Non-Compliance With a Provisional Measure Automatically Leads To a Violation of the Right of Individual Application ... or Doesn't It?

Strasbourg Court Takes Away Any Remaining Doubts and Broadens Its Pan-European Protection

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Provisional or interim measures before the European Court of Human Rights – Historic judgment in the case of *Olaechea Cahuas* v. *Spain* – The non-compliance by a State with an interim measure leads to a violation of Article 34 ECHR, irrespective of the subsequent finding of a violation of other material provisions of the ECHR by the Court – Remaining (loopholes for) recalcitrant states – Lack of reasoning of interim measures – Lack of clarity as to applicants' unwillingness to abide by an interim measure and currently untenable, extremely narrow scope ratione materiae of situations in which interim measures are indicated by the Court – Codification of the institute of provisional measures by including it as a separate provision into the European Convention through an additional protocol.

1. The competence of the European Court to indicate interim measures[1]

The European Convention on Human Rights (ECHR) does not confer any competence on the European Court of Human Rights 'to issue', let alone 'to order'

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[1] The decisions and judgments of the European Court and most decisions and reports of the former European Commission can be found on <www.echr.coe.int> through the HUDOC search engine. The figure(s) at the end of the decisions of the Commission refer to page(s). The resolutions and judgments of the Inter-American Court can be found on <www.corteidh.or.cr>.

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provisional or interim measures during the procedure before the Court.[2] However, the practice of provisional measures has been established for the very first time in 1957 in the first Greek Inter-State case and it has been institutionalised since 1959 of the last century through the Rules of the European Court and since 1974 through the Rules of the former European Commission. It is currently regulated in the Rules of the (new) European Court:

> 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 (Article 39(1)).[3]

Article 39(2) of the Rules of Court says: 'Notice of these measures shall be given to the Committee of Ministers'. In fact, the Committee of Ministers is kept abreast of the provisional measure in order to allow it to exercise its supervisory competence.[4] Interim measures can be indicated to both parties in the proceedings, i.e., the applicant or the respondent State. Most provisional measures are, however, directed towards the respondent State[5] and only exceptionally are some simultaneously addressed to the applicant and the respondent State.[6] Very few cases are known in which an interim measure has been directed to an applicant, while at the same time no interim measure has been directed to the respondent State.[7] Moreover, the Chamber may request information from the parties with regard to

[2] The competence of other regional (human rights) courts (Inter-American Court, African Court, European Court of Justice) to take interim measures has a legal basis in the respective treaties. Cf. Art. 63(2) American Convention on Human Rights (22 Nov. 1969), Art. 27(2) Protocol to the African Charter on Human and Peoples' Rights (9 June 1998) and Art. 242-243 EC Treaty (25 March 1957).

[3] If a Chamber has yet to be constituted, the president of the Section to which the application has been allocated, shall exercise the power to indicate interim measures (Art. 52(3) Rules of Court). In the event of a relinquishment of jurisdiction or if a re-hearing is granted, the Grand Chamber or its president will exercise the power to indicate interim measures (Art. 71 Rules of Court, <www.echr.coe.int>).

[4] *See also* Art. 39(2) Rules of Court.

[5] ECtHR 10 Aug. 2006, Case 24668/03, *Olaechea Cahuas* v. *Spain*, ECHR 2006; ECtHR 12 April 2005, Case 36378/02, *Shamayev and Others* v. *Russia and Georgia*, ECHR 2005. The State may even be asked to take interim measures to prevent private individuals from causing damage to other private individuals. Cf. EComHR, 2 March 1995, Case 24573/94, *H.L.R.* v. *France* (request not to extradite a drugs courier to Colombia who had collaborated with the French judiciary upon his arrest. The danger of retaliation if returned to Colombia came from private persons, drug traffickers reported to the police, not from state actors).

[6] ECtHR 8 July 2004, Case 48787/99, *Ilaşcu and Others* v. *Moldova and Russia*, ECHR 2004-VII, at para. 10-11; EComHR, 14 Sept. 1995, Case 26516/95, *Bhuyian* v. *Sweden*; EComHR 15 Jan. 1993, Case 19796/92, *Vakalis* v. *Greece*, *Decisions & Reports*, 36, 226-227.

[7] ECtHR 6 Dec. 2005, Case 74308/01, *Tanyeri and Others* v. *Turkey*.

every matter connected with the implementation of an interim measure it has indicated.[8]

According to the European Court, interim measures have only been indicated 'in limited spheres', namely 'if there is an imminent risk of irreparable damage'.[9] A radioscopy of the case-law shows that interim measures will only be issued when three cumulative conditions are met: (1) the situation must be imminent and exceptional and there must no longer be any suspensive domestic remedy available against the disputed act; (2) there must be a high degree of probability that the disputed act will contravene the ECHR and (3) there must be a risk of irreparable damage.[10]

With regard to the substantive issues and the rights and freedoms in the European Convention, concerning or under which a provisional measure may be issued, the European Court has indicated that

> [w]hile there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture, inhuman or degrading treatment or punishment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention.'[11]

While it can be agreed with the European Court that '[t]he vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings', in which it is alleged that if expelled or extradited, the applicant(s) face a real risk of being subjected to treatment incompatible with Article 2 and/or 3 of the European Convention,[12] a survey of the case-law of the Court[13] indicates that besides above-mentioned type of cases, the Strasbourg Court has also resorted to indicating provisional measures in order to protect (a) persons condemned

[8] Art. 39(3) Rules of Court. *See*, in the same sense, Art. 25(6) of the Rules of Court of the Inter-American Court on Human Rights.

[9] ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I, at para. 104.

[10] E.g., M. Buquicchio-de Boer, 'Interim Measures by the European Commission of Human Rights', in M. de Salvia and M.E. Villiger (eds), *The Birth of European Human Rights Law. Liber Amicorum Carl Aage Norgaard* (Baden-Baden, Nomos Verlag 1998), p. 229 at p. 230, 231, 233.

[11] ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I, at para. 104.

[12] ECtHR 7 July 1989, Case 14038/88, *Soering* v. *United Kingdom*, Series A, No. 161, at para. 4; ECtHR 9 May 1997, Case 30240/96, *D.* v. *United Kingdom*, Reports 1997-III, at para. 3; ECtHR 11 July 2000, Case 40035/98, *Jabari* v. *Turkey*, ECHR 2000-VIII, at para. 6.

