

A CRITICAL ANALYSIS OF THE WORK OF THE EUROPEAN COMMISSION AND EUROPEAN COURT OF HUMAN RIGHTS IN RELATION WITH NON-COMPLIANCE OF INTERIM MEASURES - PERIOD 1957-2011

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Abstract

Today, interim measures have a key role in many of the cases that are brought before the European Human Rights System. The instrument has been designed to preserve and protect rights and freedoms to persons in a situation of extreme gravity and urgency, together with the interests of the parties in a case before the Court. This legal figure has been applied – nowadays – on a daily basis for more than half a century, first by the former European Commission on Human Rights (European Commission or Commission) and later by the European Court of Human Rights (European Court, Court or ECtHR). Despite the fact that interim measures have over time acquired a growing importance in the case law, States when faced with such a measure requiring them to act, sometimes refuse to abide by them. This contribution aims to give an exhaustive overview of the State incompliances. It is argued that the number of non-compliances is steadily growing, as is the number of perpetrators, not only among the ‘new’ Member States, but also among the ‘older’ member States and even the ‘founding fathers’ and that this can have a negative effect on the supervisory system as a whole. Some initiatives can, however, be taken by the European Court and the Committee of Ministers to improve and streamline the procedure with regard to interim measures, whereby all actors in the dispute may benefit.

INTRODUCTION

Between 1 January 1974 (the date from which there are official statistics available on the indication of interim measures) and 1 January 2010, in total 2.207 provisional measures have been issued of which 522 have been issued in the period 2000-2007, and 1.401 in the period 2008-2009 alone (see also *infra* Table 1). The exponential

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increase of requests for interim measures has undoubtedly been a positive aspect as it is a vote of confidence in the European organs of human rights.¹ It is remarkable how interim measures have gradually become part of the international legal world due to the effective and prompt responses to the needs of those that have requested them. But there is also a negative aspect in the European system, which is that on a number of occasions Member States have willingly incomed with the interim measures indicated. For that lately, a number of disturbing reports and signs have poured out of the Council of Europe with regard to unwilling or recalcitrant States,² although on the other hand the European Court (also with good reasons), followed by most legal doctrine,³ has always maintained that State practice has been exemplary, the Court on important occasions spoke of the 'consistent use [of States] to respect [...] indications [of interim measures]⁴ or underlined that '[c]ases of States failing to comply with indicated measures remain very rare'.⁵

¹ The decisions and judgments of the European Court and most decisions and reports of the former European Commission can be found on (www.echr.coe.int) through the HUDOC search engine.

² See, e.g., Press Release 615(2009), Parliamentary Assembly, Blatant disregard yet again, by Italy, of binding interim measures ordered by the ECHR, *available at* <https://wcd.coe.int/ViewDoc.jsp?id=1481061&Site=COE>; Report CommDH(2009)16, Commissioner H. R. Council of Europe, Thomas Hammarberg following his visit to Italy on 13-15 January 2009, (Apr. 16, 2009) at. 21-24, paras. 98-119; Doc. 11978, Parliamentary Assembly, Motion for a recommendation presented by C.W.A. Jonker and Others, Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights, (Jul. 6, 2009); Press Release 355(2010), Secretary General Council of Europe, Extradition of Mustapha Labsi, (Apr. 29, 2010); Press Release 403(2010), Secretary General Council of Europe, Concerns over repeated Italian expulsions, (May. 19, 2010); Press Release 467a10, Secretary General of Council of Europe, Expulsions by Italy: Committee of Ministers stresses the obligation to comply with interim measures indicated by the European Court of Human Rights, (Jun. 8, 2010). Press release of Council of Europe can be found on (<https://wcd.coe.int>)

³ E.g., George Letsas, *International Human Rights Law and the Binding Force of Interim Measures*, 5 EUR HUM RTS L. REV. 527, 527-34 (2003); Alastair Mowbray, *A New Strasbourg Approach to the Legal Consequences of Interim Measures*, 5 HUM RTS L. REV. 377-80 (2005); Alphonse Spielmann, *Les mesures provisoires et les organes de protection prévus par la Convention européenne des droits de l'homme*, in PRÉSENCE DU DROIT PUBLIC ET DES DROITS DE L'HOMME. MÉLANGES OFFERTS À JACQUES VELU, at 1306-07 (Brussels: Bruylant 1992).

