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## INTERIM MEASURES IN THE EUROPEAN CONVENTION SYSTEM OF PROTECTION OF HUMAN RIGHTS

*Protecting the fundamental rights of individuals in cases of urgency*<sup>1</sup>. This is the general issue at stake that is raised by the study of « interim measures » in international human rights law. Such a simple assertion requires one to assess the progress made in this field. Indeed, it originally stems from a procedural mechanism in the national legal order – often referred to as « provisional measures »<sup>2</sup> – that has traditionally been used to ensure the equal rights of the parties to legal proceedings; in one word, its aim is to protect the efficiency of the judicial system<sup>3</sup>. Along the same lines, the implementation of this technique in the international legal order appears to mimic in its functioning the national legal order from where it originates. For a long time, preserving the rights invoked by a party to a dispute has logically<sup>4</sup> been the object of interim measures in public international law, thereby maintaining the integrity of the decision on the merits of the case. In other words, the aim was to prevent both the object and the effectiveness of the decision from being denied so that the final outcome of the case was not prejudiced<sup>5</sup>.

The state of affairs changed substantially with the appearance of international jurisdictions to protect human rights, whose key role consists above all in protecting the rights of individuals. Accordingly, the emergence of international human rights litigation, alongside traditional litigation between States, has served not to modify but instead to add to the *purpose* of interim measures. The protection of the fundamental rights of individuals has been added to the objective of ensuring a fair and equal balance of the parties' rights in legal proceedings and preserving the integrity of decisions of international justice; in short, protecting the judicial function. Remarkably, in the context of protecting the fundamental rights of individuals, the International Court of Justice (*ICJ*), stated of its own motion in the *Lagrand* case that interim measures had mandatory force, even though its rules did not refer to this in circumstances where the life of a man was at stake<sup>6</sup>. For a change, it

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<sup>1</sup> The notion of urgency is fairly ambiguous from a legal perspective as it depends on the judge's appreciation; it appears to be both an attribute of judicial authority and a reference to a standard, see. E. JOUANNET, « Quelques observations sur la signification de la notion d'urgence », H. RUIZ-FABRI, J-M. SOREL (dir.), *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales, regards croisés*, Paris, Pedone, 2001, p.205 ss.

<sup>2</sup> The *Dictionnaire de Droit international public* drafted under the direction of J. SALMON (Bruxelles, Bruylant, 2001) presents very similar definitions of interim measures and provisional measures and systematically cross-refers to both expressions (see. p.698 et 701).

<sup>3</sup> It is thought that the Italian « proceduralist » scholars were the ones that gave « autonomy » to « preservation » action, see A. CANÇADO TRINDADE, « Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme », *Mesures conservatoires et droits fondamentaux*, G. COHEN-JONATHAN, J-F. FLAUSS (dir.), Bruxelles, Bruylant, 2005, p.146.

<sup>4</sup> The reason lies in the stated roles of the « historical » international jurisdictions – the Permanent Court of International Justice and the International Court of Justice – which had no *prima facie* connection with the protection of fundamental rights.

<sup>5</sup> The text of Article 41 of the Statute of the ICJ illustrates this case in point: « 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 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.* » The case-law has often confirmed this « traditional » goal of interim measures whose object was « preservation », see ICJ, 27 June 1986, *Nicaragua v United States*.

<sup>6</sup> ICJ, 21 June 2001, *Lagrand (Germany v. United States)*, 2001, §§48-117.

was the ICJ that paved the way for the European Court of Human Rights (*the Court*) to overturn its previous case-law in the landmark case of *Mamatkulov*, notwithstanding there being partly dissenting opinions that were also well-reasoned.<sup>7</sup>

One may state that in today's international legal order, these two functions coexist regardless of the main role of the international jurisdiction in question (*i.e.* whether it arbitrates on litigation between States or controls State action towards individuals). In this context, it will be interesting to evaluate more precisely the manner in which these two purposes coexist side by side within the European Convention system of guaranteeing rights through the effectiveness of interim measures<sup>8</sup>. We will begin by assessing the basis of effectiveness of interim measures (I) then decipher their practical *manifestations* (II).

## I. The basis of effectiveness

The *Mamatkulov* case is particularly important in the field of the European Convention of Human Rights (the *Convention*) due to its specific "conventional" context. Indeed, we know that, just as in the "universal" system, but unlike the American system, the Convention system of human rights protection does not have a legal base that expressly provides for interim measures to have binding force. Article 39 of the Rules of the Court<sup>9</sup> (the *Rules*) appears somewhat circumspect with regards to Article 63§1 of the American Convention of Human Rights<sup>10</sup>. In the absence of an express provision in the Convention, the assertion of the binding force of interim measures leads back to the more general question of the source or the basis of the power of the judge<sup>11</sup>. It is relevant to analyse in turn both the Court's justification for determining its own competence (A), as well as its justification for declaring that interim measures have binding force (B).

### A. The power of the judge

In order to assess the importance of the Court's assertion of its power to order binding interim measures, it is useful to briefly recall the position of the law before this « change of direction »<sup>12</sup> in

<sup>7</sup> The reversal of the previous case-law took place in two stages: it was declared by a panel of 7 judges, then confirmed by the Grand Chamber: ECHR, 6 February 2003, *Mamatkulov and Abdurasulovic v. Turkey*; ECHR, Grand Chamber, 4 February 2005, *Mamatkulov and Askarov v. Turkey*, see. G. COHEN-JONATHAN, « Sur la force obligatoire des mesures provisoires. L'arrêt de la Grande Chambre européenne du 4 février 2005 », *RGDIP*, 2005, pp. 421 et s.; P. FRUMER, « Un arrêt définitif sur les mesures provisoires: la Cour européenne des droits de l'homme persiste et signe. Commentaire de l'arrêt Mamatkulov et Askarov c. Turquie du 4 février 2005 », *RTDH*, 2005, pp. 799-826; P. TAVERNIER, « Observations – Chronique de jurisprudence de la Cour européenne des droits de l'homme », *JDI*, 2006, pp. 1077-1079; H. TIGROUDJA, « La force obligatoire des mesures provisoires indiquée par la Cour européenne des droits de l'homme. Observations sous l'arrêt du 6 février 2003, *Mamatkulov c. Turquie* », *RGDIP*, 2003, pp. 601-632.

<sup>8</sup> Effectiveness means for these purposes: "having a mandatory nature, binding".

<sup>9</sup> Article 39 of the Rules of the Court: « 1. *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.* 2. *Notice of these measures shall be given to the Committee of Ministers.* 3. *The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.* »

<sup>10</sup> Article 63§2 of the American Convention of Human Rights: « *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.* » This article must be read in conjunction with Article 25 of the Rules of Procedure of the Inter-American Court of Human Rights. (NB/ emphasis added).

