INTERIM MEASURES AND THE MAMATKULOV JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

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I have known Lucius Caflisch in two different capacities, first when I was his student in Geneva and then as his colleague in the European Court of Human Rights. Working with him in both contexts was always enjoyable because of his wit and sense of fun, but also, of course, instructive because of his tremendous erudition. It is, therefore, with some trepidation that I venture to disagree with him on the principal issue dealt with in the present paper. I nonetheless dedicate it to him with gratitude for many years of help and friendship.

1 INTRODUCTION

The concept of interim measures (provisional measures or provisional measures of protection) was introduced into international law from domestic law and is linked mainly to the judicial settlement of disputes.¹ Interim measures are seen as a tool to stop or to postpone the execution of a decision or an act that might prejudice the outcome of the proceedings before a final judgment is reached. Thus, interim measures aim to preserve the respective rights of the parties pending the judgment and to ensure the effectiveness of a court’s jurisdiction to decide the merits of a case.

The indication of interim measures does not prejudge a decision regarding admissibility or violation. The main purpose of preserving the status

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¹ Provisional measures exist today also in relation to procedures established under United Nations human rights treaties and other bodies.

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quo is to forestall any irreparable damage that may result from the execution of the act concerned while proceedings are pending, an outcome which could, eventually, nullify the result of the final judgment. Another very important feature is the urgent nature of the measure: the urgency of protection being primordial to avoid irreversible harm and for the protection of the rights at stake.

Even if interim measures are mostly seen as procedural decisions, they can also comprise of substantive elements. They should not be classified solely as a procedural right distinguishable from substantive rights, as they are definitely linked to the decision on substance by their object, which is to protect the rights which are the very subject of the proceedings.

Interim measures are at the same time, a practical and necessary means to preserve each party’s rights, such as protection from the destruction of crucial evidence pertaining to the facts or from danger to an individual’s health and well-being which, particularly in respect of the European Court of Human Rights, could seriously jeopardize an individual’s rights under the Human Rights’ Convention. When directed at States, these measures do not require them to renounce important aspects of their sovereign powers; what they demand is more time to enable the court to examine the case and render a decision.

They may be either of an injunctive or of a prohibitive nature. In the former case, either party may be required to take action. For example, applicants before the ECHR may be requested by the Court to start eating, i.e. to call off their hunger strike.2 In the latter, parties may be requested to refrain from certain actions until the court has ruled. For instance governments are frequently asked to refrain from deportation or extradition of individuals before the ECHR.

Today, an important number of international dispute settlement mechanisms exist, which in one way or another, are authorized to indicate interim measures. However, a long unsettled question is that of their legal force, i.e. whether such measures are of a binding or a non-binding character. International tribunals exercise a specially assigned jurisdictional power which depends on the underlying constituent instrument. If special provisions to indicate interim measures are expressly provided for and derive from a treaty, the binding character of such measures is clear and incontestable. If, however, this is not the case and there is an absence of such provisions, or the language is not clear, or that they are not contained in a conventional instrument, a controversy might arise as to the nature of their binding force.3

2 E.g., Iliaşcu and Others v. Moldova and Russia [GC], no. 48787/99, § 11, ECHR 2004.
3 Among the writings on this subject, see: K. Oellers-Frahm, Die einstweilige Anordnung in der