⁴ Conka and Others v. Belgium, App. no. 51564/99, Eur. Ct. H.R. (Feb. 5, 2002); see also Cruz Varas and Others v. Sweden, App. no. 15576/89, Eur. Ct. H.R. (Mar. 3, 1991), at para., 121.

⁵ Mamatkulov and Askarov v. Turkey, App. nos. 46827/99 and 46951/99, Eur. Ct. H.R. (Feb. 2, 2005), at para., 105. *Cruz Varas and Others*, App. no. 15576/89, at para., 100.

This article aims to give a completely view in respect to the cases where States have refused to abide by the measures during the period 1957-2011. In the same way this article pretends to examine whether the number of incompliances by Member States is allegedly on the rise. It is argued that the number of non-compliances is steadily growing, as is the number of perpetrators, not only among the 'new' Member States, but also among the 'older' member States and even the 'founding fathers' and that can have a negative effect on the supervisory system as a whole. Developing this topic is relevant, not only because of the factual circumstances in which interim measures are adopted, *i.e.* in essence to protect persons whose right to life and/or personal integrity are in danger of being violated, but also because, if the number of non-abidances is really going up, this might be deemed a threat for the overall (efficiency of the) supervisory system.

After a brief introduction to the legal basis and application of interim measures (2), the contribution will mainly highlight the cases where Member States have incomplied with an interim measure issued by the former European Commission and/or the former and current European Court, and the reasons invoked by States to do so (3), to conclude with an analysis and evaluation of the situation (4), and some suggestions to avoid non-abidance by States in the future (5).

I. INTERIM MEASURES FROM A LEGAL PERSPECTIVE

A. The Legal Basis

It must emphasise that the institute of the interim measures is not contemplated in the ECHR itself but in the Rules of Court.⁶ The ECHR does not confer any competence on the European Court of Human Rights 'to issue'; let alone 'to order' interim measures. However, the practice of provisional measures has been established for the very first time in 1957 when the European Commission decided to order their adoption in the first Greek Inter-State case and it has been institutionalized since 1959 through the Rules of the European Court and since 1974 through the Rules of the former European Commission.⁷

During the period in which the European Commission existed (1953-1998),⁸ it was the Commission that adopted interim measures⁹ and, only when necessary and provided the case was sent to the Court, they were extended.¹⁰ In practice, when a case with interim measures was sent to the Court, the measures lost their effect and had to be re-adopted under Article 36 of the Rules of Court,¹¹ so it was ultimately stipulated that the interim measures of a case that the Commission filed with the Court were maintained, unless the President decided otherwise.¹²

⁶ See also Practice Direction concerning 'requests for provisional measures', Eur. Ct. H. R. (Oct. 16, 2009).

⁷ The European Convention initially provided two organs charged with ensuring respect for the commitments assumed by the States parties: the European Commission and the European Court. These organs had competence to receive complaints against any of the States parties that alleged the violation of any of the rights set out in the Convention. The Commission was provided for judicial organ charged with overseeing compliance of the Convention. In this task, the Court is accompanied by two organs of the Council of Europe: the Secretary General and the Committee of Ministers.

⁸ The European Commission received its first petition in 1955.

⁹ See, *Chahal v. the United Kingdom*, App. no. 22414/93, Eur. Ct. H.R. (Nov. 15, 1996), paras. 4 and 84; in the same case, Dec. on admissibility (Sep. 1, 1994); *Jabari v. Turkey*, App. no. 40035/98, Eur. Ct. H.R. (Jul. 11, 2000), para., 6; in the same case, Dec. on admissibility (Nov. 28, 1999); *Ahmed v. Austria*, App. no. 25964/94, Eur. Ct. H.R. (Dec. 17, 1996), paras. 5 and 20; *Aspichi Dehwari v. the Netherlands*, App. no. 37014/97, Eur. Comm'n H.R. (Oct. 29, 1998), para., 7 (Commission report), see also in the same case Eur. Ct. H.R. (Apr. 27, 2000), para., 5.