<sup>11</sup> C. GREWE, « Réflexions sur la fonction de juger à partir de l'arrêt *Mamatkulov c. Turquie* rendu par la Cour européenne des droits de l'homme le 4 février 2005 », *Common Values in International Law, Essays in Honour of Christian Tomuschat*, Kehl, Strasbourg, Arlington, NP Engel Verlag, 2006, p.536.

<sup>12</sup> We used this expression to make a critical assessment of the modalities of reversal of case-law by the Court, see. L. BURGORGUE-LARSEN, « De l'art de changer de Cap. Libres propos sur les « nouveaux » revirements de jurisprudence de la Cour européenne des droits de l'homme », *Libertés, Justice, Tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, Bruxelles, Bruylant, 2004, pp.329-344.

the Turkish case. Whereas at first, the silence of the Convention was favoured (1), it was nonetheless re-visited (2) a few years later.

## 1. The silence of the Convention as a *favoured* approach

On the silence of the Convention, the European Commission of Human Rights (the *Commission*) (Article 36 of its Rules of Procedure)<sup>13</sup> just like the Court (Article 39 of the Rules) determined they had the power to *propose* to the respondent State, interim measures that provisionally preserved the status quo. The practice of the Commission was to intervene, prior to ruling upon the admissibility of an application, in order to request the respondent State to suspend the execution of a disputed judicial decision that would have irreversible effects<sup>14</sup>. The *Soering*<sup>15</sup> case brought interim measures to the fore in the universe of the Convention, as the case highlighted the dire consequences of the extradition of the applicant to the United States where he could face the death penalty. The United Kingdom cooperated with the request by the Court not to extradite the applicant, despite breaching as a result its obligations under the extradition treaty signed with the United States government... These measures were purely indicative and devoid of any legal effect with regards to both the admissibility of the application as well as the decision on the merits. Given the importance of compliance by States with the interim measures indicated by the Commission and the Court, some applicants did not hesitate to develop the argument that these measures were binding. In the *Cruz Varas* case, the applicants were able to argue in favour of the binding nature of interim measures<sup>16</sup>. They made the point that while the Convention did not contain any specific rule with regards to the interim measures indicated by the Commission, it was necessary to attribute binding force to these measures so as to give full effect to the right to individual application guaranteed by Article 34 (ex Article 25§1) of the Convention. Whereas on the one hand the Commission concluded in this case – by 12 votes to 1 – that there had been a violation of the right to bring an application, on the other hand the Court distanced itself from this position on the grounds of the lack of an express legal basis<sup>17</sup>. The Court upheld its position in the *Conka* case, this time not in

<sup>13</sup> It entered into force on 13 December 1973 and provided: «*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.*»

<sup>14</sup> In §106 of the *Mamatkulov* case of 2005, one discovers certain practical elements in relation to the practice of the Commission : «*The Commission adopted that practice very early on, particularly in extradition and deportation cases, and the States concerned proved very cooperative (see, inter alia: Greece v. the United Kingdom, no. 176/56, Commission's report of 26 September 1958, unpublished; X v. the Federal Republic of Germany, no. 2396/65, Commission's report of 19 December 1969, Yearbook 13; Denmark, Norway, Sweden and the Netherlands v. Greece, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12; Denmark, Norway and Sweden v. Greece, no. 4448/70, Commission's report of 4 October 1976, Decisions and Reports (DR) 6; and E.R. v. the Federal Republic of Germany, no. 5207/71, Commission decision of 13 December 1971, Collection of Decisions 39).*»

<sup>15</sup> European Court of Human Rights, 7 July 1989, *Soering v. United Kingdom*, GACEDH n°15.

<sup>16</sup> European Court of Human Rights, 20 March 1991, *Cruz Varas v. Sweden*, Series A n° 201, see. G. COHEN-JONATHAN, «*De l'effet juridique des mesures provisoires dans certaines circonstances et de l'efficacité du droit de recours individuel. A propos de l'arrêt Cruz Varas*», *RUDH*, 1991, p.205 et s. E. GARCIA DE ENTERRIA, «*De la légitimité des mesures provisoires prises par la Commission et la Cour européennes. L'affaire Cruz Varas*», *RTDH*, 1992, p.251 et s.

<sup>17</sup> European Court of Human Rights, 20 March 1991, *Cruz Varas v. Sweden*, §98 : «*In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties*» ; §99 : «*It would strain the language of Article 25 [current article 34] to infer from the words "undertake not to hinder in any way the effective exercise of this right" an obligation to comply with a Commission indication under Rule 36 [current Article 39 of the Rules]*» ; § 102 : «*the power to order binding interim measures cannot be inferred from either Article 25 § 1 (art. 25-1) in fine or from other sources*». The only element that

relation to the interim measures indicated by the Commission, but in respect of its own interim measures which had not been complied with by the respondent State<sup>18</sup>. The Court emphasised in these cases that it was not able (whether through the path of constructive interpretation or through the path of adoption of rules of procedure or both) to introduce new provisions in the Convention where it is silent on the question<sup>19</sup>. Two years later, the Court changed direction (2003) and confirmed the reversal of its case-law in the decision by its Grand Chamber (2005). In doing so, the Court reassessed the limits it had expressed regarding its power to judge.

## 2. The silence of the Convention revisited

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. It was completely revisited before being overridden<sup>20</sup>. Two types of arguments are put forward by the Court to justify its power to order binding interim measures. First of all « *the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms* » (§100). The Court highlights one of the key differences that distinguishes the European Convention of Human Rights from classic international treaties<sup>21</sup>, namely that it goes beyond the principle of reciprocity towards the creation of « objective obligations ». Following this justification pertaining to the *specificity* of the protection of human rights in international law here in the form of the Convention (treaty for the « *collective enforcement* », « *instrument of human rights protection* », §111), the Court reaps the benefits of its *teleological method of interpretation* (§101). The consequence is to give special importance, not only to the effectiveness of individual applications, but also to the general spirit of the Convention, an instrument designed to « *maintain and promote the ideals and values of a democratic society* ». Thus the Court supports an objective interpretation of the Convention, which relies upon the importance of the values that underpin it and that play a key role, namely that of determining the purpose and limits of the judge's action, just like in a number of national legal systems<sup>22</sup>. Hence one can see that the arguments limiting the powers of the judge in the *Cruz Varas* case in 1991 have been set aside in 2005 and demoted to the rank of minor arguments. Judges Caflisch, Türmen and Kovler are the ones who disputed the power of the Court to fill the gap left by the Convention on interim measures<sup>23</sup>, and concluded that the Court had

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the Court accepted in this case (by ten votes to nine) was that failure to comply with an interim measure aggravated the breach of the requirements of Article 3 of the Convention. Michele DE SALVIA, legal counsel at the European Court of Human Rights, explains the profound reasons (to some extent coming from within the Court) that pushed the Court to « tip-toe ». He comments that the reason for this method of dealing with the problem may possibly stem from the fact that the 'former' Court had no direct and immediate contact with applicants and neither therefore, with the reality of sometimes dramatic situations that needed to be dealt with through an approach that was both pragmatic and courageous. Also, it may be due to the fact that the Court thought it should refrain from ratifying a practice originating from the Commission, a body that did not have complete judicial competence and whose conclusions (opinions) were not binding. (NB/translated from the original version in French), « La pratique de la Cour européenne des droits de l'homme relative aux mesures provisoires », in *Mesures conservatoires et droits fondamentaux*, G. COHEN-JONATHAN, J-F. FLAUSS (dir.), Bruxelles, Bruylant, 2005, p.178.

