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Interim Measures Requested before International Courts and International Quasi-Judicial Bodies in the Protection of Human Rights: Do they also Protect the Right to Participate in Public Affairs?

Beatriz VÁZQUEZ RODRÍGUEZ*

Abstract: The adoption of precautionary measures by international courts and the indications regarding their adoption by quasi-judicial bodies in the protection of human rights have been a fundamental element in guaranteeing effective judicial protection of individual rights recognized in International Human Rights Treaties. However, the exceptional and urgent character of these measures, the indeterminacy of the requirements for their adoption, and the discussions on their legal nature have raised several problems in practice. These issues are being resolved based on the case law that originates from these courts and bodies, which will inevitably lead to the existence of certain particularities with respect to the solutions offered according to the given system of human rights protection. In fact, one of these particularities concerns the material scope of protection. The present contribution focuses on the adoption of precautionary measures in the protection of political rights, particularly regarding the right to take part in the conduct of public affairs, on which the various international human rights protection systems have unique positions.

Keywords: European Court of Human Rights, Human Rights Committee, Inter-American Court of Human Rights, interim measures, International Human Rights Protection, participation in public affairs, political rights.

(A) INTRODUCTION

The adoption of precautionary measures at the international level is of particular interest regarding the individual protection of human rights. These procedural measures are a useful instrument for the protection of individuals who are subject to an imminent risk of suffering an irreparable damage of certain rights enshrined in the human rights treaties applicable to them. Although firmly recognized in contemporary International Law, precautionary measures do not enjoy a homogeneous basis in the international legal system, neither in terms of their jurisdiction nor with regard to their material scope of application. Instead, their bases differ depending on which regional human rights protection mechanism we turn to at the international level, or on whether we are referring to the precautionary measures recommended by the monitoring body established by International Human Rights Treaties.

* PhD on Public International Law, University of Oviedo, vazquezbeatriz@uniovi.es. Part of this paper was at Instituto de Estudios Internacionales (IEI), Universidad de Chile, while visiting as a lecturer from 1st July to 1st September 2018. This article was written in the framework of the research project DER2017-86017-R, "Obstáculos a la movilidad de personas en los nuevos escenarios de la UE/ Barriers to the Mobility of Persons in the new scenarios of the EU", funded by the Spanish Ministry of Economy and Competitiveness (MINECO).

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While respect for particularism in the international legal system is significant, greater uniformity in the adoption and implementation of precautionary measures in the field of international human rights protection would be desirable. This because of the given importance of the rights protected, whose standards of protection should not be guaranteed depending on the protection system to which the individual is attached. However, as we shall see, this does not mean that the systems are compartmentalized or that they represent opposing realities regarding the protection of human rights, but rather that in some cases, their mutual influence and interconnectedness will be highlighted.

Based on this premise, interim measures will be analyzed from a strictly International Human Rights Law perspective[1] through what has been established in conventional or regulatory standards as well as through important contributions in the matter made by the case law of the respective courts, where applicable. Such case law has been instrumental in determining the subject matter, the material scope of application of precautionary measures, and, in some cases, their obligatory character. In this regard, this study will cover the adoption of interim measures by the European Court of Human Rights (ECtHR) and their adoption in the Inter-American System for the protection of human rights, with special reference to political rights and, more specifically, to the right to participate in public affairs.[2] In addition, given that the possibility of indicating precautionary measures is not exhausted with respect to their application by international courts in the protection of human rights but rather it is possible that certain monitoring bodies established in Human Rights Treaties may indicate interim measures to States Parties, this paper will also analyze through a comprehensive approach, the practice regarding interim measures adopted by the Human Rights Committee (CCPR), bearing in mind that Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right of every citizen to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections, and to have access, on general terms of equality, to public service in a State Party[3]. The reason for paying special attention to

[1] Other international judicial bodies that can adopt this type of measures, such as the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU), or the International Tribunal for the Law of the Sea (ITLOS) are excluded from this study.

[2] However, this question will not be analyzed from the perspective of the African System, since both the entry into force of its Additional Protocol and the constitution of the African Court of Human Rights are very recent, so that its jurisprudence does not have a significant path regarding our object of study. In that sense, the first time that the African Court of Human and Peoples' Rights adopted provisional measures, it was in March 2011 through an interim measure requesting the government of Libya to abstain from any action that it will involve the loss of human lives or the violation of their physical integrity that may violate the norms of The African Charter on Human and Peoples' Rights or other human rights instruments to which they are a party.

[3] Regarding the quasi-judicial bodies, there are several that have attributed this power, some based on the provisions of its constituent instruments as is the case of CEDAW (Art. 5, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999, U.N. Doc. A/54/49 and art.

this right of participation in public affairs is the existence of a recent practice that allows us to ask if, in general terms, it is a right that is being protected through the adoption of this type of specific measures.

(B) PRECAUTIONARY MEASURES AS PROCEDURAL MECHANISM TO AVOID IRREPARABLE DAMAGE

Interim measures have a long history in the internal legal systems of the States, and concepts of similar nature can even be found in Roman Law.[4] From an exclusively internal point of view, the nature of these measures, issued by a court's decision, presupposes the existence of a general procedural principle which seeks to guarantee, in advance, the foreseeable consequences which may arise in the course of a litigation between the parties. If this legal concept is extrapolated to the international sphere and, in particular to the sphere of international human rights law, the legal nature of these measures remains unchanged. To this extent, even though the measure will be adopted in this case by an international court or quasi-judicial body with jurisdiction over the protection of human rights, States Parties of the Convention are required to implement, as soon as possible, all necessary measures recognized in their internal legal systems to prevent the violation of a right protected in a Human Rights Treaty.

Accordingly, it has been argued that, "la transposición normativa de las medidas cautelares, del ordenamiento nacional hacia el internacional, no genera modificaciones sustanciales en cuanto al contenido de tales presupuestos, y en cuanto al objeto perseguido."[5] It is true, however,

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63.1, Rules of procedure of the Committee on the Elimination of Discrimination against Women, Annex I of the Report of the Committee on the Elimination of Discrimination against Women (A/56/38), identically they provide that: "After receipt of a communication and prior to its final decision, the Committee has the option of contacting the State Party with an urgent request that the State Party take steps to protect the alleged victim or victims from irreparable harm") and the case of CRPD (Art. 4, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, "At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation"); another on the basis of its rules of procedure as is the case of CAT, (Art. 114.1, Rules of procedure of the Committee against Torture, adopted by the Committee at its first and second sessions and amended at its thirteenth, fifteenth, twenty-eighth, forty-fifth and fiftieth sessions). However, we will focus on the CCPR, because it is the only one that can adopt provisional measures for the protection of political rights, in particular the right to take part in the conduct of public affairs, vote and be elected at genuine periodic elections, and have equal access to public service positions.

4 See, A. Aguiar-Aranguren, 'Apuntes sobre las medidas cautelares en la Convención Americana sobre los Derechos Humanos', in R. Niento (ed.), *La Corte y el Sistema Interamericano de Derechos Humanos* (Corte Interamericana de Derechos Humanos, San José, 1994) at 95-96.

5 We translate: 'The normative transposition of precautionary measures, from the national to the international order, does not generate substantial changes in the content of such budgets, and in terms of the

that "[l]a transposition des mesures provisoires ou conservatoires de l'ordre juridique interne à l'international toujours face à la probabilité ou à l'imminence d'un "dommage irréparable", et la préoccupation ou la nécessité d'assurer la "réalisation future d'une situation juridique" ont eu pour effet d'étendre le domaine de la juridiction internationale, avec la réduction conséquente du célèbre domaine réservé de l'Etat."[6] As a result, this extension of international jurisdiction becomes essential with respect to the adoption of precautionary measures in the protection of human rights, in which the protected legal right goes beyond a mere right of individual request and becomes an instrument that guarantees the effective protection of human rights, i.e. a protection that goes beyond the individual interests of the parties involved in the dispute to find a justification for protecting the interests of the entire international community as a whole. In recent times, however, the proliferation of international courts with the power to adopt these measures has caused them not to have a homogeneous character or a single objective, as R. J. Macdonald emphasizes,

> "despite the proliferation of tribunals and interim measures –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 [...] Interim measures in international law differ as to the nature of the body which issues them, the conditions under which request can be made, the conditions under which requests will be granted, whether the tribunal can indicate the measures proprio motu, whether the security deposits are required, and so on."[7]

Nevertheless, despite the variety of procedures for adopting precautionary measures in the different international human rights protection systems, it must be noted that all of them are certainly based on a common model, i.e. the one developed in the Statute of the Permanent Court of International Justice (PCIJ),[8] which was later reflected in Article 41 of the Statute of the International Court of Justice (ICJ).[9] It follows from the wording of that provision that the

object pursued', E. Rey Cantor; A. M., Rey Anaya, 'Medidas cautelares y medidas provisionales ante la Comisión y la Corte Interamericanas de Derechos Humanos', 14 *Revista Jurídica UCES* (2010) 127-193, at 130.

6 P. Guggenheim, *Les Mesures Provisoires de Procédure Internationale et leur Influence sur le Développement du Droit des Gens*, (Rec. Sirey, Paris 1931), at 174.

7 R. J. Macdonald, 'Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights', 52 *Heidelberg Journal of International Law* (1992), at 720.

8 According to the Encyclopedia of Public International Law, "The PCIJ Statute was inspired by the work of the Institute of International Law in 1875 and by the rules of the Central American Court of Justice (1907-18) established in 1907", R. Wolfrum, Interim (Provisional) Measures of Protection', in R. Wolfrum (dir.), *The Max Planck Encyclopedia of Public International Law*, Vol. V, (Oxford University Press, Oxford 2012), at 299. See also, R. J. Macdonald, *supra* n. 7, at 717-720.

9 Art. 41, Statute of the International Court of Justice: '1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the

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power of the ICJ to adopt such measures is discretionary and exceptional, in the sense that they are adopted only under special circumstances. The laconism of this provision has been completed by the ICJ's own case law on the nature and subject matter of precautionary measures. More specifically, regarding the *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, the Court ruled that: "Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue."[10]

On the basis of this ruling, the ICJ seemed to identify three characteristics to determine the main subject matter of interim measures, namely: the preservation of the respective rights of the parties, which implies maintaining the status quo of the pending situation; the existence of a risk that may cause irreparable damage through acts or omissions of the respondent State; and that the Court's decision to adopt interim measures does not prejudge or anticipate the final judgement on the merits of the case[11]. Although this scenario presented by the ICJ serves as a starting point for determining the object of these measures, it must be borne in mind that the specific objectives of each system are linked to their material scopes of application established in the international treaties on the matter, in our case, the European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the International Covenant on Civil and Political Rights (ICCPR); as well as in the provisions concerning interim measures recognized in some regulatory provisions.

(C) JURISDICTIONAL AND PROCEDURAL ISSUES IN THE ADOPTION OF PRECAUTIONARY MEASURES

respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council'.

[10] *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, ICJ Reports (1972) at 18.

[11] The Institute of International Law (IIL) has studied the issue of provisional measures having passed a resolution at its session of Hyderabad 2017 ('Provisional measures', final resolution Third Commission, 8 September, 2017). Throughout the preparatory work, the practice of the ICJ deserved special attention, (see: 'Provisional measures-preparatory work', Third Commission, final report 23, December, 2016). It should be noted that within the Third Commission there was some debate about the scope of their work; in this regard, the Report indicates: 'There was no clear consensus on these issues and, in view of the fact that the subject is potentially enormous, this report is mainly limited to judicial tribunals and deals with public international law, private international law, international commercial arbitration and some universal principles of private law', *Ibídem*, at. 268.

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In general, there are differences in the jurisdictional capacity to adopt precautionary measures in international Human Rights protection systems. While in the cases of the ECtHR, the CCPR, and the Inter-American Commission, the power to adopt interim measures has no conventional but regulatory basis; the Inter-American Court of Human Rights, in contrast, has such power under its founding treaty, as will be seen below.

