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The Binding Character of the Provisional Measures adopted by the European Court of Human Rights

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On 4 February 2005, the Grand Chamber of the European Court of Human Rights considered for the first time in a final judgment that a refusal by a State party to the European Convention on Human Rights¹ to comply with an interim measure indicated by a Chamber of the Court or its President on the basis of Article 39 of the Rules of the Court constitutes a violation of Article 34 of the Convention, which imposes an obligation on the Contracting Parties “not to hinder in any way the effective exercise” of the right to individual application.² This is a remarkable development. It represents a clear break with the previous case-law of the European Court of Human Rights, which had previously considered that not only the provisional measures indicated by the European Commission of Human Rights under Article 36 of its Rules of Procedure,³ but also the provisional measures

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, entered into force on 3 September 1953 (CETS No. 5).

² Eur. Ct. HR (GC), judgment of 5 February 2005 in the case of *Mamatkulov and Askarov v. Turkey*, Appl. No. 46827/99 and 46951/99, nyr. The judgment was adopted after the *Mamatkulov and Abdurasulovic v. Turkey* judgment delivered on 6 February 2003 by a Chamber constituted within the 1st section of the Court had been accepted for referral to the Grand Chamber, upon the request of the defending State (see Art. 43 ECHR).

³ Eur. Ct. HR, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, pp. 36-37, §§ 102-103. This judgment led to a voluminous commentary: R. Bernhardt, “Interim Measures of Protection under the European Convention on Human Rights”, in R. Bernhardt (ed.), *Interim Measures indicated by International Courts*, Berlin, Springer Verlag, 1994, p. 102; G. Cohen-Jonathan, “De l’effet juridique des ‘mesures provisoires’ dans certaines circonstances et de l’efficacité du droit de recours individuel: à propos de l’arrêt Cruz Varas de la Cour européenne des droits de l’homme”, *Revue universelle des droits de l’homme*, 1991, p. 205; E. Garcia de Enterria, “De la légitimité des mesures provisoires prises par la Commission et la Cour européennes des droits de l’homme. L’affaire Cruz Varas”, *Rev. trim. dr. h.*, 1992, p. 251; R. St. J. McDonald, “Interim measures in international law, with special reference to the European system for the protection of human rights”, 52(3-4) *ZaöRV* 703 (1992); K. Oellers-Frahm, “Zur verbindlichkeit einstweiliger Anordnungen der Europäischen Kommission für Menschenrechte”, 18 *EuGRZ* 197 (1991); D. Spielmann,

itself may choose to indicate under the Rules of Court⁴ were not binding upon the States Parties to whom such measures are addressed. Indeed, such a power has not been conferred upon the European Court of Human Rights by the drafters of the Convention. It was not provided in the original version of the Convention, as adopted in 1950 when both the jurisdiction of the Court and the right to individual application were still optional, and despite the fact that a proposal had been made in that respect when the Convention was amended in 1994 in order to create a permanent and single Court – whose jurisdiction since 1 November 1998 is compulsory for all States parties to the Convention⁵ – nor was such a power then granted to the Court.

The facts of the *Mamatkulov* case may be briefly recalled. The applicants were two Uzbek nationals, Rustam Mamatkulov and Abdurasulovic Askarov, both members of an opposition party in Uzbekistan, and whom the Uzbek authorities suspected of murder, causing injuries by the explosion of a bomb in Uzbekistan, and an attempted terrorist attack on the President of the Republic. After their arrival in Turkey from Kazakhstan, Uzbekistan requested their extradition in accordance with a bilateral extradition treaty. However, after they had lodged applications with the European Court of Human Rights when faced with the threat of being extradited, the President of the Chamber on 18 March 1999 indicated to the Turkish Government, under Rule 39 of the Rules of Court, that “it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had had an opportunity to examine the application further at its forthcoming session on 23 March.” On that date, the Chamber extended the interim measure until further notice. In the meantime however, on 19 March 1999, the Turkish Cabinet

“Les mesures provisoires et les organes de protection prévus par la Convention européenne des droits de l’homme”, in *Présence du droit public et des droits de l’homme. Mélanges offerts à Jacques Velu*, Bruxelles, Bruylant, 1992, t. II, p. 1204; C.A. Norgaard, “Interim Measures under the European System for Protection of Human Rights”, in *Festschrift Ole Due*, Stockholm, 1993, p. 283.