<sup>18</sup> European Court of Human Rights, DR, 13 March 2001, *Conka v. Belgium* and European Court of Human Rights, 5 May 2002, *Conka v. Belgium*. The much expected reversal of case-law did not take place even though one might have thought that the reforms brought about by Protocol n°11, in particular the mandatory nature of the right of individual application, were good grounds for a reversal of case-law.

<sup>19</sup> This is how the partly dissenting judges in the *Mamatkulov* case presented the legal position (§6 of their opinion).

<sup>20</sup> European Court of Human Rights, Grand Chamber, 4 February 2005, *Mamatkulov and Askarov v. Turkey*, §§100-102.

<sup>21</sup> This is often highlighted by a number of internationalist legal scholars.

<sup>22</sup> C. GREWE, *op.cit.*, p.539.

<sup>23</sup> Point 11 of the joint partly dissenting opinion of judges Caflisch, Türmen et Kovler : « neither Article 26 (d) of that Convention, empowering the Court to enact Rules of Procedure, nor Article 34, instituting the right of individual application, is sufficiently connected to the issue under consideration to fill a "gap" in the Convention by instituting binding interim measures *ex nihilo*, thereby imposing on the States Parties to the Convention an obligation without their consent. In other words, there is a big difference between a simple *interpretation* of a treaty and its *amendment*, or between the exercise of the judicial role and international legislation. »

acted *ultra vires*<sup>24</sup>. By coming back to a classic distinction, they deny the Court's power to exercise a legislative function instead of interpreting the law (point 12). They therefore dispute the use by the Court of its teleological method of interpretation (point 13) and put forward instead the other techniques of interpretation mentioned in Articles 31 and 32 of the Vienna Convention. The outcome they reach is obviously the opposite of the Court's solution. Furthermore, they consider that the text of the Convention (which is silent on interim measures), together with reference to the preparatory work in drawing up the Convention (which showed the failure to insert a provision dealing with interim measures), as well as the subsequent practice of the States (which does not demonstrate their agreement to consider interim measures as binding), and finally the relevant rules of international law (that consist here of the constituting treaties setting up the international courts and tribunals which indicate interim measures but without any impact on the current Court), are all elements showing that the Court was not entitled to grant itself the power to consider interim measures as binding. Even recourse to the general rules of international law or the general principles recognised by the civilised nations was cast aside<sup>25</sup>.

Instead of adopting an approach that one might be quick to describe as « positivist », the Court prefers to embrace a specific approach (collective enforcement and objective protection of rights) as well as a humanist attitude to the Convention (based on the promotion of ideals and values). Having confirmed its *imperium*<sup>26</sup>, the Court was able to develop the second part of its argumentation without any difficulty, which enabled it to deal with the issue of the effects of interim measures.

## B. The effect of interim measures

Although the *Mamatkoulov* case revealed a new approach concerning the effect of interim measures (1), it was not entirely explicit and much was left « unsaid » which thus prevented one from ascertaining the exact effect of interim measures. We had to wait for the Court to deal with further cases for a clear approach on the binding force of interim measures (whatever the particularities of the cases brought before the Court) to replace the ambiguity of its early cases.(2).

### 1. An *ambiguous* effect.

In relying on the general principles of international law and on the fact that « *other international bodies have expressed a view on this subject since Cruz Varas and Others.* » (§110), the Court thereby created in the process an unbreakable legal connection between the respect of interim measures and the effectiveness of the Convention right to individual application. All of its reasoning wavers between these two elements. First, the international context, characterised by the

<sup>24</sup> Point 25 of the joint partly dissenting opinion of judges Caflisch, Türmen et Kovler : «Our basic conclusion is, therefore, that the matter examined here is one of *legislation* rather than of *judicial action*. As neither the constitutive instrument of this Court nor general international law allows for holding that interim measures must be complied with by States, the Court cannot decide the contrary and, thereby, impose a new obligation on States Parties. To conclude that this Court is empowered, *de lege lata*, to issue binding provisional measures is *ultra vires*. Such a power may appear desirable; but it is up to the Contracting Parties to supply it. »

<sup>25</sup> Points 22 and 23 of the joint partly dissenting opinion of judges Caflisch, Türmen et Kovler: « 22. There remains the question of whether the Court may, on the basis of a *rule of general international law* or a *general principle of law recognised by civilised nations*: (i) indicate provisional measures; and (ii) order such measures. If that were the case, the Court could justify the enactment of mandatory interim measures by such a rule or principle even in the absence of any enabling treaty provision. Regarding *general principles of law recognised by civilised nations*, there may well be a widespread rule on obligatory interim measures on the domestic level, based on the rule of compulsory jurisdiction applicable on that level. By contrast, as pointed out earlier (see paragraph 16 above), that rule does not prevail on the international level, which is why it cannot be applied as such on that level. In other words, the principle cannot be transposed to the business of international courts. 23. There must, however, be a *customary rule* allowing international courts and tribunals, even in the absence of a treaty provision, to enact Rules of Procedure, a rule which may include the power to *formulate* interim measures. But that rule cannot be taken to include the power to *prescribe* such measures. »

<sup>26</sup> The *imperium* consists in determining the dispute with binding force, having the necessary authority to confer efficiency and effectiveness upon judicial acts whereas *jurisdictio* is the mandate or the act of stating the law and determining the dispute by applying the law.

doctrine of convention committees (the Human Rights Committee of the United Nations and the United Nations Committee against Torture (§§114-115)), and associated with the jurisprudence of the international tribunals (that of the Inter-American Court of Human Rights and that of the ICJ (§§116-117)) – is a further sign of the internationalisation of judicial dialogue<sup>27</sup>. The importance of the Convention right to individual application is « *now a key component of the machinery for protecting the rights and freedoms set forth in the Convention* » (§122), especially since the transformation of the system effected by Protocol n°11<sup>28</sup>. In other words, on the one hand it takes into account<sup>29</sup> the international judicial environment and the resulting general principles of international law (in favour of what some call the *unity* of the judicial function)<sup>30</sup>; 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* » (§124). 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. The Convention right to individual application was also brought to the fore when the Court noted « the importance of a suspensory application » consistent with the right to bring an effective legal claim as per Article 13 of the Convention which, as we know, has been given a new meaning by the Court since the *Kudla* case<sup>31</sup>. Effectiveness is thus a “multi-layered” concept as it concerns simultaneously the effectiveness of the Convention right to individual application as such (article 34), i.e. the right to bring an international claim, as well as the right to an effective legal remedy in national law (Article 13). The comment made by Constance Grewe in relation to this link is that we are witnessing a genuine interconnection linking national judges and European judges in order to build a substantial European constitutional order<sup>32</sup>.