Beginning our analysis with the European system of human rights protection, one finds that, during the process of drafting of the 1949 Convention, the 'Travaux Préparatoires' included a provision on interim measures which was almost identically worded to Article 41 of the Statute of the ICJ, but which was not finally reflected in the text of the Convention.[12] After several attempts, and in response to the demands of some Member States, the now defunct Commission on Human Rights included interim measures in Rule 36 of its Rules of Procedure, recognizing that "The Commission, or when 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."[13] Subsequently, the Court also included this power, which was consolidated in Article 36 of its Rules of Court in the same terms as the Commission had included it in its own rules. With the entry into force of Protocol No. 11 and the abolition of the European Commission on Human Rights, the power to adopt interim measures with respect to claims brought by individuals was concentrated in the hands of the Court. This was definitively consolidated in Rule 39 of its Rules of Court, according to which:

> 1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.
> 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.
> 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.
> 4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.[14]

Regarding procedural issues, Article 34 ECHR provides, as is well known, that any individual,

[12] See, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, (Martinus Nijhoff, The Hague, 1975-85), at 302-320.

[13] See, 'Amendments to the Rules of Procedure of the European Commission of Human Rights', 17 *Yearbook of the European Convention on Human Rights* (1974) at 52.

[14] Rule 39, ECHR, Rules of Court, entered into force on 16 April 2018.

non-governmental organization, or group of individuals may present an individual application claiming to be the victim of a violation by one of the States parties of the rights set forth in the Convention. Under this provision, those having legal standing as applicants may, under Rule 39, submit a request to the Court for the adoption of precautionary measures at any stage of the proceedings, provided that the individual or group of persons is under the jurisdiction of one of the States parties under Article 1 ECHR. Each request is examined by the Court on an individual basis, and all of them shall be given priority unless the request involves a dilatory tactic. If the application is incomplete or insufficiently substantiated, the Court may decline to hear it or, on an exceptional basis, may request the submission of additional information. However, under Rule 39, ECtHR is also allowed to adopt interim measures on its own initiative.

After the entry into force of Protocol No. 11, a relevant change to the procedure was introduced, as requests for interim measures in the current system are automatically recorded once submitted, irrespective of whether they are subsequently adopted by the Court. In practice, the President will consult with a judge with expertise in the respondent State's laws and will review the documentation submitted by the applicant. For instance, with respect to the most frequent cases, i.e. applications for the suspension of expulsion or deportation orders, the Court will consider

grounds of fear; evidence submitted, Convention Issue or Article invoked; reasons for leaving home country, whether applicant applied for political asylum and decision made as to it; date arrival in Member State; decisions by the Member State administrative or judicial bodies on expulsion/extradition of the applicant; availability of any other domestic authority to stop the impending expulsion/extradition; suspensive effect of domestic remedies; government assurances given by the state to be expelled or deported to; and involvement of UNHCR and decisions made by that body.[15]

Once a decision has been taken based on the necessary requirements for the granting of measures, the ECtHR informs the applicant or, where appropriate, his or her legal representatives in writing. However, the reasons for granting or refusing them are not reflected in the decision provided by the Court. Thus, the Steering Committee for Human Rights (CDDH), in its report on precautionary measures, made the following recommendation: "The Court could consider also communicating additional, generic information on interim measure requests, including on the reasons for refusals, in such a way as not to put the safety of the

[15] H. R. Garry, 'When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights', 7(3) *European Public Law* (2001) 399-432, at 414.

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applicant at risk."[16] A more detailed statement of reasons on the ECtHR's position in each specific case is relevant, since it could enable states to determine with greater precision what constitutes irreparable damage. Thus, this statement of reasons would enable them to assess it in their internal procedures while avoiding the need for the applicant to resort to the ECtHR. In addition, this would also provide greater legal certainty, which would allow the individual to know the reasons for their adoption or refusal, while allowing states to more adequately challenge an eventual imposition of interim measures.

The ECtHR, however, did not deem it appropriate, considering that any additional wording to its decisions would amount to additional work for the Court and would delay the adoption of these urgent measures.[17] In the event that the Court decides to order interim measures, the respondent State is informed of its decision by fax or mail.[18] Otherwise, the decision is final and there is no appeal against the Court's decision. This does not mean that the applicants cannot submit a new request as long as new evidence is provided to meet the requirements for the granting of the measures.[19]

Under Rule 39, the European Court may decide to apply interim measures until the end of the proceedings, unless new circumstances arise that require the lifting of interim measures, or the adoption of interim measures until a date that the Court itself determines. After this date, the ECtHR will have to decide whether their temporary extension is necessary, by setting a new date, or whether to decree a new extension until further notice. The Court may decide to lift them, either because deems it appropriate, as it considers that the applicant is not in a position to suffer irreparable damage, or at the request of the applicant himself or herself, or because the respondent Government so requests.[20] The Court typically adopts such measures until a specific date, after which it will consider whether or not they should be extended depending on whether or not it considers that there is an imminent risk. In addition, it should be stressed that, due to the urgent nature of these measures, the time frame for the Court to reach a decision is really short and therefore it makes a general assessment. It is only *a posteriori*, once the case has been brought to the attention of the Court, that it may even consider that the facts which *prima facie* gave rise to the adoption of these measures do not then constitute

[16] Draft CDDH report on interim measures under Rule 39 of the Rules of Court, GT-GDR-C (2013) R2, 2 February 2013, at 13.

[17] *Ibídem*, at 10.

[18] Toolkit on How to Request Interim Measures under rule 39 of the rules of the European Court of Human Rights for Persons in Need International Protection, UNHCR, (Strasburg, 2012) 1-20, at 13.

[19] See: S. D. Jóhannsdóttir, *Interim Measures under Rule 39 of the Rules of the European Court of Human Rights Protecting Human Rights in Cases of Urgency*, M thesis on file at the University of Iceland, Iceland, at. 24 – 26.

[20] Toolkit on How to Request Interim Measures under rule 39 of the rules of the European Court of Human Rights for Persons in Need International Protection, *supra* 65, at. 14.

breaches of the Convention.[21]

Turning to the inter-American human rights system, one of the most notable differences with respect to the European system is that the possibility of adopting interim measures has a conventional basis. This is because they are regulated in the founding Treaty, which, as we shall see below, has resolved from the outset the problems regarding the obligatory character of these measures at this specific regional level and, as a result, the liability arising from their possible non-compliance. However, there are also some similarities with the European system of human rights protection, since, as is well known, the creation of the Inter-American Court of Human Rights has had the ICJ and the ECtHR as its references.[22] As was the case in the beginning of the European system, there is a duality with regard to the application of interim measures for the protection of human rights, which in this case remains unchanged to this day. According to the very terminology used by this system —and despite the fact that in both of them "the nature of provisional measures is not only preventive in the sense that they preserve a juridical situation, but fundamentally protective, because they protect human rights"—[23] it distinguishes between *precautionary measures*, which are adopted by the Inter-American Commission on Human Rights (IACHR), and *provisional measures*, which are issued by the Inter-American Court.

With respect to precautionary measures, they have their origins in the IACHR Rules of Procedure,[24] Article 25 of which states that "the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system."[25] It follows from the wording of this provision that the IACHR can, on its own initiative or at the request of a party, indicate to a State Party the

[21] 'The full facts of the case will often remain undetermined until the Court's judgment on the merits of the complaint to which the measure is related. It is precisely for the purpose of preserving the Court's ability to render such a judgment after an effective examination of the complaint that such measures are indicated. Until that time, it may be unavoidable for the Court to indicate interim measures on the basis of facts which, despite making a prima facie case in favour of such measures, are subsequently added to or challenged to the point of calling into question the measures' justification', *Paladi v. Moldova*, para. 89.

[22] See E. Rey Cantor; A. M., Rey Anaya, *supra* n. 5, at 128-132. See also, M. Díez Crego, 'El impacto de la jurisprudencia de la Corte Interamericana sobre el Tribunal Europeo de Derechos Humanos', 75 *Revista de la Facultad de Derecho* PUPC (2015) at 31-56.

[23] *Case of Herrera-Ulloa v. Costa Rica*. Provisional Measures. Order of the Inter-American Court of Human Rights, 6 December, 2001, para. 4.

[24] Rules of Procedure of the Inter-American Commission on Human Rights (IACHR), (Approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November, 2009, and modified on 2 September, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on 1 August, 2013).

[25] Art. 25.1, Rules of Procedure of IACHR.

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adoption of different actions to protect the human rights protected by the American Convention on Human Rights and to avoid imminent harm, considering in any case the seriousness and the urgency, with the aim of avoiding irreparable damage. For their part, the provisional measures adopted by the Inter-American Court have a conventional basis, since Article 63(2) of the American Convention on Human Rights empowers the Court to adopt protection measures in exceptional situations in order to avoid irreparable damage to individuals.

From the above, several conclusions can be drawn, because this system, as far as the adoption of precautionary measures is concerned, has two fundamental differences with respect to the European one. First of all, it must be noted that the provisional measures adopted by the Inter-American Court have a conventional basis, so, by virtue of the principle of *pacta sunt servanda*, enshrined in The Vienna Convention on the Law of Treaties, there is an obligation on the parties to comply with them in good faith. This issue will be addressed in the section on the obligatory character of these measures. Second of all, there is a difference concerning the material content of the provisions relating to provisional measures, since this system specifies in its conventional and regulatory standards, in a much more precise manner, the criteria necessary for the application of these measures, as will be seen in subsequent sections.

In the case of the Inter-American Court and the Inter-American Commission, there are certain particularities with respect to procedural issues. The Inter-American Court of Human Rights may consider a request for interim measures when the State issuing it is a party of the American Convention and when it has recognized the jurisdiction of the Court as compulsory. In this regard, a distinction must be made between the jurisdiction in contentious cases submitted to the Court and the jurisdiction of the Court in cases where proceedings are pending before the Commission.[26] In the first case, Article 63(2) of the Convention states that, in matters under consideration of the Court, the Court shall adopt interim measures in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons. This means that there must be an ongoing proceeding in place beforehand. In addition, according to Article 27 of the Rules of Procedure of the Court, the measures may be issued by the Court on its own initiative at any stage of the proceedings, or the "victims or alleged victims, or their representatives, may submit to it a request for provisional measures, which must be related to the subject matter of the case."[27] In the second case, also enshrined in Article 63(2) of the Convention and in Article 27(2) of the Rules of Procedure of the Court, in the case of matters not submitted to the Court, the Court may act at the request of the Commission. This request for precautionary measures by the Commission to the Court is also recognized in

[26] See, E. Rey Cantor; A. M., Rey Anaya, *supra* n. 5, at 172-188.

[27] Art. 27.3, Rules of Procedure of IA Court HR.

Article 19(c) of the Statute of the Commission, but its Rules of Procedure further develop this premise by considering that such a request will be made "when the State concerned has not implemented the precautionary measures granted by the Commission; when the precautionary measures have not been effective; when there is a precautionary measure connected to a case submitted to the jurisdiction of the Court; or when the Commission considers it pertinent for the efficacy of the requested measures, to which end it shall provide its reasons."[28] The applications submitted by anyone having legal standing as applicants according to the aforementioned circumstances shall be submitted "to the Presidency, to any Judge of the Court, or to the Secretariat."[29]

With regard to the granting of the measures, it will be the President, in consultation with the Permanent Commission, who shall draft a decision in which he or she will call upon the State to adopt a series of precautionary measures in defense of the rights enshrined in the Pact of San José. At a later session, the Court shall ratify the decision previously taken by the President and may maintain or extend the precautionary measures proposed.

As for the Inter-American Commission, Article 25 of its Rules of Procedure states that in order to request the adoption of precautionary measures to the States parties, it may act on its own initiative or at the request of a party. If it is at the request of a party, this implies that the request may be submitted by an individually affected person, a person linked to a particular group, organization, or community of people, or by a third party acting on their behalf, in order to prevent a risk of irreparable damage to persons or to the subject matter of a petition or case pending before the bodies of the inter-American system. This means that the request for interim measures may be made in connection with a previous request; in connection with a pending case; or a simple request for precautionary measures may be made. In the last case, the request must include a brief with reference to the facts and modes of proof, and it is important to note that, in this proceeding, "el principio de subsidiariedad no opera en relación con la solicitud de las medidas cautelares, es decir, que no se exige el agotamiento de los recursos de jurisdicción internos para acceder a la protección internacional a través de esta institución procesal",[30] while it is required for the submission of complaints or petitions to this body, although it is true that the Commission —among other reasons— will take into account "whether the situation has been brought to the attention of the pertinent authorities or the

[28] Art. 76.2, Rules of Procedure of IACHR.

[29] Art. 27.4, Rules of Procedure of IA Court HR.

