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Urgent need to deal with new failures to co-operate with the European Court of Human Rights

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Kimmo SASI, Finland, Group of the European People's Party

Summary

The Committee on Legal Affairs and Human Rights stresses the importance of the duty of States Parties to the European Convention on Human Rights to co-operate with the European Court of Human Rights in upholding the right of individual application to the Court.

Individual measures indicated by the Court under Rule 39 of its Rules of Court are designed to protect this right by preventing the creation of a fait accompli, resulting in a risk of serious, irreversible harm to an applicant. The committee therefore calls on all States Parties to the Convention to respect interim measures indicated by the Court and to provide it with all the information and evidence it requests.

The committee strongly condemns instances of outright violations by several States Parties to the Convention of the Court's interim measures aimed at protecting applicants from extradition or deportation to countries where they would be at risk of, in particular, torture. It is worried about the recent phenomenon, observed in the Russian Federation, of the temporary disappearance of applicants protected by interim measures and their subsequent reappearance in the country which had requested extradition. This can be likened to the practice of "extraordinary renditions" repeatedly condemned by the Parliamentary Assembly.

The committee welcomes the increasing use, by the Court, of factual presumptions and the reversal of the burden of proof in dealing with refusals of States Parties to co-operate with it, which consist in their failure to provide full, frank and fair disclosure in response to requests by the Court for further information or evidence.

1. Reference to committee: Doc. 13185, Reference 3961 of 31 May 2013.

Contents **Page**

A. Draft resolution 3
B. Draft recommendation 4
C. Explanatory memorandum by Mr Sasi, rapporteur 5
1. Introduction 5
1.1. Procedure 5
1.2. States Parties' duty to co-operate with the Court: a safeguard of the right of individual petition 5
1.3. The Council of Europe's previous work on this subject 6
2. The Rule 39 mechanism: recent trends 9
3. Evolution of the Court's approach to States' obligation to co-operate under Article 38 of the Convention 12
4. Conclusions 13
Appendix – Cases examined by the Court in which Rule 39 has been breached 15

A. Draft resolution[2]

1. Recalling its Resolution 1571 (2007) on member States' duty to co-operate with the European Court of Human Rights and Resolution 1788 (2011) "Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights", the Parliamentary Assembly stresses the importance of the right of individual application to the European Court of Human Rights ("the Court"). The protection of this right is the purpose of individual measures indicated by the Court under Rule 39 of its Rules of Court, which are designed to prevent the creation of a fait accompli.

2. The Assembly considers any disrespect of legally binding measures ordered by the Court, such as interim measures indicated under Rule 39, as a clear disregard for the European system of protection of human rights under the European Convention on Human Rights (ETS No. 5, "the Convention").

3. The Assembly therefore calls on all States Parties to the Convention to respect interim measures indicated by the Court and to provide it with all the information and evidence it requests.

4. The Assembly strongly condemns instances of outright violations by several States Parties to the Convention (Italy, the Russian Federation, the Slovak Republic, Turkey and Ukraine) of the Court's interim measures aimed at protecting applicants from extradition or deportation to countries where they would be at risk of, in particular, torture.

5. The Assembly insists that international co-operation between law-enforcement bodies based on regional agreements, such as the Shanghai Cooperation Organisation, or on long-standing relations, must not violate a State Party's binding commitments under the Convention.

6. The Assembly is therefore particularly concerned about the recent phenomenon, observed in the Russian Federation, of the temporary disappearance of applicants protected by interim measures and their subsequent reappearance in the country which had requested extradition. The clandestine methods used indicate that the authorities had to be aware of the illegality of such actions, which can be likened to the practice of "extraordinary renditions" repeatedly condemned by the Assembly.

7. The Assembly welcomes the increasing use, by the Court, of factual presumptions and the reversal of the burden of proof in dealing with refusals of States Parties to co-operate with it, which consist in their failure to provide full, frank and fair disclosure in response to requests by the Court for further information or evidence.

8. Regarding interim measures under Rule 39, and welcoming the fact that the Court has begun indicating positive measures and follow-up requirements in order to ensure the effective protection of the rights of applicants at risk, the Assembly:

8.1. encourages the Court to be as specific as necessary in indicating such measures and to cautiously explore the possibility of ordering damages on the basis of Article 41 of the Convention in case of violations of interim measures;

8.2. invites the Court to speed up, to the extent possible, the proceedings on the merits in cases in which it indicates interim measures.

2. Draft resolution adopted unanimously by the committee on 12 December 2013.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2014) on the urgent need to deal with new failures to co-operate with the European Court of Human Rights, to Resolution CM/Res(2010)25 of the Committee of Ministers on member States' duty to respect and protect the right of individual application to the European Court of Human Rights, adopted as a response to Assembly Resolution 1571 (2007) on member States' duty to co-operate with the European Court of Human Rights, and to the Committee of Ministers' decision regarding kidnappings and irregular removals from the national territory taken at its 1176th meeting on 10 July 2013.

2. The Assembly commends the Committee of Ministers for following up on a regular basis cases of non-respect of the interim measures of the European Court of Human Rights.

3. The Assembly invites the Committee of Ministers to continue insisting on the effective investigation of any violations of the Court's interim measures, in particular irregular removals from the national territory, and to require the States Parties concerned to hold to account the perpetrators of any illegal acts.