[13] *See* Y. Haeck and C. Burbano Herrera, 'Interim Measures in the Case-Law of the European Court for the Protection of Human Rights', 21 *Netherlands Quarterly of Human Rights* (2003) p. 625 at p. 631-640 and 645-649.

to and under imminent threat of enforcement of the death penalty[14] and (b) persons in bad health in detention who are on a hunger strike or have attempted to commit suicide.[15] Although the European Commission once issued an interim measure for the protection of evidence, it is more likely that the Court, when faced with such situation, will not resort to Article 39 of the Rules of Court, but would, firstly, rather opt to ask a State to clarify some of the factual issues (ex Article 54 para. 2, a Rules of Court),[16] and secondly would, e.g., carry out an on-site inspection (ex Article 42 para. 2 Rules of Court). In recent times, the Court has also rather surprisingly (although it was very much needed) indicated an interim measure to the United Kingdom Government to ensure that frozen embryos of a woman whose ovaries had been removed (because of risk of cancer), and which were under imminent threat of being destroyed after the withdrawal of consent by the male partner of the applicant, were preserved until the Court had completed its examination of the case.[17] In another case, in the light of the danger that the applicant concerned would be sentenced by a court, which as the European Court had already stated did not comply with the requirements of Article 6 ECHR (right to a fair trial), and given the fact that in this case there was more at stake because the applicant was risking the death penalty, the Court also indicated to a State by means of an interim measure to make every effort to ensure that the rights of the applicant under Article 6 ECHR would be guaranteed, that the rights of defence would be respected, especially that the applicant would have unrestricted and effective access to his lawyers in private, and that he would effectively have the opportunity to exercise his individual right of petition to the European Court through lawyers of his choice. The State was also asked to inform the Court regarding any measure taken to that effect.[18] In a last, and also quite surprising but opportune case, an interim measure was indicated to a State in order to enforce Article 34 ECHR, i.e., the right of application of an applicant. In this case,

[14] EComHR 26 May 1970, Case 4448/67, *Denmark, Norway and Sweden* v. *Greece*, *Yearbook of the European Convention on Human Rights,* Vol. 13, 1970, 108 at p. 110, 126; ECtHR 12 May 2005, Case 46221/99, *Öcalan* v. *Turkey*, ECHR 2005, at para. 5; Press Release 683 of 30 Nov. 1999, <www.echr.coe.int>, visited 2 Nov. 2007.

[15] These persons are in fact reacting this way because they have received a negative answer as to their request for political asylum (EComHR 14 Sept. 1995, Case 26516/95, *Bhuyian* v. *Sweden*), are complaining about their harsh detention conditions (ECtHR 6 Dec. 2005, Case 74308/01, *Tanyeri and Others* v. *Turkey*) or about the duration of their preventive detention (EComHR 20 Oct. 1997, Case 33977/96, *Ilijkov* v. *Bulgaria*).

[16] *See*, for example, ECtHR 26 Sept. 1999, *Absandze* v. *Georgia*, Case 57861/00.

[17] ECtHR 10 April 2007, Case 6339/05, *Evans* v. *United Kingdom*, ECHR 2007, at para. 5.

[18] ECtHR 12 May 2005, Case 46221/99, *Öcalan* v. *Turkey*, ECHR 2005, at para. 5; Information Note No. 4, at p. 25-26, <www.echr.coe.int>, visited 2 Nov. 2007. The respondent State refused to answer the questions on the grounds that they went far beyond the scope of application of Rule 39 (*see* Information Note No. 5, at p. 8, <www.echr.coe.int>, visited 2 Nov. 2007.

two Russian women (mother and daughter) had submitted a case before the European system, alleging that some members of their family had been assassinated by State agents. During the procedure before the Court, one of the applicants was murdered, and that was when the Strasbourg Court decided to issue a provisional measure, whereby the State was indicated not to hinder the right of the remaining applicant to submit an application in conformity with Article 34 of the Convention.[19]

2. From the non-binding to the binding nature of interim measures and the possible finding of a violation of the ECHR if a State does not comply with an interim measure

The binding force of interim measures ordered by international bodies has been controversial and uncertain throughout the twentieth century.[20] Under the European system of human rights, in the early nineties of the last century, the non-binding nature of an interim measure was first established by the European Court in a Swedish case (*Cruz Varas and Others*).[21] Some ten years later it was confirmed in a Belgian case (*Conka and Others*).[22] While the (former) European Commission of Human Rights (ECmHR) had originally held that the failure to abide by one of its interim measures to suspend an expulsion amounted to a violation of the right to individual application under Article 25 (now Article 34) of the European Convention, the European Court, on the contrary, held that the power to order interim measures could not be inferred from either the obligation not to hinder the right to individual application under Article 25 ECHR (the right being of a procedural rather than a substantive nature), nor from any other (international) source.[23] In this regard, for the Court, an unwillingness or failure on the part of a respondent State to comply with an interim measure indicated by the

[19] ECtHR 20 Oct. 2005, Case 57953/00 and 37392/03, *Sharaniyevna Bitiyeva and X.* v. *Russia*.

[20] G. Letsas, 'International Human Rights Law and the Binding Force of Interim Measures', 5 *European Human Right Law Review* (2003) p. 527 at p. 528.

[21] ECtHR 20 March 1991, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, Series A, No. 201, at paras. 102-103.

[22] ECtHR 5 Feb. 2002, Case 51564/99, *Conka and Others* v. *Belgium*, ECHR 2002-I.

[23] ECtHR 20 March 1991, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, Series A, No. 201, at para. 98. Compare: In the Inter-American System, the binding force of provisional measures is deduced (1) from its express mention in the ACHR, (2) from the phrasing of Art. 63(2) is which provisional measures are contemplated; (3) from the relation of Art. 63(2) with other ACHR provisions and the Vienna Convention on the Law of Treaties. *See* J.M. Pasqualucci, 'Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law', 26 *Vanderbilt Journal of Transnational Law* (1993-1994) p. 803 at p. 823-824, 849; H. Faúndez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos* (San José, IIDH 2004) p. 586-587.

European Court could eventually only constitute an 'aggravated liability (or breach)', in case a substantive provision was (*ex post facto*) held to be violated.[24] This meant that if an incompliance by a State with an interim measure did not also lead to the violation of a substantial right, then, in the eyes of the Court, one could not deduce the violation of any (procedural) provision. But if the opposite were to happen, that is if, apart from the above-mentioned non-compliance with a provisional measure, a violation of substantial right were established, then the non-compliance with the provisional measure would constitute a kind of reason or motive which would worsen, i.e., 'aggravate', the responsibility of the State for the violation of the substantial right concerned.[25]

Meanwhile, the European system has evolved to a situation in which it is accepted that the incompliance of a State with a provisional measure can lead to an autonomous finding of a violation of the right of individual application. In fact, in a dramatic and revolutionary move in a Turkish case (*Mamatkulov and Askarov*), based on its 'living instrument' doctrine in combination with the current convergent trend for other international organs (Human Rights Committee, International Court of Justice, Inter-American Court on Human Rights) to declare that

[24] ECtHR 20 March 1991, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, Series A, No. 201, at para. 103 and ECtHR 5 Feb. 2002, Case 51564/99, *Conka and Others* v. *Belgium*, ECHR 2002-I.

