

Interim Orders by the European Court of Human Rights – Comments on *Mamatkulov and Abdurasulovic v. Turkey**

Christian J. Tams**

1. Introduction

The relevance of interim protection before international judicial bodies is increasingly being recognised.¹ Nearly all international courts and tribunals are expressly authorised to issue interim orders.² Under the system established by the European Convention of Human Rights, such orders have so far remained exceptional. The main reason for this is that proceedings usually focus on human rights violations that are alleged to have occurred in the past. Furthermore, since proceedings are conditional upon the prior exhaustion of local remedies,³ the Court usually gets involved at a time when interim protection is no longer feasible. Nevertheless, interim orders play an important role in a specific set of cases, namely extradition and expulsion cases.⁴ Since these potentially involve the risk of irreparable harm, applicants have regularly requested the Court to intervene in order to safeguard rights threatened by extradition or expulsion.⁵ In the wake of the Court's recogni-

* *Mamatkulov and Abdurasulovic v. Turkey* (Applications nos. 46827/99 and 46951/99), Judgment of 6 February 2003 (hereinafter 'Judgment'), available at <<http://www.echr.coe.int/Eng/Judgments.htm>>.

** Gonville & Caius College, Cambridge. I am grateful to Professor James Crawford, Chester Brown and Ben Olbourne for comments on the manuscript.

¹ See generally Elkind, *Interim Protection, A Functional Approach* (1981); Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit* (1975); Oellers-Frahm, *Interim Measures of Protection*, in: Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law (EPIL)*, vol. II (1995), 1027; Sztucki, *Interim Measures in the Hague Court* (1983); Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 *ICLQ* 90 (1995); Oda, *Provisional Measures, The Practice of the International Court of Justice*, in: Lowe/ Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996), 541; Collins, *Provisional and Protective Measures in International Litigation*, 234 *Recueil des Cours (RdC)* (1992 III), 9; and the various contributions in Bernhardt (ed.), *Interim Measures Indicated by International Courts* (1994).

² With respect to the ECHR, the power to grant interim protection is recognized in Rule 39, which, as of 1998, has replaced (then) Rule 36, under which the Commission was entitled to grant interim relief. On Rule 36 see especially Krüger, *Vorläufige Maßnahmen nach Artikel 36 der Verfahrensordnung der Europäischen Kommission für Menschenrechte (insbesondere in Ausweisungs- und Auslieferungsfällen)*, 23 *EuGRZ* 346 (1996).

³ See article 35, para. 1 of the European Convention.

⁴ As Bernhardt has noted, the relevance is not necessarily restricted to these specific situations. Among the other examples he gives are the on-going imprisonment of an offender despite his/her deteriorating health, or the separation of children from their families in the absence of procedural safeguards; see Bernhardt, *Interim Measures of Protection under the European Convention on Human Rights*, in: id. (note 1), 102-103.

tion of extraterritorial effects of certain Convention rights (notably the prohibition against torture and inhuman treatment),⁶ the relevance of such interim orders has increased.

Despite their importance, the legal rules governing interim relief, both under the European Convention and before other international courts and tribunals, have long remained a grey area. Until very recently, courts have even been equivocal on one of the most fundamental issue – whether interim orders are binding in law. In *Mamatkulov and Abdurasulovic v. Turkey (Mamatkulov)*, a Chamber of the ECHR has now decided that they are. It has thereby followed the lead taken by the International Court of Justice (ICJ) in its landmark ruling in the *LaGrand case*,⁷ and has reversed its previous jurisprudence.⁸ The new decision – which is currently being appealed before the Grand Chamber of the ECHR pursuant to article 43, para. 1 of the Convention⁹ – is to be commended, as it enhances the effectiveness of the European system for human rights protection. As will be shown in the following, however, the reasoning upon which it is based, in particular the Court's failure to confront its earlier case-law, is highly problematic.

2. The Facts

In the circumstances of the case, the two applicants, Rustam Mamatkulov and Azkarov Z. Abdurasulovic, were suspected by Uzbek authorities to have been involved in homicide, attempted terrorist attacks and other crimes. Both were arrested in Turkey, which – under a bilateral treaty on judicial co-operation – was obliged to extradite them to Uzbekistan.¹⁰ The applicants lodged complaints with the Court under article 34 of the Convention, alleging that they would be subject to torture in Uzbekistan. On 18 March 1999, the President of the competent Chamber, acting under Rule 39 of the Rules of Court, indicated that “it was desir-

⁵ See Krüger (note 2); Bernhardt (note 1), 102.