[30] We translate: 'The principle of subsidiarity does not operate in relation to the request for precautionary measures, that is, it does not require the exhaustion of domestic remedies to access international protection through this procedural institution', E. Rey Cantor, *supra* 5, at 184. In the same sense, see: H. Faúndez Ledesma, *supra* n. 43, at 275.

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reasons why it would not have been possible to do so."[31]

In any event, if the requirements and formalities set out above are complied with, the Commission may request the state to adopt precautionary measures; it may reject the request for measures on the grounds that, on the merits of the case, it is a petition for human rights violations and, as such, it should have exhausted the remedies of the domestic jurisdiction; or it may demand further information from both the applicant and the state concerned.

For its part, the Human Rights Committee has considered in its practice that the possibility of indicating interim measures derives from the mandate established in the Covenant on Civil and Political Rights, which has subsequently been codified in its regulatory standard. Based on the current Article 92 of its Rules of Procedure, "The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication."[32]

With regard to procedural issues relating to such measures in the Human Rights Committee, it only needs to be recalled that individual complaints may be lodged against a State, provided that it is a State party to the International Covenant on Civil and Political Rights and that, in addition, such State has recognized the power of the Committee monitoring the Treaty to receive and consider complaints from individuals, ratifying the Optional Protocol to the International Covenant on Civil and Political Rights. Under Article 92 of its Rules of Procedure, this body, after receiving a communication and before issuing its advisory opinion, has the power to request the State party against which the complaint is addressed, to adopt interim measures in order to avoid irreparable damage to the victim of the alleged violations. Although not specified in the Rules of Procedure, the Committee entrusts the Special

[31] Art. 25.6.a) Rules of Procedure of IACHR.

[32] Art. 92, Rules of procedure of the Human Rights Committee, 11 January 2012, (The current version of the rules was adopted at the Committee's 2852nd meeting during its 103rd session). In addition to these measures, in accordance with the practice of recent years, the Special Rapporteur has requested States Parties to adopt what he calls "protection measures" in relation to the author or authors of a communication, which he also extends to their relatives when there is circumstantial evidence that the submission of the communication to the Committee has led to acts of intimidation to its authors. The Committee itself considers that the differences between protection measures and interim measures are found "in that their purpose is not to prevent irreparable damage affecting the person who is the subject of the communication, but simply to protect those who might suffer adverse consequences for having submitted the communication, or to call the State party's attention to the worsening of their situation, which is linked to the alleged violations of their rights", The mandate of the Special Rapporteur on New Communications and Interim Measures, CCPR/C/110/3, 6 May, 2014, at 3.

Rapporteur on New Communications and Interim Measures[33] with the processing of requests for communications for which interim measures are issued.[34] In practice, in most cases, the request for interim measures is linked to the submission of a new communication, with the Special Rapporteur having the power to decide whether to accept or refuse it when taking a position on the registration of the communication. The Special Rapporteur will only act if considers that the petition must be attended to take into account the particular circumstances of the specific case and without it being necessary to invite the State to present its point of view. This could cast doubt on the guarantees offered by this procedure as far as the State is concerned, although it has been justified by noting that "The protection of international human rights processes and of the individual in question takes priority over any short term inconvenience caused to the State".[35]

Regarding the transparency of the indication of these measures, it should be stressed that, there is no requirement to state or make public the grounds for his or her decision to adopt precautionary measures. Thus, this decision is communicated only to the parties without disclosing the grounds on which the interim measure in question was ordered or refused.[36] In this regard, it has been argued that, in the case of the CCPR, efficiency and urgency are given priority in the adoption of these measures over the need to provide extensive justification for its decision.[37] Finally, it is important to note that, if the CCPR decides to indicate interim measures in a particular case, this does not imply that it has made a decision on the admissibility or the merits of the case. However, the Committee should adopt such measures when there is a reasonable likelihood that the individual complaint may be successful at the merits stage.[38]

(D) THE MATERIAL SCOPE OF APPLICATION OF PRECAUTIONARY MEASURES

[33] The mandate of the Special Rapporteur encompasses five main functions among which is "(b) dealing with requests from authors on interim and protection measures", *Ibídem*, at 2.

[34] This practice was adopted by the Committee at its 35th session in 1989. At its 55th session in 1995 the Committee decided that the Special Rapporteur would retain this competence until the Working Group on Communications took up the question of admissibility, UNGAORA/vol. I, para. 467

[35] S. Joseph, K. Mitchell, L. Gyorki and C. Benninger-Budel, *A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, (OMCT Handbook Series, Vol. 4, 2006), at 99.

[36] According to H. Keller and C. Marti, with regard to the commitment made by the CCPR regarding the ECHR's publication of the reasons why it guarantees or denies provisional measures: "The Special Rapporteur on New Communications and Interim Measures recently suggested such an approach also for the HRC", H. Keller, C. Marti, 'Interim relief compared: use of interim measures by the UN Human Rights Committee and the European Court of Human Rights', 73(3) *Heidelberg Journal of International Law* (2013) 325-372, at 339.

[37] E. Rieter, *Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication*, (Intersentia, Maastricht University, 2010), at 141-144.

[38] See: Individual Complaint Procedures under the United Nations Human Rights Treaties, Fact Sheet nº 7/Rev.2, 2013, at 13-14.

As has been mentioned, it is necessary to turn to conventional and procedural standards in order to understand, according to their context, when precautionary measures can be adopted. However, given the minimal guidance provided by the statutes of the international courts — even less so in the case of the ECtHR—, and of the quasi-judicial bodies, it will be the case law originating from them the one completing and redefining the objectives of the interim measures and the scope of the rights protected in their respective jurisdictions, as we shall see below.

(1) Criteria for the Adoption of Precautionary Measures

Rule 39 of the ECtHR Rules of Court does not determine the material scope in respect of which interim measures could be adopted. As we have seen, only the last sentence of its first paragraph states that these measures would be indicated to protect "the interests of the parties or of the proper conduct of the proceedings." However, the ECtHR case law has answered this question, and in *Mamatkulov and Askarov v. Turkey*, in addition to stressing the exceptional nature of these measures, it confirmed that the Court's practice allowed the adoption of these measures only in cases where there is "an imminent risk of irreparable damage."[39] Furthermore, bearing in mind the different nature of the provisions on interim measures included in Treaties other than those applied by the ECtHR, the ECtHR referred to the provisions on this issue included in the Statutes of the ICJ and the Inter-American Court of Human Rights and in the Rules of Procedure of the CCPR and The Committee against Torture in the United Nations system. All of them confirmed that "the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed, it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending."[40]

As a result, without a specific provision in the ECHR on the specific material scopes in which Rule 39 applies, the Court's practice has shown that such measures are adopted in very limited situations in which, in any event, the existence of "an imminent risk of irreparable damage" is demonstrated. However, its own case law does not provide the data to consider when such an imminent risk of irreparable damage exists. In the *Paladi* case, the Court only considered that "where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention",[41] the object of an interim measure shall be to preserve and protect the rights and interests of the parties in a dispute before the Court while pending the final decision.

But under what conditions can the Court *plausibly* assert that there is such an imminent

39 *Mamatkulov and Askarov v. Turkey*, (App. n. 46827/99, 46951/99), 4 February, 2005, para. 104.
40 *Mamatkulov and Askarov v. Turkey*, para. 124.
41 *Paladi v. Moldova*, (App. n. 39806/05), 10 March, 2009, para. 89.

risk of irreparable damage? In this regard, the ECtHR —in relation to expulsion and extradition cases— has considered that this imminent risk exists only and exclusively when there is no possibility of invoking domestic remedies to suspend these orders, or when invoked but not successfully, which means that "the situation must be imminent and exceptional and there must no longer be any suspensive domestic remedy available against the disputed act; there must be a high degree of probability that the disputed act will contravene the ECHR and there must be a risk of irreparable damage."[42] Nevertheless, some authors believe that, in order for this criterion to be met and for the application of precautionary measures to be considered, there must be cumulative criteria: "First, there must be a threat of irreparable harm of a very serious nature. Second, the harm must be imminent and irremediable, and third, prima facie, there must be an arguable case that removal will violate the Convention."[43]

As far as the inter-American system is concerned, there is a fundamental difference with the ECtHR, which is that, while the ECtHR only refers in its regulatory standard to the need for the existence of "an imminent risk of irreparable damage", the inter-American system has explicitly laid down the criteria necessary for the adoption of these measures, both in its conventional standard as well as in its regulatory standard. This has brought about important interpretive work by the Inter-American Court to clarify the scope of its terms. In this sense, under Article 25(2) of the Rules of Procedure of the Inter-American Commission, the Commission may, on its own initiative or at the request of a party, indicate to a State party the adoption of precautionary measures to protect human rights protected by the American Convention on Human Rights and to avoid an imminent harm, considering that:

> a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;
> b. "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
> c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.[44]

With regard to the Inter-American Court, Article 63(2) of the Pact of San José recognizes that:

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[42] Y. Haeck, C. Burbano Herrera, L Zwaak, 'Non-compliance with a Provisional Measure Automatically Leads To a Violation of the Right of Individual Application ... or Doesn't It?: Strasbourg Court Takes Away Any Remaining Doubts and Broadens Its Pan-European Protection', 4 *European Constitutional Law Review*, (2008) 41-63, at 43. See also, P. McCormick, 'A Risk of Irreparable Damage: Interim Measures in Proceedings before the European Court of Human Rights', 12 *The Cambridge Yearbook European Legal Studies*, (2009-2010) 313-336, at 318; E. Rieter, 'Provisional Measures: Binding and Persuasive? Enabling Human Rights Adjudicators to Follow Up on State Disrespect', 59(2) *Netherlands International Law Review* (2012), 165-198, at 171-174.

[43] N. Mole, C. Meredith, 'Asylum and the European Convention Human Rights' (2010) 9 *Human Right Files*, 1-291, at. 218.

[44] Art. 25.2, Rules of Procedure of IACHR.

"In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."[45] According to the contents of this provision, the requirements are apparently the same as for the adoption of precautionary measures by the Commission. However, the requirement of gravity, in this case, implies that it must be of a higher degree, i.e. extreme in nature. In the same way, Article 27 of the Rules of Procedure of the IACHR reiterates the need for the cumulative existence of the requirements of: extreme gravity, urgency, and avoiding irreparable damage to persons.[46] In this system, it has also been repeatedly pointed out that the adoption of these measures, as in the case of the ECtHR, is carried out on a case-by-case basis, so that their adoption cannot be subject to "strict criteria that must apply to each and every case; instead, it has to look at the nature of the risk and the harm that the precautionary measure seeks to avert."[47]

Beginning with the requirement of gravity, it has been argued that, in this notion, "no basta con la gravedad del peligro que se anticipa, sino que también se requiere que este sea verosímil. La gravedad de la amenaza es la consecuencia de un peligro real y no meramente hipotético"[48] and, as a result, "se debe de relacionar con hechos o situaciones que pongan en peligro derechos humanos fundamentales, es decir, aquellos que bajo ningún respecto pueden verse menoscabados o limitados en su ejercicio."[49] In order for the gravity to be "extreme", the Court has considered that the situation must be of "an intense or high level of gravity",[50] and therefore it "obviously refers not only to the gravity of the threat but also to its extreme nature. Therefore, the threat should not refer to just any risk; this risk must be extreme and of gravity, and the

45 Art. 63.2, American Convention on Human Rights, Pact of San José, Costa Rica, 1969.

46 Art. 27.1, Rules of Procedure of IA Court HR, approved by the Court during its LXXXV Regular Period of Sessions, held from, 16 to 28 November, 2009.

47 Annual Report, Inter-American Commission of Human Rights, 2011, at 73.

48 We translate: 'the seriousness of the danger that is anticipated is not enough, but it is also required that it be credible. The seriousness of the threat is the consequence of a real danger and not merely hypothetical', H. Faúndez Ledesma, 'Medidas cautelares y medidas provisionales: acciones urgentes en el Sistema Interamericano de Protección de los Derechos Humanos', 107 *Revista de la Facultad de Ciencias Jurídicas y Políticas*, (1998) at 537. On the notion of urgency, see: A. Aguiar-Aranguren, *supra* n. 4, at. 20.

49 We translate: 'it must relate to facts or situations that endanger fundamental human rights, that is, those that under no circumstances may be impaired or limited in their exercise', A. Aguiar-Aranguren, *supra* 4, at 102.