On the basis of these different elements, the Court reversed its previous case-law and – through an ingenious combination of Articles 1, 34 and 46 of the Convention – held that a State that did not comply with an interim measure ordered by the Court would be in breach of its obligations under these provisions of the Convention<sup>33</sup>. It held that such a failure to comply would « *undermine the effectiveness of the right of individual application* » given that it would neither enable the Court to « *carry out an effective examination of the application* » (Article 34) nor to « *ensure that the protection afforded to the applicant by the Convention is effective* » (the new object of interim measures) (Article 1). The legal argumentation might have concluded at this stage but the Court included in its argument the supervisory role of the Committee of Ministers in relation to the execution of final judgments, which might also be undermined in the event of a failure to comply with an interim measure. Paragraph 125 is key in that it clearly displays the traditional object of interim measures – shown in the European Convention system by the proper examination of an application and the effective monitoring of the execution of a final judgment pursuant to Articles 34

<sup>27</sup> L. BURGORGUE-LARSEN, « De l'internationalisation du dialogue des juges. Missive doctrinale à l'attention de Bruno Genevois », *Mélanges en hommage au Président Bruno Genevois, Le dialogue des juges*, Paris, Dalloz, 2009, pp.95-130.

<sup>28</sup> European Court of Human Rights, Grand Chamber., 4 February 2005, *Mamatkulov and Askarov v. Turkey*, §122 « Under the system in force until 1 November 1998, the Commission only had jurisdiction to hear individual applications if the Contracting Party issued a formal declaration recognising its competence, which it could do for a fixed period. The system of protection as it now operates has, in that regard, been modified by Protocol No. 11, and the right of individual application is no longer dependent on a declaration by the Contracting States. Thus, individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention. » (NB/ emphasis added).

<sup>29</sup> This “taking into account” is not always linear...and the reader must take care not to distort the logic behind its argumentation but instead to reconstruct it so as to distinguish the key message.

<sup>30</sup> C. GREWE, *op.cit.*, p.541 et s.

<sup>31</sup> European Court of Human Rights, Grand Chamber, 26 October 2000, *Kudla v. Poland*

<sup>32</sup> C. GREWE, *op.cit.*, p.535: In French, this comment reads: l'on assiste à «une véritable interconnexion qui relie juges internes et juge européen dans l'édification concrète de l'ordre constitutionnel européen.»

<sup>33</sup> European Court of Human Rights, Grand Chamber, 4 February 2005, *Mamatkulov and Askarov v. Turkey*, §126 : « The effects of the indication of an interim measure to a Contracting State – in this instance the respondent State – must be examined in the light of the obligations which are imposed on the Contracting States by Articles 1, 34 and 46 of the Convention. »

and 46 – as well as its more innovative object, to ensure the effective protection of the fundamental rights established by Article 1 of the Convention.

At this stage, the following comments must be made. Whereas, in the end, it is the protection of fundamental rights of individuals that constitutes the ultimate *rationale* of such jurisprudence<sup>34</sup>, nonetheless the argument for the binding effect of interim measures is based on the nature of Article 34, which was entirely reassessed on this occasion<sup>35</sup>. Above all, at no moment did the Court use the magic word «mandatory» to describe the effect of interim measures, though this was much hoped for by legal scholars and by human rights activists<sup>36</sup>. Equally, the wording of the decision in *Mamatkoulov* is fairly ambiguous regarding whether the fulfilment by States of their obligation to comply with interim measures should be linked to the subsequent observation of obstacles to the effective exercise of the Convention right to individual application<sup>37</sup>. Fortunately, the subsequent case-law gave clear and express answers to these different issues.

## 2. An explicit effect

The first use of the adjective «mandatory» took place in the *Aoulmi* decision taken against France in 2006<sup>38</sup> and removed any ambiguity regarding the obligation of States to comply with interim measures. However, in relation to the observation (be it subsequent or not) of obstacles to the effective exercise of the Convention right to individual application, there remained the question of the specific circumstances of each case. The first cases that confirmed the reversal by *Mamatkoulov* of the Court's previous case-law – i.e. the *Shamayev* and *Aoulmi* cases – were not able to give a precise answer given that the obstacles to the Convention right to individual application had been

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<sup>34</sup> This idea had already previously motivated the European Commission of Human Rights. Michele DE SALVIA thus comments that the Commission established a precise legal base providing for the possibility of indicating interim measures because it felt the need to formally bring to the attention of the governments concerned the need to avoid executing specific measures that were the subject of the litigation. The principle being that, as far as possible, the applicant should not have to suffer a serious and irreparable damage precisely because of the execution of such measures, see « La pratique de la Cour européenne des droits de l'homme relative aux mesures provisoires », *op.cit.*, p. 177-178.

<sup>35</sup> The drafting of §125 is significant because it relegates to the second stage (as shown by the wording «where appropriate») the «newer» object of interim measures, namely the protection of applicants' fundamental rights. Notably, it reads: «Likewise, under the Convention system, interim measures, as they have consistently been applied in practice (see paragraph 104 above), 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. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.»

<sup>36</sup> § 128 is revealing in this regard : « 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.»

<sup>37</sup> J-F FLAUSS, in assessing the impact of this reversal of case-law, writes that a literal reading of the Court's justification in the *Mamatkulov* case, leads to the conclusion that failure to comply with interim measures is not unlawful *per se*; it only becomes unlawful when it hinders the effective exercise of the Convention right to individual application. In other words, the applicant must imperatively prove that failure to comply with interim measures constituted an obstacle to the exercise by him of his Convention right to individual application. (...) If such a neutralising interpretation were shown to be well-founded in the future, the result would be that the contribution of the *Mamatkulov* case would be relegated to the rank of «safety valve»: the breach of Article 34 would only be entertained once all other alleged breaches had been dismissed, (NB/translated from the original version in French) « Discussion », *Mesures conservatoires et droits fondamentaux*, G. COHEN-JONATHAN, J-F. FLAUSS (dir.), Bruxelles, Bruylant, 2005, p.210.

<sup>38</sup> European Court of Human Rights, 17 January 2006, *Aoulmi v. France*, § 111 : « (...) even though the binding nature of measures adopted under Rule 39 had not yet been expressly asserted at the time of the applicant's expulsion, Contracting States were nevertheless already required to comply with Article 34 and fulfil their ensuing obligations » (§ 111). » (NB/ emphasis added).



duly shown<sup>39</sup>... The question therefore remained whether, in the event that the obstacles to the Convention right to individual application were not effective in the long run, nonetheless the failure by the respondent State to comply with the interim measures would constitute a breach of Article 34. The *Olaechea Cahuas* case<sup>40</sup> – since confirmed by the *Mostafa* case<sup>41</sup> – has brought an end to the questions raised by the analytical blind spots left by the Court's reversal of its jurisprudence.

