of the tribunal as an effective means of resolving disputes"[85]. Thus the obligation to abide by interim measures orders would stem from the fact that the parties have submitted their dispute to the jurisdiction of the court, in this case, the Convention organs. In the present case, as in all cases of individual petition, the Contracting States, by acceding to Art. 25, automatically accept the jurisdiction of the convention organs in cases of individual petition against them.

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[81] Rosenne, *supra* note 41, at 427.

[82] Hambro, *supra* note 41, at 164.

[83] Ted L. Stein, Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt, AJIL 76 (1982), 499.

[84] Stein, ibid., at 509.

[85] Stein, ibid., at 510–511.

Ironically, the Court in *Cruz Varas* referred to past state compliance with interim measures as a matter of "good faith compliance" rather than established state practice, thus implying that good faith was something less than an obligation of the signatories to the European Convention. That, of course, is not the situation. On the contrary, "cette coopération loyale et de bonne foi est essentielle au bon fonctionnement du système de la Convention"[86]. The acceptance of jurisdiction, which is based on an article of the Convention, may in this way therefore also found an obligation to abide by the interim measures orders of the Convention organs.

The European Convention

1. The Convention Generally – and State Practice

The fact that the Convention contains no explicit power on interim measures obviously had a great impact on the decision of the Court in *Cruz Varas*. However, the absence of an interim measures provision in the Convention has been explained by two leading experts at the Commission. Writing in 1988, Norgaard and Krüger found that such absence was "not surprising" since "the system created by the Convention was not conceived to operate in the practical way it operates today"[87]. They rightly emphasize that the primary concern at the time of the drafting of the Convention was to quickly put in place a system of human rights protection: "it was not foreseeable then in which way this new Convention would be used by the European citizen and how it would be applied by the organs set up to ensure the observance of the engagements undertaken in the Convention"[88].

This explanation is particularly important when one considers that at the time the Convention came into force it represented one of the world's earliest and most comprehensive systems for the international protection of human rights. Not only was the field of human rights adjudication a new one, it was also one which might be expected to meet with some initial resistance from national authorities wary of new encroachments on

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[86] Cohen-Jonathan, *supra* note 10, at 208.

[87] Carl Aage Nørgaard/Hans Christian Krüger, Interim and Conservatory Measures under the European System of Protection of Human Rights, in: Manfred Nowak/Dorothea Steurer/Hannes Tretter (eds.), Fortschritt im Bewußtsein der Grund- und Menschenrechte. Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora (Kehl am Rhein 1988), at 109–110.

[88] Nørgaard/Krüger, ibid., at 110.

their sovereignty. However, as is universally recognized, the history of the development of the European Convention on Human Rights has been remarkable: the number and kinds of rights that are guaranteed have increased, through additional protocols, the processes by which these rights are protected have been developed, the number of applications made to Convention organs has increased dramatically, and the interpretation of the Convention by those organs has given the document the character of a living, growing instrument designed to maintain and promote the ideals and values of a democratic society. The Convention has come to embody, in Frowein's phrase, "the Public Order of Europe"[89].

In line with these developments, the practice of states in complying with indications of interim measures by the Commission should be viewed in the context of an evolving system for the protection of human rights. Certainly the practice of the Commission to indicate interim measures and the practice of states to comply with those indications both predate Rule 36. In fact, Rule 36 served to codify the pre-existing practice of the Commission[90]. Because of the uniform practice of states to comply, both with the earlier indications and with indications made under Rule 36, it was decided by the Committee of Ministers not to pursue the drafting of an additional Protocol to the Convention regarding binding interim measures[91].

In their Report in *Cruz Varas*, the Commission seemed to find state practice significant, although it is not clear what weight they meant to give to it. For its part, the Court observed that state practice in this case showed more or less universal compliance, but it noted that while such practice could be used to demonstrate the agreement of states regarding the interpretation of a Convention provision, it could not "create new

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[89] Jochen Abr. Frowein, The European Convention on Human Rights as the Public Order of Europe, in: Academy of European Law (ed.), Collected Courses of the Academy of European Law, Vol. 1, Book 2 (1990), 267–359.

[90] In his 1980 article, Krüger placed some weight on established state practice, noting that "it has for many years now been accepted in practice that [Rule 36 indications] should be observed", Krüger, *supra* note 10, at 75.