[25] With regard to non-compliance by states with provisional measures issued by the Inter-American Court (ex Art. 63(2) ACHR), there is only 1 case (*James and Others*) in which the Court has (already) rendered a judgment on the merits after the non-compliance by a state (IACtHR 21 June 2002, *Hilaire, Constantine and Benjamin and Others* v. *Trinidad and Tobago*, Series C, No. 94). In this case, the Court held that 'the execution of Joey Ramiah by Trinidad and Tobago constitute[d] an arbitrary deprivation of the right to life. This situation [wa]s *aggravated* because the victim was protected by Provisional Measures ordered by this Tribunal, which expressly indicated that his execution should be stayed pending the resolution of the case by the inter-American […] system' (ibid., at para. 198 (emphasis added)). It went on to emphasise 'the seriousness of the State's non-compliance in virtue of the execution of the victim despite the existence of Provisional Measures in his favour', and found the State in violation of the right to life (Art. 4 ACHR) (ibid., at paras. 200, 223 sub 7). The wording indicated that under the current Inter-American case-law (taking into account that there is only 1 relevant judgment), an incompliance with an interim measure can only be an 'aggravation' of a violation of a substantive provision (e.g., the right to life) established *post facto*, and will not lead to an autonomous finding of a violation of, e.g., Art. 63(2) (containing the institute of provisional measures) or Art. 44 ACHR (right of individual complaint). In some convincing separate opinions under resolutions of the Court, Antonio Cançado Trindade refers to the 'autonomous' character of the institute of provisional measures and seems very much in favour of a further 'strengthening and conceptual refining' of the autonomous legal regime of those measures, accepting 'the necessity of the autonomous character of the international responsibility of the State, based on Articles 63(2) and 1(1) ACHR in case of non-compliance'. *See* Concurring Opinion of Cançado Trindade under IACtHR (resolution) 29 June 2005, *Eloisa Barrios y otros* v. *Venezuela*, at paras. 3, 4, 5, 8 and IACtHR (resolution) 22 April 2004, *Penitenciarias de Mendoza* v. *Argentina*, at paras. 1, 12, 18, 19.

their provisional measures are compulsory, while pointing to the increasing importance of the right to individual application in the Convention mechanism, the European Court overturned its previous jurisprudence. It implicitly held, firstly in 2003 and later in 2005 that its interim measures under Article 39 of the Rules of Court were legally binding for the State which they were addressed to. Moreover, non-compliance could lead to the establishment of a violation of the right of individual application (Article 34 ECHR),[26] at least if the non-compliance with the measure indicated, had in this case encroached upon the core of the right of application.[27] More recently, at the beginning of 2006, the Court explicitly confirmed the legally binding character of interim measures, to which it had made reference in the *Mamatkulov and Askarov* case, in a judgment against France (*Aoulmi*).[28] In the latter judgment, the Court for the first time expressly used the term 'binding' ('obligatoire') to refer to the legal force of provisional measures.[29]

However, not all had been solved this way. For example, when taking into account the above-mentioned case-law, the question could be raised whether in each case an (inevitably *ex post facto*) assessment is needed on the consequences (for the applicant) of the non-compliance by the State with an interim measure indicated by the Court, in order to see whether a violation of Article 34 could be established. According to certain legal doctrine, following the above-mentioned Strasbourg case-law (*Mamatkulov and Askarov*) there was no automatic relation between the non-compliance with interim measures and the establishment of a violation of the right of individual application (although this should have been

[26] ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I, at para. 110. For 3 examples where a violation of Article 34 ECHR has been found as a result of the non-compliance with an interim measure: ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I, at para. 128; ECtHR 12 April 2005, Case 36378/02, *Shamayev and Others* v. *Russia and Georgia*, ECHR 2005, at para. 479; ECtHR 17 Jan. 2006, Case 50278/99, *Aoulmi* v. *France*, ECHR 2006, at para. 112. For 1 example where the non-compliance with an interim measure has not lead to the establishment of a violation of Art. 34 ECHR: ECtHR 12 May 2005, Case 46221/99, *Öcalan* v. *Turkey*, ECHR 2005, at para. 201.

[27] In this regard, reference can be made to ECtHR 12 May 2005, Case 46221/99, *Öcalan* v. *Turkey*, ECHR 2005, at para. 201 and (foremost) ECtHR 12 April 2005, Case 36378/02, *Shamayev and Others* v. *Russia and Georgia*, ECHR 2005, at para. 472.

[28] ECtHR 17 Jan. 2006, Case 50278/99, *Aoulmi* v. *France*, ECHR 2006, at para. 111.

[29] Some European Court judges and some legal doctrine argue that given the persistent refusal of member states to include a provision into the European Convention making interim measures binding, the departure of the Court in the *Mamatkulov and Askarov* case from its own jurisprudence is an illustration that the majority of the Court has been legislating in defiance of a clear intention of these member states. *See* Dissenting Opinion of Judges Caflisch, Turmen and Kovler under ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I. Also A. Mowbray, 'A New Strasbourg Approach to the Legal Consequences of Interim Measures', 5 *Human Rights Law Review* (2005) p. 377 at p. 386.

the case).[30] Other legal doctrine held that this question, given the indistinctness of the case-law concerned, stayed open.[31] Whatever view one adheres to, *Mamatkulov and Askarov* can be described as 'a revolutionary judgment without teeth', because the language used has permitted legal doctrine to develop two different deductions or theories, i.e., either (1) the answer to the question whether one can speak of an automatic violation of the right of individual application in case of non-compliance with an interim measure was left open, which basically means that there might or might not be an automatic violation in case of non-compliance or (2) notwithstanding the fact that the Court confirmed that interim measures are binding, non-compliance surely does not automatically generate a violation of the above-mentioned right of application. In fact, in both interpretations, the applicant and potential victim of irreparable damage is the certain loser.

3. From the binding nature of interim measures to the automatic finding of a violation of the ECHR if a State does not comply with an interim measure

The above-mentioned problem as to the possible absence of immediate legal consequences for a State unwilling to abide by an interim measure issued by the European Court has (seemingly) been definitively resolved by the recent *Olaechea Cahuas* case against Spain. In this case, the Spanish authorities did not comply with a provisional measure of 6 August 2003 concerning the staying of the extradition by Spain to Peru of a Peruvian national. The beneficiary of the measure was Mr. Adolfo Olaechea Cahuas, an alleged member of Sendero Luminoso (the Shining Path) in Europe, who was sought in his home country for supporting terrorist activities of that Maoist guerrilla movement.

On 6 August 2003, the European Court decided to issue an interim measure in order to temporarily suspend the imminent extradition of the person concerned to Peru. Nevertheless, investigating judge Juan del Olmo of the *Audiencia Nacional* (the Spanish High Court), to whom the provisional measure of the European Court was communicated by the Spanish State, dismissed the indication

[30] Haeck and Burbano Herrera, *supra* n. 13, at p. 662-663; J. Vande Lanotte and Y. Haeck, *Handboek EVRM. Deel 1. Algemene beginselen [Manual on the ECHR. Part I. General Principles]* (Antwerp/Oxford, Intersentia 2005), p. 481-482; Ph. Leach, *Taking a Case to the European Court of Human Rights* (Oxford, Oxford University Press 2005) p. 42; X., 'Case Comment (Aoulmi v. France, 17 January 2006)', 6 *European Human Rights Law Review* (2006) p. 355 at p. 355.