¹⁰ It should be recalled that the European Court initiated its tasks in January 1959. The Court held its first public hearing in October 1960 and delivered its first judgment on 14 November of that year. See, 3 Y.B. EUR. CONV. ON H.R. (1960), Introduction.

¹¹ In effect as of 1 April 1989.

¹² Hanna R. Garry, *When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights*, EUR. PUB. L.411, (2001).

Provisional measures are currently regulated in the Rules of the (new) European Court. Rule 39(1) holds that '[t]he Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, 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' (Rule 39(1)), and '[t]he Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.' (Rule 39(3)). Finally, '[n]otice of these [interim] measures shall be given to the Committee of Ministers' (Article 39(2)). In fact, the Committee of Ministers is kept informed of the provisional measure in order to allow it to exercise its supervisory function.

B. Whom are the Interim Measures Addressed to and Circumstances in what are adopted (Arts. 2, 3, 6, 8 y 34 ECHR)

While interim measures have been indicated by the European Court and former Commission to both parties in the proceedings, *i.e.*, the applicant(s) and the respondent State, most provisional measures are directed towards the State.¹³ Quite exceptionally are some simultaneously addressed to the applicant and the respondent State,¹⁴ while very few cases are known in which an interim measure has been directed to an applicant, while at the same time no interim measure has been directed to the respondent State.¹⁵ The conflict between Georgia and Russia in the summer of 2008 gave rise to an Inter-State case, in which the European Court seems to set a new precedent, as the Court intervened for the first time by ordering an

¹³ *E.g.*, *Olaechea Cahuas v. Spain*, App. no. 24668/03, Eur. Ct. H.R. (Dec. 11, 2006); *Shamayev and Others v. Russia and Georgia*, App. no. 36378/02, Eur. Ct. H.R. (Oct. 12, 2005). The State may even be asked to take interim measures to prevent private individuals from causing damage to other private individuals. Cf. *H.L.R. v. France*, App. no. 24573/94, Eur. H.R. (Apr. 29, 1997) (Commission report).

¹⁴ *E.g.*, *Ilasçu and Others v. Moldova and Russia*, App. no. 48787/99, Eur. Ct. H.R. (Jul. 8, 2004); at paras. 10-11; *Bhuyian v. Sweden*, App. no. 26516/95, Eur. Comm'n H.R. (Sep. 14, 1995); *Vakalis v. Greece*, App. no. 17841/91, Eur. Comm'n H.R. (May. 5, 1993), 36 DR at 226-227.

¹⁵ *E.g.*, *Tanyeri and Others v. Turkey*, App. no. 74308/01, Eur. Ct. H.R. (Dec. 6, 2005).

interim measure to both Member States benefiting an extremely large but 'identifiable group of persons' (being the entire population of Georgia, including South Ossetia).¹⁶

The motives for which interim measures can be granted are so broadly formulated in the Rules of the Court, that is why the Court has further concretized and developed them through its case law.¹⁷ In practice, interim measures are virtually only issued when three cumulative conditions are met: (1) the situation must be imminent and exceptional and there must no longer be any suspensive domestic remedy available against the disputed act; (2) there must be a high degree of probability that the disputed act will contravene the ECHR and (3) there must be a risk of irreparable damage.¹⁸

With regard to the substantive issues and the rights and freedoms in the European Convention, concerning or under which a provisional measure may be issued,¹⁹ the European Court has indicated that:

[w]hile there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture, inhuman or degrading treatment or punishment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention.²⁰

In the ambit of Articles 2 and 3 ECHR, interim measures are usually issued to suspend the expulsion or extradition of the applicant(s) to countries – mostly, but not

¹⁶ Press Release 581, Eur. Ct. H.R. (Aug. 12, 2008) and Information Note no. 110, Eur. Ct. H.R. (Jul. 31, 2008) at 49.

