UCL
Université catholique de Louvain

INTERNATIONAL HUMAN RIGHTS
LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL
Related to: section 2, sub-section 5, unit 1: *The Jus Commune of Human Rights* (ex. 1)

European Court of Human Rights (Grand Chamber), judgment of 5 February 2005 in the case of *Mamatkulov and Askarov* v. *Turkey*, Appl. Nos. 46827/99 and 46951/99 (excerpts)

Universal systems of human rights protection

1. The United Nations Human Rights Committee

40. Rule 86 of the Rules of Procedure of the United Nations Human Rights Committee provides:

"The Committee may, prior to forwarding its views on the communication to the State Party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State Party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication."

41. In its decision of 26 July 1994 (in Glen Ashby v. Trinidad and Tobago), the Committee dealt with the first case of a refusal by a State to comply with interim measures in the form of a request that it stay execution of the death penalty. It pointed out that by ratifying the Optional Protocol, the State Party had undertaken to cooperate with the Committee in proceedings under the Protocol, and that it had not discharged its obligations under the Optional Protocol and the Covenant (Report of the Human Rights Committee, volume I).

42. In its decision of 19 October 2000 (in Dante Piandiong, Jesus Morallos and Archie Bulan v. the Philippines), the Committee stated:

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

Quite apart, then, from any violation of the Covenant charged to a State Party in a communication, a State Party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant,

or to render examination by the Committee moot and the expression of its Views nugatory and futile. ...

Interim measures pursuant to Rule 86 of the Committee's rules adopted in conformity with Article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol."

The Committee reiterated this principle in its decision of 15 May 2003 (in Sholam Weiss v. Austria).

2. The United Nations Committee against Torture

43. Rule 108 § 9 of the Rules of Procedure of the Committee against Torture enables provisional measures to be adopted in proceedings brought by individuals alleging a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It reads as follows:

"In the course of the consideration of the question of the admissibility of a communication, the Committee or the working group or a special rapporteur designated under Rule 106, paragraph 3, may request the State Party to take steps to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State Party does not imply that any decision has been reached on the question of the admissibility of the communication."

44. In the case of a Peruvian citizen resident in Venezuela who was extradited to Peru despite the fact that a stay of her extradition had been called for as a provisional measure (see Cecilia Rosana Núñez Chipana v. Venezuela, decision of 10 November 1998), the Committee against Torture expressed the view that the State had failed to "comply with the spirit of the Convention". It noted the following:

"... the State Party, in ratifying the Convention and voluntarily accepting the Committee's competence under Article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee."

45. In another decision that concerned the extradition to India of an Indian national resident in Canada (see T.P.S. v. Canada, decision of 16 May 2000) despite the fact that Canada had been requested to stay the extradition as a provisional measure, the Committee against Torture reiterated that failure to comply with the requested provisional measures "... could ... nullify the end result of the proceedings before the Committee".

C. The International Court of Justice (ICJ)

46. Article 41 of the Statute of the ICJ provides:

"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."

47. The ICJ has pointed out in a number of cases that the purpose of provisional measures is to preserve the respective rights of the parties to the dispute (see, among other authorities, the judgment of 27 June 1986 in Nicaragua v. the United States of America). In an order of 13 September 1993 in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia

and Herzegovina v. Yugoslavia), the ICJ stated that the power of the court to indicate provisional measures

"... has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; and ... the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent".

48. In its judgment of 27 June 2001 in LaGrand (Germany v. the United States of America), it noted:

"102. ... The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognised by the Permanent Court of International Justice when it spoke of 'the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute' (Electricity Company of Sofia and Bulgaria, Order of 5 December 1939 ...)."

This approach was subsequently confirmed in the court's judgment of 31 March 2004 in Avena and other Mexican nationals (Mexico v. the United States of America).

D. The Inter-American system of human rights protection

1. The Inter-American Commission on Human Rights

49. Rule 25 of the Rules of Procedure of the Inter-American Commission on Human Rights provides:

"1. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

2. If the Commission is not in session, the President, or, in his or her absence, one of the Vice-Presidents, shall consult with the other members, through the Executive Secretariat, on the application of the provision in the previous paragraph. If it is not possible to consult within a reasonable period of time under the circumstances, the President or, where appropriate, one of the Vice-Presidents shall take the decision on behalf of the Commission and shall so inform its members.

3. The Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures.

4. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case."