[31] F. Krenc, 'Observations sous C.E.D.H., Öcalan c. Turquie, gde ch., 12 mai 2005', 124 *Journal des Tribunaux* (2005) p. 756 at p. 758; F. Frumer, 'Un arrêt définitif sur les mesures provisoires: la Cour européenne des droits de l'homme persiste et signe', 16 *Revue trimestrielle des droits de l'homme* (2005) p. 799 at p. 819.

to suspend the extradition the Court issued on 6 August 2003. He based the decision on the fact that the applicant had first accepted a short track extradition. and was aware of the facts for which his extradition was requested. In addition, assurances were received from the Peruvian government that the terrorist acts of which the applicant had been accused were not punishable with the death penalty and that a life sentence, which would normally be applicable regarding those crimes, would also not apply. Moreover, the protection of the physical integrity of the person concerned and his right to a fair trial would be guaranteed. On 7 August 2003, i.e., one day after the interim measure had been issued, the (conservative) Spanish Government proceeded with the extradition.[32]

While in earlier cases (*Mamatkulov and Askarov*, *Shamayev*, *Aoulmi*), the right of application of the petitioners after their extradition or expulsion had been effectively hindered by the fact that all contact of the lawyers with their clients had come to a halt, the situation was not the same in the *Olaechea Cahuas* case. The applicant, once he was on Peruvian soil, had been released provisionally after 3 months under the condition that he would not leave his residence city of Lima during the judicial investigation. Moreover, during the whole Peruvian procedure, the applicant had been in contact with his London-based lawyer. These considerations prompted the Spanish authorities to conclude that there could not have been any kind of hindrance to the right of application.[33]

Notwithstanding the above-mentioned differences between the cases, and concretely the decent treatment the applicant received after his extradition to Peru, the European Court did not agree with the reasoning offered by the Spanish State and acknowledged that the non-compliance by a respondent State with whatever interim measure adopted by the Court addressed to that State, would indeed lead to the establishment of a violation of the European Convention, in particular of the right of application under Article 34, independently of the establishment *ex post facto* of the existence of a hindrance of the effective exercise of the right to individual application. After the Court had first signalled that '… a conservatory measure is, from its nature, provisional, and its necessity is assessed at a precise moment in history because of the existence of a risk that could hinder the effective exercise of the right to application', it held:

> … if [a] Contracting Party does not respect [a] provisional measure decided [by the Court], the risk of hindering the effective exercise of the right of application continues … . Even [if the risk … has not been confirmed], […] the force of the provisional measure has to be judged obligatory. Indeed, the decision of the State

[32] ECtHR 10 Aug. 2006, Case 24668/03, *Olaechea Cahuas* v. *Spain*, ECHR 2006, at paras. 7-17.

[33] Ibid., at paras. 76-79.

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> regarding the respect for the measure cannot be postponed awaiting a possible confirmation of the existence of a risk [of irreparable damage]. The simple non-observance of a provisional measure decided by the Court in function of the existence of a risk is, in itself, a severe encroachment, at that precise moment, of the effective exercise of the right of individual application.[34]

In the final paragraphs of the judgment in the *Olaechea Cahuas* case, the European Court comes to apply the only logical legal consequence resulting from the above-mentioned assessment of how one can arrive at a 'severe encroachment' of the effective exercise of the right to application, by holding that 'by not conforming to the provisional measures indicated according to Article 39 of its Rules, Spain had not respected the obligations which rested upon it in the light of Article 34 of the European Convention.'[35]

Critics may argue that the judgment of the European Court in the *Olaechea Cahuas* case has 'only' been delivered by a Chamber of seven judges and not by the Grand Chamber of 17 judges, whose opinion would have been (more) authoritative.[36] It is, however, important to mention that the Chamber that delivered the judgment came to its conclusion unanimously, without any judge issuing a concurring or dissenting opinion. Consequently, one must assume that all the members of the Chamber were in agreement with each other on this important issue. Moreover, it is impossible to our knowledge that such a 'hot issue' as the binding force of provisional measures, combined with the automatic establishment of a violation of the right to individual application if not complied with by a State, would have passed unnoticed in the European Court and/or would not have been debated in the weekly meetings of the Section Registrars of the Court. As such, one may feel quite assured that the majority of the judges in the Strasbourg Court are backing up the Chamber judgment at issue. Finally, it is important to say that, although in practice, one may safely assume that the European Court has now accepted the automatic violation of the right to individual application in case of non-compliance of a respondent State with an interim measure, it would not be

[34] '… si [une] Partie contractante ne respecte pas la mesure provisoire décidée [par la Cour], le risque d'entraver l'exercice effectif du droit de recours continue … . Même [si le risque n'a pas été confirmé …], […] la force de la mesure provisoire doit être jugée obligatoire. En effet, la décision de l'Etat quant au respect de la mesure ne peut pas être reportée dans l'attente d'une éventuelle confirmation de l'existence d'un risque de dommage irréparable. La simple inobservation d'une mesure provisoire décidée par la Cour en fonction de l'existence d'un risque est, en soi, une grave entrave, dans ce moment précis, à l'exercice effectif du droit de recours individuel.' Ibid., at para. 81.

[35] Ibid., at paras. 82-83.

[36] No request for a re-hearing has been submitted by the applicant or the Spanish government. Therefore, the judgment was final as from 11 Dec. 2006 in accordance with Art. 44(2) of the European Convention.

bad if the Court in the near future would fully endorse its new point of view in a Grand Chamber judgment.

4. Is there is a remote chance that non-compliance with an interim measure does not lead automatically to the establishment of a violation of the right of individual application?

While the judgment in the *Olaechea Cahuas* case on interim measures is undoubtedly an indication that the net around states unwilling to abide by an interim measure of the European Court is being steadily tightened, there still seems to be a loophole for a State to escape its responsibility under the European Convention for not abiding by an interim measure, even if the merits of the case are under consideration before the Court. In fact, in the *Olaechea Cahuas* case, while underlining its preparedness to abide by interim measures indicated by the European Court under normal circumstances, the Spanish Government (also) argued that they were unable to comply with the current provisional measure 'because the applicant had requested it too late [6 August, while the transfer was foreseen on the next day], without giving the indispensable time to the Spanish authorities to put into place the measures which are necessary to avoid the extradition.'[37] The Court rejected this argument, indicating that the Spanish authorities, after having received the interim measure to suspend the extradition of the applicant to Peru, had handed the measure to the competent judge Juan del Olmo in the *Audiencia Nacional* and had later sent the negative response from that judge (i.e., a judicial decision confirming the well-foundedness of the extradition) to the European Court. According to the Court, '[t]he time necessary would not have been longer if the Government, as an internal authority, had ordered the suspension of the extradition in appliance of the measure decided by the Court.'[38]

While it could be easily deduced from the facts in the *Olaechea Cahuas* case that the attempt of the Spanish Government to evade its responsibility was bound to fail, a careful reading of the judgment also makes it clear that if a respondent State can prove that the time lapse between the indication of an interim measure by the European Court to stay a State act and the execution of that State act is unreasonably short, a member state will be able to escape its international responsibility and a conviction under Article 34 ECHR. So, the Court does leave a dangerous loophole to the adventurous state willing to take a risk.

Whilst such a hypothetical situation can theoretically not be excluded, it is our strong conviction that in practice, arguments from the respondent state that

[37] ECtHR 10 Aug. 2006, Case 24668/03, *Olaechea Cahuas* v. *Spain*, ECHR 2006, at para. 65.
[38] Ibid., at para. 70.