[91] Spielmann notes that states almost always complied with interim measures indications made before the enactment of rule 36, and that the pattern of compliance remained the same after rule 36 was incorporated into the rules of procedure (Spielmann, *supra* note 30, 17). The Committee of Ministers decided to discontinue work on an additional Protocol to the Convention concerning an interim measures power, on the basis "inter alia, that the existing practice of the Commission in requesting governments to postpone the measure complained of worked satisfactorily", Decision of the Court in *Cruz Varas,* para. 96.

rights and obligations which were not included in the Convention at the outset"[92]. Nevertheless, this does not provide a full answer to the issue of state practice. The Vienna Convention on the Law of Treaties provides in Art. 31(3)(b) that in interpreting treaties: "There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[93]. Certainly, within the context of the Convention and its most important feature, the right of individual petition, it could be said that state practice has helped to clarify the interpretation of Art. 25(1) to the effect that the individual right of petition may in some cases require the state to refrain from taking certain actions as indicated by the Commission.

In *Cruz Varas*, state practice might well have been accepted as indicating the agreement of states concerning the interpretation of the right to petition guaranteed by Art. 25(1) of the Convention. It is worth recalling that, due to universal compliance with Rule 36 indications, the issues raised under Art. 25(1) in *Cruz Varas* had not previously arisen in any admissible case. Since this particular issue under Art. 25(1) had not yet arisen, the parties may have felt that they were merely acting in "good faith co-operation". However, in no way does this fact preclude an interpretation of Art. 25(1) that would give such "good faith co-operation" the force of obligation. On this latter interpretation, the state practice in question demonstrates an understanding that the act of submitting to the jurisdiction of the Commission and the Court, which is what is contemplated by Art. 25, involves the obligation not to make that submission meaningless[94].

2. Rule 36

Certain information relating to the legislative history of Rule 36 was not included in the brief summary given by the Court. Norgaard and Krüger point out that the need for an interim measures power had begun to be felt as early as 1960, just seven years after the coming into force

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[92] Decision of the Court, para. 100.

[93] The "context" of the European Convention of Human Rights, and in particular of the individual right to petition is discussed *infra*, in the section on Art. 25(l).

[94] Spielmann writes: "On aurait pu croire que la pratique bienveillante des Etats membres du conseil de l'Europe aurait pu faire naître le sentiment qu'en vertu d'une certaine coutume internationale, ces mesures étaient obligatoires", see Spielmann, *supra* note 30, 29.

of the Convention. The perceived need apparently arose in situations relating to expulsion, much like that in *Cruz Varas*. At the time, although the Commission enjoyed no explicit power similar to Rule 36, it developed a practice of contacting the government in question and requesting that decisions to expel applicants be suspended until the matter could be examined by the Commission[95]. It seems that in "practically all cases" the governments complied with these requests[96]. Rule 36 was not added to the rules of procedure of the Commission until 1974. In the period up to that year, however, what is described as "a clear practice"[97] emerged relating to recommendations by the Commission to suspended decisions to expel or deport an applicant making allegations under Art. 3. The practice of the Commission appears to be that "... it is only in cases of extreme urgency that the Commission proceeds to recommend interim measures: the facts must *prima facie* point to a violation of the Convention, and the omission to take the proposed measures must result in irreparable injury to certain interests of the parties or to the progress of the examination"[98].

This practice, and the almost uniform acquiescence of Contracting States to the terms of Rule 36 orders, would indicate that out of the

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[95] See Nørgaard/Krüger, *supra* note 87, at 110–111. In 1969, M.A. Eissen wrote that: "La Commission n'ignore pas davantage 'qu'elle n'a pas le pouvoir de prescrire des mesures conservatoires', mais seulement celui 'd'en suggerer'", Eissen, *supra* note 20, at 254. Eissen argued for an additional protocol to the Convention to provide for such a power. Karel Vasak, also writing well before Rule 36 was made part of the Rules of Procedure of the Commission, was of the view that the Convention organs had no binding interim measures power. Nevertheless, he was aware of the importance of such a power, and argued that a rule regarding interim measures should be formulated in the Rules of Procedure of the Commission (Karel Vasak, La Convention Européenne des Droits de l'Homme [Paris 1964], at 167.)