⁶ *Soering v. United Kingdom*, ECHR, Ser. A, vol. 161 (1989); and, for a clear discussion, Frowein and Peukert, *EMRK-Kommentar* (2nd ed., 1996) Article 3, MN 18-23, 51-55.

⁷ *LaGrand case (F.R.G. v. U.S.)*, Judgment of 27 June 2001, available at <http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm> (at paras. 102-103).

⁸ See especially the judgment in *Cruz Varas v. Sweden*, ECHR, Ser. A, No 201 (1991).

⁹ See <<http://www.echr.coe.int/BilingualDocuments/PendCase.htm>>. Grand Chamber proceedings were initiated at a time when the bulk of the present note had been completed. As is explained below (section 4), despite the involvement of the Grand Chamber, the present decision merits to be evaluated, as it addresses a question of fundamental importance.

It should also be noted that after the conclusion of the oral proceedings in the present case, the Chamber had sought to relinquish jurisdiction in favour of the Grand Chamber following article 30 of the Convention. The Turkish government objected, so to preserve the possibility of a subsequent Grand Chamber judgment (cf. Judgment, paras. 9-11).

¹⁰ See Judgment, paras. 13-24 and cf. Agreement for Mutual Assistance in Civil, Commercial and Criminal Matters between Turkey and the Republic of Uzbekistan (entered into force on 18 December 1997) (quoted in Judgment, para. 38).

able in the interest of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to the Republic of Uzbekistan".¹¹

Despite this order, Mamatkulov and Abdurasulovic were handed over to the Uzbek authorities on 27 March 1999. Upon request by the Turkish government, Uzbek authorities had affirmed their respect for the international prohibition against torture, and stated that neither of the applicants would be subject to capital punishment.

On 28 June 1999, the Supreme Court of the Republic of Uzbekistan found the applicants guilty of the afore-mentioned charges, and sentenced them to 20 and 11 years imprisonment respectively.¹² During the proceedings before the ECHR, Turkey presented the Court with medical certificates issued by Uzbek prison doctors, confirmed by observations of Turkish diplomats during visits at the applicants' prisons, which stated that the applicants were in good health. In contrast, the applicants' representatives referred to reports, by Amnesty International, about ill-treatment and torture by Uzbek law enforcement authorities, and stated that they had been unable to communicate with the applicants.

3. The ECHR's Judgment

As regards the law, applicants' representatives argued that by extraditing Mamatkulov and Abdurasulovic to Uzbekistan, and thereby exposing them to an unfair trial, torture, and subsequent imprisonment, Turkey had violated its obligations under articles 3 and 6 § 1 of the Convention.¹³ By proceeding with the extradition despite the Court's indication of provisional measures on 18 March 1999, it had furthermore violated article 34 of the Convention. Both issues will be dealt with in turn.

Article 3 and Article 6 § 1

The applicants' claims based on articles 3 and 6 § 1 were both dismissed. Addressing article 3 of the Convention, the Court re-iterated its long-standing view that the Convention does not enshrine a right to political asylum, and that member States have a right to regulate the expulsion of aliens.¹⁴ The question remained whether, at the time of the extradition, there were substantial grounds for believing that Mamatkulov and Abdurasulovic would be subject to torture or cruel and inhuman punishment in Uzbekistan, and that Turkey was therefore bound not to extra-

¹¹ Judgment, para. 25.

¹² Judgment, paras. 29-31, 35.

¹³ In conjunction with article 3, applicants' representatives alleged a violation of article 2 (right to life). The Court took note of this issue but considered that the complaint had to be examined under article 3 of the Convention (see Judgment, para. 57).

¹⁴ Judgment, para. 65 (quoting *Vilvarajah and Others v. the United Kingdom*, Series A, No. 215 (1991), para. 102).

dite them under the principles established in the *Soering* case.¹⁵ The Court held that there was insufficient evidence for this.¹⁶ In particular, it stressed that Turkey had only granted the extradition requests after having obtained assurances that Uzbek authorities would respect the international prohibition against torture and not demand capital punishment. Insofar as the applicants had relied on independent reports about the human rights situation in Uzbekistan, the Court also noted that these reports only described the general situation. The test established by *Soering* however was individual, and required more than general allegations about the human rights situation in the country seeking extradition. The extradition therefore did not violate article 3.