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go this way should not be accepted by the European Court or should be scrutinized by the Court from the outset with utmost strictness, given the fact that a State Government can in (virtually) all situations suspend the execution of an act which it is controlling itself on extremely short notice (for example 1 hour). Moreover, although an oral confirmation by the European Court of an interim measure issued to a state will always be followed by fax, which will usually arrive a few hours later,[39] and the decision will also be notified by ordinary letter, it is clear from the outset that the respondent State should not await any written confirmation(s) and should therefore take immediate action.[40] In this respect, it might also not be a bad idea if the European Court would set aside its unwillingness to contact the national bodies directly responsible for enforcing the contested act (e.g., the expulsion or the extradition of an applicant, or the immediate person in charge of the people accompanying the persons to be deported), in order to shrink the time frame between the actual issuance of an interim measure and the execution of the state action. Another possibility worth considering would be for the Committee of Ministers of the Council of Europe to adopt a recommendation addressed to the member states of the Council, urging them to adopt legislation which allows for a speedy and coherent response from the state administration or the national judiciary following an interim measure adopted by the Strasbourg Court.

5. Is the 'firm stand' of the European Court on the binding force of and the legal consequences of non-compliance with interim measures driven by a realistic fear of mounting non-respect by member states of interim measures?

It is remarkable that, while the European Court (followed by the bulk of legal doctrine[41]), has on all important earlier occasions been eager to speak of the 'consistent use [of States] to respect these indications [of interim measures]'[42] or to

[39] ECtHR 20 March 1991, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, Series A, No. 201, at para. 55.

[40] Haeck and Burbano Herrera, *supra* n. 13, p. 654. In that regard, one may also ask the question whether the Strasbourg Court itself has, in the past in all cases in which an interim measure has been requested by the applicant or his representative, been diligent and processed the request within extremely short notice. Given the fact that no research has been done or information been given by the Court on this issue, this question cannot be answered in a satisfactory way.

[41] Letsas, *supra* n. 20, p. 534; Mowbray, *supra* n. 29, p. 380. *See also* (earlier) D. Spielmann, '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* (Brussels, Bruylant 1992) p. 1306-1307.

[42] ECtHR 5 Feb. 2002, Case 51564/99, *Conka and Others* v. *Belgium*, ECHR 2002-I. Also EcomHR (report) 7 June 1990, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, at para. 121, in

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underline that '[c]ases of States failing to comply with indicated measures remain very rare'[43] and, thereby clearly suggesting that the recent change (initiated with *Mamatkulov and Askarov*) in its case-law had not been prompted by any problems as to non-compliance by member states with interim measures indicated by the Court, reality also shows otherwise. That is why, in our opinion, the Court has, in the *Olaechea Cahuas* judgment, neglected to include an identical or similar passage containing the statements mentioned earlier. Indeed, any statement from the Court in that sense, in our opinion, would not sound (and anyway has never sounded) very convincing.[44]

While in the period prior to the *Cruz Varas* judgment (1958-1991), interim measures have been complied with in all but four cases,[45] in the following period (1991-2005) the situation was a bit different. In fact, during the latter period, the European Court was confronted with at least 7 new cases in which various old member states (Belgium, France, Russia, Spain and Turkey) blatantly refused to comply with interim measures issued by the Court.[46] Moreover, during the same period, in another worrisome case, the French Government had indicated that in the hypothetical situation that it would be confronted with an interim measure indicated by the European Court by telephone (and confirmed by fax), France

which it was – mistakenly – stated that until the moment of the expulsion of the petitioner, no State had ever refused to abide by an interim measure indicated by the European Commission.

[43] ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I, at para. 105. Earlier ECtHR 20 March 1991, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, Series A, No. 201, at para. 100.

[44] Compare: the pleading of judge (and former President) Cançado Trindade of the Inter-American Court for 'the autonomous character of the international responsibility of the State, based on Articles 63(2) and 1(1) of the Convention, in case of non-compliance by the State, prompted by his profound preoccupation that the institute of provisional measures in the last five years has proved to be insufficient in certain situations, where "a clear non-compliance" with provisional measures on behalf of the states can be detected.' *See* IACtHR (resolution) 22 Nov. 2004, *Penitenciarias de Mendoza* v. *Argentina*, at paras. 8-9.

[45] ECtHR 20 March 1991, Case 15576/89, *Cruz Varas and Others* v. *Sweden*, Series A, No. 201, at para. 100; EComHR, 6 Oct. 1976, Case 7317/75, *Lynas* v. *Sweden*, *Decisions & Reports* 6, p. 41; EComHR, 10 Oct. 1985, Case 11615/85, *Geller* v. *Netherlands*; EComHR, 7 Dec. 1989, Case 15658/89, *Mansi* v. *Sweden*, *Decisions & Reports* 64, p. 242.

[46] EComHR 16 Oct. 1992, Case 18560/91, *D.S., S.N. and B.T.* v. *France*, (expulsion to Sri Lanka); EComHR, 5 Dec. 1996, Case 31113/96, *Urrutikoetxea* v. *France* (extradition to Spain); EComHR 23 Jan. 1997, Case 32824/96, *Berke* v. *France* (failed deportation to Mauretania); EComHR 18 Sept. 1997, Case 34795/97, *A.B.* v. *France* (expulsion to Tunisia); ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I (extradition to Uzbekistan); ECtHR 12 March 2003, Case 46221/99, *Öcalan* v. *Turkey*, ECHR 2003 (request to Turkey to inform the Court of every measure it would be taking in order to make every effort to ensure that the petitioner would be given a fair trial); ECtHR 5 Feb. 2002, Case 51564/99, *Conka and Others* v. *Belgium*, ECHR 2002-I (collective expulsion to Slovakia); ECtHR 10 Aug. 2006, Case 24668/03, *Olaechea Cahuas* v. *Spain*, ECHR 2006 (extradition to Peru).

would first have to assess itself whether the request for an interim measure by an applicant (not to expel him) carried enough weight in order to comply with the interim measure indicated by the Court. In this case, there was, strictly speaking, no non-compliance by France with an interim measure to suspend an imminent deportation of a person to Algeria, given the fact that the French had only received the telephone call from Strasbourg, whereby they were requested to temporarily suspend the expulsion, followed by the confirmation per fax of the provisional measure, at a moment when the person concerned had been put on the boat to Algiers and had already left French territory. Nevertheless, the French Government did respond to the European Court that

> [e]n tout état de cause, à supposer même que l'embarquement [du requérant] ait eu lieu, comme il vous avait été indiqué, à 17 heures, il est à craindre que la demande de suspension de l'exécution de la mesure d'expulsion n'aurait pas davantage pu être traitée en temps utile. En effet, des instructions éventuelles aux fins de non exécution d'une mesure d'expulsion ne sauraient à l'évidence se fonder sur un simple appel téléphonique, sans examen préalable des pièces du dossier constitué par le requérant.[47]

In some Commission cases, the Contracting State on the one hand complied with the interim measure indication because it did not deport the applicants to the country indicated by the former Commission, but on the other hand deported the applicants to another country not mentioned in the request.[48]

In short, in quite a brief period of time, the European Court has been confronted on quite a number of occasions with completely unwilling or partially recalcitrant member states with regard to the compliance with provisional measures. Therefore, when in the *Olaechea Cahuas* case, it was once again confronted with a government (the Spanish Government) unwilling to listen to the Court, the European Court simply had no other option than to pronounce itself the way we have described earlier, with the objective to set a precedent in order to maintain the effectiveness of provisional measures.