¹⁷ See, *supra* note 5 *Mamatkulov and Askarov*, App. nos. 46827/99 and 46951/99, at para., 104.

¹⁸ E.g., Buquicchio-de Boer, *Interim Measures by the European Commission of Human Rights*, in *THE BIRTH OF EUROPEAN HUMAN RIGHTS LAW. LIBER AMICORUM CARL AAGE NORGAARD*, at 230, 231 and 233 (de Salvia and Villiger eds., 1998).

¹⁹ For a typology and relatively recent overview of the cases in which interim measures have been issued over the years, see, *inter alia*, Hanne Garry and 7 *European Public Law* at 399-431, *supra* note 12; Yves Haeck and Clara Burbano-Herrera, *Interim Measures in the Case-Law of the European Court of Human Rights*, 21 *N.Q.HUM.RTS.* 625-675 (2003); Catharina Harby, *The Changing Nature of Interim Measures before the European Court of Human Rights*, 16 *EUR. HUM. RTS. L. REV.* 5, 73-84 (2010) .

²⁰ See, *supra* note 5 *Mamatkulov and Askarov*, App. nos. 46827/99 and 46951/99, at para., 104; *Paladi v. Moldova*, App. no. 39806/05, Eur. Ct. H.R. (Mar. 10, 2009) at para., 86; *Al-Saadoon and Mufdhi v. UK*, App. no. 61498/08, Eur. Ct. H.R. (Mar. 2, 2010) at para., 160.

uniquely third States – where their life or limbs are at risk,²¹ and exceptionally an interim measure has been issued after the expulsion had been implemented,²² but the Court is also resorting to indicating provisional measures in order to protect persons in detention in a Member State who are in bad health and/or on a hunger strike and/or have attempted to commit suicide,²³ or to protect persons under imminent threat of enforcement of the death penalty.²⁴

In the past only very rarely an interim measure has been indicated to prevent the violation of the right to a fair trial (Article 6 ECHR). In a Turkish case, in the light of the danger that the applicant concerned would be sentenced by a court to the death penalty, the Court indicated to a State by means of an interim measure to make every effort to ensure that the rights of the applicant under Article 6 ECHR would be guaranteed, that the rights of defence would be respected, especially that the applicant would have unrestricted and effective access to his lawyers in private, and that he would effectively have the opportunity to exercise his individual right of petition to the European Court through lawyers of his choice.²⁵

Very exceptionally, an interim measure has been issued to halt the deportation in order to prevent a violation of the right to private and family life (Article 8 ECHR).²⁶

²¹ *Supra* note 13 *Olaechea Cahuas*, App. no. 24668/03, (extradition to Peru); *Shamayev and Others*, App. no. 36378/02 (extradition to Russia); *Azzouza Rachid v. Belgium*, App. no. 27276/95, 82-A Eur. Comm'n H.R. Dec. & Rep. 156, 157 (1995), (expulsion to Algeria).

²² *BM and 51 Others v. Spain*, App. 20347/92, Eur. Comm'n H.R. (Sep.11, 1992).

²³ These persons are in fact reacting this way because they have received a negative answer as to their request for political asylum, *see* note 14 *Bhuyian*, App. no. 26516/95, are complaining about their harsh detention conditions, *see* note 15 *Tanyeri and Others*, App. no. 74308/01 or about the duration of their preventive detention, *Ilijkov v. Bulgaria*, App. no. 33977/96, Eur. Comm'n H.R. (Oct. 20,1997) .

²⁴ *Greece v. UK* (1956), App. no. 176/56, XII R. I. A. A. 83; *Denmark, Norway and Sweden v. Greece*, App. no. 4448/70, Eur. Comm'n H.R. (Oct. 5, 1970), 13 Y.B. EUR. CONV. ON H.R., 108 at 110, 126; *Öcalan v. Turkey*, App. no. 46221/99, Eur. Ct. H.R. (May. 12, 2005) at para., 5.