The Court gave short shrift to the applicants' argument based on article 6 § 1. In line with its previous jurisprudence, the Court held that extradition proceedings within member States did not concern "the determination of ... civil rights and obligations or ... criminal charges", as required by article 6 § 1.¹⁷ With regard to the proceedings in Uzbekistan, which in the view of the applicants' representatives had involved torture and inhuman treatment, the Court referred to its earlier jurisprudence on the right of fair trial in foreign countries, and its relevance in extradition proceedings. Quoting the *Soering* judgment, it held that the extradition of applicants might be considered under article 6 § 1 if "the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."¹⁸ However, in line with its earlier statement on article 3, it held that there was insufficient evidence that Mamatkulov and Abdurasulovic faced torture and inhuman treatment in Uzbekistan, and hence dismissed the claim based on article 6 § 1.¹⁹

Article 34

In the remainder of its judgment, the Court considered in depth whether Turkey had violated its obligations under the Convention by disregarding the President's request not to proceed with the extradition until the Court had heard the case. In the absence of any conventional provision expressly addressing the matter, this was treated as an issue arising under article 34 of the Convention. The Court therefore had to inquire whether by extraditing Mamatkulov and Abdurasulovic to Uzbekistan, Turkey had "hinder[ed] in any way the effective exercise of [the] right [of individual petition]", and whether this conduct would give rise to responsibility under the system established by the ECHR.

As regards the facts, there was little denying that by extraditing the applicants to Uzbekistan, Turkey had rendered it more difficult for them to assert their Convention rights. The real issue that arose therefore was whether the conduct of the

¹⁵ *Soering* case (note 6).

¹⁶ See Judgment, paras. 65-77.

¹⁷ Judgment, para. 80 (quoting *Maaouia v. France*, no. 39652/98, para. 40, ECHR 2000-X).

¹⁸ *Soering* case (note 6), para. 113; and cf. Judgment, para. 85.

¹⁹ Judgment, paras. 82-87.

Turkish authorities was such as to give rise to an actual and independent violation of the Convention. For that to be the case, the Court had to decide that its order of 18 March 1999 had imposed upon Turkey a legal obligation. The wording of article 34 was of little help in deciding the question: the provision merely obliges States parties “not to hinder in any way the effective exercise of [the] right [of individual petition]”, but does not specifically address the question of interim protection. Rule 39 (which does address it) did not settle the issue either. It merely stipulates that “The Chamber or ... its President may ... indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or the proper conduct of the proceedings ...” without however qualifying the legal effects of such indications. The Court thus enjoyed a considerable margin of appreciation in interpreting the provisions. This it did in two steps.

In a first step, the Court interpreted article 34 in a purposive way, taking as a starting-point its frequent references to the character of the Convention as a living instrument.²⁰ Relatively briefly, it referred to its earlier judgment in *Cruz Varas*, where it had held that interim measures indicated by the former European Commission did not impose upon member States binding legal obligations.²¹ It stressed that this judgment (upon which Turkey’s arguments had chiefly been based) had been rendered prior to the entry into force of Protocol No. 11 in 1998. The 1998 reform had strengthened the right of individual application, which was no longer optional in character, but formed “a key component of the machinery for protecting human rights and freedoms set out in the Convention”.²² The Court also noted that while earlier decisions were not formally binding on subsequent courts, legal predictability required a consistent jurisprudence. Contrary to the arguments advanced by the Turkish government, however, jurisprudential consistency – according to the Court – did not require it to follow the *Cruz Varas* judgment, but rather to maintain a dynamic and evolutive approach to the interpretation of the Convention, which gave practical effects to the rights enshrined in it.²³

In the second part of its analysis, the Court adopted what might be called a comparative approach. Stressing the need to interpret the Convention in the light of general international law,²⁴ it analysed the approaches of other international judicial or quasi-judicial bodies. While conceding that the matter was governed by differently formulated rules, it noted that the Committee Against Torture, the Human Rights Committee, and the Inter-American Court of Human Rights had underlined the importance of compliance with interim measures.²⁵ More importantly,

²⁰ Judgment, para. 94 (quoting, *inter alia*, *Matthews v. United Kingdom*, no. 24833/94, para. 39, ECHR 1999-I).