3. Draft recommendation adopted unanimously by the committee on 12 December 2013.

C. Explanatory memorandum by Mr Sasi, rapporteur

1. Introduction

1.1. Procedure

1. The motion for a recommendation entitled "Urgent need to deal with new failures to co-operate with the European Court of Human Rights" (Doc. 13185) was transmitted to the Committee on Legal Affairs and Human Rights for report by the Parliamentary Assembly on 23 April 2013. At its meeting on 25 June 2013, the committee appointed me as rapporteur. As agreed on 4 September 2013, the committee held a joint hearing on "Failures to implement Strasbourg Court provisional measures" with the Committee on Migration, Refugees and Displaced Persons during the October 2013 part-session, on the basis of my introductory memorandum.[4] The following experts participated in the hearing:

– Ms Clara Burbano Herrera, Senior Research Fellow, Human Rights Centre, Ghent University, Belgium

– Mr Vincent Berger, former Jurisconsult of the European Court of Human Rights, lawyer, Paris

– Ms Heather McGill, Amnesty International, London

1.2. States Parties' duty to co-operate with the Court: a safeguard of the right of individual petition

2. The right of individual petition is a cornerstone of the system of protection of human rights under the European Convention on Human Rights (ETS No. 5, "the Convention"). The Assembly has defended this right throughout the discussions over the past years on the reform of the Convention system.[5] The effective exercise of the right of individual petition is guaranteed by the obligations undertaken by the member States not to hinder it (Article 34 of the Convention) and to co-operate with the European Court of Human Rights ("the Court") by furnishing all necessary facilities, should it decide to carry out its own investigation (Article 38).

3. In recent years, the number of cases in which the Court found a breach of Article 38 of the Convention has dramatically decreased. This may be due in part to the resolution of certain political situations and the States' increased willingness to co-operate with the Court. It may also be the consequence of a change in the Court's approach, namely a quasi-automatic shifting of the burden of proof on the governments in cases characterised by certain patterns of fact.[6] As a result, the Court finds substantive violations even without indisputable evidence, which the governments are still often reluctant to provide. Consequently, while the problems previously leading to findings of the breach of the obligation to co-operate with the Court have not disappeared, presently they appear to be examined and taken into account in the context of substantive violations.

4. I am quite satisfied that the Court has found a way to resolve such cases in a way which safeguards the applicants' rights to the extent possible. The Assembly, in Resolution 1571 (2007) on member States' duty to co-operate with the European Court of Human Rights,[7] had in fact "commended the Court for its assertiveness in developing case law concerning member States' duty to co-operate in the establishment of facts" and encouraged it to continue "making use of presumptions of fact and reversing the burden of proof in appropriate cases".

5. The situation is quite different when it comes to Article 34 of the Convention and, especially, to the States' compliance with Rule 39 of the Rules of Court. This rule empowers the Court to 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. In particular, application of Rule 39 in extradition and expulsion cases allows the Court to ensure that the status quo is maintained or an applicant's situation is not worsened before

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4. "Urgent need to deal with new failures to co-operate with the European Court of Human Rights", document AS/Jur (2013) 31 dated 17 September 2013.
5. See, for example, Resolution 1856 (2012) on guaranteeing the effectiveness and authority of the European Convention on Human Rights (paragraph 2).
6. See O. Chernishova and N. Vajic, "The Court's evolving response to the States' failure to co-operate" in *The European Convention on Human Rights, a living instrument: essays in honour of Christos L. Rozakis* (ed. D. Spielmann), Brussels, Bruylant, 2011, pp. 72-77.
7. Based on a report by our former colleague, Mr Christos Pourgourides (Cyprus, EPP/CD), Doc. 11183.

it has an opportunity to examine the merits of the complaint. In 2005, the Court ruled that interim measures indicated by it are legally binding on the Parties and their breach can result in a violation of the right of individual petition.[8]

6. In 2010, the Court received the highest number of requests for application of Rule 39 in its history. Since then, their number has significantly dropped,[9] which may be explained by a variety of factors, ranging from changes in certain political situations to the Court's own procedural reforms, as well as, perhaps, to a possible improvement in the processing of a certain category of cases by domestic administrative and judicial authorities.

7. Despite the apparent statistical success in terms of the decreased number of requests lodged with the Court, non-compliance with binding interim measures ordered by the Court provides a reason for serious concern. Since 2005, the Court has dealt with a significant number of such cases from several States and concerning, most often, removal of the applicants or their expulsion or extradition in contravention of the indication under Rule 39. However, recently a new trend has emerged: the applicants enjoying the protection of an interim measure, who were previously subject to removal following a domestic decision, "disappear" in suspect circumstances and then either resurface in their home/requesting countries or never reappear at all. Eight such incidents have been reported since 2011, all of which have occurred in one member State and concerned applicants wanted on extradition grounds by two States which are not Contracting Parties to the Convention. In a few such cases, the Court has already arrived at the conclusion that the removal had occurred either with the direct involvement or passive connivance of the authorities of the State which was bound by the interim measure.[10]

8. By disregarding the Court's indications, States Parties deny to applicants the practical and effective protection of their Convention rights, prevent the Court from properly examining applications and undermine the Court's authority. However, the situation becomes even more unsettling when States attempt to create a "smoke screen" to deny responsibility for the events that occur in their territory.

1.3. The Council of Europe's previous work on this subject

9. The subjects of respect of the right of individual petition guaranteed by Article 34 of the Convention and compliance with interim measures under Rule 39 is not new to the Council of Europe's work – several bodies have dealt with its various facets at different times.

1.3.1. Parliamentary Assembly

10. The issue has been raised in two important reports of the Assembly and the resolutions and recommendations based on them.