[96] Nørgaard/Krüger, *supra* note 87, at 111. In an interesting article, written before the enactment of Rule 36, a representative of the German Ministry of Justice argued for a binding interim measures power for the Commission on the basis of the practice of the Commission, unsupported by any rule, to make requests to governments to suspend extradition and expulsion proceedings in matters which had been brought before the Commission. State practice was to comply with these requests, and Buelow argued that such practice had become "customary law". Buelow also noted that, just as Art. 28 of the Convention required the full cooperation of states after an application has been declared admissible, so Art. 25(l) required similar cooperation up until that time, whenever the Commission had made such a request. See E. Buelow, Bemerkungen aus der Sicht des Gegenwärtigen Verfahrensbeauftragten, R.D.H. 8 (1975), 361.

[97] Nørgaard/Krüger, ibid., at 111.

[98] See P. van Dijk/G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights (Deventer 2nd ed. 1990), at 66. In fact, the Court in *Cruz Varas* noted that this was the case: Judgment of the Court, *supra* note 2, para. 53.

haziest of origins a sharply defined and carefully used power to order interim measures has emerged. Rule 36 was added to the rules of procedure as a result of this practice and cannot be said to be the sole source from which such a power stems. The opinion of the Commission was not that Rule 36 itself is binding but that interim orders in cases of extradition and expulsion have an obligatory character because their breach can render meaningless both the system of protection and the specific rights to be protected under the Convention, and may give rise to irreparable harm in particular cases. In this light, Rule 36 may not in fact give the Commission the power to make binding orders, but it may certainly describe the procedure whereby the Commission may indicate to a government that its proposed conduct would violate the applicant's right to lodge an effective petition, and could seriously jeopardize his or her other rights under the Convention. The question becomes then, what principle, or what provision of the Convention, necessitates and creates the power of the Commission to make indications of interim measures.

4. Art. 25(1)

Because it founds the individual right of petition, Art. 25(1) is one of the most significant articles in the European Convention on Human Rights[99]. For the same reason, it was, and perhaps remains, a rather controversial article. At the time of the drafting of the Convention, serious divergences of opinion occurred as to the nature and scope of the right. There were many suggestions about the breadth of the proposed individual right of petition; indeed they included a proposed right of states to veto petitions made by individuals against them. In the end, the formula adopted was one by which the provision would only apply to a state which had declared that it recognized the competence of the Commission to receive such petitions. The article was not to come into force until six states had made such declarations[100].

The importance of Art. 25 derives from the fact that it gives the individual a direct recourse to Convention organs. As is well-known, the lack of individual recourse has been a most serious, perhaps the most serious impediment to the development of the protection of human rights in in-

[99] van Dijk/van Hoof describe it as "the most progressive provision of the European Convention", ibid., at 37.

[100] Art. 25(4). The provision came into force on July, 5, 1955. By 1987, all states within the system had officially recognized the competence of the Commission under this article.

ternational law[101]. Art. 25 was thus both controversial and ground breaking at the time that it was placed within the Convention. Although the Articles which follow it make general provisions regarding the way in which Convention organs will deal with individual petitions, Art. 25 is the sole article which guarantees that right, and its effective exercise, to individuals. Thus it is an extremely important article within the framework of the Convention, and, obviously, for the individual who wishes to petition Convention organs[102]. Its object is to give meaning and content to the individual right of petition, a right that is central to both the scheme of the Convention and the workings of the Court and Commission. In this respect, it is not unreasonable to suggest that Art. 25 may, by obliging states not to hinder in any way the effective exercise of the right to petition, require them to refrain, in certain circumstances, from acts which would render meaningless the exercise of that right. This interpretation is supported by Recommendation 817 (1977) of the Consultative Assembly to the Committee of Ministers.

Recommendation 817 (1977) was referred to by the majority of the Court in *Cruz Varas*, presumably in support of the view that state compliance with interim measures was not mandatory but was achieved in the form of recommendations. Yet a closer look at the text of the first paragraph of Recommendation 817 (1977) reveals a somewhat different aspect:

Recommendation 817(1977) on certain aspects of the right to asylum, which recommends that the Committee of Ministers call on all governments of the member States:

(a) to recognize the right of individual application under Art. 25 of the European Convention on Human Rights and, if this right is recognised, suspend extradition or expulsion to a non-Contracting State in cases where the Commission and, where appropriate, the Court have been called on to take a decision on allegations that the person concerned runs a

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[101] The more recent American Convention on Human Rights (entered into force in 1978) made the right of individual petition mandatory to the Convention, while the right of state complaint is optional.