50 *Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, November 24th, 2009, para. 3; *Case of Salvador Chiriboga v. Ecuador*. Provisional Measures. Order of the Inter-American Court of Human Rights, 15 May, 2011, para. 7; *Case of Gonzales Lluy et al. vs. Ecuador*. Provisional Measures. Order of the Inter-American Court of Human Rights, 2 September, 2015, para. 7.

ordinary tools of apparatus of the State should not suffice to cope with such threat".[51] With regard to the requirement of urgency, the Court has found that this requires "the remediation response to be immediate. The analysis of this aspect corresponds to assessing the timing and duration of the precautionary or protective intervention requested",[52] which should involve "above all, an immediate and, in principle, of short duration measure in order to face with such situation, since a lack of response would mean a danger per se."[53] In the practice developed by the IACHR, the Court jointly assesses the requirements of gravity and urgency, since, as argued by some authors, "Lo primero [que haya extrema gravedad y urgencia] implica que exista un riesgo de daño sumamente grave y que resulte apremiante, en virtud de las circunstancias existentes -que deben ser apreciables de forma casuística-, adoptar sin demora la medida que parezca necesaria -de la naturaleza y con las características pertinentes- conforme a la hipótesis de riesgo que se contemple."[54]

Finally, with respect to the requirement to avoid irreparable damage, the Court has ruled that "there must exist a reasonable probability that the damage is caused and it must not involve legally protected interest capable of being repaired."[55] There is no specific jurisprudential line on this issue, although some authors have considered that "en realidad, un daño irreparable para las personas solo puede ser el resultado de una violación de su derecho a la vida o a la integridad física, y probablemente de la violación de garantías judiciales que tengan una incidencia directa sobre el disfrute de esos derechos."[56] However, the IACHR has not

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[51] *Matter of the Mendoza Prisons regarding Argentina. Provisional Measures.* Order of the Inter-American Court of Human Rights, 30 March, 2006, Concurrent Opinion of Judge D. García-Sayán, para. 11.

[52] *Matter of Four Ngöbe Indigenous Communities and its members regarding Panama.* Provisional Measures. Order of the Inter-American Court of Human Rights, 28 May, 2010, para. 9.

[53] *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, 8 February, 2008, para.18; *Matter of Alvarado Reyes et al. regarding Mexico.* Provisional Measures. Order of the Inter-American Court of Human Rights, 15 May, 2011, para.16.

[54] We translate: '[that there is extreme gravity and urgency] implies that there is a risk of extremely serious damage and that it is urgent, by virtue of the existing circumstances -which must be discernible in a casuistic way-, adopt without delay the measure that seems necessary according to the hypothesis of risk that is contemplated', S. García Ramírez, *Los Derechos Humanos y la Jurisdicción Interamericana* (Universidad Nacional Autónoma de México, México, 2002), at 130.

[55] *Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, 24 November, 2009, para. 3; *Matter of Yare I and Yare II Capital Region Penitenciary Center regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, 24 November, 2009, para. 3; *Matter of Pérez Torres et al. ("Campo Algodonero") regarding Mexico.* Provisional Measures. Order of the Inter-American Court of Human Rights, 30 June, 2011, para 11; *Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison) regarding Venezuela.* Order of the Inter-American Court of Human Rights, 6 September, 2012, para. 11.

[56] We translate: 'in fact, irreparable damage can only be the result of a violation of their right to life or physical integrity, and probably of the violation of judicial guarantees that have a direct impact on the enjoyment of those rights', H. Faúndez Ledesma, *supra* n. 40, at 160. In relation to the requirement of "irreparable harm", see: A. M.

interpreted the material scope of application of these measures in such a restrictive way as to limit their application to Articles 4 (right to life) and 5 (right to humane treatment) of the American Convention on Human Rights, as we shall see in the following section.

As regards the CCPR, in order to be able to indicate interim measures, its regulatory provision determines the need "to avoid an irreparable damage", which means that its material scope of application is similar to those studied in relation to the ECtHR and the Inter-American System for the Protection of Human Rights. Therefore, for requesting the adoption of precautionary measures before the CCPR, the applicant must also, a priori, demonstrate that there is an imminent risk of irreparable damage and that the remedies in his or her domestic legal system do not provide such a guarantee to prevent such damage. For the determination of the *prima facie* existence of irreparable damage, the CCPR, in *Charles E. Stewart v. Canada*, stated that these requirements "cannot be determined generally"[57] but the assessment must be carried out on a case-by-case basis. In addition, according to the CCPR, "the essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy."[58] With regard to the imminence of the risk, the CCPR also found that it was a fundamental requirement, and so in *Lansman*, it refused to indicate interim measures, considering that "the application of rule 86 of the rules of procedure would be premature but that the authors retained the right to address another request under rule 86 to the Committee if there were reasonably justified concerns that quarrying might resume."[59] With regard to the irreparability of the damage, the CCPR's ruling in *Weiss* is crucial, when it found

> "that in a case where it has requested interim measures of protection, it does so because of the possibility of irreparable harm to the victim. In such cases, a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author's favour by the domestic remedies considering the case. In such cases, there remain no effective remedies to be exhausted after the event sought to be prevented by the request for interim measures takes place; specifically, no appropriate remedy is available to the author now detained in the United States

Salvador Ferrer, 'Medidas provisionales en casos de desaparición forzada en la jurisprudencia de la Corte Interamericana de Derechos Humanos: Análisis, crítica y reto', 32 *Revista Electrónica de Estudios Internacionales* (2016) 1-31, at 4-5.

57 CCPR, *Charles E. Stewart v. Canada*, Com. n. 538/1993, 1 November, 1996, para. 7.7.

58 *Ibídem*.

59 CCPR, *Ilmari Lansman and forty-seven other members of the Muotkatunturi Herdsmen Committee and members of the Angeli local community*, Com. n. 511/1992, 24 October, 1994, at 5.

should the State party's domestic courts decide in his favour in the proceedings still pending after his extradition."[60]

This case substantially broadened the scope of interim measures, insofar as it no longer implies that the determination of an "irreparable damage" should be considered to be a precondition for the granting of an interim measure, since it alludes to the possibility that such a risk exists.[61]

(2) The Scope of Protected Rights: The Exceptional Nature of the Precautionary Protection of the Right of Political Participation

As stated above, the ECtHR has considered that, taking into account the necessity of the aforementioned requirements, the assessment to propose interim measures must be made on a case-by-case basis and, precisely because of their nature, the most characteristic cases in the practice of the ECtHR are those in which the claimants feared that, if an expulsion or extradition order was enforced, they could face threats to their lives, which would therefore be contrary to Article 2 ECHR (right to life) or to ill-treatment, prohibited by Article 3 ECHR (prohibition of torture and inhuman and degrading treatment). In this respect, the ECtHR has adopted precautionary measures with regard to asylum seekers who fear that, if their expulsion order is enforced, they may be subjected to persecution, ill-treatment, or other serious attacks of many different natures: some cases involve the risk of persecution on political, ethnic, or religious grounds,[62] or on grounds of sexual orientation;[63] other cases comprise the risk of stoning for adultery or genital mutilation;[64] others the risk of being socially excluded[65] or sexually exploited;[66] and other cases consider that there is a risk that expulsion could prevent access to HIV treatment[67] or psychological care.[68] Specifically, with regard to Article 2 of the Convention, the ECtHR has adopted interim measures to prevent the extradition of individuals to a State where there is a death sentence against them, thus avoiding their execution.[69] More exceptionally, the ECtHR has also adopted such measures in relation to Article 5 ECHR (right to liberty and security) and Article 6 ECHR (right to a fair trial) where

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[60] CCPR, *Weiss v. Austria*, Com. n. 1086/2002, 15 May, 2003, para. 8.2.

[61] *Ibídem*, para. 8.2.

[62] *Abdollahi v. Turkey*, (App. N. 23980/08), 3 November, 2009; *F.H. v. Sweden* (App. n. 32621/06), 20 January, 2009; *Y.P. y L.P. v. France* (App. n. 32476/06), 1 September, 2010; *W.H. v. Suède* (App. n. 49341/10), 8 April, 2015; *F.G. v. Sweden* (App. n. 43611/11), 23 March, 2016.

[63] *M. E. v. Sweden*, (App. n. 71398/12), 8 April, 2015.

[64] *Jabari v. Turkey*, (App. n. 40035/98), 11 July, 2000; *Abraham Lunguli v. Sweden*, (App. n. 33692/02), 1 July, 2003.

[65] *Hossein Kheel v. the Netherlands*, (App. n. 34583/08), 16 December, 2008.

[66] *M. v. The United Kingdom*, (App. n. 16081/08), 1 December, 2009.

[67] *D. v. The United Kingdom*, (App. n. 30240/96), 2 May, 1997; *N. v. The United Kingdom* (App. n. 26565/05), 27 May, 2008.

[68] *Paposhvili v. Belgium*, (App. n. 41738/10), 17 April, 2014.

[69] *Öcalan v. Turkey*, (App. no. 46221/99), 12 May, 2005; *Nivette v. France*, (App. n. 44190/98), 3 July, 2001.

there is a risk of flagrant denial of justice in the event of expulsion or extradition.[70] According to statistics, during 2017, out of a total of 1,669 precautionary measures requested to the ECtHR, 1,019 were outside the scope of application of the Court, 533 were refused, and 117 were adopted. The latter were linked to cases of expulsion.[71]

Nevertheless, the ECtHR has also adopted precautionary measures apart from these situations of expulsion or extradition, for example, under Article 3, the ECtHR adopted precautionary measures in order to safeguard the health of the applicant in detention.[72] In addition, under Article 6, the Court ordered interim measures to protect the right to a fair trial and, more specifically, the right to legal assistance in order to guarantee adequate representation of the defendant in the proceedings before the ECtHR.[73] Even more exceptionally, it has applied Rule 39 of its Rules of Court to protect rights under ECHR Article 8 (right to respect for private and family life) in cases where it considered that there was a potentially irreparable risk for private or family life,[74] including here the adoption of precautionary measures to prevent the destruction of evidence essential to the examination of a claim, by preventing a clinic from destroying the claimant's embryos before the ECtHR had the chance to complete its examination of the case;[75] or by adopting interim measures to suspend the implementation by the French Council of State of a judgement authorizing the withdrawal of the artificial nutrition and hydration which kept a fully dependent person alive.[76] Likewise, based on the protection of rights contained in Article 8, the ECtHR adopted a precautionary measure to suspend an eviction order.[77] Recently, the Court has also adopted provisional measures to protect rights related to freedom of expression recognized in Article 10 of the Convention.[78]

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[70] *Soering v. The United Kingdom*, (App. n. 14038/88), 7 July, 1989; *Othman (Abou Qatada) v. The United Kingdom*, (App. n. 8139/09), 17 January, 2012; *Ismoilov and Others v. Russia*, (App. n. 2947/06), 24 April, 2008. For an examination of the adoption of provisional measures regarding the violation of rights related to cases of deportation, see: C. Burbano Herrera, Y. Haeck, 'Staying the Return of Aliens from Europe through Interim Measures: The Case-law of the European Commission and the European Court of Human Rights' 13 *European Journal of Migration and Law* (2011), 31-51.

[71] ECtHR, Thematical statistics - Interim measures, available here and here.

[72] *Kotsaftis v. Greece*, (App. n. 39780/06), 12 June, 2008; *Paladi v. Moldova*, (App. n. 39806/05), 10 March, 2009; *Aleksanyan v. Russia*, (App. n. 46468/06), 22 December, 2008; *Salakhov e Islyamova v. Ukraine*, (App. n. 28005/08), 14 March, 2013.

[73] *Öcalan v. Turkey*, (App. no. 46221/99), 12 May, 2005; X. *v. Croatia*, (App. n. 11223/04), 17 July, 2008.

[74] *Amrollahi v. Denmark*, (App. n. 56811/00), 11 July, 2002; *Eskinazi and Chelouche v. Turkey*, (App. n. 14600/05), 6th December, 2005; *Neulinger and. Shuruk v. Switzerland*, (App. n. 41615/07), 6 July, 2010; *B. v. Belgium* (App. n. 4320/11), 10 July, 2012.

[75] *Evans v. The United Kingdom*, (App. n. 6339/05), 10 April, 2007.

[76] *Lambert and Others v. France*, (App. n. 46043/14), 5 June, 2015.

[77] *Yordanova and Others, v. Bulgaria*, (App. n. 25446/06), 24 April, 2012, *A.M.B. and Others v. Spain*, (App. n. 77842/12), 28 January, 2014; *Raji and Others v. Spain*, (App. n. 3537/13), 16 December, 2014.