²⁵ *See id. Öcalan*, App. no. 46221/99; *Bilasi-Ashri v. Austria*, App. no. 3314/02, Eur. Ct. H.R. (Nov. 26, 2002).

²⁶ *See, e.g., Singt Uppal v. UK*, App. no. 8244/78, 20 Eur. Comm'n H.R. Dec. & Rep. 29,34(1980); *Merzouk v. France*, App. no. 48453/99, Eur. Ct. H.R. (Nov. 14, 2000); *Neulinger and Shuruk v. Switzerland*, App. no. 41615/07, Eur. Ct. H.R. (Jul. 6, 2010) and (Jan. 8, 2001) at para., 4.

Quite recently, the Court has also rather surprisingly – although very much needed – indicated an interim measure to the United Kingdom to ensure that frozen embryos of a woman (whose ovaries had been removed because of pre-cancerous tumours in both ovaries), which were under imminent threat of being destroyed after the withdrawal of consent by the male partner of the applicant, were preserved until the Court had completed its examination of the case.²⁷

Finally, the right for an individual to lodge a complaint to the European Court, without being hindered (Article 34 ECHR), has occasionally led the European Court to issue an interim measure. In one case, two Russian women (mother and daughter) had submitted a case before the European system, alleging that some members of their family had been assassinated by State agents. During the procedure before the Court, one of the applicants was murdered, and that was when the Strasbourg Court decided to issue a provisional measure, whereby the State was indicated not to hinder the right of the remaining applicant to submit an application in conformity with Article 34 of the Convention.²⁸ In another case an interim measure was indicated to a government to appoint a lawyer to represent the applicant – a woman who had been divested of her legal capacity, and had not been able to participate in the adoption proceedings of her own daughter – before the European Court in Strasbourg.²⁹

Furthermore, as yet, in contrast with the Inter-American Court of Human Rights,³⁰ no provisional measures have ever been indicated for protection of other rights and freedoms than the aforementioned rights and freedoms. The European Court has, for example, always refused to grant provisional measures in cases

²⁷ Evans v. UK, App. no.6339/05, Eur. Ct. H.R. (Mar. 7, 2006) and (Apr. 10, 2007) at para., 5.

²⁸ Bitiyeva and X v. Russia, App. nos. 57953/00 and 37392/03, Eur. Ct. H.R. (Jun. 21, 2007) at para., 63.

²⁹ X. v. Croatia, App. no. 11223/04, Eur. Ct. H.R. (Jul. 17, 2008) at para., 61.

³⁰ See CLARA BURBANO HERRERA, PROVISIONAL MEASURES IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 48-55 (Antwerp: Intersentia, 2010).

related to the protection of the right to property (Article 1 Protocol No. 1),³¹ as violations of the right to property can usually be remedied through financial compensation, or the right to free elections (Article 3 Protocol No. 1), as, in accordance with fixed Strasbourg case law, the right to free elections does not apply to referendums.³²

C. Binding character³³

Nowadays, pursuant to the vision of the European Court itself, it is clear that interim measures are binding upon the respondent State and therefore have to be complied with.³⁴ The inobservance of provisional measures by a Member State³⁵ leads to an autonomous and almost automatic violation of the right to application (Article 34, *in fine* ECHR), under which a State may not hinder that right of petition.³⁶ Decisive is, moreover, the existence of a risk of irreparable damage at the moment of taking a provisional measure, not the establishment afterwards that the investigation

³¹ Izquierdo Galbis v. Spain, App. no. 59724/00, Eur. Ct. H.R. (May. 20, 2003).

³² See Press Release, Registry Eur. Ct. H. R. Inappropriate use of interim measures procedure, (Dec. 21, 2007) in which it was pointed out that requests for the adoption of interim measures in respect of the French Government's decision not to organize a referendum on the European Union Lisbon Treaty, had 'no chance whatsoever of success and serve[d] solely to take up time which could be spent [by the Court] on more urgent matters in respect of which the Court might be called upon to issue an interim measure.'