²¹ See *Cruz Varas* case (note 8); Judgment, para. 97.

²² Judgment, para. 106.

²³ Judgment, para. 105.

²⁴ Judgment, para. 99 (quoting *Al-Adsani v. the United Kingdom*, no. 35763/97, para. 60, ECHR 2001-XI).

²⁵ See e.g. Committee against Torture, *Cecilia Rosana Núñez Chipana v. Venezuela*, Communication No. 110/1998 (para. 8); Human Rights Committee, *Piandiong et al v. The Philippines*, Commu-

the International Court, in its 2001 *LaGrand* judgment, had expressly confirmed that interim orders under article 41 of the ICJ Statute imposed upon parties binding legal obligations.²⁶ This was of crucial relevance not only because of the eminence of the ICJ as the UN's principal judicial organ, but also because *LaGrand* had conclusively settled a long-standing debate.²⁷ Finally, the ICJ's approach was relevant to the ECHR since article 41 of the ICJ Statute used similar language as Rule 39, referring to the respective courts' power to "indicate" interim orders.²⁸ The ICJ's finding that an "indication" in the sense of article 41 of the ICJ Statute was legally binding thus provided support for a similar reading of Rule 39 and article 34 of the Convention.

In the light of these considerations, the Court "re-examine[d]"²⁹ the legal effects of interim orders. While refraining from pronouncing in the abstract whether such orders were binding or not, the Court stated that they could ensure the effective protection of Convention rights, by enabling it to "to carry out an effective examination of ... application[s]".³⁰ From this, it followed that where interim orders had been "indicated in order to avoid irreparable harm being caused" to the applicant, they imposed upon member States legally binding obligations. In the circumstances of the present case, the Court had little difficulty to find that its interim order of 18 March 1999 had been necessary to avoid irreparable harm, and therefore had been binding on Turkey. This in turn meant that by extraditing Mamatkulov and Abdur-asulovic to Uzbekistan, Turkey had prevented them from effectively exercising their right of individual application, and thereby violated article 34. Insofar as the applicants had claimed compensation for non-pecuniary damage, the Court stated that this finding constituted in itself sufficient satisfaction in the sense of Article 41.³¹

nication No. 869/1999, UN Doc. CCPR/C/70/D/869/1999 (paras. 5.1-5.2.). For further references see Judgment, paras. 45-49.

²⁶ *LaGrand* case (note 7), paras. 102-103.

²⁷ The problem is addressed in the works cited in footnote 1; for a very clear summary of the debate see especially Oellers-Frahm, EPIL II, at 1029-1030. See further Szabó, Provisional Measures in the World Court: Binding or Bound to be Ineffective?, 10 LeidenJIL 475 (1997); and Mennecke/Tams, The Right to Consular Assistance Under International Law: The *LaGrand* Case Before the International Court of Justice, 42 GYIL 192 (1999), 203-209.

²⁸ In its relevant part, article 41 provides: "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."

²⁹ Judgment, para. 106.

³⁰ Judgment, para. 107.

³¹ Judgment, para. 115. In addition, the applicants had claimed pecuniary damage. However, since they had not specified the nature of their pecuniary injury, the Court dismissed this claim. It did however award the applicants € 10,000 for costs and expenses (see Judgment, paras. 113-118).

4. Comment

The ECHR's decision in *Mamatkulov* is remarkable in a number of respects, not all of which can be discussed here. As regards the findings on articles 3 and 6 § 1 of the Convention, the Court sensibly opted for a relatively restrictive reading of both provisions. With respect to article 6 § 1, it confirmed the existing jurisprudence pursuant to which questions of expulsion and extradition do not usually affect the Convention's access to justice guarantees. In view of the extreme breadth of article 6 § 1, there is certainly a case for consistency of jurisprudence, as otherwise the provision would lose all its remaining cohesiveness and turn into an omnibus general clause.³² As regards article 3, the Court had good reason to rely on Uzbekistan's formal assurances to respect the international guarantees against torture and inhuman treatment, and therefore to find that article 3 had not been violated. That having been said, however, it is slightly surprising that the Court, when assessing whether the situation in Uzbekistan was so critical that Turkey ought to have refused extradition, seemed to downplay the relevance of independent assessments by bodies such as Amnesty International. One can readily agree that the extradition of individuals to a foreign country raises questions of article 3 only if there is a real risk of torture or inhuman treatment, and if the applicant faces a specific risk of being subjected to it.³³ When assessing whether this risk exists, independent country reports however seem a rather helpful (although not sufficient) source of information.