11. In the above-mentioned report on member States' duty to co-operate with the European Court of Human Rights, in addition to drawing attention to the instances of non-compliance with interim measures indicated by the Court, the Committee on Legal Affairs and Human Rights compared the status of interim measures in the European Convention system and other international systems of human rights protection. In particular, it referred to the practice developed under Article 63.2 of the American Convention on Human Rights, which empowers the Inter-American Court of Human Rights to order positive action by States. For example, in the *Aleman-Lacayo* case, the Inter-American Commission of Human Rights asked the Court to pass a measure requesting that the Government of Nicaragua adopt effective security measures to protect the life and personal integrity of Dr Aleman-Lacayo, including providing him and his relatives with the "name and telephone number of a person in a position of authority" who would be responsible for providing them with protection. The Court granted the Commission's request and called on the Nicaraguan Government to adopt "such measures as are necessary to protect the life and personal integrity of Dr Aleman-Lacayo" (see *Aleman-Lacayo* case, Inter-American Court of Human Rights, Order of 2 February 1996). Interestingly, one of the invited experts, Ms Burbano-Herrera,[11] also referred to this interesting case at our hearing on 3 October 2013, and another, Mr Berger, the former Jurisconsult of the European Court of Human Rights, encouraged the latter to be "more inventive" in relation to Rule 39 interim measures.

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8. *Mamatkulov and Askarov v. Turkey* (Applications Nos. 46827/99 and 49651/99), judgment of 4 February 2005 (Grand Chamber), paragraph 129.

9. See, for example, the Steering Committee for Human Rights' "Report on interim measures under Rule 39 of the Rules of Court", adopted at its 77th meeting, 19-23 March 2013, paragraph 10.

10. See, for example, *Abdulkhakov v. Russia*, Application No. 14743/11, judgment of 2 October 2012, and *Zokhidov v. Russia* (Application No. 67286/10), judgment of 5 February 2013; *Savriddin Dzhurayev v. Russia*, Application No. 71386/10, judgment of 25 April 2013 (not yet final).

12. In Resolution 1571 (2007), the Assembly called on the competent authorities of all member States to, *inter alia*:

> *"17.2. take positive measures to protect applicants, their lawyers or family members from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner;*
>
> *17.3. thoroughly investigate all cases of alleged crimes against applicants, their lawyers or family members and to take robust action to prosecute and punish the perpetrators and instigators of such acts so as to send out a clear message that such action will not be tolerated by the authorities;"*

13. In the same resolution, the Assembly invited the Court to "tak[e] appropriate interim measures, including new types thereof, such as ordering police protection or relocation of threatened individuals and their families". It also invited national parliaments "to include all aspects of States' duty to co-operate with the Court in their work aimed at supervising the compliance of governments with obligations under the Convention, and to hold the executive or other authorities accountable for any violations".

14. It is noteworthy, in this context, that in the recent judgment in the *Savriddin Dzhurayev* case, the Court, for the first time, required, as a general measure under Article 46 of the Convention, that the respondent State put in place an appropriate mechanism capable of ensuring that applicants in respect of whom the Court has indicated interim measures "benefit from immediate and effective protection against unlawful kidnapping and irregular removal" from the host State's territory and jurisdiction. This mechanism "should be subject to close scrutiny by a competent law-enforcement officer … capable of intervening at short notice to prevent any sudden breach of interim measures that may occur on purpose or by accident". The Court also required easy access of such applicants and their legal representatives to the State agents concerned "in order to inform them of any emergency and seek urgent protection".[12] As Mr Berger pointed out, at the hearing on 3 October 2013, the Court still refrained from indicating precisely which specific measures the respondent State was required to take in order to achieve the intended result, but the fact that the Court clearly requested the authorities to take positive measures is a significant step forward, in line with the Assembly's earlier invitation.

15. Following the transfer by the Italian authorities of the applicant Mr Toumi to Tunisia in flagrant disregard of the Court's interim measure, on 6 August 2009 Ms Herta Däubler-Gmelin (Germany, SOC) and Mr Christos Pourgourides (Cyprus, EPP/CD), at the time respectively the Chair of the Committee on Legal Affairs and Human Rights and the rapporteur on implementation of judgments of the European Court of Human Rights, made a joint statement to the press, condemning Italy for its action.[13]

16. On 20 August 2009, Ms Däubler-Gmelin addressed a written question to the Committee of Ministers, seeking information about the steps it had taken with respect to repetitive non-compliance by Italy with interim measures and the measures it intended to take to ensure its compliance in the future.[14] Simultaneously, Ms Däubler-Gmelin sent a letter to the Italian parliamentary delegation with similar questions.

17. The second relevant report of the Assembly is that on "Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights"[15] by the Committee on Migration, Refugees and Displaced Persons. It was published at the height of the influx of the requests for application of Rule 39 made mostly by asylum seekers and migrants and focused specifically on that vulnerable group of potential beneficiaries of interim measures. With the number of incidents of non-compliance with an interim measure at the time still being relatively low, the report analysed the general notion of States' compliance and objective impediments which might thwart it. It also provided an overview of the Council of Europe's structure of institutional support for the Rule 39 mechanism.

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11. See Clara Burbano Herrera, Provisional Measures in the Case Law of the Inter-American Court of Human Rights, 2010.
12. See paragraph 262 of the judgment, op. cit.
13. http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=2544&lang=2&cat=.
14. Doc. 12000.
15. Doc. 12435, adopted on 9 November 2010.

18. In Resolution 1788 (2011), based on this report, the Assembly condemned "any disrespect of legally binding measures ordered by the Court … as a blatant disregard for [this] system of protection of human rights" and urged the member States to:

> *"15.1 guarantee the right of individual petition to the Court under Article 34, neither hinder nor interfere with the exercise of that right in any manner whatsoever and fully comply with the letter and spirit of interim measures indicated by the Court under Rule 39, in particular by:*
>
> *15.1.1 co-operating with the Court and Convention organs, by providing full, frank and fair disclosure in response to requests for further information under Rule 39(3), and facilitating to the highest degree any fact-finding requests made by the Court;*
>
> *..."*

19. In addition, the Assembly again expressed the hope that the Court would require "the adoption of specific measures by States to remedy harm caused, in order that the Committee of Ministers may more effectively monitor the execution of judgments".