6. A number of remaining hot issues

The *Olaechea Cahuas* judgment should not be seen as the end of the jurisprudential evolution regarding provisional measures under the European Convention. In

[47] ECtHR 26 Sept. 2002, Case 50160/99, *Koughouli* v. *France.*

[48] See, e.g., EComHR 18 Oct. 1993, Case 19776/92, *Barir and Others* v. *France* (request from Commission to France not to expell applicants to Somalia, followed by expulsion of applicants to Syria).

fact, there are a number of outstanding important and very controversial issues concerning provisional measures in the Strasbourg system which have not or have only been dealt with in a very summary and/or non-conclusive way by the European Court. Perhaps it would be interesting for the European Court to take the case-law and the vision of its Inter-American counterpart into account, as it has done on other occasions in the past.

First of all, the increased effectiveness of the interim measures due to the automatic link of non-compliance by a State to the establishment of a violation of the right of petition by that State is very relative. In fact, only those applications which are assessed by the European Court as to the merits of the case will enjoy the protection or guarantees offered under the case-law on interim measures. The very prudent estimation by legal doctrine that more than half of the cases in which interim measures are indicated are subsequently declared inadmissible,[49] implies that states, when confronted with an interim measure, will still (be able to) weigh whether there is a chance that the case will perhaps not go to the merits phase, and as such, will (be able to) examine if they can escape their international responsibility and a certain conviction for violation of the right of petition under Article 34 ECHR. In this regard, it may be alleged that this is distorting or even annihilating the effect of the recent protective case-law regarding interim measures. In fact, as a Court, one can hardly hold that in the future interim measures will be binding and will automatically lead to the finding of a violation of the European Convention, while by declaring the majority of the cases inadmissible, it is in fact refusing to tie any sanction to the violation of Article 34 by adventurous states who may not have abided by the respective interim measures addressed to them by the Court.

Secondly, in the current state of the Strasbourg case-law, it is not entirely clear what the legal consequences are for the individual applicant who decides not to comply with a provisional measure indicated to him while at the same time, another interim measure was directed to the respondent State. In our opinion, it would not be logical if even a manifest unwillingness from the petitioner to comply would lead to a declaration of inadmissibility of his application, a decision which could be made under Article 35(3) of the European Convention, allowing the Court to declare a case inadmissible which it considers to be an abuse of the right of application.[50] Indeed, beneficiaries of provisional measures cannot lose their victim-status because of their mere unwillingness to abide by an interim

[49] Haeck and Burbano Herrera, *supra* n. 13, p. 628.

[50] Such a decision could theoretically be motivated by the intentional flagrant violation of rules of procedure. Cf. EComHR 12 April 1991, Case 13524/88, *D.* v. *Spain*, *Decisions and Reports* 69, p. 185 at p. 194.

measure indicated by the Court. However, depending on the factual situation, the application could be struck out of the list of cases in accordance with Article 37(1) ECHR.[51] An inadmissibility decision would be too drastic, given the fact that the lack of action of the applicant can under no circumstances (nor in the line of the current Strasbourg case-law) be considered as an abuse of the right to present individual applications under Article 34 ECHR. A number of Turkish cases, in which the Court struck the applications out of its list of cases because the applicants, notwithstanding repeated requests from the Court to comply with its interim measure to present themselves at a hospital of their choice to undergo a medical exam ordered by a panel of specialists appointed by the European Court to establish whether they were fit to undergo detention, subsequently to be submitted to the Court's Registry, had not submitted the above-mentioned report or otherwise justified their omission, thereby hindering the establishment of the facts in their own cases, indicate that the Strasbourg Court itself also seems to go into the direction of striking out applications instead of declaring applications plainly inadmissible in the case of non-compliance by private persons with an interim measure directed to them.[52] Nonetheless, it should be mentioned that the striking out of a case can also be unreasonable under the circumstances. If, for example, an interim measure is directed to a person held in detention not to commit any further suicide attempts, while at the same time the respondent State is ordered, through another interim measure, to take all necessary steps to guard the health situation of the detainee concerned, and the person detained tries to commit suicide once again, in violation of the interim measure directed to him, the case cannot be struck out of the list of cases if it can be deduced from the facts that, for instance, prison guards had left instruments allowing a relatively easy suicide in the inmate's cell. In short, the European Court has to be very careful and has to examine each individual case on the facts, *inter alia* by checking whether the respondent State has also done all that can be reasonably expected from it in order to avoid a certain behaviour from the applicant going against an interim measure directed to that applicant, before coming to a decision whether or not to strike an application out of the list of cases. This is certainly the case in a detention situation, where the inmates are left under full State supervision. While, for the

[51] Art. 37 ('Striking out applications') says: '1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires. 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.'

[52] For example ECtHR 10 Nov. 2005, Case 5142/04, *Hun* v. *Turkey*, para. 38.

moment being, we agree with the case-law of the Court in the few cases with regard the incompliance on the part of individuals with regard to interim measures directed to them, it might not be a bad idea, given the above-mentioned, if the Court would further clarify its vision on the issue.

Thirdly, the absence of reasoning[53] and publication of provisional measures[54] (in contrast with the admissibility decisions and judgments) is also a matter of concern. Even though a decision of acceptance or rejection of an interim measure is a measure of a procedural nature and such measures in principle fall, in accordance with the Explanatory Report to the Eleventh Protocol to the European Convention,[55] under the obligation of providing reasons, it is interesting to observe that, notwithstanding the existence of such obligation, the decisions on provisional measures are generally not reasoned[56] nor made public on the website of the European Court. In that regard, it should be mentioned that provisional measures of the Inter-American Court of Human Rights, the European Court of Justice and the International Court of Justice are for example duly reasoned and published. Although it is understandable that the European Court, due to its huge case-load in comparison with its international counterparts, may not be very eager to have to spend its precious time providing reasons for its decisions regarding interim measures, one could equally argue that a number of other more compelling reasons outweigh this negative, purely procedural economic motive. For example, there is the necessity for the respondent State to act with the necessary speed and even for the national judge to be able to act when confronted with an unwilling State. It is also important for the applicants, in case their request for provisional measures has been rejected, that they can take cognizance of the rea-

[53] In fact, in every case in which a provisional measure is requested, (only) some references are included in a checklist (an internal document) to be filled in by the Registry case-lawyer and signed by the President (of the Chamber) issuing the interim measure concerned.

[54] Apart from the 'very concise' references to a number of cases (with summary of the facts) in which provisional measures have been issued by the Court in the Annual Activitiy Reports of the different Sections of the European Court. *See* <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Section+activity+reports/>, visited 2 Nov. 2007.

[55] Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (ETS No. 155), at para. 105.