While the findings on articles 3 and 6 § 1 are relevant, the Court's elaboration on the legal effects of interim orders is the most interesting aspect of the *Mamatkulov* judgment. Given the pending proceedings before the Grand Chamber, the present decision may not be the last word on the matter. It nevertheless merits close scrutiny, as it concerns a question of fundamental importance and marks a break with the Court's previous case law, under which interim orders were not considered to be binding. Even under the present law, States had usually complied with Court's requests under Rule 39.³⁴ However, it is only under the new jurisprudence that non-compliance constitutes a breach of the Convention and entails the responsibility of the State in question. This marks a considerable step towards a more effective system of human rights protection in Europe.

Before evaluating the Court's reasoning, two preliminary remarks seem necessary. First, it may seem astonishing at first glance that the Court considered article

³² It is telling that one of the standard works in the field, Frowein's and Peukert's ECHR-commentary, lists situations in which article 6 § 1 was considered applicable, and those in which it was not; see Frowein/Peukert (note 6), Article 6, MN 51-52, 185-196. More than any other Convention right, article 6 § 1 is shaped by the Court's jurisprudence, and can hardly be analysed in any textual or systematic way – hence the increased need for consistency of jurisprudence. For a comprehensive analysis of article 6 § 1 see Frowein/Peukert (note 6), 150-320; Jacobs/White/O'vay, *The European Convention on Human Rights* (3rd ed., 2002), 139-170.

³³ In addition to the present judgment, see e.g. the *Vilvarajah* case (note 14), paras. 111-112.

³⁴ *Cruz Varas* case (note 8), para. 100.

34 to have been violated, given that the provision is silent on the question of interim protection. However, in the absence of a clear statutory provision addressing interim orders, there is little to be said against interpreting interim protection as an inherent part of individual petition procedure (governed by article 34). In particular, Rule 39 could not be directly invoked by the applicants, as article 34 specifically refers to “violations ... of the rights set forth in the Convention”.³⁵ Secondly, the Court’s qualification that orders should only be binding if made to prevent irreparable harm, seems to introduce an unnecessary element of uncertainty, and likely to provoke disagreement on whether a specific order had, *in casu*, imposed a legal obligation. The qualification however is not as far-reaching as it seems to be – the Court having granted interim relief so far only where the risk of irreparable harm was evident – and can be justified. From a dogmatic point of view, it might have been preferable had the Court clarified that danger of irreparable harm was a precondition for the granting of interim relief, and that all interim orders thus granted imposed upon States binding legal obligations. That however is of little practical relevance. In contrast, given the wide formulation of Rule 39 (especially the reference to the “the interest of the ... proper conduct of the proceedings”), it was indispensable for the Court to recognise some form of restriction to cases requiring urgent and immediate action.³⁶

As regards, more particularly, the Court’s reasoning, two aspects merit further discussion. The first relates to methodology. Interestingly, a considerable part of the Court’s discussion is devoted to an analysis of the jurisprudence of other judicial bodies.³⁷ Of course, the problem of interim orders, as a general feature of international dispute settlement, is a topic suitable for comparative analysis, especially in light of the renewed debate following the ICJ’s *LaGrand* judgment.³⁸ Nevertheless, the ECHR’s willingness to interpret the Convention in the light of general international law is remarkable, in particular because similar statements could be found already in two of the most important recent decisions. In *Banković*³⁹ and *Al-Adsani*,⁴⁰ the Court had interpreted the ECHR standards governing State im-

³⁵ The situation is different where the right to grant interim relief is expressly provided for in the treaty or statute establishing an international judicial body (as, for example, in article 41 of the ICJ Statute).