20. In June 2012, the Committee on Legal Affairs and Human Rights discussed the issue of non-compliance with interim measures by the Russian Federation and Ukraine in the framework of its hearings on implementation of Court judgments.[16]

1.3.2. Committee of Ministers

21. In Resolution CM/Res(2010)25,[17] adopted as a response to Assembly Resolution 1571 (2007), the Committee of Ministers called on the States Parties, *inter alia*, to:

> *"2. fulfil their positive obligations to protect applicants or persons who have indicated an intention to apply to the Court … by … providing appropriate forms of effective protection, including at international level;*
>
> *3. … take prompt and effective action with regard to any interim measures indicated by the Court so as to ensure compliance with their obligations under the relevant provisions of the Convention ...;*
>
> *4. identify and appropriately investigate all cases of alleged interference with the right of individual application, having regard to the positive obligations already arising under the Convention in light of the Court's case law;*
>
> *5. take any appropriate further action, in accordance with domestic law, against persons suspected of being the perpetrators and instigators of such interference, including, where justified, by seeking their prosecution and the punishment of those found guilty;"*

22. In addition, in the same resolution the Committee of Ministers decided to examine urgently any incident of interference with the right of individual application. Since then, the incidents of non-compliance with Rule 39 in adjudicated cases, as well as the ones that are still pending before the Court, are regularly on the agenda of the Committee of Ministers' Human Rights meetings.

23. At their 1176th meeting on 10 July 2013, the Ministers' Deputies

> *"1. noted with grave concern that a further incident involving allegations of kidnapping and illegal transfer of an applicant protected by an interim measure indicated by the Court under Rule 39 has been reported, this time in the context of the Mamazhonov case;*
>
> *2. strongly insisted that light be shed on this incident and on the fate of the applicant as quickly as possible;*
>
> *3. consequently insisted again on the pressing need to adopt as of now measures to ensure an immediate and effective protection of the applicants in a similar situation against kidnappings and irregular removals from the national territory;*
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> *…"*[18]

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16. See the Information Note prepared by the Secretariat of the Committee on Legal Affairs and Human Rights upon the instructions of Mr Klaas de Vries, AS/Jur (2012) 23.
17. Adopted on 10 November 2010: https://wcd.coe.int/ViewDoc.jsp?id=1703817.
18. Regarding point 3 of the Deputies' decision, it is notable that the Court has also stressed the need for "an appropriate mechanism tasked with both preventative and protective functions, in order to ensure that the applicant benefits (in particular, following his release from detention) from immediate and effective protection against unlawful or irregular

2. The Rule 39 mechanism: recent trends

24. Rule 39 of the Rules of Court reads as follows:

> *"1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.*
>
> *2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.*
>
> *3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.*
>
> *4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."*

25. As stated above, Rule 39 is linked to Article 34 of the Convention, by which the States Parties "undertake not to hinder in any way the effective exercise of the right" of individual application. The Court's practice is only to issue an interim measure against a State Party where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied. In its very recent judgment in the case of *Savriddin Dzhurayev v. Russia*, the Court reaffirmed that the purpose of interim measures is not limited to facilitating effective examination of applications but includes ensuring effectiveness of the protection afforded to the applicant by the Convention.[19] Such indications also allow the States concerned to properly discharge their obligation to comply with a legally binding final judgment of the Court and permit the Committee of Ministers to supervise execution of the final judgments.[20] A firm position on the absolute and utmost importance of States' compliance with interim measures was expressed by the States Parties themselves in the Izmir Declaration[21] and by the Committee of Ministers in its Interim Resolution CM/ResDH(2010)83[22] in the case of *Ben Khemais v. Italy*. The Court has also reiterated on several occasions that, in complying with an interim measure, States should have regard not only to its letter but also to its spirit or, in other words, its very purpose.[23]

26. While the legally binding nature of interim measures means that their non-respect can result in the finding of a violation of Article 34 of the Convention, the Court has specified that this may not happen if the respondent State has demonstrated that an objective impediment prevented compliance and that it took all reasonable steps to remove the impediment, and to keep the Court informed about the situation. Such was the case in the applications *Muminov v. Russia*, *Sivanathan v. the United Kingdom*, *M.B. and Others v. Turkey,* and *Hamidovic v. Italy*,[24] where the Court accepted that a breach of the imposed interim measure had been either the result of an unfortunate sequence of events (usually insufficient time between the Court's

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removal from the territory of Russia and the jurisdiction of the Russian courts" (letter to the Committee of Ministers dated 22 July 2013 concerning the case of *Saliyev v. Russia*). Similarly, in its "Additional questions" addressed to the Russian authorities on 8 July 2013 in the case of *Mamazhonov v. Russia* (Application No. 17239/13), the Court asked what measures the authorities took "to protect the applicant against his conceivable removal from Russia before, during, and immediately after his alleged release from the pre-trial detention facility".

19. See *Savriddin Dzhurayev v. Russia*, op. cit., paragraph 212. The same arguments are articulated by the Court in its earlier judgments in the cases *Mamatkulov and Askarov v. Turkey*, op. cit., paragraph 125; *Shamayev and Others v. Georgia and Russia*, Application No. 36378/02, judgment of 12 April 2005, paragraph 473; *Aoulmi v. France* (Application No. 50278/99, paragraph 108; regarding France, it should be noted that in a subsequent case (*Ministère de l'Intérieur c. Djamel Beghal*) the Conseil d'Etat aligned itself on the practice of the Strasbourg Court and annulled the expulsion order against Mr Beghal for the duration of the procedure before the European Court of Human Rights (Conseil d'Etat, Ordonnance of 30 June 2009, Application No. 328879, *Ministre de l'Intérieur, de l'Outre-Mer et des Collectivités Territoriales c. M. Djamel Beghad*); and *Ben Khemais v. Italy*, Application No. 246/07, judgment of 24 February 2009, paragraph 82.