The Spanish case thus allows the Court – even in the absence of an effective obstacle to the Convention right to individual application – to conclude that there had been a breach of Article 34 of the Convention<sup>42</sup>. In order to reach this result, the Court links in the strongest possible way Article 39 of the Rules of the Court to Article 34 of the Convention. Moreover it brings to the fore the ability of the Court, on the basis of its Rules to assess whether there is a «risk of irreparable damage» to the applicant through any «acts or omissions» of the respondent State that might constitute an obstacle to the effective exercise of the Convention right to individual application. This link between a regulatory rule and a Convention rule was the technique found by the Court to give the Convention its effectiveness or “*effet utile*”. It resulted, based on a «constructive interpretation» in «promoting a simple rule of procedure to the rank of a Convention rule<sup>43</sup>.» The European judge took the opportunity to make some conceptual remarks on the nature and the objectives of interim measures : «a provisional measure is by its very own nature, provisional, (and...) its need is assessed at a given moment as a result of there being a risk that might obstruct the effective exercise of the Convention right to individual application guaranteed by Article 34 (...) The simple lack of compliance with an interim measure decided by the Court due to the existence of such a risk is *per se*, a serious obstacle, at that given moment, to the effective exercise of the Convention right to individual application<sup>44</sup>.»

## II. The *manifestations of effectiveness*

The progress achieved in the context of the Convention is hugely significant. Whereas it was established by both practice and the case-law of the Court that the filing of an application in Strasbourg did not suspend the execution of a national measure that appeared *a priori* contrary to the Convention<sup>45</sup>, the Commission took the opportunity to amend its rules of procedure to change the state of affairs (Article 36). The Court followed suit on this procedural route (Article 39) and ended up elevating a simple procedural recommendation to the status of a Convention rule (with its binding effects), thanks to the virtues of constructive interpretation (in *Mamatkulov* and subsequent

<sup>39</sup> European Court of Human Rights, 12 April 2005, *Shamayev and others v. Georgia and Russia*, § 478 : «The difficulties faced by Mr Shamayev, Mr Aziev, Mr Khadjiev and Mr Vissitov following their extradition to Russia were of such a nature that the effective exercise of their right under Article 34 of the Convention was seriously obstructed» ; European Court of Human Rights, 17 January 2006, *Aoulmi v. France*, §§93 et 110 : «Counsel for the applicant pointed out that he had not been able to make contact with his client since his removal to Algeria» (§ 93), which brought the Court to the conclusion that «the applicant has been hindered in the effective exercise of his right of individual application» (§ 110).

<sup>40</sup> European Court of Human Rights, 10 August 2006, *Olaechea Cahuas v. Spain*, see. I. MOULIER, «Observations – Chronique de jurisprudence de la Cour européenne des droits de l'homme», *JDI*, 2007-2, pp.783-785.

<sup>41</sup> European Court of Human Rights, 15 January 2008, *Mostafa and others v. Turkey*.

<sup>42</sup> European Court of Human Rights, 10 August 2006, *Olaechea Cahuas v. Spain*, §§ 79-80: «It appears from the documents submitted by the parties in the instant case that after having been extradited in spite of the interim measures indicated by the Court, the applicant had been placed in a Peruvian prison then granted conditional release three months later, and that he had constantly been in touch with his counsel in London. *It is therefore not possible to conclude that the applicant's right to an effective remedy was hindered in the same way as in the cases cited above. However, that fact, which became known after the decision to apply the interim measure had been taken, does not mean that the Government complied with their obligation not to hinder in any way the effective exercise of the right enshrined in Article 34.*» (NB/ emphasis added).

<sup>43</sup> F. SUDRE, *Droit européen et international des droits de l'homme*, Paris, PUF, 2008 (9<sup>e</sup> édition), p.673.

<sup>44</sup> European Court of Human Rights, 10 August 2006, *Olaechea Cahuas v. Spain*, §81.

<sup>45</sup> European Commission of Human Rights, n°2136/64, *Annuaire* 7, p.298.

cases). At this stage, it is important to analyse the specific treatment of urgency so as to assess the practice of the former Commission as well as the current Court. We will address the substantive aspects of effectiveness (i.e. the material scope of measures) as well as the procedural aspects.

## A. The *material* manifestations

Whereas the indication of binding interim measures only affects a narrow pool of guaranteed rights (1), it is relevant to ask the question whether the Court will develop its case-law so as to expand the scope of the interim measures (2).

### 1. The material *limits*

The requests for interim measures generally made by the applicants and submitted to the Court cover a broad range of rights guaranteed by the Convention<sup>46</sup>. Nevertheless, in practice, it can be shown that the quasi totality of interim measures indicated by the former Commission and the new Court concerned grievances based on breaches of Article 2 (the right to life) and Article 3 (the prohibition of torture and of inhuman or degrading treatment or punishment) of the Convention as well as Protocol n°6 (abolition of the death penalty)<sup>47</sup> concerning matters of expulsion and extradition. Indeed, these « serious cases » – which highlight the risk incurred by the applicant of being subject for example to ill-treatment in the event of effective implementation of a deportation measure – gave legitimacy to the Commission’s initial approach. In the same vein, the Court has not departed from this philosophy and has applied Article 39 « strictly »<sup>48</sup>. In other words, the Court will only indicate interim measures (which very often consist in requesting the suspension of the execution of a national measure) only if there is a risk of creating an irreversible situation or an « irreparable damage » and that this risk is « imminent ». The bulk of cases concerns situations of expulsion and extradition towards third countries where the applicants risk being subjected to ill-treatment<sup>49</sup>. The *Jabari* and *D. and a.* cases are good examples. Indeed the Court held that the corporal punishments provided for under Islamic criminal law – such as stoning and flogging – violated the dignity and the physical and psychological integrity of human beings<sup>50</sup>.

The question posed at this stage is whether the binding force of interim measures only applies to « absolute » rights to which there is no exception. In addition to the practice of the Court, the extract in paragraph 108 of the decision in *Mamatkulov* suggests this may be the case<sup>51</sup>. Should

<sup>46</sup> C.A. NORGAARD, H.C. KRUGER, « Interim and conservatory Measures under the European System of Protection of Human Rights », M. NOWAK, D. STEURER, H. TRETTER (ed.), *Progress in the Spirit of Human Rights, Festschrift für Felix Ermacora*, Edition Engel, Kehl, 1988, pp.109-117.

<sup>47</sup> J-F. FLAUSS, *op.cit.*, p.195 et H.R. GARRY, « When procedures involves Matters of life and death : Interim Measures and the European Convention on Human Rights », *European Public Law*, 2001, vol.7, pp.415-417 ; Y. HEAK, C. BURBANO HERRERA, « Interim Measures in the case of the European Court of Human Rights », *Netherlands Quarterly of Human Rights*, 2003, vol.21, pp.631-639.