³⁶ See also Bernhardt (note 1), 102. The approach suggested in the text is in line with the ICJ’s judgment in the *LaGrand* case, and the ICJ’s jurisprudence on the conditions governing interim relief. On urgency and the risk of irreparable harm see especially Merrills (note 1), 106-114; and the Court’s judgment in the *Great Belt* case, ICJ Reports 1991, 19.

³⁷ See Judgment, paras. 39-51 and 100-103.

³⁸ See e.g. the case notes and comments by Aceves, 965 AJIL 210 (2002); Oellers-Frahm, 28 EuGRZ 265 (2001); and Mennecke/Tams, 51 ICLQ 449 (2002); Cassel, 15 LeidenJIL 69 (2002); Deen-Racsmány, *ibid.*, 87; Orakelashvili, *ibid.*, 105; as well as the different contributions to the symposium “Reflections on the ICJ’s *LaGrand* decision”, 27 YaleJIL 423 (2002).

³⁹ *Banković and Others v. Belgium and 16 Other Contracting States* (admissibility), no. 52207/99, available at <<http://www.echr.coe.int/Eng/Judgments.htm>>. On the case cf. the note by Rühl/Trilsch, 97 AJIL 168 (2003).

⁴⁰ *Al-Adsani* case (note 24). Cf. the case notes by Emberland, 96 AJIL 699 (2002); and Lloyd Jones, 52 ICLQ 463 (2003); and further Orakelashvili, *State Immunity and International Public*

munity and jurisdiction in the light of general international law.⁴¹ Whether these three cases mark a shift towards a less autonomous (i.e. less Convention-centred) approach to treaty interpretation is too early to tell. However, the new popularity of general international law in the ECHR's jurisprudence is an interesting development.⁴² It stands in marked contrast, for example, to the Court's jurisprudence on the permissibility of reservations to treaties, in which a question of general relevance (whether reservations should be permissible) was solved not by reference to the general rules of treaty law, but on the basis of what the Court considered to be the specific character of the European system of human rights protection.⁴³ Where decisions such as *Loizidou* had emphasised the peculiarities of the Convention system, *Mamatkulov* (as well as *Banković* and *Al-Adsani*) now stresses that it is in many respect not so different. The public order of Europe thus appears to be anchored in general international law.

The Court's reasoning however is not only relevant from a methodological point of view. Beyond methodology, it is particularly interesting how the Court deals with its earlier case-law on the matter. However much one wishes to agree with the Court's judgment, this is the most troubling aspect of the decision. The passages of the judgment addressing article 34 and Rule 39 almost seem to suggest that the question of bindingness had never arisen before, and that the Court therefore was starting from a clean slate. This is of course deceptive. In fact, the judgment in *Cruz Varas* had involved issues very similar to those underlying the present case.⁴⁴ In *Cruz Varas*, Sweden was alleged to have incurred responsibility by deporting the applicant to Chile, although the (then) Commission had requested it not to do so. In the view of a near-unanimous Commission, this conduct violated the effective exercise of the right of petition under (then) article 25.⁴⁵ In contrast, the

Order, 45 GYIL 227 (2002); Ta m s, Schwierigkeiten mit dem *Ius Cogens*. Anmerkungen zum Urteil des Europäischen Gerichtshofes für Menschenrechte im Fall *Al-Adsani* gegen Vereinigtes Königreich vom 21. November 2001, 40 AVR 331 (2002).

⁴¹ See *Al-Adsani* case (note 24), para. 55, where the Court observed that "[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part" (at para. 55). This was repeated in near-identical terms in the *Banković* decision (note 39), para. 57.

⁴² Cf. also Rüt h/Trilsch (note 39), 171-172, who note that the Court's emphasis on the general international law concept of jurisdiction in *Banković* is not entirely in line with its previous case-law.

⁴³ See especially *Loizidou v. Turkey* (preliminary objections), ECHR, Ser. A, No. 310 (1995), paras. 65-98; and already *Belilos v. Switzerland*, ECHR, Ser. A, No. 132 (1988). The permissibility of reservations to human rights treaties, and the ECHR's specific Convention-based approach, is discussed e.g. in the case note by Kokott/Rudolf, 90 AJIL 98 (1996). Cf. further R e s s, Die Zulässigkeit territorialer Beschränkungen bei der Anerkennung der Zuständigkeit des Europäischen Gerichtshofes für Menschenrechte. Anmerkung zum Fall *Loizidou* gegen die Türkei vom 23. März 1995, 56 ZaöRV 427 (1996); and Giegerich, Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungs Kompetenzen von Vertragsgremien. Ein konstitutioneller Ansatz, 55 ZaöRV 713 (1995).