³³ On this see, Yves Haeck, Clara Burbano Herrera and Leo Zwaak, *Interim Measures in the Case-Law of the European Court for the Protection of Human Rights*, 4 EUR. CONST. L. REV. 41-63, (2008).

³⁴ Aoulmi v. France, App. no. 50278/99, Eur. Ct. H.R. (Jan.17, 2006) at para., 111; Shtukaturov v. Russia, App. no. 44009/05, Eur. Ct. H.R. (Mar. 27, 2008) at para., 144.

³⁵ In case an individual does not abide by a provisional measure and for example does not submit certain requested information to the European Court, without properly and thus in a persuasive way justifying his omission, the provisional measure can be lifted or the case can be struck off the list. In conformity with Article 37(1) Eur. Conv. on H.R.; *E.g.*, Hun v. Turkey, App. no. 5142/04, Eur. Ct. H.R. (Nov.10, 2005) at para., 38.

³⁶ See, *supra* note 5 *Mamatkulov and Askarov*, App. nos. 46827/99 and 46951/99, at para., 110 and *supra* note 13 *Olaechea Cahuas*, App. no. 24668/03, at paras. 81-83. The European Court referred to the fact that the European Convention on Human Rights is a 'living instrument' and the existing converging trend in other international bodies (Human Rights Committee, International Court of Justice, Inter-American Court of Human Rights). Some judges of the Court and certain legal doctrine argue that, given the persistent refusal of the Member States to include a provision in the ECHR that would make provisional measures binding, the vision of the European Court in the case of *Mamatkulov and Askarov* illustrate that a majority of the Court has created legislation in violation of a clear intention of the Member States. See dissenting opinion of judges Caflisch, Turmen and Kovler. see, *inter alia*, Mowbray, *supra* note 3, at 386.

has not been obstructed. An provisional measure is taken in function of the risk is in itself, a serious obstacle or obstruction, at that exact time, of the effective exercise of the right of individual application constitutes therefore a violation of Article 34, *in fine* ECHR.³⁷ A delay in the enforcement of an interim measure can also lead to the establishment of a violation of the right of individual petition. As such, a delay of 4 days as a result of failure of a government and of the national judge in the implementation of a provisional measure appears in a certain case sufficient for the establishment of a violation of Article 34 ECHR.³⁸ The fact that the damage which the provisional measure aims to prevent subsequently turns out not to have occurred in spite of the State's failure to act in full compliance with the provisional measure, is irrelevant for the appraisal of whether a State has complied with its obligations under Article 34 ECHR. Therefore, no actual damage needs to be established.³⁹

II. STATES WHICH HAVE INCOMPLIANCE INTERIM MEASURES: STUDY OF THE CASE

LAW

Interim measures have been introduced into the Strasbourg system as an exceptional mechanism of easy access for those persons who seek to protect effectively their rights. These measures give persons the possibility of petitioning the European Court so that, through a very fast-track procedure, an irreparable harm is

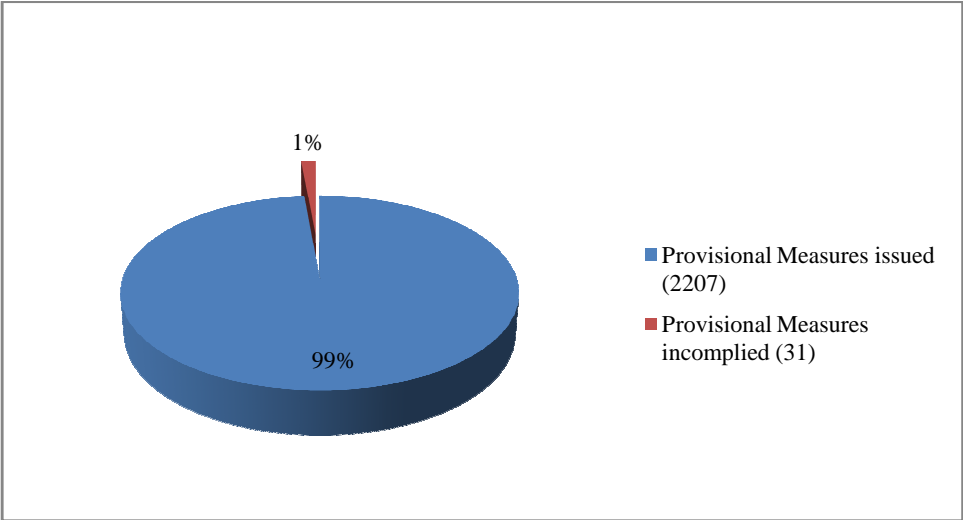
³⁷ See, *supra* note 13 *Olaechea Cahuas*, App. no. 24668/03, at paras. 81-83. This way, the Court revoked its old case law, under which a provisional measure was not legally binding and the non-abidance could only lead to an 'aggravated responsibility (or breach)', if a subsequent violation of a substantive right could be established. See, *supra* note 5 *Cruz Varas and Others*, App. no. 15576/89, at paras. 89, 102-103 and *supra* note 4 *Conka and Others*, App. no. 51564/99.