[78] *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, (App. n. 16812/17), 28 November, 2017; *Sedletska v. Ukraine*, (App. n. 42634/18), 18 September, 2018.

In contrast, with regard to the right of political participation, it is true that, although Article 3 of the Additional Protocol to the European Convention on Human Rights only establishes an international obligation for States Parties to hold periodic and free elections, the case law has combated the restrictive regulation of this precept, and has considerably expanded the scopes of protection with regard to the right of political participation[79]. However, neither the defunct Commission nor the ECtHR have adopted interim measures for the protection of this right, with their case law being very restrictive regarding a possible extension of their material scope of protection. For example, the Court has excluded the application of Rule 39 of its Rules of Court for the adoption of interim measures in relation to the French State's decision not to hold a referendum on the Treaty of Lisbon, where it considered that "Elle n'a toutefois jamais accueilli une demande de mesures provisoires dans des circonstances telles que le refus d'un Etat d'organiser un référendum, fort éloignées du cadre habituel de pareilles mesures";[80] or for preventing the Turkish Constitutional Court from ruling on the dissolution of a political party.[81] In short, according to the present practice of the ECtHR, and as it stated in the *Mamatkulov and Askarov v. Turkey case,*[82] these urgent and exceptional measures are applied primarily by virtue of Articles 2 and 3 of the ECHR —and are usually linked to situations of expulsion or extradition— since, by their very nature, in the event of violation, damage of an irreversible nature can occur, which makes them more sensitive to being protected by the test applied by the ECtHR case law.

In the inter-American system, the application of provisional and precautionary measures has been adopted with respect to a much more extensive material scope, although it should be borne in mind that, based on the joint application of the aforementioned articles of the Inter-American Convention on Human Rights, more than one hundred precautionary measures have been requested.[83] Apart from these cases, to a lesser extent, interim measures have also been

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[79] See: *Mathieu-Mohin and Clerfayt*, (App. n. 9267/81), 2 March, 1987; *United Communist Party of Turkey and Others v. Turkey*, (App. n. 133/1996/752/951), 30 January, 1998; *Bowman v. United Kingdom* (141/1996/760/961), 19 February, 1998; *Hirst v. the United Kingdom (no. 2)*, (App. n. 74025/01), 6 October, 2005.

[80] ECtHR, Communiqué du greffier, Usage indu des demandes de mesures provisoires, 21 December, 2007.

[81] *Sezer c. Turkey*, (App. n. 35119/08), Press release 28 July, 2008.

[82] "Interim measures have been indicated only in limited spheres. Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings", *Mamatkulov and Askarov v. Turkey*, (App. n. 46827/99 and 46951/99), 4 February, 2005, para. 104.

[83] *Matter of Millacura Llaipén et al. regarding Argentina*, provisional measures, orders: 6 July, 2006; 6 February, 2008; 25 November, 2011; 21 November, 2012; 13 February, 2013 and 26 November, 2013; 28 April, 2006; 4 July, 2006; 12 May, 2007; 8 July, 2009; 26 August, 2010 and 26 June, 2012; *Case of the Mapiripán Massacre v. Colombia*,

adopted with respect to other articles of the Pact of San José, such as Article 13 (freedom of thought and expression),[84] Article 16 (freedom of association),[85] Article 19 (rights of the child),[86] Article 21 (right to property),[87] Article 22 (freedom of movement and residence),[88] or Article 25 (right to judicial protection),[89] among others.[90]

In this system, however, precautionary measures have also been adopted for the protection of Article 23 (right to participate in government),[91] and more specifically with regard to guaranteeing the right of political participation. The American Convention on Human Rights —and, as we shall also see, in the case of the Covenant on Civil and Political Rights—, unlike the European Convention, explicitly recognizes the right of political participation. Thus, Article 23 of the Pact of San José states that all citizens are entitled "a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be

provisional measures, orders: 27 June, 2005; 3 May, 2008; 2 September, 2010 and 1 March, 2011; *Case of Gutiérrez Soler v. Colombia*, provisional measures, orders: 9 July, 2009; 30 June, 2011 and 23 October, 2012; *Case of Bámaca-Velásquez v. Guatemala, provisional measures, orders:* 29 August, 1998; 5 September, 2001; 21 February, 2003; 20 November, 2003; 11 March, 2005 and 27 January, 2009; *Case of Mack Chang et al. v. Guatemala*, provisional measures, orders: 21 February, 2003; 6 June, 2003; 26 January, 2009; 16 November, 2009 and 26 January, 2015; *Matter of Lysias Fleury regarding Haiti*, provisional measures, orders: 7 June, 2003; 2 December, 2003 and 25 November, 2008; *Matter of the Mendoza Prisons regarding Argentina*, provisional measures, orders: 22 November, 2004; 18 June, 2005; 30 March, 2006; 27 November, 2007 and 26 November, 2010; *Case of DaCosta Cadogan and Boyce et al. v. Barbados*, provisional measures, order: 2 December, 2008; *Matter of Dottin et al. regarding Trinidad and Tobago*, provisional measures, order: 14 May, 2013; *Matter of the Communities of the Jiguamiandó and the Curvaradó regarding Colombia*, provisional measures, orders: 6 March, 2003; 17 November, 2004; 15 March, 2005; 7 February, 2006; 5 February, 2008; 17 November, 2009; 30 August, 2010; 25 November, 2011; 27 February, 2012 and 22 May, 2013; *Case of Fernández Ortega et al. vs. Mexico*, provisional measures, orders: 30 April, 2009, 23 November, 2010; 20 February, 2012; 23 February, 2016; 7 February, 2017; *Matter of children deprived of liberty in the "Complexo do Tatuapé" of Fundação CASA regarding Brazil*, provisional measures, orders: 17 November, 2005; 30 November, 2005; 4 July, 2006; 3 July, 2007 and 25 November, 2008.

[84] *Case of Herrera Ulloa v. Costa Rica*, provisional measures, orders: 21 May, 2001; 23 May, 2001; 7 September, 2001; 6 December, 2001 and 26 August, 2002.

[85] *Matter of Carlos Nieto et al. regarding Venezuela*, provisional measures, orders: 9 July, 2004; 22 September, 2006; 3 July, 2007; 5 August, 2008 and 26 January 26, 2009.

[86] *Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic*, provisional measures, orders: 26 May, 2001 and 8 July, 2009; *Matter of L.M. regarding Paraguay*, provisional measures, orders: 1 July, 2011 and 27 April, 2012.

[87] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, provisional measures, orders: 6 September, 2002 and 26 November, 2007; *Matter of Garífuna Comunity of Barra Vieja regarding Honduras*, provisional measures, order: 14 October, 2014.

[88] *Matter of Peace Community of San José de Apartadó regarding Colombia*, provisional measures, orders: 24 November, 2000; 18 June 18, 2002; 17 November, 2004; 15 March, 2005; 2 February, 2006; 6 February, 2008 and 30 August, 2010.

[89] *Case of Durand and Ugarte v. Peru*, provisional measures, order: 30 May, 2018.

[90] For a complete list of the resolutions on provisional measures issued by the Inter-American Court of Human Rights, see: Sistematización de las resoluciones sobre medidas provisionales emitidas por la Corte Interamericana de Derechos Humanos, 2018.

[91] *Case of Castañeda Gutman v. Mexico*, provisional measures, order: 25 November, 2005.

elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country."[92] In addition, in the following paragraph, it contemplates a series of limits restricting the exercise of political participation, only on grounds "of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."[93] In this system, there has also been an important jurisprudential work by the Court that has extended the material scope of protection to guarantee this right to participate in political life. However, unlike the ECtHR, precautionary measures were taken here to protect this right. Specifically, in the *Case of Castañeda Gutman*, on 17th October 2005, the Commission adopted precautionary measures to protect the political rights of this individual, specifically to allow his candidacy for the presidency of Mexico to be registered, while the Commission decided on the admissibility and merits of the case. Subsequently, the Commission requested interim measures before the Inter-American Court, considering that these measures did not afford the necessary protection to the individual and could cause him irreparable damage. Although the Inter-American Court finally did not deem the adoption of interim measures to be appropriate, this was not based on the consideration that this political right did not meet the test of "extreme gravity and urgency, and when necessary to avoid irreparable damage to persons" for the indication of these measures, but because it considered that, if this Court were to rule on them, "the petitioner's claims would be consummated with the order for the adoption of provisional measures. Indeed, to adopt the requested measures would be tantamount to deciding, *in limine litis* and by way of an incidental proceeding, issues central to the case and their consequences."[94]

In this sense, it can be argued that there is no doubt that most of the interim measures indicated in this system have been so with the aim of providing protection against possible irreparable damage linked to Articles 4 (right to life) and 5 (right to humane treatment) of the American Convention on Human Rights, which were adopted in the same way as the majority of precautionary measures in the European system, that is, on the basis of the equivalent articles in the ECHR, i.e. Article 2 (right to life) and Article 3 (prohibition of torture). In this system, however, the Commission has adopted precautionary measures for the protection of political rights recognized in Article 23 of the Pact of San José, and the Court has considered that they are eligible for protection through interim measures. It is true that these cases are very rare in practice, but this is not due to a restrictive application of the case law of the Commission or

[92] Art. 23.1, American Convention on Human Rights.

[93] Art. 23.2, *Ibídem*.

[94] *Matter of Castañeda-Gutman regarding Mexico*. Provisional Measures. Order of the Inter-American Court of Human Rights, 25 November, 2005, para. 6.

the Court, but because, as has been said, "el proceso de plena garantía de la participación política se encuentra en una fase intermedia, [...] se trata de un derecho inacabado [...]" and thus "es delicado, dilatado y aún insuficiente."[95] Furthermore, as Justice García-Sayán stressed in his concurring opinion in the *Case of Yatama*, the right to take part in the conduct of public affairs, "as all juridical categories, has evolved and has been reformulated with historical and social progress [...] In recent years, this evolution has developed substantially the concept of the right to take part in the conduct of public affairs, which, nowadays, is a reference point that includes a very wide variety of components [...] Indeed, the broad and general concept of the right "to take part in the conduct of public affairs," as it appears in the Convention, has been refined and expanded."[96] Therefore, this implies not only an extension of the material scope of this right, but also of its procedural scope, accepting the possibility of adopting this type of measures to protect rights of this nature.

Quantitatively, during 2017, the Court issued 22 decisions on interim measures, including cases of adoption, extension, lifting, or refusal of requests for interim measures.[97] Currently, the Court has 26 interim measures under supervision, with Colombia (5), Mexico (4), Brazil (4), and Venezuela (4) being the states with the highest number of indicated interim measures. In the case of the Inter-American Commission, in 2017, 1,037 measures were requested before the Commission, and 45 were granted. The largest number of requests for these measures were made in Colombia (246), Mexico (187), Argentina (88), and Brazil (76). However, the largest number of precautionary measures were granted with respect to the states of Venezuela (10) and Guatemala (6).[98]

In the case of the CCPR, between 2015 and 2017, the Special Rapporteur requested the adoption of interim measures in accordance with Rule 92 of the Rules of Procedure of the Committee in more than a hundred cases.[99] In addition, like the ECtHR and the Inter-American System, in most cases this body has recommended that States Parties adopt interim

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[95] We translate: 'The process of full guarantee of political participation is at an intermediate stage, [...] it is an unfinished right, [...], it's delicate, dilated and still insufficient', E. Bernales Ballesteros, 'El derecho humano a la participación política', 59 *Derecho PUCP: Revista de la Facultad de Derecho* (2006), 9-32, at 10.

[96] *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs, 23 June, 2005. Series C, nº 127. Concurring Opinion of Judge D. García-Sayán, para. 12-13.

[97] Annual Report of the Inter American Court of Human Rights, 2017, at 101.

[98] Statistics of the IACHR, available here.

[99] See: analysis of Committee's case law: Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights Jurisprudence - CCPR/C/113/4; Consideration by the Human Rights Committee at its 114th, 115th and 116th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights - CCPR/C/116/3; Consideration by the Human Rights Committee at its 117th, 118th and 119th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights - CCPR/C/119/3.

measures[100] to avoid potential violations of the right to life (Article 6)[101] and the right not to be subjected to torture and inhuman treatment (Article 7).[102] However, more exceptionally, it has also adopted interim measures with the aim of preventing possible violations of the freedom of thought, conscience, or religion (Article 18),[103] freedom of expression (Article 19),[104] or the rights of indigenous people (Article 27).[105] With regard to the political rights recognized in Article 25 of the International Covenant on Civil and Political Rights, as noted by the Committee in its General Comment No. 25, "Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol",[106] which would also imply the application of interim measures.