⁴⁴ See *Cruz Varas* case (note 8).

⁴⁵ See the Commission's Report of 7 June 1990, Application No. 15576/89, available at <<http://www.echr.coe.int/Eng/Judgments.htm>>, especially at paras. 105-127. The Commission's decision was taken by 12 votes to 1, with only Commissioner Sperduti dissenting.

Court, in its judgment of 20 February 1991, refused to find that Sweden had violated the Convention. After considerable debate, and with a bare majority of 10 votes to 9, it held that (then) article 25 could not be read to imply a duty to comply with interim orders.⁴⁶ If States parties intended to put in place a regime of binding interim orders, they – according to Court in 1991 – would have to amend the Convention accordingly.⁴⁷ This judgment, which at the time gave rise to considerable discussion, seemed to have settled the debate.⁴⁸

If seen against this background, the present *Mamatkulov* judgment is considerably more of a revolution than the Court would wish readers to believe. Its failure to confront the *Cruz Varas* jurisprudence is problematic, and does little to enhance the transparency of the judgment. The fact that the Court presents what in reality is a clear break with previous judgments as a consistent application of a dynamic and evolutive approach to interpreting the Convention is even more surprising. This in particular since the reasons the Court gives for distinguishing *Cruz Varas* are not compelling. When “re-examining” the issue of bindingness, the Court stresses the important changes brought about by Protocol No. 11. However, even before 1998, one could hardly doubt that the individual complaint procedure under (then) article 25 was a “key component of the machinery for protecting the rights and freedoms set out in the Convention”.⁴⁹ What is more, as Judge Türmen shows in his dissent, Protocol No. 11 did not affect the question of whether interim orders entail legal obligations.⁵⁰ Proposals for reversing *Cruz Varas* by amending the Convention were indeed put forward; however, to the disappointment of observers, none of them found sufficient support. The point was made very clearly by Merrills and Robertson who considered it “a pity that when Protocol No. 11 was drafted the opportunity was not taken to include a provision making interim measures binding. As things stand, governments remain under no obligation to respect interim measures, and so should the question in *Cruz Varas* arise again, the answer would no doubt be the same.”⁵¹

Finally, and perhaps most importantly, even the new Court, operating under the reformed system of human rights protection, had confirmed the existing jurisprudence. In the *Conka* case, decided in March 2001, an unanimous Chamber did not find that Belgium’s non-compliance with an interim order constituted a violation of article 34, and specifically rejected the applicants’ suggestion that *Cruz Varas* be revisited.⁵² How this decision is to be reconciled with the present Court’s claim that Protocol No. 11 requires interim orders to be binding, is not clear.

⁴⁶ *Cruz Varas* case (note 8), at para. 99.

⁴⁷ *Ibid*, at para. 102.

⁴⁸ For comment see e.g. MacDonald, *Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights*, 52 *ZaöRV* (1992), 703; Oellers-Frahm, 18 *EuGRZ* 197 (1991); Collins (note 1), 187-191.

⁴⁹ Judgment, para. 106.

⁵⁰ See Judgment, Diss.Op. Türmen, 37-38.

⁵¹ Merrills/Robertson, *Human Rights in Europe*, (4th ed., 2001), 318.