<sup>48</sup> European Court of Human Rights, 4 February 2005, *Mamatkulov v. Turkey*, § 103.

<sup>49</sup> §38 of the *Jabari v. Turkey case*, (ECHR, 11 July 2000) refers to the classic *dictum* since the *Soering* case as follows: « It is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, pp. 35-36, §§ 90-91; the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, §§ 69-70; and the *Chahal v. United Kingdom* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, §§ 73-74).

<sup>50</sup> European Court of Human Rights, 11 July 2000, *Jabari v. Turkey*. This case was about an applicant who was liable to be stoned for adultery committed by her in Iran, where she risked being expelled to; European Court of Human Rights, 22 June 2006, *D and a. v. Turkey* : flogging for « fornication », was considered inhuman punishment.

<sup>51</sup> European Court of Human Rights, 4 February 2005, *Mamatkulov v. Turkey*, § 108: « In cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of *one of the core*

such a material limitation be confirmed – which currently appears to be the case given that the Court replicated word for word that extract in its judgment in *Mostafa* in 2008<sup>52</sup> – it would mark the existence of « two standards of protection ». Professor Flauss notes in this regard that interim judicial protection may be subject to less stringent requirements than those imposed on national courts in relation to the protection of rights guaranteed by the Convention<sup>53</sup>. Indeed, in the *Conka* case, the European judge was especially keen for the applicants to benefit from interim judicial protection that was genuinely effective at national level and going far beyond the simple scope of « core rights »<sup>54</sup>.

Is this limitation likely to be overcome? This is a fairly tricky question. On the one hand, the current case-law does not leave any scope for a possible evolution, whereas on the other hand, the practice of other international jurisdictions for the protection of human rights would suggest that this would not only be possible but that it would also be desirable.

## 2. The material extension?

The two cases that concerned *prima facie* rights other than « absolute rights » were in fact cases where the right to life was at stake. The *Öcalan*<sup>55</sup> and *Evans*<sup>56</sup> cases show that risks of « irreparable damage », which are likely to trigger interim measures, are not just limited to litigation concerning foreign nationals (who have subsequently moved outside their territory); nevertheless, these cases reveal in essence that the Court continues to apply a strict analysis on the use of Article 39.

In relation to the first case, the applicant – known for his fierce defence of the Kurdish identity in Turkey, as leader of the PKK – complained about his arrest in Kenya by Turkish secret agents and of his transfer to Turkey where he was the subject of criminal proceedings for attempting to bring about the secession of part of the national territory, an offence for which the prosecution had sought the death penalty. The Court applied Article 39 of its Rules in order to protect the rights guaranteed by Article 6§1<sup>57</sup>. Nonetheless, the life of the applicant was ultimately at stake given that he had been condemned to death. Therefore, the specific circumstances of the case may explain why Article 39 was applied in order to ensure the requirements of a fair trial. Above all, would not the use of Article 34 in situations where Article 6§1 is at stake, surely commit the Court, in some cases, « to grant extra-territorial effects » to the requirements of the right to a fair trial, which the Court has always refused to do in relation to this provision<sup>58</sup>? One must note here the significant difference between the treatment afforded by Article 6§1 and by Article 3. The Court has not hesitated to recognise the extra-territorial scope of Article 3 of the Convention, thereby projecting the values of a « democratic society » towards third party States that are not signatories of the

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*rights under the Convention*, the object of an interim measure is to maintain the *status quo* pending the Court's determination of the justification for the measure. ».(NB/ emphasis added).

<sup>52</sup> European Court of Human Rights, 15 January 2008, *Mostafa and others v. France*, §37.

<sup>53</sup> J-F. FLAUSS, *op.cit.*, p.210-211: « la protection juridictionnelle provisoire serait soumise à des exigences moins prégnantes que celles imposées aux juridictions nationales relativement à la défense des droits garantis par la Convention de sauvegarde. »

<sup>54</sup> Article 13 of the Convention goes so far as to imply the existence of a remedy that would oppose the implementation of a measure of collective expulsion of foreign nationals prior to the assessment by the national authorities of its respect of the Convention (European Court of Human Rights, 5 February 2002, *Conka v. Belgium*, combination of Articles 13 and 4 of Protocol n°4).

<sup>55</sup> European Court of Human Rights, 6 February 2003, *Öcalan v. Turkey*; European Court of Human Rights, Grand Chamber, 4 February 2005, *Öcalan v. Turkey*.

<sup>56</sup> European Court of Human Rights, 7 March 2006, *Evans v. United Kingdom*; European Court of Human Rights, Grand Chamber., 10 April 2007, *Evans v. United Kingdom*.

<sup>57</sup> European Court of Human Rights, DR, 14 December 2000, *Öcalan v. Turkey*. The Court requested the Turkish Government to « take interim measures within the meaning of Rule 39 of the Rules of Court, notably to ensure that the requirements of Article 6 in the proceedings against the applicant in the State Security Court were complied with and that the applicant was able to exercise his right to individual application to the Court through lawyers of his own choosing effectively. »

<sup>58</sup> This is the question posed by J-F. FLAUSS, *op.cit.*, p.196.

Convention. On this point, the Court does not play lightly with those values that it has decided to defend, nor does it accept that the « pluralism of cultures or of legal traditions » justifies « practices or rules that are incompatible with the fundamental values of a democratic society<sup>59</sup>. »

In the *Evans* case, the question concerned the possible destruction of frozen embryos of a couple that had a few years before undergone treatment for *in vitro* fertilisation (*IVF*) but where the male partner had subsequently withdrawn his consent. In this case, the Court hid behind the lack of a European consensus in order not to bring the question of the beginning of life within the scope of Article 2 of the Convention<sup>60</sup>; it dealt with the case exclusively from the angle of Article 8 of the Convention. One might have thought that the seeds had been sown for a substantive extension of Article 39 of the Rules. However, in reality, what was at the heart of the interim measures in this case was in fact the « potential life » of the frozen embryos. Indeed, when the President of the Chamber indicated to the British government that the Court was applying Article 39 of the Rules, it did so « *without prejudice to any decision of the Court as to the merits of the case.* » Indeed, it was « *desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos, the destruction of which formed the subject-matter of the applicant's complaints, were preserved until the Court had completed its examination of the case*<sup>61</sup>. »

Thus, one may observe that a material extension on the basis of an innovative shake-up of the European case-law is not on the agenda. However, the fact that the binding force has been elevated to the rank of « general principle of international law » by the ICJ and that the Inter-American Court of Human Rights does not in any way limit the application of interim measures to intangible rights<sup>62</sup> should encourage the Court to be less restrained. We dare not imagine that the overstretched capacity of the Court, which is suffocating under its case-load, could be the cause of such judicial restraint ...

## **B. The procedural manifestations**

Individuals and the State are face to face in a confrontation with much at stake each time a request for an interim measure is made. It will be interesting to take a close look at the respective role of these two players within the mechanism of Article 39 of the Rules.