This is confirmed by the United Nations when it emphasizes the importance that the system attaches to this right. It has been highlighted in the report "Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them",[107] by the United Nations High Commissioner for Human Rights, which states that Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right and opportunity of every citizen to have access, on general terms of equality, to public service in his country, and that, in addition, "Restrictions to the right to participate in political and public affairs, while permissible, must be objective, reasonable, non-discriminatory and provided for by law [...] The "essence" of the right should never be affected. Several international human rights mechanisms have emphasized that limitations should remain the exception rather than the rule."[108] Thus, the report goes on to point out that the human rights mechanisms have concluded that the limitation of political participation on the grounds of

[100] For a study on situations in which interim measures requests have been issued, see: S. Ghandhi, 'The Human Rights Committee and Interim Measures of Relief', 13(2) *Canterbury Law Review* (2007), 203-226, at 206-210.

[101] CCPR, *Glenn Ashby*, Com. n. 580/1994, 21 March, 2002; *Lyubov Kovaleva and Tatyana Kozyar*, Com. n. 2120/2011, 29 October, 2012.

[102] CCPR, *Sendic Antonaccio*, Com. n. 063/1979, 28 October, 1981; *Alice Altesor and Victor Hugo Altesor*, Com. n. 010/1977, 29 March, 1982; *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov*, Com. n. 1461/2006,1462/2006,1476/2006,1477/2006, 16 July, 2008.

[103] CCPR, *Malcolm Ross*, Com. n. 736/1997, 18 October, 2000.

[104] CCPR, *Hak-Chul Shin*, Com. n. 926/2000, 16 March, 2004.

[105] CCPR, *Bernard Ominayak, Chief of the Lubicon Lake Band*, Com. n. 167/1984, 26 March, 1984.

[106] CCPR, General Comment No. 25 - The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25), CCPR/C/21/Rev.1/Add.7, 27 August, 1996, para. 2.

[107] Report of the Office of the United Nations High Commissioner for Human Rights, "Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them", A/HRC/30/26, 23 July, 2015.

[108] *Ibídem*, para. 14.

"intellectual or psychosocial impairment and the imposition of linguistic requirements for candidates for public office or the automatic disenfranchisement of detainees, convicted felons or people under guardianship have been found by human rights mechanisms to constitute unreasonable and discriminatory restrictions on the exercise of political and public participation rights."[109] It further indicates that General Comment No. 25 on Article 25 of the Covenant, as well as the case law of the CCPR, "provide guidance on the measures that States should take to implement the right to participate in political and public affairs."[110] In this regard, it is true that the Committee has taken a position on a number of issues concerning the rights recognized in Article 25 of the Covenant on Civil and Political Rights, as highlighted by two examples from recent practice. In *Sudalenko v. Belarus*,[111] the Committee had to examine whether the rights protected under Article 25 of the Covenant had been violated, in particular the right to be elected to public office, due to Belarus' refusal to allow the author of the communication to hold a rally before his future voters. The Committee considered that "the possibility of meeting with potential voters as integral to the rights guaranteed under article 25 of the Covenant, which includes the right to be elected to public office. Although the State party may establish rules and regulations governing political campaigns, those rules and regulations must not disproportionally restrict the rights guaranteed under the Covenant."[112] As a result, the Committee held that his rights, under Article 25, Paragraph b), read in conjunction with Article 21 of the Covenant, had been violated. More recently, in *Sacrano v. Venezuela*,[113] the Committee considered that the termination of his duties as mayor and his de facto disqualification from exercising his right to vote and be elected also constituted a violation of Article 25(b) of the Covenant.

However, despite the existing case law on the protection of this right, with regard to the adoption of precautionary measures for its protection, there is no practice as such in the procedure of this body. In *Diergaardt*,[114] interim measures were requested to the Committee, as the authors of the communication considered that the termination of self-government in their community and the new territorial division had divided the Baster community, which would have a negative impact on the rights of a minority, by virtue of Article 25(a) and (c) of the Covenant. However, the Committee did not find a violation of Article 25, nor did it determine the necessity of adopting such measures in advance. In addition, it is necessary to

[109] *Ibídem*, para. 15.
[110] *Ibídem*, para 6.
[111] CCPR, *Sudalenko v. Belarus*, Com. n. 1992/2010, 27 March, 2015.
[112] *Ibídem*, para. 8.6.
[113] CCPR, *Scarano v. Venezuela*, Com. n. 2481/2014, 17 March, 2017. See also, CCPR, *Delgado Burgoa v. Bolivia*, Com. n. 2628/2015, 28 March 2018; CCPR Maldonado Iporre v. Bolivia, Com. n. 2629/2015, 28 March 2018.
[114] CCPR, *Diergaardt et al. v. Namibia*, Com. n. 760/1997, 25 July, 2008.

emphasize that the measures requested were not strictly to protect this right but were aimed at preventing expropriation or the purchase and sale of community land. In a subsequent case, *Dissanayake*, the individual concerned considered that his expulsion from Parliament, his disqualification for nine years from participating in the conduct of public affairs and, in particular, from carrying out relevant duties in the main opposition party in a presidential election year, as well as the suspension for a period of nine years of his right to vote and to be elected, amounted to a clear violation of his rights under Article 25 of the Covenant. The State Party in question considered that the disqualification of a convicted person from voting or standing as a candidate could not be interpreted as an undue restriction for the purposes of Article 25 of the Covenant. However, the Committee held that "the right to vote and to be elected may not be suspended or excluded except on grounds, established by law, which are objective and reasonable."

Furthermore, referring to Comment No. 25, it considered that "if a conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence." In this specific case, although it found that such restrictions were indeed provided for in the Sri Lankan legislation, it did not deem the restrictions to be reasonable. As a result, "the Committee concludes that the prohibition on the author's right to be elected or to vote for a period of seven years after conviction and completion of sentence, are unreasonable and thus amount to a violation of article 25(b) of the Covenant."[115] Again, in this case, precautionary measures were requested, but these were requested because the author of the communication, during the proceedings in his domestic courts, had been sentenced to two years of hard labor for contempt, and he considered that he could suffer irreparable damage if he served his sentence. However, the Special Rapporteur finally considered that working in a print shop did not appear to cause such damage.

It is in this context that, in March 2018, the action of this Committee took place, urging Spain to adopt all the necessary measures to guarantee that Jordi Sánchez —former president of the Catalan National Assembly and JxCat deputy, who was nominated as a candidate for President of the Generalitat— could exercise his political rights in an attempt to protect the right granted under Article 25 of the Covenant.[116] In particular, the CCPR noted that "Under rule 92 of the Committee's rules of procedure, the State party has also been requested to take all necessary measures to ensure that Mr. Jordi Sánchez I Picanyol can exercise his political rights in compliance with article 25 of the Covenant."[117] At first glance, this position of the

[115] CCPR, *Dissanayake*, Com. n. 1373/2005, 4 August, 2008, para. 8.5.

[116] CCPR, Procedure of individual communication under the Optional Protocol, G/SO 215/51 ESP (140), 23 March, 2018.

[117] *Ibídem*.

Committee appears to be novel. However, it should be borne in mind that, as highlighted by the Committee, "this request does not imply that any decision has been reached on the substance of the matter under consideration."[118] This communication was therefore included in the register of individual claims, which constitutes a step prior to the possible admissibility of the complaint, where Spain has six months to put forward the arguments on the admissibility and merits of the case, which will be assessed by the CCPR at a later stage.[119]

More recently, on the 22th of May, the CCPR rejected the request of the representatives of former President Lula da Silva to adopt provisional measures to prevent his entry in prison because "based on the information that Lula presented to the committee, it has not been established that there is a risk of irreparable damage"[120]. However, the representatives of the former president, considering that there were new elements that demonstrated the possibility of suffering irreparable damage, submitted another request to the Committee. This time, the CCPR in its communication of August 17th concluded that, "the facts indicate the existence of a possible irreparable harm to the author's rights under article 25 of the Covenant"[121]. Thus, by virtue of Article 92 of its Rules of Procedure, it requested the State Party, "to take all necessary measures to ensure that the author enjoy and exercise his political rights while in prison, as candidate to the 2018 presidential elections, including appropriate access to the media and members of his political party; as well as not to prevent the author from standing for election at the 2018 presidential elections, until the pending applications for review of his conviction have been completed in fair judicial proceedings and the conviction has become final".[122]

(E) THE OBLIGATORY CHARACTER OF COMPLYING WITH THE INTERIM MEASURES ADOPTED

With regard to the legally obligatory character of precautionary measures with regard to the

[118] *Ibídem.*

[119] Three days after the aforementioned Communication, the CCPR had also accepted the complaint filed by former President Carles Puigdemont against an alleged violation of Article 25 of the International Covenant on Civil and Political Rights in Spain. However, in this case, precautionary measures are not indicated; the former President is just requested to point out "the kind of remedies you would like to obtain from the State party in case the Committee concludes that a violation of the Covenant has taken place in the case you have submitted, unless you have already indicated these remedies in your initial submission", (CCPR, Procedure of individual communications under the Optional Protocol, G/SO 215/51 ESP (141), 26 March, 2018). In any event, it should not be forgotten that —as in the case of Jordi Sánchez— the report of the Committee only states that the complaint was given permission to proceed and grants the Spanish authorities a period of six months to provide all the information on the matter. As a result, this permission does not prejudge the actions of the executive or the judiciary, nor does it determine the adoption of any specific measure.

[120] Statement of Sarah Cleveland, CCPR member, press conference in Geneva, 22 May, 2018.

[121] CCPR, ref: G/SO215/51 BRA (1), 17 August, 2018.

[122] *Ibídem.*

international protection of human rights, the issue differs significantly from one system of protection to another. The basis for this dissimilarity is determined by the different character of the provisions relating to these measures. As has already been pointed out, in the European system, provisions are of a regulatory character. In principle, this has meant that, during the first few years, the case law of the ECtHR refused to recognize the obligatory character of these measures, so that non-compliance with them did not imply any legal obligation towards the state to which they were addressed. However, from the *Mamatkulov and Abdurasulovic v. Turkey case*, in a move confirmed by the Grand Chamber in *Mamatkulov and Askarov v. Turkey*, the ECtHR radically changed its position and recognized the obligatory character of the States concerned to comply with the interim measures adopted by the ECtHR. With regard to the inter-American system, the interim measures of the IACHR have a conventional basis, so that from the outset, any failure by States to comply with them is a violation of the principle of *pacta sunt servanda*. Specifically, regarding the character of these measures indicated by the Inter-American Commission, we will see how the debate has also been settled by the case law of the IACHR. Finally, with respect to the CCPR, this aspect is determined by a regulatory standard, although there has been an important jurisprudential work that has been done on this issue and that will be analysed under this heading.

In the European system, it was in the *Cruz Varas case* that this issue was examined, first by the Commission and then by the ECtHR. The Commission, in its report on the merits of the case, considered that Sweden had failed to fulfill its obligations under Article 25(1), now Article 34 ECHR, by failing to comply with the precautionary measures adopted by the Commission to prevent the deportation of Mr Cruz Varas, on the understanding that the Commission did not need to assess whether the indication of precautionary measures was obligatory in general terms for the States addressed. The Commission's examination was limited "on the specific question of whether, in the circumstances of the case at hand, the failure of Sweden to comply with the indication constituted to breach of Art. 25 (l) of the Convention."[123] For the Commission, "Although the Convention itself is silent as to provisional measures and their nature, it does contain a general obligation of Contracting States, in Art. 25(l), not to interfere with the effective exercise of the right of petition under the Convention."[124] However, for the Court, the Commission's reasoning was not correct, considering that there was no provision in the ECHR empowering the Commission to order precautionary measures. For the Court, allowing an interpretation that imposes obligations on States meant misconstruing the

[123] See the report of the Commission in *Publications of the European Court of Human Rights*, series A, vol. 201, at 42 and ss.

[124] P. Vernet, 'Los Alcances de la Nueva Jurisprudencia de la Corte Europea de Derechos Humanos Respecto de las Medidas Provisionales', 21 *Anuario Español de Derecho Internacional* (2005) 535-560, at 545.