20. Ibid.

21. Final Declaration of the High Level Conference on the Future of the European Court of Human Rights held in Izmir on 26-27 April 2011, p. 3.

22. Adopted by the Committee of Ministers on 3 June 2010 at the 1086th meeting of the Ministers' Deputies: https://wcd.coe.int/ViewDoc.jsp?id=1632365.

23. See *Paladi v. Moldova*, Application No. 39806/05, judgment of 10 March 2009 [Grand Chamber], paragraph 91.

24. For details of the applications, see the Appendix to this document.

communication of the measure and actual removal of the applicant or delays in transmission of information within the government structures) or a consequence of the applicant's own actions, failing to establish the government's responsibility.

27. Nevertheless, since 2005, when the Court declared interim measures legally binding, there have been nearly 20 cases in which the Court found a breach of Article 34 of the Convention linked to a non-respect of Rule 39. In several of these cases, namely *Aleksanyan v. Russia*, *Paladi v. Moldova* and *Grori v. Albania*,[25] the interim measures concerned the applicants' medical treatment – transfer from prison to hospital or continued treatment in a specialised medical facility. In one case, *Shtukaturov v. Russia*,[26] the Court required the respondent government to permit the applicant to see his lawyer. However, in most of such cases an interim measure had been applied in order to stay the applicants' extradition or expulsion, so as to prevent the risk of their ill-treatment, proscribed by Article 3 of the Convention, in the receiving country.[27]

28. The particulars of all the cases with a (alleged) breach of Rule 39 can be found in the appendix to the present document (and therefore do not bear a repetition here); several trends are discernible.

29. Firstly, between 2009 and 2012, the Court rendered four judgments against Italy concerning the extradition, in flagrant defiance of interim measures, of Tunisian nationals who, in their home country, were charged with, or convicted *in absentia* of, terrorist activities. The transfers of the applicants to Tunisia occurred between June 2008 and May 2010. The Italian Government justified their actions by claiming that the applicants represented a threat to national security. In all of the above judgments, in addition to a breach of Article 34 of the Convention, the Court found violations of Article 3 of the Convention, which prohibits torture and inhuman treatment, due to the applicants' risk of being subjected to ill-treatment. It is noteworthy that one of the four applicants, Mr Toumi, subsequently indicated to the Court that he had been tortured upon arrival in his home country.[28] No information regarding the current situation of the other applicants has, to date, been submitted by the Italian Government.

30. An even longer series of episodes concerning "undercover" transfer of persons to Tajikistan and Uzbekistan from the Russian Federation began in the summer of 2011.[29] Thus far, the Court has delivered three judgments against the Russian Federation in this type of case, finding in all of them that the illegal transfers had occurred with the active involvement or passive connivance of the Russian authorities.[30] The Court has also established in all three judgments that, by transferring the applicants or failing to protect them from forcible removals, the Russian Federation acted in breach of its obligations under Article 3 of the Convention. Five more applications raising the same issue are currently pending before the Court.[31] In the majority of these cases the applicants were wanted in their home States for membership of an illegal religious organisation or participation in unlawful religious activities. In other cases, the applicants were indicted for alleged terrorist activities or crimes that could be qualified as being against State security. In all of these cases, the applicants were initially arrested in Russia with a view to extradition, and then released, usually upon expiry of the statutory time-limit for such detention, and thereafter they "disappeared" in suspect circumstances. In the majority of the cases, after their "disappearance" the applicants resurfaced in the requesting countries where they were convicted and sentenced as charged, often amidst claims of torture, which the local authorities refused to investigate. In other cases, indirect evidence of the applicants' transfer to the requesting States has surfaced, mostly coming from anonymous media sources.[32] In all of these cases, the Russian authorities either refused to open criminal investigations into the applicants' disappearance or produced vague and inconclusive explanations, with the investigations pending for years.

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25. *Aleksanyan v. Russia*, Application No. 46468/06, judgment of 22 December 2008; *Paladi v. Moldova*, op. cit.; *Grori v. Albania*, Application No. 25336/04, judgment of 7 July 2009.
26. *Shtukaturov v. Russia*, Application No. 44009/05, judgment of 27 March 2008.
27. For an analysis of the role and application of Rule 39 measures up until April 2012, see "Research on ECHR Rule 39 Interim Measures", European Legal Network on Asylum (ELENA) and European Council on Refugees and Exiles (ECRE), April 2012.
28. *Ben Khemais v. Italy*, *Trabelsi v. Italy*, *Toumi v. Italy* and *Mannai v. Italy*. Details of the applications are listed in the Appendix to this document.
29. However, even before that there had been at least one instance when a failed extradition was substituted with expulsion, which, in its turn, took place despite an interim measure imposed by the Court – see the Court's judgment of 3 June 2010 in the case of *Kamaliyevy v. Russia*, Application No. 52812/07.
30. Supra note 10.
31. See the Appendix to this document.
32. See, for instance, the cases of *Koziyev v. Russia*, *Latipov v. Russia*, and *Ermakov v. Russia* (details in the Appendix to the present document).