⁴ Eur. Ct. HR (3d sect.), *Čonka and Others v. Belgium* (dec.), No. 51564/99, 13 March 2001.

⁵ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, opened for signature in Strasbourg on 11 May 1994, and entered into force on 1 November 1998 (CETS No. 155). The Swiss delegation had submitted a proposal with a view to including an Article in the Convention on provisional measures to the effect that “the Court may ... prescribe any necessary interim measures” (doc. DH-PR(93)20, 22 November 1993).

had issued a decree for the applicants' extradition. They were handed over to the Uzbek authorities on 27 March 1999. Three months later, the High Court of the Republic of Uzbekistan found the applicants guilty of the offences as charged and sentenced them to 20 and 11 years' imprisonment respectively. In a Chamber judgment of 6 February 2003, while concluding that the other provisions invoked by the applicants had not been violated, the Court held, by six votes to one, that there had been a breach of Article 34 of the Convention because Turkey had not complied with the interim measures indicated by the Court. It is this which the Grand Chamber of the Court confirms in its judgment of 4 February 2005, by 14 votes to three. The Court considers that "by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention."⁶

The interim measures adopted by the European Court of Human Rights are based on Rule 39(1) of the Rules of the Court, which provides that "The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it." This Rule reproduces the wording of Rule 36 of the Rules of the former Court, which came into force on 1 January 1983, inspired in turn by Article 36 of the Internal Rules of the European Commission of Human Rights which, in the *Cruz Varas* case of 1991, the Court had considered did not have the power to adopt interim measures binding upon the parties to whom they are addressed. However, when it adopted its Rules with the entry into force of Protocol No. 11 on 1 November 1998, the new Court added two paragraphs suggesting that the provisional measures it would "indicate" as desirable "in the interests of the parties or of the proper conduct of the proceedings before it" might be recognized an obligatory character which the measures indicated by the European Commission of Human Rights did not have: Rule 39(2) provided that notice of the provisional measures shall be given to the Committee of Ministers, implying that at least a certain political pressure should weigh on the States to which such measures are indicated; and Rule 39(3) added that the Chamber "may request information from the parties on any matter connected with the implementation

⁶ *Mamatkulov and Askaraov* judgment, § 128.

of any interim measure it has indicated,” which did create the impression that such interim measures, when indicated as desirable, could not simply be ignored by the Parties.

Despite the opportunity created by these modifications, the Court simply confirmed its previous case-law in its admissibility decision adopted on 13 March 2001 in the case of *Conka*, after the Belgian authorities decided in October 1999 to ignore a request by the Court to suspend the expulsion of a family of Slovak nationals of Roma ethnic origin who had been denied asylum in Belgium. While expressing its regret at the failure of the Belgian authorities to “cooperate in good faith” with the European Court of Human Rights, the Court still considered that compliance with the provisional measures it indicated under Rule 39 was a matter of judicial comity rather than a legal obligation deriving from the European Convention on Human Rights.⁷ Even taking into account the almost uniform practice of the States parties to the Convention to comply with the interim measures indicated by the Court – like, previously, with those indicated by the Commission,⁸ the hesitation of the Court to go further is quite understandable. The Rules of the Court are adopted by the plenary Court under Article 26 of the European Convention on Human Rights. Their status therefore differs markedly from that of Article 41 of the Statute of the International Court of Justice, which the International Court of Justice interpreted in the *LaGrand (Germany v. the United States)* judgment of 27 June 2001 as imposing on the States parties to a dispute before the Court an obligation to comply with the provisional measures indicated under that provision,

⁷ See *supra* note 4.