[102] It has been stated that: "... Art. 25 forms the cornerstone on which the whole system of the Convention depends. Indeed, if and in so far as the exercise of the individual right of complaint is restricted, the Strasbourg organs are also deprived of the principal instrument for assessing the situation as to the protection of the other rights and freedoms guaranteed in the Convention. Moreover, besides the legal protection of individuals, an element of 'European public order' is also involved", van Dijk/van Hoof, *supra* note 98, at 50.

grave danger of being subjected to treatment incompatible with the requirements of the European Convention on Human Rights in the non-Contracting State in question[103].

The text of this Recommendation explicitly links compliance with the indications of the Commission and the Court to a state's recognition of the individual right of petition under Art. 25 of the Convention. This linkage is far from co-incidental; indeed it was precisely the position of both the Commission and the dissenting judges in *Cruz Varas* that disregard of such indications could lead to a breach of Art. 25. The Recommendation can, and should, be seen as a reflection of the obligations assumed by a state which acknowledges the right of individual petition, in cases of extradition or expulsion.

It is respectfully submitted that the majority of the Court may have approached the question in the wrong way. The majority stated that: "It would strain the language of Art. 25 to infer from the words 'undertake not to hinder in any way the effective exercise of this right' an obligation to comply with a Commission indication under Rule 36"[104]. However, the question is not whether Art. 25(1) contains an implicit obligation to obey Rule 36 indications but, rather, whether there is an obligation on a state under Art. 25(1) not to render ineffective the exercise of the right to petition by both expelling the applicant from the jurisdiction of the Court and by putting his or her life in potentially grave peril.

In interpreting the scope of Art. 25(1), the majority of the Court stated that "it flows from the very essence of this procedural right that it must be open to individuals to complain of alleged infringements of it in Convention proceedings. In this respect also the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory[105]." It is ironic that the majority nevertheless found that Art. 25(1) could not be interpreted to restrain Contracting States from expelling a petitioner and placing him or her in a potentially life-threatening situation. In these circumstances, the right of petition of an individual who is then expelled to a country where he or she faces possible torture or death would certainly seem to be rather "theoretical and illusory". In the words of the dissenting judges, the opinion of the majority means that while States "would be obliged to allow a person to lodge a petition with the Commission", [they would nevertheless] "be

103 Yearbook of the Convention, Vol. 20 (1977), 82–85.
104 Decision of the Court, para. 99.
105 Decision of the Court, para. 99.

able to expel him immediately thereafter irrespective of the consequences however serious they might be"[106]. This interpretation, and its rejection, finds support among commentators[107].

It can hardly be said that the interpretation given to Art. 25(1) by the Commission and the dissenting judges in *Cruz Varas* in any way strains the meaning of that Article. An effective right of petition can be broadly or narrowly construed. If one chose to construe the right in its most narrow and limited sense, the whole point of providing for a right of individual petition would have to be questioned. Art. 25 transforms the European Convention from a "mere" inter-state treaty into a Charter of Rights for individuals in Europe. Clearly, it is not a minor, procedural provision: in a sense it is the heart of the Convention as regards individuals and their rights. A narrow interpretation of such a provision is the one most likely to fly in the face of the intentions of the drafters of the Convention.

Summary and Conclusion

Provisions on interim measures can be found in the statutes or rules of procedure of a vast number of international courts, tribunals, and quasi-judicial organs. The wording of these provisions, their use and interpretation, and, in particular, the degree to which they can be said to be binding vary enormously. It is thus difficult to rely on the practice and experience of any particular international court or tribunal in order to give de-

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[106] Dissenting Opinion, para. 2.

[107] Rogge has argued that Art. 25 provides the basis for an obligation to comply with a Rule 36 indication of the Commission. He observes that: "The provision, in Art. 25, that the High Contracting Parties must not 'hinder the effective exercise' of the right of petition cannot only mean that they must refrain from interfering with the 'exercise' of this right, e.g., by stopping letters from applicants to the Commission, but it must also be interpreted as an obligation to abstain from impeding the 'effective exercise'. An application to the Commission concerning a proposed expulsion to Idi Amin's Uganda could not be 'effective' if the expulsion took place before this application was examined in Strasbourg", see Kerstin Rogge, Proceedings of the Sixth International Colloquy About the European Convention on Human Rights, Seville, 13–16 November, 1985 (Dordrecht 1985), at 796. The same question is also discussed by Kerstin Rogge in: Einstweilige Maßnahmen im Verfahren vor der Europäischen Kommission für Menschenrechte, NJW 30 (1977), 1569–1570. See also van Dijk/van Hoof, *supra* note 98, 66, where the authors state: "In our opinion, in certain cases the provision of Art. 25 of the Convention that those contracting States which have accepted the right of individual applications undertake not to hinder in any way the effective exercise of this right, may imply the obligation to take the measures as indicated by the Commission".