31. The most recent Court judgment in this respect, *Savriddin Dzhurayev v. Russia*, concerns a case falling exactly into this category. The applicant, initially arrested in Russia with a view to extradition to Tajikistan for alleged unlawful religious activities, was released in May 2011, following an application by the Court of an interim measure staying his extradition. In September 2011, the Russian authorities granted Mr Dzhurayev temporary asylum in Russia. According to the applicant, on 31 October 2011, he was abducted in Moscow by a group of men who detained him in a minivan for one or two days and tortured him, then took him to the airport, from where he was flown to Khujand (Tajikistan) without going through normal border formalities or security checks. Upon arrival, he was handed over to the Tajik authorities. According to his father's submissions, Mr Dzhurayev was then detained at a police station, where he was severely ill-treated and forced to confess. Once informed of the abduction in Moscow, Mr Dzhurayev's lawyer immediately contacted a number of Russian officials, including the Head of the Moscow police and the Prosecutor General, asking them to protect Mr Dzhurayev from the risk of a forcible transfer to Tajikistan. An official request to that effect was also addressed by the Russian Commissioner for Human Rights to the Head of the Moscow police. The investigators in charge refused to open a criminal investigation on at least four occasions. The Russian Government relied in their final submissions on the information received from the Prosecutor General of Tajikistan to the effect that the applicant had "voluntarily surrendered" to the Tajik authorities after crossing several State borders without a single document.

32. In April 2012, a regional court in Tajikistan found Mr Dzhurayev guilty of a number of offences and sentenced him to 26 years' imprisonment. During the trial, according to the applicant's lawyer's submissions, the applicant did not plead guilty and insisted that he had been abducted, forcibly transferred to Tajikistan and tortured to extract confessions. The local authorities did not answer the relatives' request for a forensic examination of the applicant and his co-accused.

33. In the above case, the Court, based on several factual elements of the case – the speed with which the applicant reached Tajikistan, which suggested the use of an aircraft, the impossibility to board an aircraft bound for a foreign country without going through the administrative checks and formalities, the refusal of the authorities to conduct anything resembling a good-faith investigation into the incident, and its own findings in two previous applications –, found it established that the applicant's forcible transfer had occurred with the involvement of State agents. The Court stressed, in particular, that the actions of the State agents were "characterised by manifest arbitrariness and abuse of power with the aim of circumventing" the decision granting the applicant temporary asylum and the steps taken to prevent the applicant's extradition in line with the interim measure. The Court likened the actions of the Russian authorities concerning the applicant's forcible transfer to the infamous "extraordinary renditions" in the sense that both were conducted "outside the normal legal system" and, "by [their] deliberate circumvention of due process, [were] anathema to the rule of law and the values protected by the Convention".[33]

34. Noteworthy in this context is the nature of co-operation between Russia and central Asian States in the framework of the Shanghai Cooperation Organisation, mentioned on several occasions by international organisations as incompatible with international human rights norms, especially the principle of *non-refoulement*, and the rule of law.[34] The Shanghai Convention on Combating Terrorism, Separatism and Extremism of 2001[35] requires member States, among which are the Russian Federation, Tajikistan and Uzbekistan, to exchange information, develop legal co-operation and share practical assistance. Co-operation between secret services is carried out without any oversight: a service merely requests assistance from another service upon which the receiving State "shall take all necessary measures to ensure a prompt and most complete execution of the request".[36] In fairness, the convention contains a caveat which allows for denial or postponement of execution of a request for assistance if the competent authority of the requested State "considers that its execution … contradicts the legislation or international obligations of the requested Party".[37] Even assuming that the aforementioned events in Russia took place within the framework of co-operation under this convention, an inference can be made that it is the lack of political will, and not of legal tools, that impedes proper safeguarding of individuals against their forcible transfer to countries implicated in widespread and systematic use of torture.

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33. See paragraph 204 of the judgment.
34. See, in particular, the Concluding observations of the United Nations Human Rights Committee published in November 2009, paragraph 17; United Nations Human Rights Council: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, February 2009, paragraph 49; Alternative Report of the International Commission of Jurists to the United Nations Committee against Torture, October 2012 (see paragraphs 28 and 29).
35. Its English translation can be accessed at: http://www.refworld.org/category,LEGAL,ASIA,,,49f5d9f92,0.html.
36. Article 9.1 of the convention.
37. Article 9.6 of the convention.

35. It should be noted, in this connection, that other States have also been recently implicated in situations of direct defiance of interim measures. One such case is *Labsi v. Slovakia*,[38] where the Slovak authorities, under the pretext of a superior societal interest, expelled the applicant, convicted *in absentia* by an Algerian court of membership of a terrorist organisation, to his home country in flagrant disregard of the Court's indication under Rule 39. This case gained particular notoriety due to the comments made by the spokesperson of the national Ministry of the Interior to the effect that the Slovak authorities were prepared to run the risk of being found to be in breach of the Convention and that other States which had failed to comply with a Rule 39 measure only had to pay "a few thousand euros".[39]

36. The most recent case in this category, communicated to the authorities in January 2013, is the application *Malevanaya and Sadyrkulov v. Ukraine*.[40] In this case, the Ukrainian State agents disregarded the Court's interim measure prohibiting expulsion of the political refugees by sending them to Georgia.

37. This type of case has caused much disarray among human rights defenders. Amnesty International has recently published an interesting report entitled "Eurasia: Return to torture: Extradition, forcible returns and removals to Central Asia."[41] The report covers abduction, disappearance, unlawful transfer, imprisonment and torture of individuals wanted on religious, political and economic grounds from, among others, Russia and Ukraine to Central Asia, often in breach of interim measures and judgments of the European Court of Human Rights. Amnesty International has likened these cases to a "region-wide extraordinary renditions programme".[42] As this subject is also of interest to the Assembly's Committee on Migration, Refugees and Displaced Persons, our committee held a joint hearing with our sister committee during the Assembly's October 2013 part-session on "Failures to implement Strasbourg Court provisional measures", during which I gave the floor also to the researchers involved in the preparation of the above-mentioned report.