50. The scope of the precautionary measures is determined by reference to the scope of the recommendations made by the Commission in respect of the individual petition. In its judgment of 17 September 1997 in Loayza Tamayo v. Peru, the Inter-American Court of Human Rights ruled that the State "has the obligation to make every effort to apply the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organisation of American States, whose function is 'to promote the observance and defence of human rights' ...".

2. The Inter-American Court of Human Rights

51. Article 63 § 2 of the American Convention on Human Rights states:

"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."

52. Rule 25 of the Rules of Procedure of the Inter-American Court of Human Rights provides:

"1. At any stage of the proceedings involving cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court may, at the request of a party or on its own motion, order such provisional measures as it deems pertinent, pursuant to Article 63 § 2 of the Convention.

2. With respect to matters not yet submitted to it, the Court may act at the request of the Commission.

3. The request may be made to the President, to any judge of the Court, or to the Secretariat, by any means of communication. In every case, the recipient of the request shall immediately bring it to the President's attention.

4. If the Court is not sitting, the President, in consultation with the Permanent Commission and, if possible, with the other judges, shall call upon the government concerned to adopt such urgent measures as may be necessary to ensure the effectiveness of any provisional measures that may be ordered by the Court at its next session.

5. The Court, or its President if the Court is not sitting, may convoke the parties to a public hearing on provisional measures.

6. In its Annual Report to the General Assembly, the Court shall include a statement concerning the provisional measures ordered during the period covered by the report. If those measures have not been duly implemented, the Court shall make such recommendations as it deems appropriate."

53. The Inter-American Court has stated on several occasions that compliance with provisional measures is necessary to ensure the effectiveness of its decisions on the merits (see, among other authorities, the following orders: 1 August 1991, Chunimá v. Guatemala; 2 July and 13 September 1996, 11 November 1997 and 3 February 2001, Loayza Tamayo v. Peru; 25 May and 25 September 1999, 16 August and 24 November 2000, and 3 September 2002, James et al. v. Trinidad and Tobago; 7 and 18 August 2000, and 26 May 2001, Haitians and Dominican nationals of Haitian origin in the Dominican Republic v. the Dominican Republic; 10 August and 12 November 2000, and 30 May 2001, Alvarez et al. v. Colombia; see also the judgment of 21 June 2002, Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago).

In two orders requiring provisional measures, the Inter-American Court of Human Rights ruled that the States Parties to the American Convention on Human Rights "must fully comply in good faith (pacta sunt servanda) with all of the provisions of the Convention, including those relative to the

operation of the two supervisory organs of the American Convention [the Court and the Commission]; and that, in view of the Convention's fundamental objective of guaranteeing the effective protection of human rights (Articles 1 § 1, 2, 51 and 63 § 2), States Parties must refrain from taking actions that may frustrate the restitutio in integrum of the rights of the alleged victims" (see the orders of 25 May and 25 September 1999 in James et al. v. Trinidad and Tobago).

(...)

111. The Court reiterates in that connection that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which states that account must be taken of "any relevant rules of international law applicable in the relations between the parties". The Court must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human rights protection (see Golder v. the United Kingdom, judgment of 21 February 1975, Series A no. 18, p. 14, § 29). Thus, the Convention must be interpreted so far as possible consistently with the other principles of international law of which it forms a part (see Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 60, ECHR 2001-XI).

112. Different rules apply to interim, provisional or precautionary measures, depending on whether the complaint is made under the individual petition procedures of the United Nations organs, or the Inter-American Court and Commission, or under the procedure for the judicial settlement of disputes of the ICJ. In some instances provision is made for such measures in the treaty itself and in others in the rules of procedure (see paragraphs 40, 43, 46, 49, 51 and 52 above).

113. In a number of recent decisions and orders, international courts and institutions have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions on the merits. In proceedings concerning international disputes, the purpose of interim measures is to preserve the parties' rights, thus enabling the body hearing the dispute to give effect to the consequences which a finding of responsibility following adversarial process will entail.

114. Thus, under the jurisprudence of the Human Rights Committee of the United Nations, a failure to comply with interim measures constitutes a breach by the State concerned of its legal obligations under the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and of its duty to cooperate with the Committee under the individual communications procedure (see paragraphs 41 and 42 above).

115. The United Nations Committee against Torture has considered the issue of a State Party's failure to comply with interim measures on a number of occasions. It has ruled that compliance with interim measures which the Committee considered reasonable was essential in order to protect the person in question from irreparable harm, which could nullify the end result of the proceedings before the Committee (see paragraphs 44 and 45 above).