### **1. The role of individuals in the procedure**

Individuals are all at once at the source of the requested interim measures, but they may also be – exceptionally – the addressees of such measures.

*Applicants* that are subject to an expulsion order, or to extradition or to “refoulement” to a third country ask the Court, through their legal counsel, to indicate interim measures. Indeed, it remains

<sup>59</sup> F. SUDRE, « Le pluralisme saisi par le juge européen », *Droit et pluralisme*, L. FONTAINE (dir.), Bruxelles, Bruylant, 2007, p.272.

<sup>60</sup> The Court re-iterated in the process the solution stemming from the *Vo v. France* case. The reading of §§ 54 and 56 of the judgment in *Evans* (ECHR, Grand Chamber., 10 April 2007) clearly shows this in §54 : «In its judgment of 7 March 2006, the Chamber recalled that in *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII, the Grand Chamber had held that, in the absence of any European consensus on the scientific and legal definition of the beginning of life, *the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.* Under English law, as was made clear by the domestic courts in the present applicant's case, an embryo does not have independent rights or interests and cannot claim - or have claimed on its behalf - a right to life under Article 2. There had not, accordingly, been a violation of that provision.»; § 56 : « *The Grand Chamber, for the reasons given by the Chamber, finds that the embryos created by the applicant and J do not have a right to life within the meaning of Article 2, and that there has not, therefore, been a violation of that provision.* » (NB/ emphasis added).

<sup>61</sup> European Court of Human Rights, 7 March 2006, *Evans v. United Kingdom*, §3.

<sup>62</sup> L. BURGORGUE-LARSEN, A. ÚBEDA DE TORRES, *Les Grandes décisions de la Cour interaméricaine des droits de l'homme*, Prologue de S. GARCÍA RAMÍREZ, Bruxelles, Bruylant, 2008, pp. 211 et s.

very rare for the Court to act of its own motion – to date, only one case between States has illustrated such a scenario<sup>63</sup>. Nonetheless, one should not neglect the role of NGOs, which to some extent take on the role of informal counsel for the applicants by instigating requests for interim measures. Equally, by being able to intervene during the course of proceedings, through the mechanism of « third party intervention », *i.e.* acting in the capacity of *amicus curiae* – based on Article 36§2 of the Convention and Article 44§2 of the Rules – one suspects that their role in this field may become even more important and more visible<sup>64</sup>. It will be noted at this stage that observations were submitted by several organisations to the Court in the *Mamatkulov* case. Thus, the International Commission of Jurists as well as Human Rights Watch and Aire Centre were present as *amici curiae*<sup>65</sup>. The application of interim measures shows that a number of private entities, following the example of organisations for the protection of human rights, use this technique, which in addition to enriching the Convention procedure, often highlights specific issues for the Court's benefit<sup>66</sup>.

Exceptionally, individuals are sometimes also the addressees of interim measures alongside States. Therefore, an interim measure may be simultaneously addressed to the respondent State as well as to the applicant. Thus, in a case dealt with by the former Commission, it recommended to Germany to suspend the extradition of the applicant to Turkey while at the same time requesting the applicant not to take advantage of his liberation to escape and leave German territory<sup>67</sup>. In the same way, the Strasbourg institutions have on a number of occasions requested applicants not to commence or pursue a hunger strike that might endanger their lives<sup>68</sup>.

## 2. The role of States in the procedure

Obviously, States are the principle addressees of interim measures. Until recently, such measures have arisen in cases brought by individual applicants. The events of summer 2008 gave the Court the opportunity to order such measures in the context of litigation between States, which created a new and dramatic precedent<sup>69</sup> where Europe was once again the scene of huge violations of human rights<sup>70</sup>... Here, there are several kinds of questions arising. First of all, one must determine the

<sup>63</sup> See the case of *Denmark, Norway and Sweden v. Greece*, n°4448/67. Decision of 26 March 1970, *Annuaire de la CEDH*, vol. 13, 1970, p.110 et 126, quoted by J-F. FLAUSS, *op.cit.*, p.198, note 10.

<sup>64</sup> This point was admitted by the Court in European Court of Human Rights, 6 May 2003, *Tascin Acar v. Turkey*.

<sup>65</sup> European Court of Human Rights, 4 February 2005, *Mamatkulov and Askarov v. Turkey*, §9.

<sup>66</sup> See the intervention by *l'Association nationale d'assistance aux frontières pour les étrangers (National Association for Assisting Aliens at Borders)* in European Court of Human Rights, 26 April 2007, *Gebremedhin [Gaberamadhien] v. France*, §5. On the use of this technique of intervention in proceedings by the “barreaux” (the French bar), see. P. LAMBERT, « La pratique de la tierce intervention devant la Cour européenne des droits de l'homme : l'expérience de l'intervention des barreaux », *RTDH*, 2006, p.331 et s. In general, on the role of NGOs at the judicial level, J-F. FLAUSS, « Les organisations non gouvernementales devant les juridictions internationales compétentes dans le domaine de la protection des droits de l'homme », G. COHEN-JONATHAN, J-F. FLAUSS (dir.), *Les Organisations non gouvernementales et le droit international des droits de l'homme*, Bruxelles, Bruylant, 2005, pp.71-101.

<sup>67</sup> European Commission of Human Rights, DR, 3 May 1983, *Altun v. Federal Republic of Germany*, DR 38, pp.226-227, quoted by J-F. FLAUSS, *op.cit.*, p.197.

<sup>68</sup> European Commission of Human Rights, 14 September 1995, *Vakolis v. Greece*, n°19795/92 ; European Commission of Human Rights, 14 September 1995, *Bhuyian v. Sweden*, n°28516/95 ; European Commission of Human Rights, 20 October 1997, *Ilijkov v. Bulgaria*, n°33977/96.

<sup>69</sup> On 11 August 2008, Georgia, which had planned to file a complaint against the Russian Federation for breach of Articles 2 and 3 of the Convention and Article 1 of the first additional protocol, requested that the Court indicate interim measures on the basis of Article 39 against Russia. Georgia asked the Court to call upon the « Russian Government to abstain from taking any measure that might threaten the life or health of the civilian populations and to enable the Georgian emergency services to take all necessary measures to provide assistance, through a humanitarian corridor, to the civilian and military casualties on the ground. » The following day, on 12 August 2008, the Court considered that the situation carried a « real and continuous risk of serious breaches of the Convention » (in particular with regards to Articles 2 and 3) and its President asked both governments to inform it of all measures taken to ensure total compliance with the Convention.

<sup>70</sup> This is a major challenge that the European Convention system will need to meet in the years to come. Is it equipped to do so? Nothing is less certain. In this context, the Court decided, in accordance with Article 41 of its Statute, to deal

manner in which the Court assesses the situation within States (whether these States are signatories to the Convention or third party States) in order to be properly informed and able to indicate interim measures affecting them. The next question is to see whether and how the States respond.