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regulatory provision,[125] thus creating new rights and obligations for the States Parties, which, besides, at the time of the drafting of the ECHR, they ultimately refused to include. The Court added that other sources of international law could not be used to consider this obligation either, inasmuch as it could not be inferred that a custom had formed on its obligatory character, since there was no *opinio iuris* on the matter, nor could it be determined, on the basis of the existence of general principles of international law, that the interim measures indicated by international courts entailed legal obligations for states.[126] However, it is important to remember that the ECtHR ruled by 10 votes against the dissenting vote of 9 judges, who pointed out that, while unlike other international instruments, there is no explicit clause on interim measures:

> "this does 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. In this context too, present-day conditions are of importance. Today the right of individual petition and the compulsory jurisdiction of the Court have been accepted by nearly all the member States of the Council of Europe. It is of the essence that the Convention organs should be able to secure the effectiveness of the protection they are called on to ensure."[127]

Ten years later, in the *Conka case*,[128] the ECtHR reaffirmed its position. However, a few years later, the jurisprudential shift of the Court was reflected in *Mamatkulov and Abdurasulovic v. Turkey*, where the ECtHR, deviating from its previous jurisprudence, considered that, if a State did not comply with the interim measures ordered, it was failing to comply with its obligations under the Convention, thereby undermining the effectiveness of the right of individual application, recognized in Article 34 of the Convention, because it thus prevented the Court from ensuring effective protection and from carrying out an effective examination of the application laid down in the same provision. In addition, the scope of this provision included the obligation to "refrain from any act or omission that will undermine the authority and effectiveness of the final judgment."[129]

Its new line of argument has led some authors to state that "The change of direction is a masterstroke as the silence of the Convention regarding the binding force of interim measures no longer constitutes in 2005 an insurmountable barrier."[130] The Court based its argument on

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[125] *Case of Cruz Varas and Others v. Sweden*, (App. n.15576/89), 20 March, 1991, para. 99.

[126] *Case of Cruz Varas and Others v. Sweden*, para. 101 and 102.

[127] *Case of Cruz Varas and Others v. Sweden*, Joint Dissenting Opinion of Judges, parr. 5. See, E. García de Enterría, 'Sobre la legitimidad de las medidas cautelares utilizadas por la Comisión y el Tribunal Europeo de Derechos Humanos', 25 *Poder Judicial* (1992) 9-31.

[128] *Case of Conka v. Belgium*, (App. n. 51564/99), 8 February, 2002.

[129] *Mamatkulov and Abdurasulovic v. Turkey*, (App n. 46827/99, 46951/99), 6 February, 2006, para. 110.

[130] L. Burgorgue-Larsen, 'Interims measures in the European system of Human Rights', 2 (1-2) *Inter-American and European Human Rights Journal* (2009) 99-118, at 103.

the general principles of law, on the case law of several courts concerning the obligatory character of precautionary measures, and on the character of these measures in relation to the committees established pursuant to the Covenants on Human Rights. With regard to the general principles, the Court justified the obligatory character of these measures on the basis of the application of the principle of "inherent powers", considered by many authors to be "a general principle of international law and inherent part of the judicial function" [131] and particularly necessary when these interim measures are not included in their constituent instruments. In addition, the Court also considered that failing to comply with these measures was a breach of the obligations pursuant to the European Convention, on the grounds that, when a state "ratifies a treaty and accepts the competence or jurisdiction of the tribunal charged with the enforcement of the rights protected in the treaty, the State must comply in good faith not only with the substantive provisions of the treaty but also with its procedural and regulatory provisions."[132] From this perspective, the ECtHR's legal argument for justifying these measures is based on what is already recognized in *Loizidou v. Turkey*: "the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms."[133] Thus, given the specificity and importance of the rights recognized in this Treaty, the adoption of precautionary measures goes beyond granting effectiveness to individual claims, since this is about protecting the very essence of the Convention. In addition, the ECtHR understood, as the judges had argued in the dissenting opinion in the *Cruz Varas case*, that the Convention should be interpreted and applied in a way that would make the protection of recognized rights effective, which implies a dynamic and evolving position with respect to its interpretation. In other words,

> "on the one hand it takes into account the international judicial environment and the resulting general principles of international law (in favour of what some call the unity of the judicial function); hence, it states that «whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending». On the other hand, it relies on the extraordinary specificity of the Convention right to individual application (emphasising here the single nature of the European judicial system) which must not be obstructed in any way." [134]

[131] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Grotius Publications, Oxford, 1953) at 269.

[132] *Mamatkulov and Abdurasulovic v. Turkey*, para. 109.

[133] *Mamatkulov and Abdurasulovic v. Turkey*, para. 100. See: *Loizidou v. Turkey*, (preliminary objections), 23 March, 1995, Series A nº 310, para. 70).

[134] L. Burgorgue-Larsen, *supra* n. 127, at 105. See also, O. De Schutter, 'The Binding Character of the Provisional Measures adopted by the European Court of Human Rights', 7 *International Law FORUM du Droit International* (2005), 16-23, at 21.

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In this regard, the ECtHR case law has also clarified the scope of these measures by considering, in *Olaechea Cahuas v. Spain*, that non-compliance with Article 34, when the respondent state does not adopt the interim measures indicated, does not depend on whether or not the risk that led to their adoption actually materializes.[135] The Court also did not admit in *Ben Khemais v. Italy*[136] the non-implementation of the measures adopted in cases of expulsion by the respondent States Parties, because these states argued that diplomatic guarantees and assurances had been obtained from the state to which the individual was to be expelled.[137] In general terms, the ECtHR has never accepted the "objective impediments"[138] alleged by states, such as the absence of a legal mechanism in their legal systems[139] to justify non-compliance by States Parties.

In the case of the inter-American system, from the very beginning, "the drafters of the American Convention of 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."[140] Thus, the obligation of states to comply with precautionary measures and provisions derives in general terms from Article 1(1) of the American Convention on Human Rights itself, in which states commit themselves to respect the rights and freedoms recognized therein, and to guarantee their free and full exercise to all persons subject to their jurisdiction.[141] Furthermore, with respect to the interim measures adopted by the IACHR, given their conventional origin, their obligatory character is not disputed. This provision is further reinforced by what is laid down in Article 68(1), where the States Parties to the Convention undertake to comply with the decisions of the Court. This implies that the submission to the contentious jurisdiction of the Court extends to complying with the interim measures adopted, as the IACHR pointed out in the *Case of Velásquez Rodríguez v. Honduras*, when it stated that the Court's jurisdiction

[135] *Olaechea Cahuas v. Spain*, (App. n. 24668/03), 10th August 2006, para. 81. See: C. Harby, 'The Changing Nature of Interim Measures before the European Court of Human Rights', 1 *European Human Rights Law Review* (2010), 73-84, at 74-75; Y. Haeck, C. Burbano Herrera and L. Zwaak, 'Non-Compliance With a Provisional Measure Automatically Leads to a Violation of the Right of Individual Application ... or Doesn't It? Strasbourg Court Takes Away Any Remaining Doubts and Broadens Its Pan-European Protection', 4 *European Constitutional Law Review* (2008), 41-63.

[136] *Ben Khemais v. Italy*, (App. n. 246/07), 24 February, 2009, para. 80-83.

[137] On cases of non-compliance, see: Y. Haeck, C. Burbano Herrera and L. Zwaak, 'Strasbourg's Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?', 11 *European* Yearbook on *Human Rights* (2011), 375-403.

[138] See: *Grori v. Albania*, (App. n. 2536/04), 7 July, 2009, para. 191, 194 and 195.

[139] *Shtukaturov v. Russia*, (App. n. 44009/05), 27 March, 2008, para. 148.

[140] R. J. Macdonald, *supra* n. 7, at. 722.

[141] See, M. Del Rosario, 'Las Medidas Cautelares y Provisionales de la Comisión y la Corte Interamericana de Derechos Humanos, Funciones y Alcances', 22 *Praxis de la Justicia Fiscal y Administrativa* (2017), 37-62.

regarding interim measures had been established in the Pact of San José, but also by "*el carácter de órgano judicial que tiene la Corte y los poderes que de ese carácter derivan.*"[142] Finally, with respect to the obligatory character of the precautionary measures contemplated in the Rules of Procedure of the Commission, the IACHR, in its decision on interim measures in the *Matter of the Mendoza Prisons*, considered it appropriate to point out, "The ultimate aim of the American Convention is the effective protection of human rights, and, pursuant to the obligations contracted under it, the States should ensure the effectiveness of their mechanisms (endow them with effet utile), which implies implementing and carrying out the resolutions issued by its supervisory organs, whether the Commission or the Court."[143] Nevertheless, some authors have expressed the view that the Inter-American System should develop legal arguments regarding the possible non-compliance with the interim measures by the States Parties, since, despite being established in legally binding provisions, "The absence of true legal effect given to provisional measures by the Inter-American Court and the lack of decisions that endorse its position on the legal consequences of non-compliance by States with provisional measures go against the very credibility of the institution because its decisions may begin to be perceived by individuals and other social actors as decisions that are simply theoretical."[144]

As to the Human Rights Committee, and as to whether these measures create obligations for States Parties to the Covenant, the answer is that, in principle, since the prerogative to indicate these measures is contained in a regulatory provision, they do not have such an obligatory character. However, this Committee also seems to consider that despite coming from a regulatory provision, the binding nature of these measures is based on the principle *pacta sunt servanda* and on the implicit obligation of the States Parties to comply with the legal obligations assumed when affirms that, "Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol."[145] In this respect, there has been a change in the position of the CCPR, with a new —much more explicit— approach to the obligatory adoption of the precautionary measures adopted by this Committee until the famous *Piandiong* advisory decision, perhaps because, as has been said, the Committee "had

[142] *Case of Velásquez Rodríguez v. Honduras*, Order of the Inter-American Court of Human Rights, 19 January, 1988, para. 1.

[143] *Matter of the Mendoza Prisons regarding Argentina. Provisional Measures*. Order of the Inter-American Court of Human Rights, 22 November, 2004, para.16.

[144] C. Burbano Herrera, Y. Haeck, 'Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems', 28 (3) *Netherlands Quarterly of Human Rights* 2010, 332-360, at 360.

[145] General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 25 June, 2009, CCPR/C/GC/33.

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clearly lost patience with State's indifference towards interim measures",[146] because, in previous cases, such as *Mansaraj et al.*[147] and *Glenn Ashby*,[148] although the Committee had requested States Parties to suspend the executions of the individuals, states had ignored the interim measures indicated. However, in *Dante Piandiong et al. v. Philippines*, the CCPR provides a more explicit and categorical basis for the consequences of non-compliance with interim measures by States Parties, due to the very nature of the body, as it considers that

> "By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its views."[149]

In its argumentation, the Human Rights Committee went on to state that "a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile"[150] and it found that: "Interim measures (...) are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol."[151] In short, it follows from the foregoing that the Committee's competence to hear complaints and, where appropriate, to adopt interim measures derives from the principle of *pacta sunt servanda*, which entails a legal obligation for the states which have become bound by the Optional Protocol. For some authors, this has meant that, "even though the HRC has never used the term "binding" [...] it has implicitly endowed its interim measures with obligatory character in so far as it considers incompliance as a separate or autonomous breach of the Optional Protocol and the Covenant."[152] Another author, in a similar vein, considers that "The argument that interim measures are essential to the competence granted to quasi-judicial enforcement bodies by the States and that

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[146] G. J. Naldi, 'Interim Measures in the UN Human Rights Committee', 53(2) *The International and Comparative Law Quarterly*, (2004), 445-454, at. 449.

[147] CCPR, *Mansaraj et al.*, Com. n. 839/1998,840/1998,841/1998, 16 July, 2001.

[148] CCPR, *Glenn Ashby*, Com. n. 580/1994, 21 March, 2002.

[149] CCPR, *Dante Piandiong, et. al. v. Philippines*, Com. n. 869/1999, 19 October, 2000, para. 5.1.

[150] *Ibídem*, para. 5.2.

[151] *Ibídem*, para. 5.4.