116. In various orders concerning provisional measures, the Inter-American Court of Human Rights has stated that in view of the fundamental objective of the American Convention on Human Rights, namely guaranteeing the effective protection of human rights, "States Parties [had to] refrain from taking actions that may frustrate the restitutio in integrum of the rights of the alleged victims" (see the orders of 25 May and 25 September 1999 in James et al. v. Trinidad and Tobago).

117. In its judgment of 27 June 2001 in LaGrand (Germany v. the United States of America), the ICJ stated: "The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The [purpose of] Article 41 ... is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties

to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."

Furthermore, in that judgment, the ICJ brought to an end the debate over the strictly linguistic interpretation of the words "power to indicate" ("pouvoir d'indiquer" in the French text) in the first paragraph of Article 41 and "suggested" ("indication" in the French text) in the second paragraph. Referring to Article 31 of the Vienna Convention on the Law of Treaties, which provides that treaties shall be interpreted in the light of their object and purpose, it held that provisional measures were legally binding. This approach was subsequently confirmed in the court's judgment of 31 March 2004 in Avena and other Mexican nationals (Mexico v. the United States of America) (see paragraph 48 above).

118. The Court observes that in Cruz Varas and Others (cited above) it determined the question whether the European Commission of Human Rights had power under former Article 25 § 1 of the Convention (now Article 34) to order interim measures that are binding. It noted that that Article applied only to proceedings brought before the Commission and imposed an obligation not to interfere with the right of the individual to present his or her complaint to the Commission and to pursue it. It added that Article 25 conferred upon an applicant a right of a procedural nature distinguishable from the substantive rights set out in Section I of the Convention or the Protocols to the Convention. The Court thus confined itself to examining the Commission's power to order interim measures, not its own. It considered the indication that had been given in the light of the nature of the proceedings before the Commission and of the Commission's role and concluded: "Where the State has had its attention drawn in this way to the dangers of prejudicing the outcome of the issue then pending before the Commission any subsequent breach of Article 3 ... would have to be seen as aggravated by the failure to comply with the indication" (Cruz Varas and Others, cited above, pp. 36-37, § 103).

119. The Court emphasises in that connection that, unlike the Court and the Committee of Ministers, the Commission had no power to issue a binding decision that a Contracting State had violated the Convention. The Commission's task with regard to the merits was of a preliminary nature and its opinion on whether or not there had been a violation of the Convention was not binding.

120. In Čonka (decision cited above) the Court referred to the argument set out in paragraph 109 above and added: "The Belgian authorities expelled the applicants the same day ..., without giving any reasons for their decision to ignore the measures that had been indicated under Rule 39 of the Rules of Court. In view of the settled practice of complying with such indications, which are given only in exceptional circumstances, such a manner of proceeding is difficult to reconcile with 'good faith co-operation with the Court in cases where this is considered reasonable and practicable'."

121. While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents (see, among other authorities, mutatis mutandis, Chapman v. the United Kingdom [GC], no. 27238/95, § 70, ECHR 2001-I, and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 74, ECHR 2002-VI). However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, Tyrer v. the United Kingdom, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and Christine Goodwin, cited above, § 75).

122. Furthermore, the Court would stress that although the Convention right to individual application was originally intended as an optional part of the system of protection, it has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention. 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.

123. In this context, the Court notes that in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect. The Court reiterates in that connection that Article 31 § 1 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose (see paragraph 39 above), and also in accordance with the principle of effectiveness.

124. The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending (see, mutatis mutandis, Soering, cited above, p. 35, § 90).

It has previously stressed the importance of having remedies with suspensive effect when ruling on the obligations of the State with regard to the right to an effective remedy in deportation or extradition proceedings. The notion of an effective remedy under Article 13 of the Convention requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention (see Čonka v. Belgium, no. 51564/99, § 79, ECHR 2002-I). It is hard to see why this principle of the effectiveness of remedies for the protection of an individual's human rights should not be an inherent Convention requirement in international proceedings before the Court, whereas it applies to proceedings in the domestic legal system.

125. 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.

Indications of interim measures given by the Court, as in the present case, permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention.

126. Consequently, 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.

127. The facts of the case, as set out above, clearly show that the Court was prevented by the applicants' extradition to Uzbekistan from conducting a proper examination of their complaints in accordance with its settled practice in similar cases and ultimately from protecting them, if need be, against potential violations of the Convention as alleged. As a result, the applicants were hindered in the effective exercise of their right of individual application guaranteed by Article 34 of the Convention, which the applicants' extradition rendered nugatory.

3. Conclusion

128. The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.

129. Having regard to the material before it, the Court concludes that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey is in breach of its obligations under Article 34 of the Convention.