That said, none of these considerations would have forced the Court to arrive at the same conclusions as in *Cruz Varas*, and to find in favour of Turkey. It may have simply been that – as 9 judges and most commentators thought in 1991⁵³ – *Cruz Varas* was wrongly decided, and *Conka* and others were misguided follow-up decisions. As the Court rightly remarked, it is not bound by its earlier jurisprudence, and entitled to change its views over time. But in the interest of transparency it should have drawn attention to this change of view. That it has chosen not to do so, and instead tried to present *Mamatkulov* as a consistent approach to treaty interpretation, is unfortunate – in particular, since reasons for a change of view would not have been difficult to find. Under a more transparent approach, the Court might have openly confronted the *Cruz Varas* jurisprudence, and pointed to its inherent flaws. It could have stressed that since judicial proceedings are concluded by binding judgments, it would seem odd for States to be able to undermine that process by ignoring interim orders.⁵⁴ It could have argued that by declaring interim measures non-binding, the Court in *Cruz Varas* had failed to give full effect to the rights protected by the Convention. It could have stressed the principle of institutional effectiveness⁵⁵ or even asserted – as was done by some commentators – that the dignity of a court requires orders to be binding.⁵⁶ Finally, on the basis of its comparative analysis, it could have argued that there now had emerged a general principle of international judicial procedure pursuant to which interim orders are binding.⁵⁷ Such a transparent approach, it is submitted, would have greatly enhanced the force of the Court's decision. As it stands, *Mamatkulov* is a landmark decision, but based on an unpersuasive reasoning. One can only hope that this problem will be addressed in the future judgment by the Grand Chamber.

⁵² *Conka v. Belgium* (admissibility), no. 51564/99, available at <<http://www.echr.coe.int/Eng/Judgments.htm>>, para. 11. Cf. the brief remarks by Jacobs/White/O'vay (note 32), 401-402; and further the analysis by de Graaf, *De uitzetting van de familie Conka: over leugens en spoedprocedures*, 27 NJCM Bulletin - Nederlands Tijdschrift voor de Mensenrechten 894 (2002).

⁵³ See the joint dissent opinion of Judges Cremona, Thor Vilhjalmson, Walsh, Macdonald, Bernhardt, de Meyer, Martens, Foighel and Morenilla, appended to the *Cruz Varas* case (note 8); and further Frowein/Peukert (note 6), Article 25, MN 52, 556; Oellers-Frahm (note 48); Macdonald (note 48); Collins (note 1), 187-191; Merrills and Robertson (note 51).

⁵⁴ See e.g. the separate opinion of Judge Weeramantry in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (provisional measures), ICJ Reports 1993, 389; Elkind (note 1), 162-163; Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), vol. II, 548-549.

⁵⁵ See e.g. Macdonald (note 48), 729-731 (with further references).

⁵⁶ Hambro, *The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice*, in: *Rechtsfragen Internationaler Organisation – Festschrift Wehberg Schätzel and Schlochauer* (eds.), (1956), 152, 164.

⁵⁷ Bernhardt (note 1), 103.

5. Concluding Observations

Within the space of less than two years, two of the most important international courts, the ICJ and the ECHR, have recognised the binding character of interim orders. Both decisions, *LaGrand* and *Mamatkulov*, have been of limited help to the individuals whose names they bear.⁵⁸ Both however have brought about important clarifications, strengthened the role of interim protection, and may thereby render the judicial supervision of international law more effective.

While settling the crucial issue of bindingness, neither *LaGrand* nor *Mamatkulov* settle the problem of remedies for non-compliance with interim orders. In the present case, the ECHR briefly observed that its judgment in itself constituted sufficient satisfaction. Beyond that, it is at present uncertain what remedies would be available in case of breach. Few problems arise if the violation of article 34 is accompanied by a violation of other Convention rights. In this case, even under the existing jurisprudence, the Court has seen fit to qualify non-compliance with an interim order as an aggravating circumstance warranting an increased award of just satisfaction.⁵⁹ In contrast, it remains a matter of speculation how the Court will solve cases in which (as in *Mamatkulov*) only article 34 has been violated. Clearly, if a system of (now binding) interim orders is meant to be effective, verbal declarations amounting to satisfaction cannot remain the only available remedy. It is to be hoped that when further developing the system of remedies, the Court will bear in mind its earlier statement that Convention safeguards “must be construed in a manner which makes them practical and effective.”⁶⁰ The judgment in *Mamatkulov* – for all its problems – enables the Court to approach this question.

⁵⁸ Of course, this remark in particular applies to Walter LaGrand, who was executed despite the ICJ’s order on provisional measures. His brother Karl LaGrand had suffered the same fate weeks before Germany instituted ICJ proceedings; see *LaGrand* judgment (note 7), paras. 29–34.

⁵⁹ This was recognised even in the Court’s *Cruz Varas* judgment (note 8), para. 103. See further *Conka* case (note 52), para. 11; and cf. *Jacobs/White/Ovay* (note 32), 402.

⁶⁰ *Soering* case (note 6), para. 84.