[56] There is one known exception (i.e., 2 cases), in which the Court has provided reasons for a measure (President ECtHR, 'Note Verbale' with provisional measure, 3 May 2004 in the Case 15243/04 and President ECtHR, 'Note Verbale' with provisional measure, 31 Aug. 2004 in the Case 20210/04). The reasoning was due to the unwillingness of the Dutch minister competent for the expulsion of foreigners to take into account the several interim measures issued earlier in different but similar cases, i.e., to stay the expulsion to Somalia of persons in imminent danger of being expelled to that country. Instead of accepting that these measures have some kind of 'precedent-effect', the minister on the contrary required each person concerned to request an interim measure to Strasbourg.

sons for the rejection, and to avoid being left with the idea that their request (and perhaps also the entire application) has not been analysed in an effective way by the Court. These are, in our opinion, a few primary motives for us to conclude that the European Court should change its current intransparent practice and that in the future the Court should provide reasons for and publish all its provisional measures, notwithstanding that fact that this practice will take up more time and might attract new cases. Moreover, from a(nother) purely procedural economic point of view – apparently the procedural economic argument can also be useful for defending the reasoning of provisional measures – as well as a political point of view, it is highly desirable that, for example, in identical or similar situations, the Strasbourg Court would not have to impose the same provisional measure time and again upon the same State.[57] As such, providing reasons for interim measures may also have a dissuading effect. As domestic law is not very well equipped and adapted to the principle that obligations of states under international law may also require respect from the otherwise independent domestic judicial authorities, these authorities may, in view of the lack of an explicit legal provision obliging them to comply with provisional measures, be tempted not to comply with these Strasbourg interim measures. This is perfectly illustrated in the *Olaechea Cahuas* case, where a judge of the Spanish Audiencia Nacional, to whom the provisional measure of the European Court was communicated by the Spanish government, dismissed the request to suspend an extradition.[58] If reasons for the provisional measure of the European Court had been provided, it might well have persuaded the Spanish judge to stay the expulsion. Indeed, a reasoned provisional measure may (and should) even be accepted as binding for the internal state organs and even by (supreme or constitutional) courts as regards other, similar or identical cases, as was accepted in a judgment of the Dutch Council of State (the supreme administrative court).[59] Moreover, as states cannot invoke their own national legislation as an excuse for breaching their international obligations, the legally binding force of provisional measures should be guaranteed under national law. Meanwhile, national courts must themselves accept the binding force of interim measures by the European Court and refrain from breaching a legally bind-

[57] *See supra* n. 56.

[58] ECtHR 10 Aug. 2006, Case 24668/03, *Olaechea Cahuas* v. *Spain*, ECHR 2006, at paras. 7-17.

[59] R.v.St. [Ned.] 28 May 2004, <http://www.raadvanstate.nl/> (in Dutch): 'Given the general character of the reasoning currently given for the provisional measure which has been issued – whereby the Section takes into account that the guarantee meant to be present in case of expulsion to Somalia, is not ensured at the moment – it has to be judged that above-mentioned motivated "interim measure" of the President is yet to be seen as an obstacle to the expulsion to Northern Somalia of foreigners of Somali nationality who belong to a minority and who do not have family or clan bonds in Northern Somalia.'

ing obligation, whether there is an explicit provision in internal law or not,[60] and *a fortiori* if those courts are confronted with a duly reasoned interim measure from Strasbourg and/or a number of interim measures issued in similar or identical cases. Moreover, if an interim measure is issued, its reasoning is also very important for the respondent States to be able to prepare their defence. Indeed, if the Court gives the reasons why it considers that provisional measures are necessary, it is at the same time offering the respondent States the opportunity to exercise their right of defence, precisely because the interim measure is accompanied by a justification. Only insofar as a State can take cognizance of the reasons why it is being obliged to act in a certain way will it have the opportunity to prepare its position with respect to that.

Finally, with regard to the substantive issues and the rights and freedoms in the European Convention, concerning or under which a provisional measure may be issued, the European Court in the *Olaechea Cahuas* case, whilst indicating that '[w]hile there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention',[61] in reality has been very reluctant to issue any interim measure at all in cases other than the application of the right to life (Article 2) and the prohibition of torture (Article 3). Indeed, an interim measure in Article 8 cases (the right to respect for private and family life) remained until the end of 2003 wholly exceptional[62] (while a few cases are known in the past few years). Aside from the one case, in which a state was requested to take every effort to ensure that the rights of the applicant (in a death penalty case) under Article 6 ECHR would be guaranteed,[63] and excluding the unique case in which an interim measure was issued in order to protect the right of application under Article 34 ECHR (the latter may be considered as a certain breakthrough, in that from now on the Court also seems to be using interim measures in order to protect purely procedural convention provisions)[64] cases in which an interim measure has been indicated concerning other Convention rights and freedoms, are, to our knowledge, either inexistent or unknown or at least not mentioned in any existing legal literature. On the contrary, the European Court has for example

[60] Letsas, *supra* n. 20, p. 531-532.

[61] ECtHR 4 Feb. 2005, Case 46827/99 and 46951/99, *Mamatkulov and Askarov* v. *Turkey*, ECHR 2005-I, at para. 104.

[62] Haeck and Burbano Herrera, *supra* n. 13, p. 631-640, 645-649.

[63] *See supra* n. 14 and 18.

[64] *See supra* n. 19.

persistently refused to indicate provisional measures in cases concerned with the right to property (Article 1 Protocol No. 1).[65]

However, aside from the two above-mentioned rather 'renegade' cases, the explicit confirmation of the European Court that (in theory) interim measures can be requested under 'other Convention rights', it is the first real but for the moment very weak and bleak indication that the European Court is – theoretically – willing to broaden the scope of its interim measures to other areas. In this regard, and notwithstanding the differences that exist between the American and European states, in our opinion the European Court should openly follow the approach taken by the Inter-American Court of Human Rights, which, while most cases (in fact 94%) in which provisional measures have been indicated also concern issues regarding the right to life and the protection of personal integrity,[66] it has in a broad scale of other kinds of cases not hesitated to order interim measures under other rights and freedoms in the American Convention on Human Rights, such as the right to freedom of expression,[67] the right to personal liberty,[68] the right to movement,[69] the right to property[70] and the right to a fair trial.[71] More-

[65] *See*, e.g., ECtHR 20 May 2003, Case 59724/00, *Izquierdo Galbis* v. *Spain*.

[66] IACtHR (resolution) 30 Aug. 2004, *Raxcacó y Otros* v. *Guatemala*, considerative part (henceforth 'cp') at paras. 8-9; IACtHR (resolution) 30 Nov. 2001, *Centro de Derechos Humanos Miguel Agustín Pro Juaréz y Otros* v. *México*, cp, at para. 7; IACtHR (resolution) 22 Nov. 2004, *Penitenciarias de Mendoza* v. *Argentina*, cp, at paras. 10, 11, 12; IACtHR (resolution) 2 July 1996, *Loayza Tamayo* v. *Perú*, expositive part (henceforth 'ep'), at paras. 4, 7. *See also* President IACtHR (resolution) 29 July 1997, *Cesti Hurtado* v. *Perú*, cp, at para. 7.

[67] IACtHR (resolution) 4 Sept. 2004, *Emisora de Televisión Globovisión* v. *Venezuela*, cp, at paras. 7, 8, 9, 13; IACtHR (resolution) 7 Sept. 2001, *Periódico 'la Nación'* v. *Costa Rica*, cp, at paras. 10-11; IACtHR (resolution) 7 Sept. 2001, *Diarios el Nacional y Así es la Noticia* v. *Venezuela*, cp, at paras. 9, 10; IACtHR (resolution) 2 Dec. 2003, *Luisiana Ríos y Otros* v. *Venezuela*, cp, at para. 13; IACtHR (resolution) 30 July 2003, *Marta Colomina y Liliana Velásquez* v. *Venezuela*, cp, at para. 5, ep, at para. 1.