What are the criteria established by the Court to assess the risk of serious and irreparable damage? The assessment of the imminence of danger is carried out by the President of the Chamber or by the Chamber itself. It goes without saying that, as a general rule, both the Registrars of the Chambers as well as the Registrar of the Court, play a major role in the matter just like the national judge whose opinion is sought. Two types of criteria operate in order to assess the risk of «irreparable damage». The first type concerns the *personal situation* of the applicant; the second type deals with the *general situation* of respect of human rights in the country concerned.

Therefore, when an applicant is subject to expulsion and has a history of political opposition and/or has already been imprisoned or tortured in the country of destination, the risk of « serious damage » is systematically presumed. The same presumption will apply when the foreign national has been granted the status of political refugee, either by the United Nations High Commission for Refugees<sup>71</sup>, or by a State other than the respondent State. Finally, as shown in the *Jabari* and *D. and a.* cases, the Court also pays attention to the nature of punishments inflicted, which although legal in the countries to which the foreign nationals are liable to be expelled, appear contrary to the values that underpin the Convention. In this respect, several legal scholars have asked the question as to whether the Court has put in place a « double standard » dependant on whether the foreign national is to be transferred to a third country or to a State that is a signatory to the Convention. Some consider that the Court's assessment is narrower when the transfer is towards a third country, namely because the applicant will not be able to avail himself/herself of the protection afforded by the Convention right to individual application under Article 34 of the Convention<sup>72</sup>. Although some cases show that a high threshold of requirements applies when third countries are concerned, is it possible at the same time, with absolute scientific certainty, to infer that the general practice of the Court goes in this direction? Nothing is less certain when no comprehensive data has been reported by the Court in this regard<sup>73</sup> and that no scientific research has undertaken that analysis.

With regards to the assessment of the general situation within the country of destination, the Court – which frequently repeats that it assesses the risks undergone « at the time when it is itself assessing the merits of the case »<sup>74</sup> – gives special importance to the public reports of NGOs just as it does in relation to the information that the latter transmit to the Court's registry on a case by case basis<sup>75</sup>. In

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as a priority with seven claims against Georgia as a result of the hostilities instigated in South Ossetia, brought by inhabitants of South Ossetia and by a member of the Russian armed forces seconded to the corps for maintaining peace based in Tskhinvali. The press communication by the Registrar of the Court on 16 January 2009 clarifies that these instances are part of a group of 3,300 cases with a similar context that have been filed since August 2008.

<sup>71</sup> See European Court of Human Rights, 11 July 2000, *Jabari v. Turkey*, §41 : « *The Court for its part must give due weight to the UNHCR's conclusion on the applicant's claim* in making its own assessment of the risk which the applicant would face if her deportation were to be implemented. It is to be observed in this connection that the UNHCR interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery ».

<sup>72</sup> J-F. FLAUSS, *op.cit.*, p.200 ; Y. HAEK, C. BURBANO HERRERA, « Interim measures... », *op.cit.*, p.646.

<sup>73</sup> Michele DE SALVIA, former legal counsel at the Court, has thus commented in relation to the statistical information available, that the percentage of requests made to the Court, and the circulation of decisions of acceptance or rejection, does not appear to have changed much compared with the practice of the Commission. According to him, there is no reliable data on this matter, due to lack of precise data collection, *op.cit.*, p.193.

<sup>74</sup> European Court of Human Rights, 11 July 2000, *Jabari v. Turkey*, §41

<sup>75</sup> European Court of Human Rights, 8 April 2008, *Nyanzy v. United Kingdom*: «§54. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*; and *Saadi*, cited above, §§ 128-129). §55. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental

this respect, the *N.A.* case is exemplary. It clearly establishes the Court's jurisprudence in a case concerning a Tamil threatened with expulsion to Sri-Lanka where he feared being subjected to inhuman treatment by the Sri-Lankan armed forces. The Court was successful in enforcing compliance by the United Kingdom (with whom a divergence of opinion had arisen regarding the conditions of assessment of the general human rights situation in Sri Lanka<sup>76</sup>) with Article 39 of the Rules in no less than 342 cases similar to this one. If in the future, Protocol n°14 entered one day into force, the Commissioner for Human Rights would no doubt become a reliable and respected source of information<sup>77</sup>. On the basis of these different elements, the European judge takes into account the deficiencies affecting the functioning of justice, the racist or xenophobic behaviour towards minorities and, in some cases, the revealed « practices » of systematic torture and inhuman treatment.

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The theme of interim measures will not fail to continue to gain importance in an international context marked by a high level of political, social and economic instability. The « Great Europe » has not been spared from dramatic and turbulent situations where shocking violations of Articles 2 and 3 of the Convention have taken place in certain countries<sup>78</sup>. Interim measures, now binding and taken seriously by States, generally contribute<sup>79</sup>, to the prevention of serious and irreparable damage affecting applicants... However, will the case of the war between Russia and Georgia show on the contrary their lack of effectiveness? More generally, is the Convention system capable of dealing with cases of massive human rights violations?

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sources, including the US State Department (see, for example, *Chahal v. United Kingdom*, cited above, §§ 99-100; *Muslim v. Turkey*, no. 53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, 5 July 2005; and *Al-Moayad v. Germany* (dec.), no. 35865/03, §§ 65-66, 20 February 2007). »

<sup>76</sup> On 25 June 2007, on the basis of Article 39 of the Rules, the Court indicated to the United Kingdom that it should suspend the expulsion of *N.A.* until the examination of the case. In October 2007, given the increasing number of applications by Tamils in the same situation as the applicant, the Registrar of the Chamber dealing with the case warned the British Government's agent that interim measures had been indicated in 22 cases and requested that it suspend the execution of expulsion orders. The response was negative, as the United Kingdom considered that the situation in Sri Lanka did not justify a *systematic suspension* of all expulsions of Tamils invoking Article 3 of the Convention insofar as the real and serious risk was not widespread... The Court continued to apply Article 39 in all the instances of Tamils threatened with expulsion to Sri-Lanka; thus the Court established its position on the current situation of Tamils in Sri Lanka and the influence of the general context of a country when assessing specific and individual situations.

<sup>77</sup> According to Article 36§3 of the Convention (as amended by the Protocol), the Commissioner for Human Rights will be able to make written observations and take part in the hearings in all cases before a Chamber or the Grand Chamber. It has been commented that if the President of the Court had the ability to invite the Commissioner to intervene in pending cases, the new rule would not be useless as it would reinforce the defence of the general interest, see J-F. RENUCCI, *Traité de droit européen des droits de l'homme*, Paris, LGDJ, 2007, p.853.

<sup>78</sup> The war in Chechnya is a tragic illustration of this. The Court issued between May and June 2008 no less than ten judgments where it unanimously observed the violation by Russia of Article 2, both material and substantial, due to the disappearance by force of men who had fought for the Chechen army.

<sup>79</sup> It is urgent that the Court put together precise data in order to determine the degree of implementation of interim measures by States and, where applicable, by applicants to whom such measures have also been addressed.