[152] H. Keller, C. Marti, *supra* n. 117, at 345.

such measures are, therefore, implied in the underlying treaty is compelling and necessary to the fabric of international law."[153]

Recently, the CCPR has pronounced again on this issue in the framework of the procedure of individual communications under the Optional Protocol in the case of Lula Da Silva, since his representatives presented a request to the Committee to clarify the legal nature of the provisional measures adopted on August 17th. In this regard, the Committee referred to the aforementioned General Comments No. 33 and No. 31, which consider that this type of measure is essential to avoid irreparable damage and involves obligations that all branches of government and other public or governmental authorities of the States Parties. In his view, this interpretation flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[154]

In any event, despite the Committee's attempts to afford binding force to the adoption of interim measures indicated by it, these measures cannot actually be considered to have such force, which does not prevent any State Party, as guarantor of the democratic state and the rule of law, from considering in good faith the Committee's recommendations to ensure the protection of the human rights recognized in an international treaty to which it is bound. In the case of Spain, it is established jurisprudence in different national jurisdictions that this type of measure does not have executive force. Regarding the Constitutional Court, it has considered that "las «observaciones» que en forma de Dictamen emite el Comité no son resoluciones judiciales, puesto que el Comité no tiene facultades jurisdiccionales (como claramente se deduce de la lectura de los arts. 41 y 42 del Pacto), y sus Dictámenes no pueden constituir la interpretación auténtica del Pacto, dado que, en ningún momento, ni el Pacto ni el Protocolo facultativo le otorgan tal competencia".[155] The Supreme Court, in the same line, has affirmed that "los dictámenes del Comité de Derechos Humanos de las Naciones Unidas no tienen carácter vinculante, pues el Pacto Internacional de Derechos Civiles y Políticos (...), cuando regula, en los artículos 28 y siguientes, al citado Comité, especialmente en los artículos 41 y 42, no diseña un órgano jurisdiccional, con facultades de carácter jurisdiccional, es decir, para determinar el Derecho de forma definitiva en caso de conflicto e imponerse frente a todos.

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[153] J. Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization', 38(1) *Vanderbilt Journal of Transnational Law* (2005) 1-49, at 16.

[154] CCPR, procedure of individual communication under the Optional Protocol, ref: G/SO215/51 BRA (1), 10 September, 2018.

[155] We translate: "the 'observations' issued by the Committee in the form of a View, are not judicial decisions, since the Committee does not have jurisdictional powers (as is clear from the reading of articles 41 and 42 of the Covenant), and its Views cannot constitute the authentic interpretation of the Covenant, since, neither the Covenant nor the Optional Protocol give it such competence", STC 70/2002, 3 April, 2002. In the same sense see: STC 80/2003, 28 April, 2003; STC 296/2005, 21 November, 2005; STC 116/2006, 24 April, 2006.

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Ni tampoco se le atribuye al mismo el monopolio para la interpretación y aplicación de sus normas".[156] However, the absence of legal and enforcement authority "no significa que no deban ser tenidos en cuenta por los Estados para encauzar su acción legislativa de forma que se cumplan las exigencias derivadas de la interpretación que, de las normas del Pacto, hace el Comité, pues lo cierto es que el Pacto forma parte de nuestro Derecho interno según el artículo 96.1 de la CE".[157] From its side, the National Hight Court has also pronounced in the same sense.[158]

However, with regard to the obligatory character of the measures in the case of Jordi Sánchez,

[156] We translate: "The views adopted by the Human Rights Committee are not binding force, since the International Covenant on Civil and Political Rights (...), when it regulates, in articles 28 et seq., does not design a jurisdictional body, determine the law definitively in case of conflict and impose on everyone. Nor is the monopoly for the interpretation and application of its norms attributed to it", STS 507/2015, 6 February, 2015. In the same sense see: STS 3862/2009, 9 March, 2011; STS 4310/2017, 6 November, 2017; STS 3094/2018, 11 July, 2018.

[157] We translate: "it does not mean that they should not be taken into account by the States in order to direct their legislative action so that the requirements derived from the Committee's interpretation of the rules of the Pact are met, because the Covenant is part of our domestic law according to Article 96.1 of the EC", *Ibídem*. In the opposite direction, the Supreme Court has recently ruled on the obligatory character of the recommendations originating from the Committee of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), stating that "aunque ni la Convención ni el Protocolo Facultativo regulan el carácter ejecutivo de los Dictámenes del Comité de la CEDAW, no puede dudarse que tendrán carácter vinculante/obligatorio para el Estado parte (...) una alegación o denuncia de vulneración de derechos fundamentales que se apoya en una declaración de un organismo internacional reconocido por España y que ha afirmado que el Estado español ha infringido concretos derechos de la recurrente que tenían amparo en la Convención, acordando medidas de reparación o resarcimiento en favor de la denunciante y medidas de actuación por parte de España... en el seno de un procedimiento expresamente regulado, con garantías y con plena participación de España (...). Las obligaciones internacionales relativas a la ejecución de las decisiones de los órganos internacionales de control cuya competencia ha aceptado España forman parte de nuestro ordenamiento interno, una vez recibidas en los términos del artículo 96 de la Norma Fundamental, y gozan de la jerarquía que tanto este artículo –rango supralegal- como el artículo 95 –rango infraconstitucional– les confieren", We translate: "neither the Convention nor the Optional Protocol regulates the executive nature of the Views of the CEDAW Committee, it cannot be doubted that they will be binding / obligatory character for the State party (...) an allegation of infringement of fundamental rights based on a declaration by an international body recognized by Spain and which has affirmed that the Spanish State has infringed concrete rights of the appellant under the Convention, agreeing reparation measures in favor of the whistleblower and measures of action by Spain ... within a procedure expressly regulated, with guarantees and with full participation of Spain (...). The international obligations related to the execution of the decisions of the international control bodies whose competence has been accepted by Spain are part of our domestic legal system, once received in the terms of Article 96 of the Spanish Constitution, and enjoy the hierarchy that the article 96 and 95 confer them", STS 1263/2018, 17 July, 2018. According to K. Casla, "This is a revolutionary decision not only for Spain, but for comparative constitutional law and for international human rights law", Supreme Court of Spain: UN Treaty Body individual decisions are legally binding, *EJIL Analysis*, 1 August, 2018. However, it may be advisable to take into account the exceptional circumstances of the case, consisting of the fact that, in a separation case, following the judicial decision to lift the regime of supervised visits, the ex-partner of the plaintiff murdered the common daughter. These dramatic circumstances could generate a special sensitivity that would explain the proclamation of the patrimonial responsibility of the Spanish State in the specific case.

[158] SAN 989/2016, 2 February, 2018.

which are very different from those of the aforementioned cases, it should be borne in mind that the CCPR, when accepting the complaint, is only aware of the allegations made by the interested party, without yet having been checked against Spain's allegations in the specific case. In addition, the restriction of the right of political participation, as a limited right, could also be considered to be justified, given that both his situation of pretrial detention and the refusal of permission to attend the plenary session for his investiture are decisions that have been adopted by national courts in due process of law and in compliance with the applicable Spanish regulations. Finally, in view of the non-binding nature of these measures, it should be added that they cannot interfere with decisions taken by the judiciary either. In any case, one might ask, to what extent could the Spanish Government adopt any measure without interfering with the work of the courts, taking into account also the generic nature with which they have been formulated by the CCPR for this specific case. Without going into this question, it is worth mentioning that, in order to have these measures complied with, Jordi Sánchez lodged an amparo appeal before the Constitutional Court, requesting that, pursuant to the decision of the CCPR, the possibility of defending his candidacy for the Presidency of the Generalitat be authorized through alternative means, such as videoconferencing from prison or before the court. In its Writ, the Constitutional Court rules first on the terms of the communication, stating that "it is enough to look at the generic content of the resolution to reject the existence of the relation claimed by the appellant between that communication and the eventual issuance of the requested precautionary measure."[159] Subsequently, the Constitutional Court rules on the nature of Article 25 of the Covenant and its limitations, considering that it is true that this article cannot be unduly restricted, but adds that the situation of provisional detention of Jordi Sánchez "inherently" imposes limitations on the political rights deriving from the precautionary situation of loss of liberty. Therefore, it finally concludes that "the object of this *amparo* appeal is to assess the conformity to the law of the judicially approved measure at issue, as well as its legitimate purpose and its proportionality. Therefore, the resolution of such issues may not be addressed through precautionary measures and must wait to the final substantive judgement of the Court."[160] In this regard, perhaps contrary to what the Constitutional Court argues, instead of entering to assess the generic nature of the content of the communication to reject the granting of the requested precautionary measure, it would have been sufficient to have referred to its jurisprudence based on the non-executive or binding legal nature of the decisions of this Committee. In any case, it will be necessary to wait for the Committee to decide on the admissibility and —if appropriate— on the merits of the case, bearing in mind, moreover, that Jordi Sánchez is no longer a candidate for the Presidency of the Generalitat.

[159] STC 2228/2018, 22 May, 2018, para. 5.

[160] *Ibídem*.

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Moreover, if we analyse the practice regarding non-compliance, the Committee, in its documents analysing its practice, has confirmed that there are a significant number of cases of non-compliance with interim measures by some States Parties.[161] A recent example of non-compliance is *Aarrass v. Spain*,[162] where the Committee requested the State Party not to extradite the applicant to Morocco while the case was pending. Spain ignored this request and the extradition took place a few days later. Russia also failed to comply with the measures indicated in the case of *N.S. v. Russian Federation*[163], which were aimed at preventing the extradition of the applicant to Kyrgyzstan. In the cases *Yuzepchuk v. Belarus* and *Grishkovtsov v. Belarus*,[164] the Committee indicated interim measures to Belarus to prevent it from enforcing the death sentence of the applicants while the Committee was considering the matter. In both cases, however, Belarus ignored the Committee's indications and a few days later both individuals were executed.

(F) CONCLUSIONS

As the present paper has attempted to highlight, subsidiary mechanisms for the protection of human rights at the international level are a key element in strengthening the protection guaranteed by the internal legal systems of states. This extends to the adoption of precautionary measures at the international level, as they are a further guarantee of the full protection of the human rights recognized in international Treaties on the subject. In this sense, the evolution and practice of the different systems have given rise to different solutions regarding the material scope in the protection of these rights, such as the possibility of adopting precautionary measures for the protection of rights of a political nature.

From the practice of these courts and quasi-judicial bodies in the protection of human rights, it appears that the adoption of interim measures has mainly revolved around the protection of fundamental rights, such as the right to life or personal integrity, against which no restriction or limitation may be placed. Perhaps by their very nature, it has been easier for international authorities to guarantee the respect of these rights by States Parties, at a time when not all internal legal systems were protecting this type of rights with the guarantees now recognized

[161] See: Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights Jurisprudence - CCPR/C/113/4, at 17-19; Consideration by the Human Rights Committee at its 114th, 115th and 116th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights - CCPR/C/116/3, at 4-5.

[162] CCPR, *Aarrass v. Spain*, Com. n. 2008/2010, 21 July, 2014.

[163] CCPR, *N.S. v. Russian Federation*, Com. n. 2192/2012, 27 March, 2015.

[164] CCPR, *Yuzepchuk v. Belarus*, Com. n. 1906/2009, 24 October, 2014; *Grishkovtsov v. Belarus*, Com. n. 2013/2010, 1 April, 2015.

in their basic rules. However, it is worth considering whether, in line with the evolution of the practice of these international courts and quasi-judicial bodies, in addition to adopting these measures to protect the aforementioned rights, there has been a material extension regarding the protection of other rights not included in this category and therefore not protected in absolute terms. The question is therefore whether practice shows that the possibility of adopting precautionary measures for the protection of certain political rights has been accepted, or whether, on the contrary, this is merely an exception in the practice of certain systems.

The present paper argues that, in the case of the ECtHR, this court has not yet recognized a material extension for the protection of rights of a political nature, focusing on the adoption of precautionary measures for the protection of the rights to life or physical integrity, thus preventing violations of these rights in some states which do not yet adequately guarantee them. However, it should be added that, exceptionally, the ECtHR has adopted such measures to protect other types of rights, such as those relating to the right to a fair trial (Article 6); the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10 of the ECHR) which could indicate an incipient evolutionary element in its practice. In the case of the Inter-American System, there are few cases in which these measures have been indicated, but they are not of an exceptional nature and their bodies accept this possibility of protection. Finally, in the CCPR, the cases considered highlight an incipient practice regarding the indication of precautionary measures regarding political rights, in which a change can also be observed regarding their content. Thus, the CCPR apparently, has gone from formulating this type of measures with generic character to enunciate specific measures with respect to the particular case. Nevertheless, this possibility of provisional protection is still at an early stage with regard to this type of rights.

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