finition and content to the interim measures power under the European Convention on Human Rights. The two other main systems for the international protection of human rights each feature interim measures provisions, but a number of factors, including the relatively recent genesis of the International Human Rights Committee and the system of protection under the American Convention on Human Rights, make comparison difficult. The interim measures powers of the European Commission have received the most attention, have been applied with greater frequency, and have been subject to more extensive commentary than those of the organs of the other two systems.

In spite of the lack of exact parallels among international institutions, a better understanding of the interim measures powers of the organs established under the European Convention can be gained through a consideration of the development of two currents of thought in international law. The first posits that judicial and quasi-judicial tribunals have an inherent power to order interim measures. This inherent power argument meets the complaints of those who are sceptical about the interim measures powers of the Commission, which stem from a rule of procedure and not from the Convention. The second trend of thought represents the evolution of a general theory of "contempt of court" in international law. This theory goes to the heart of the question of the binding character of interim measures. Under this theory, interim measures, by virtue of the fact that they are conservatory of the situation between the parties, are obligatory as a consequence of the parties' submission to the jurisdiction of the court. Because it would go against the "dignity of the court" to render judgments that had been made meaningless by the conduct of the parties, the latter are under an obligation to comply with interim measures. This obligation stems from the parties' acceptance of the jurisdiction of the Court. In the case of the organs established by the European Convention on Human Rights, state assent to the terms of Art. 25 is an acceptance of jurisdiction in matters of individual petition.

The European Convention itself is the cornerstone of the European system for the protection of human rights. The Convention and its organs have undergone a process of creative evolution from the time of the Convention's entry into force in 1953 to the present. While the Convention contains no explicit provision on interim measures, it contains, in Art. 25, a duty of states not to interfere with the effective right of individual petition. States submit to Art. 25 by way of a declaration, and such submission opens them to the possibility of individual petitions being made against them.

Both the Commission and the Court have provided, in their respective rules of procedures, for the indication of interim measures. Although the Commission's Rule 36 was formulated in 1974, the Commission had been making interim measures indications from a much earlier time. Rule 36 is in fact more of a codification of the Commission's practice on interim measures than a foundation for the power. The making of interim measures indications by the Commission represents a process of evolution in both theory and practice. Scholarly opinion on the question of the interim measures power has undergone a parallel evolution. While early writers stressed the non-conventional and therefore non-binding character of interim measures indications, more recent opinion reveals a growing realization of the necessity of binding interim measures power. Recent commentators also express the view that the right of effective petition contained in Art. 25 of the Convention means that certain indications under Rule 36 must be seen as mandatory, since compliance with them is essential to preserving the right guaranteed by Art. 25.

In *Cruz Varas*, the Commission attempted to sever the question of interim measures from Rule 36 altogether. The key factors for consideration were the nature of the right to be protected and the inability to adequately protect that right unless a state refrained from carrying out certain acts. In such circumstances, an interpretation of the Convention that rendered its safeguards "practical and effective" required the State not to act in a way that potentially violated the Convention until the matter had been fully considered by Convention organs. The fact that a Rule 36 indication had been made did not establish this duty; it merely indicated that the case was one in which a potential violation might occur. From this perspective, the force of the interim measures indication is grounded in an interpretation of Art. 25(1) of the Convention combined with the passage from *Soering* cited above. This then was the view of the Commission and the nine dissenting judges of the Court: an applicant who is placed in circumstances where his or her personal integrity, security, and life are in jeopardy, and where he or she may be unable to communicate effectively with the Convention organs, is an applicant whose right of petition is not guaranteed in a practical or effective way. The view of the majority of the Court that such an interpretation would strain the meaning of Art. 25 is not a step forward either as regards the interpretation of the Convention or the protection and further development of the central and crucial right of individual petition.