3. Evolution of the Court's approach to States' obligation to co-operate under Article 38 of the Convention

38. Article 38 (former Article 28) of the Convention reads as follows:

> *"The Court shall examine the case together with the representatives of the Parties and, if need be, undertake an investigation for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."*

39. It should be noted that before the entry into force of Protocol No. 14 to the Convention (STCE n° 194), this provision was applicable only at the post-admissibility stage of an application.

40. Since 1999, the Court has delivered hundreds of judgments against Turkey and the Russian Federation touching upon the events in their secessionist regions and concerning Articles 2 (the right to life), 3 (prohibition of ill-treatment) and 5 (detention) of the Convention. In a great number of these judgments, these respondent States were found to have failed to properly discharge their duties under Article 38 of the Convention, most often through non-disclosure of domestic investigation files and other documents and lack of assistance to the Court's fact-finding missions. This failure often meant that the Court was unable to establish conclusively whether a substantive violation of the Convention had taken place.

41. In its Resolutions ResDH(2001)66[43] and ResDH(2006)45,[44] the Committee of Ministers, faced with the multitude of such cases, emphasised repeatedly that the principle of co-operation with the Court embodied in the Convention was of fundamental importance for the proper and effective functioning of the Convention system and called on the governments of the Contracting States to ensure that all the relevant authorities complied strictly with that obligation.

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38. See the Appendix to the present document for details.
39. See the Court Registrar's letter to the Slovak authorities, cited in paragraph 56 of the judgment.
40. See the Appendix to the present document for details.
41. http://www.amnesty.org/en/library/info/EUR04/001/2013/en.
42. Amnesty International's Submission to Council of Europe Committee of Ministers: the Garabayev Group of Cases against the Russian Federation, dated 26 August 2013 (at page 3).
43. Adopted on 26 June 2001: https://wcd.coe.int/ViewDoc.jsp?id=211733.
44. Adopted on 4 July 2006: https://wcd.coe.int/ViewDoc.jsp?id=1017111.

42. In its above-mentioned Resolution 1571 (2007), the Assembly called on the competent authorities of all member States to "assist the Court in fact-finding by putting at its disposal all relevant documents, including the complete case file concerning criminal or other proceedings before the national courts or other bodies, and by identifying witnesses and ensuring their presence at hearings organised by the Court" (paragraph 17.4).

43. In recent years, the Court's case law reached a point where the shifting of the burden of proof onto the respondent governments became quasi-automatic if the facts of the prima facie case made by the applicants matched a certain pattern suggestive of the authorities' responsibility, as previously established by the Court.[45] Aided by its Rule 44.C.1,[46] the Court began to interpret the States' lack of co-operation as a strong factual presumption in support of the applicants' assertions and thus to find substantive violations of the Convention even when it was not in possession of indisputable evidence, withheld by the respondent States. As mentioned above, in its Resolution 1571 (2007), the Assembly had in fact encouraged the Court to continue "making use of presumptions of fact and reversing the burden of proof in appropriate cases".[47] Since 2010, the number of judgments finding a violation of Article 38 has ranged from one to three per year; they have also concerned other States.

4. Conclusions

44. In light of the developments described above and of the contributions of our experts at the hearing on 3 October 2013, I should like to draw the following conclusions, which are reflected in the draft resolution and recommendation.

45. Firstly, it appears that the Court has found a workable answer to lack of co-operation by States Parties consisting in failures to provide evidence and explanations requested by the Court. Factual presumptions and, in appropriate cases, the reversal of the burden of proof, protect the applicants' interests in having violations recognised without placing an undue burden on States Parties: if they are in the right, they can always avoid findings of violations by providing the materials required by the Court.

46. Secondly, regarding non-compliance with the Court's interim measures, it would appear that this is mostly a political issue, rather than just a specifically legal one. While we must continue to remind States of their voluntarily undertaken legal obligations, such as the one to co-operate with the Court so as to allow the latter to discharge its functions, or the one to ensure the most effective protection of the Convention rights to anyone within their jurisdiction, this – I am sorry to say – does not appear to have led to any improvement in the situation – quite the opposite has happened.

47. Attempts by certain States to cover up inappropriate and illegal proceedings attest to the fact that their governments are in fact aware of their unlawfulness, but perceived political self-interest prevails. The Russian "extraordinary rendition cases" investigated by Amnesty International, described at our hearing by Ms McGill, illustrate the gravity of such abuses. International co-operation between law-enforcement bodies based on regional agreements, such as the Shanghai Cooperation Organisation, or on long-standing institutional or personal relations, however desirable for the sake of the efficiency of law enforcement, must not be allowed to violate a State Party's binding commitments under the Convention. Just as the Assembly spoke up loudly and clearly against unlawful transfers of detainees and secret detentions by the CIA (in collusion with certain European partners),[48] we cannot tolerate actions also involving temporary disappearances by one of the Council of Europe's own member States.