⁸ In the *Cruz Varas* judgment of 20 March 1991, the Court summarized thus this practice and the interpretation it could be given, falling short from identifying the emergence of a rule of a customary nature in the application of the European Convention on Human Rights: “The practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications. Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, *mutatis mutandis*, [the *Soering v. the United Kingdom* judgment of 7 July 1989], Series A no. 161, pp. 40-41, § 103, and Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset (...). In any event, as reflected in the various recommendations of the Council of Europe bodies [calling upon the States parties to the Convention to agree to recognizing the Court a power to adopt provisional measures of a binding character], the practice of complying with Rule 36 indications cannot have been based on a belief that these indications gave rise to a binding obligation (...). It was rather a matter of good faith co-operation with the Commission in cases where this was considered reasonable and practicable” (*Cruz Varas v. Sweden* judgment, cited above n. 3, at § 100).

despite the vague character of the wording of that provision. Nor may Article 39 of the Rules of the Court adopted by the European Court of Human Rights be considered equivalent to Article 63(2) of the American Convention on Human Rights, which provides explicitly for a power of the Inter-American Court of Human Rights to adopt provisional measures “in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”. Both the Statute of the International Court of Justice and the American Convention on Human Rights are international treaties to whose terms the States parties have agreed. No equivalent clause exists in the European Convention on Human Rights.

Nevertheless, the *Mamatkulov* case-law is not unprecedented in human rights jurisprudence. Under Rule 86 of its rules of procedure, the Human Rights 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.”⁹ Under the International Covenant on Civil and Political Rights, the Human Rights Committee adopts its own rules of procedure.¹⁰ It nevertheless considered in its final views of 19 October 2000 adopted in the case of *Dante Piandiong, Jesus Morillos and Archie Bulan v. The Philippines*, that a refusal of a State to comply with such measures, “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.”¹¹ The Human Rights Committee has repeated this statement since.¹² It still falls short, however, of seeing a violation of the Covenant itself in the failure by a State party to comply with the interim measures adopted by the Committee, and it remains hesitant as to the precise nature of this violation: thus, it did not include in its General comment No. 31 – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted in 2004 at its 80th session¹³ – a paragraph restating this obligation, although such a paragraph

⁹ See now Rules of Procedure of the Human Rights Committee, UN doc. CCPR/C/3/Rev. 6, 24 April 2001, Article 86.

¹⁰ Article 39(2) of the International Covenant on Civil and Political Rights.

¹¹ Human Rights Committee, final views adopted on the Communication No. 869/1999, *Annual Rep.* I, p. 181.

¹² Human Rights Committee, *Weiss v. Austria*, communication No. 1086/02, final views of 8 May 2003.

¹³ Compilation of the general comments or general recommendations adopted by human rights treaty bodies, HRI/GEN/1/Rev.7, 12 May 2004, p. 192.

was included in the draft text.¹⁴ In the framework of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture, when it adopted in accordance with Article 18(2) of the Convention its Rules of Procedure, included a Rule 108 § 9 enabling it to adopt provisional measures in proceedings brought by individuals alleging a violation of the Convention against Torture. It considered that non-compliance with such provisional measures should be considered a violation of the Convention, as “the State party, in ratifying the Convention and voluntarily accepting the Committee’s competence [to examine individual communications] under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.”¹⁵ These developments, to which the European Court of Human Rights refers in its *Mamatkulov and Askarov* judgment of 4 February 2005, undoubtedly emboldened it to follow suit, and to overcome its previous hesitations to ignore the absence of an explicit power to do so under the text of the Convention. The development achieved in the *Mamatkulov and Askarov* case thus illustrates the emergence of a *jus commune* in the international law of human rights, whereby international courts and human rights bodies contribute to its evolution through a form of interjurisdictional dialogue, relying on one another’s case-law rather than feeling constrained by the international instrument which they interpret:¹⁶ it is its status as a participant in this dialogue, rather than the legal reasoning behind its decision, which best explains the attitude of the European Court of Human Rights and why it felt empowered to go beyond the explicit text of the Convention.

