PROVISIONAL MEASURES: BINDING AND PERSUASIVE?
ENABLING HUMAN RIGHTS ADJUDICATORS TO FOLLOW UP
ON STATE DISRESPECT

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Abstract

Given the importance of the rights at stake (the right to life, the prohibition of torture and cruel treatment and the right of individual petition as such) it is crucial that states respect provisional measures by human rights adjudicators. Many factors play a role in compliance and it is often difficult to disentangle them. Yet

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it is clear that whatever reasons states may have for occasionally disrespecting provisional measures, in those cases they will try to legitimise their own actions and at times even to undermine the standing of the provisional measures or of the adjudicator ordering them. This article discusses the concept of provisional measures, including their purpose and the convergence in their use by the various adjudicators. It argues that human rights adjudicators, other authorities and NGOs are in the best position to follow up on non-compliance if the provisional measures ordered are as persuasive as possible. For a great part this persuasiveness hinges on the nature of the rights to be protected by provisional measures. ‘Core rights’ play a key role in the decision whether or not to order such measures. Moreover, core rights underlie the convergence in decision-making on the binding nature of provisional measures. In addition, this binding nature in itself obviously enhances the persuasive force of provisional measures. Moreover, it is argued in this article that in most human rights systems maintaining persuasiveness also means maintaining a relation to the claim on the merits. In other words, provisional measures cannot yet be seen as a free-standing tool. This is particularly important in the European system, where certain states appear to be intent on undermining the Court’s authority to order provisional measures.

1. INTRODUCTION

In recent years some states have ignored provisional (interim) measures by the European Court of Human Rights (ECtHR). Their reasons for doing so are often unrelated to the authority of the provisional measure and the adjudicator that ordered it. Yet states ignoring provisional measures may criticise where they can, simply in order to justify themselves in public. They may also use arguments such as ‘we lack the authority to take the measures you ask for’; ‘you are not being fair’; ‘we don’t need outsiders’, ‘we are not bound’, ‘we only respect decisions, not faxes by the Court’ etc.; or they will invoke ‘objective impediments’. They may even try and curb the European Court’s use of provisional measures aimed at preventing irreparable harm to persons by reference to the serious situation of backlogs and the overburdening of the Court or by reference to values such as the balance of powers and legitimacy. The latter are values that most people would

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2. For a discussion of various reasons forwarded by states for not complying with provisional measures, see E. Rieter, Preventing Irreparable Harm, Provisional Measures in International Human Rights Adjudication (Antwerp, Intersentia 2010) pp. 943-1019.