48. Concrete preventive action and/or specific, sufficiently dissuasive sanctions are needed to make a difference. Interestingly, one of our experts, a former senior official of the Court, suggested that the Court could make use of Article 41 of the Convention to award "punitive damages", which would provide a form of reparation because the violation, in such cases, has already taken place. Trusting in the ability of the Court to avoid any exaggerations, I consider that this proposal deserves to be studied further. Also, again in line with

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45. Supra note 6.
46. The Rule reads as follows: "Where a party fails to adduce evidence or provide information requested by the Court or to divulge information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate."
47. Resolution 1571 (2007), paragraph 18.7.
48. See Resolution 1507 (2006) on alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe member States; Resolution 1562 (2007) on secret detentions and illegal transfers of detainees involving Council of Europe member States: second report; and Resolution 1838 (2011) on abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations (Rapporteur for all three reports: Mr Dick Marty, Switzerland, ALDE).

the proposals of our experts – both Ms Burbano Herrera and Mr Berger – we should encourage the Court to be more "inventive" in relation to interim measures based on Rule 39. As we have seen,[49] the Court has thankfully begun to indicate "positive measures" designed to safeguard the applicants' rights, including provisions regarding the follow-up of the implementation of such measures. As Ms Burbano Herrera has shown, using the practice of the Inter-American Court of Human Rights as an example, there is scope for further progress in this respect. At the same time, the comparison with the Inter-American Court has also shown that the European Court of Human Rights system and the practice of the Court have some undeniable strengths that we Europeans can be proud of. I therefore share Mr Berger's sceptical stance regarding some of Ms Burbano Herrera's proposals. For example, obliging the Court to provide detailed reasons for interim measures or the possibility for judges to add concurring opinions may well reduce the efficiency of the existing set-up, where time is often of the essence.

49. In sum, the Assembly should reaffirm its support to the Court regarding member States' duty to co-operate with it by urging all member States to comply with the Court's requests, including with interim measures under Rule 39. At the same time, the Assembly should encourage the Court to cautiously continue on the path of developing its case law with a view to further improving the effectiveness of its measures, by endorsing some concrete proposals for further improvements. This is the purpose of the draft resolution. The draft recommendation shall ensure that the Committee of Ministers is also seized of this fundamental issue.

49. See footnote 25 above.

Appendix – Cases examined by the Court in which Rule 39 has been breached

Cases in which Rule 39 has been breached/allegedly breached and the response of the European Court of Human Rights

Case name	Reference	Ruling /Date	Applicant expelled/extradited/ transferred/disappeared with Rule 39 in place	Terrorism related	Violation of Article 34
Mamatkulov and Askarov v. Turkey	46827/99 and 46951/99	Judgment [GC] 04.02.2005	Yes	Yes	Yes Interim measures declared legally binding
Aoulmi v France	50278/99	Judgment 17.01.2006	Yes	No	Yes
Shamayev and Others v. Georgia and Russia	36378/02	Judgment 12.04.2005	Yes	Yes	Yes
Olaechea Cahuas v. Spain	24668/03	Judgment 10.08.2006	Yes	Yes	Yes
Mostafa and Others v. Turkey	16348/05	Judgment 15.01.2008	Yes	No	Yes
Shtukaturov v. Russia	44009/05	Judgment 27.03.2008	Not an expulsion case Rule 39 indication to allow the applicant to meet his lawyer	No	Yes
Muminov v. Russia	42502/06	Judgment 11.12.2008	Time frame contested	Yes	No
Aleksanyan v. Russia	46468/06	Judgment 22.12.2008	Not an expulsion case Rule 39 indication to transfer applicant from prison to hospital for treatment	No	Yes
Sivanathan v. the United Kingdom	38108/07	Decision (struck out of the list) 03.02.2009	Yes	No	No
Ben Khemais v. Italy	246/07	Judgment 24.02.2009	Yes	Yes	Yes
Paladi v. Moldova	39806/05	Judgment [GC] 10.03.2009	Not an expulsion case Rule 39 granted to ensure the applicant's continued treatment in a neurological centre.	No	Yes
Cherif and Others v. Italy	1860/07	Judgment (struck out of the list) 7.4.2009	Yes	Yes	
Grori v. Albania	25336/04	Judgment 7.07.2009	Not an expulsion case Rule 39 indication to transfer applicant from prison to hospital for treatment	No	Yes
Al-Saadoon and Mufdhi v. the United Kingdom	61498/08	Judgment 2.3.2010	Not an expulsion case Transfer of prisoners from custody of British forces (in detention facilities in Basra) to the Iraqi authorities	No	Yes
Trabelsi v. Italy	50163/08	Judgment 13.4.2010	Yes	Yes	Yes
M.B. and Others v. Turkey	36009/08	Judgment 15.6.2010	Alleged. Time frame contested	No	No

Case name	Reference	Ruling /Date	Applicant expelled/extradited/ transferred/disappeared with Rule 39 in place	Terrorism related	Violation of Article 34
D.B. v. Turkey	33526/08	Judgment 13.7.2010	Yes	No	Yes
Kamaliyevy v. Russia	52812/07	Judgment 03.06.2010	Yes	No	Yes
Toumi v.Italy	25716/09	Judgment 05.04.2011	Yes	Yes	Yes
Mannai v.Italy	9961/10	Judgment 27.03.2012	Yes	Yes	Yes
Labsi v. Slovakia	33809/08	Judgment 15.05.2012	Yes	Yes	Yes
Abdulkhakov v. Russia	14743/11	Judgment 02.10.2012	Yes	No	Yes
Hamidovic v.Italy	31956/05	Decision 13.09.2011	Yes	No	No
Zokhidov v. Russia	67286/10	Judgment 05.02.2013	Yes	No	Yes
Savriddin Dzhurayev v. Russia	71386/10	Judgment 25.04.2013	Yes	No	Yes
Koziyev v. Russia	58221/10	Pending	Yes	No	
Nizomknon Dzhurayev v. Russia	31890/11	Pending	Yes	No	
Latipov v. Russia	77658/11	Pending	Yes	No	
Ermakov v.Russia	43165/10	Pending	Yes	No	
Kasymakhunov v. Russia	29604/12	Pending	Yes		
Malevanaya and Sadyrkulov v. Ukraine	18603/12	Pending	Yes	No	