¹⁴ The draft text of General Comment No. 31 contained a para. 19 which read: “Failure to implement provisional measures indicated by the Committee in cases under the Optional Protocol [providing for individual communications to be submitted to the HRC] with a view to avoiding irreparable harm pending the Committee’s consideration of a case should be regarded as incompatible with the obligation to respect in good faith the Covenant, in particular its article 2 [defining the general obligations of the States parties to the ICCPR, in particular the obligation to respect and ensure the Covenant rights of the individuals under the jurisdiction of the State] and the right of individual communication under the Optional Protocol.”

¹⁵ Committee against Torture, *Cecilia Rosana Núñez Chipana v. Venezuela*, 10 November 1998.

¹⁶ See C. McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights”, 20 *Oxford J. Legal Studies* 499-532 (2000); A.-M. Slaughter, *Judicial Globalization*, 40 *Virginia J. Int’l L.* 1103 (2000).

Because it contributes to the effectiveness of the rights protected under the European Convention on Human Rights, such a development is to be welcomed. We may nevertheless note the discrepancy between the clear statement of the Court that any refusal by a State to comply with the interim measures indicated under Rule 39 will be treated as a violation of the right lodge an individual application – the “effective exercise” of which, under Article 34 of the Convention, the Contracting States undertake “not to hinder in any way” – on the one hand, and the justifications which may be given for establishing such a presumption, on the other hand. Indeed, there may be situations where, despite the failure by a State to comply with the interim measures indicated by the Court, the right to individual application is not interfered with in any way, in particular where the contacts between the individual applicant and his or her lawyers are not affected by such a refusal to comply.¹⁷ And, although the Court emphasizes that “interim measures ... play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted,”¹⁸ there may be situations where the refusal to comply with the interim measures indicated by the Court will not deprive the individual application lodged under Article 34 of the European Convention on Human Rights of its object and purpose, because the consequences which are feared are not irreparable but may be restored in full. These tensions between the rule which is affirmed and its purported justifications indicate what (we may anticipate) will constitute the future use by the European Court of Human Rights of the powers it has asserted for itself under Article 39 of the Rules of Court. These powers will be used sparingly in the future, as they have in the past: interim measures will be afforded by the Court either where there is a risk that otherwise the right to individual application will be seriously hindered, for instance where the removal of a non-national from the national territory risks interrupting the communications between the applicant and his or her lawyers, or where there appears a need to avoid the creation of an irreversible situation, in particular where a non-national faces the threat of being extradited or returned to a country where he/she runs a real risk of being ill-treated or executed. The affirmation of the obligatory character of the interim measures indicated by the Court, in that

¹⁷ See para. 2 of the joint partly dissenting opinion of Mr Caflisch, Mr Türmen and Mr Kovler, appended to the judgment of the Court in *Mamatkulov and Askarov*.

¹⁸ *Mamatkulov and Askarov* judgment of 4 February 2005, at § 125.

sense, may imply that their use will be frugal, and probably exclusively limited in fact to deportation and extradition proceedings.¹⁹

¹⁹ The situation which presented itself in the case of *Öcalan* should remain highly exceptional: see Eur. Ct. HR (1st sect.), *Abdullah Öcalan v. Turkey*, Appl. No. 46221/99, dec. of 14 December 2000. There, Article 39 of the Rules of the Court was used twice by the Court, first to ensure that the criminal proceedings against Mr Öcalan would comply with the requirements of the right to a fair trial under Article 6(1) ECHR, and secondly to avoid the death penalty being executed against him. Although disputed by Turkey, the adoption of interim measures in this case may be explained by the need to avoid serious and irreparable harm being caused to the applicant. See for further details, O. De Schutter, "La protection juridictionnelle provisoire devant la Cour européenne des droits de l'homme", in H. Ruiz Fabri and J.-M. Sorel, *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales: regards croisés*, Paris, Pedone, 2001, pp. 105-148, at pp. 115-117.