[68] IACtHR (resolution) 9 July 2004, *Carlos Nieto* v. *Venezuela*, cp, at para. 7, ep, at para. 1; IACtHR (resolution) 11 March 2005, *Gutiérrez Soler* v. *Colombia*, cp, at paras. 9, 12, rp, at para. 1; President IACtHR (resolution) 30 July 2004, *Masacre Plan de Sánchez (Salvador Jerónimo y Otros)* v. *Guatemala*, cp, at para. 9, rp, at para. 1.

[69] IACtHR (resolution) 5 July 2004, *Pueblo Indígena Kankuamo* v. *Colombia*, cp, at para. 10, rp, at para. 3; IACtHR (resolution) 6 July 2004, *Pueblo Indígena Sarayaku* v. *Ecuador*, resolutive part thenceforth 'rp'), at para. 2; IACtHR (resolution) 18 Aug. 2000, *Los Haitianos y Dominicanos de Origen Haitiano en República Dominicana* v. *Dominican Republic*, cp, at para. 9.

[70] IACtHR (resolution) 6 Sept. 2002, *Comunidad Mayagna (Sumo) Awas Tingni* v. *Nicaragua*, cp, at paras. 5, 6, 7; IACtHR (resolution) 17 June 2005, *Pueblo Indígena Sarayaku* v. *Ecuador*, cp, at paras. 9-10, rp, at para. 1(b). The fundamental reason why the Court has protected this right in the case of indigenous communities, is because it has, while applying the ACHR, considered it very important to take into account the traditions of these peoples. In this sense, it is necessary to protect their property because the damage that could be done to that right, would imply putting at risk the survival itself of the community.

[71] IACtHR (resolution) 23 Nov. 2000, *Ivcher Bronstein* v. *Peru*, cp, at para. 5, rp, at para. 1.

over, the lack of provisional measures with regard to other rights and freedoms under the Inter-American system is not so much due to the unwillingness of the Inter-American Court to order provisional measures with regard to those rights, but simply because no interim measures with regard to such rights and freedoms have been submitted or requested to the Court yet. The clear vision of the Inter-American Court confirms the argument, in our opinion correctly, taken by a former President of the Inter-American Court of Human Rights that, as all human rights are interrelated and indivisible, there does not seem to be, juridically or epistemologically, any impediment to (the provisional measures) coming to safeguard other human rights in the future, whenever the pre-conditions of extreme gravity and urgency and of the protection against irreparable damages to persons are met.[72] If the European Court would have (a) compelling reason(s) not to follow the broad stand or policy taken by the Inter-American Court in that regard, that reason (or those reasons) can to our knowledge only be of a procedural-economic character ('very time-consuming'). And if, by coincidence, there were, aside from the above-mentioned motive, other issues at stake impeding a broader use of provisional measures, it might not be a bad idea if the Court would make those motives known to its clients, the public at large, i.e., the potential applicants and their representatives.

7. Conclusion

Fifteen years – that is what it has taken the European Court in Strasbourg to issue a clear judgment on the legally binding character of an interim measure and its consequences in case of non-compliance by the State to which it is directed. The judgment of the European Court in the *Olaechea Cahuas* case can certainly be seen as a truly historic judgment on the legal consequences of the binding force of provisional measures indicated (one may now safely say 'ordered') by the European Court. Respondent States that do not conform to a provisional measure issued by the Strasbourg Court, will find their inaction virtually automatically (i.e., under the condition that the European Court is prepared to take a very severe and rigid stand as regards the remaining legal loophole mentioned earlier) interpreted in violation of the right of individual application under Article 34 of the European Convention, whatever the outcome of the assessment of the Court

[72] A.A. Cançado Trindade, 'The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)', 24 *Human Rights Law Journal* (2003) p. 162 at p. 165; A.A. Cançado Trindade, *Medidas Provisionales. Prólogo del Presidente de la Corte Interamericana de Derechos Humanos al Tomo III del Serie E.*, <http://www.corteidh.or.cr>, at para. 21. *See also* A. Borea Odria, 'Propuesta de Modificación a la Legislación del Sistema Interamericano de Protección de los Derechos Humanos', in X. (ed), *Liber Amicorum Héctor Fix-Zamudio* (San José, IACtHR 1998) p. 533 at p. 541-542.

regarding the materialisation of the violation of the substantive right(s) invoked by the applicant. As a first conclusion, the road for the European Court on the subject of interim or provisional measures may have been quite long, but the end may perhaps be quite near, certainly now that the European Court has finally established its authority as an international player able to order binding interim measures with firm legal consequences (automatic violation of Article 34 ECHR) for recalcitrant states, which is a very positive evolution.

Nevertheless, not all the member states seem to have understood the recent case-law of the Court concerning the binding character of interim measures and the legal consequences for member states in case of non-compliance. The latter is illustrated in a recent case, in which the Russian Federation has deliberately put aside an interim measure issued by the European Court by deporting a person on 24 October 2006 at 7:20 p.m., i.e., 20 minutes after the European Court had issued and notified to the Russian authorities the interim measure to suspend the deportation of the persons concerned to Uzbekistan.[73] This sad case, together with the fact that interim measures are by now binding and incompliance by States will automatically lead to holding that State internationally responsible for a violation of the right of petition (Article 34 ECHR), raises the question whether it would not, as some sort of 'consecration' and incentive, be useful to finally codify the institute of provisional measures by including it as a separate provision into the European Convention through an additional protocol. Such a move would not only be useful, but moreover perfectly join in with the original draft for an international court of human rights, drawn up by the European Movement of 1949.[74]

Lastly, a final touch of boldness on the part of the Strasbourg judges, taking into account the Inter-American jurisprudence, could consist of studying more in-depth the latter's case-law in order to try to find solutions for some of the remaining issues on provisional measures in Europe. On the other hand, the encounter with the European judges may be equally fruitful for the judges in the

[73] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 'Member states' duty to cooperate with the European Court of Human Rights', Doc. 11183, 9 Feb. 2007, p. 9 (Explanatory Memorandum), para. 52 (*Rustam Muminov* case).

[74] Notwithstanding the fact that the draft statute for an International Court of Human Rights drawn up by the European Movement expressly included the possibility for the future Court to impose provisional measures, the drafters of the ECHR have deliberately opted not to give the Court express powers to impose or to adopt interim measures. All later attempts (following recommendations, e.g., from the Parliamentary Assembly of the Council of Europe in 1971) and efforts (e.g., from the Swiss Delegation during the negotiations leading to Protocol No. 11 in 1994) to include the institution in the Convention, have also failed, in general because of the reluctance of the member states to give up too much of their sovereignty. *See* Haeck and Burbano Herrera, *supra* n. 13, at p. 627, footnote 5.

Inter-American Court, who may in turn get acquainted with some new points of view with regard to, e.g., the legal deductions following from the binding character of provisional measures, i.e., the establishment of an autonomous finding of a violation of, e.g., Article 63(2) or 44 of the American Convention to the non-compliance by member states with their interim measures, something which is an acquired right under the Strasbourg case-law.

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