³⁸ See, *supra* note 20 *Paladi*, App. no. 39806/05, at paras. 84-106.

³⁹ *Id.* at paras. 89 and 104. The slim minority of seven judges agreed with the majority that a delay in the execution of an interim measure can lead to a Convention violation, because has caused irreparable harm to the applicant and hindered him in the exercise of his convention rights, but *in casu* that is not the case, given that (1) the applicant had not suffered irreparable harm or the Court had been impeded in investigating the matter, (2) there were no indications that the State was unwilling to comply with the measure or acted in bad faith, (3) the delay of three days had not hindered the effective exercise of the right of application. Partly dissenting opinion of judges Malinverni, Costa, Jungwiert, Myjer, Sajo, Lazarova Trajkovska and Karakas.

prevented to their rights when they are in a situation of extreme gravity and urgency. However, on a number of occasions States refuse to abide by the interim measures that have been granted. A survey of the case law of the former European Commission and the former and current European Court gives a mixed picture of the instances in which States have refused to comply with interim measures. Divided over about 55 years, in total 31 times (divided over 29 cases) a State has refused to comply with a provisional or interim measure (see Table 1).

Table 1: Overall number of interim measures (in)complied by States 1957 - May 2010



Although at first glance one might conclude that the rate of compliance for interim measures is quite high (99%), that assessment may change if one considers that over 50% of the breaches have been committed over the past 12 years (1999-2010) and the fact that although it has been established that non-compliance can generate the violation of Art.34 ECHR, the tendency not to follow the orders of provisional measures continues to increase. The principal aim of this section is to describe carefully the cases (29) in which States have decided not to comply with the interim measure(s). We will take into account the responsible State, the specific situation in which the petitioners are, the date on which the interim measure was

taken and the content of the measure itself, the argumentation – if available – given by the State concerned not to comply and the final decision of the Strasbourg organs.

In order to comply with the purpose, we have divided the cases in three periods: (A) The first period starts in 1957, corresponding to the year in which the former European Commission for first time ordered provisional measures and it ends at the end of 1990, more or less with the moment on which an interim measure was adopted in the case of *Cruz Varas*, which some months later led the European Court to hold that interim measures do not have binding force. In total one can detect in this interval five cases of incompliance; (B) The second period, *i.e.* 1991-1998, the post-*Cruz Varas* era and leading to the moment the new European Court of Human Rights started to function, in which only on four occasions an interim measure has been incomplied with, has a special characteristic in that only one Member State, namely France, decided not to abide by interim measures; (C) The third period, covers the years between the moment the new Court started to function, including the moment on which the Court rendered its *Mamatkulov* judgment, in which the Court gave (certain) teeth to the figure of the interim measures, holding that an incompliance with a measure could lead to an autonomous finding of a violation of the right of application under Article 34 ECHR, and finishing with the latest case we found in which interim measures were not complied with, *i.e.* 1 May 2010. In total 20 cases are reviewed in this period of time.

A. *The First 33 Years (1957-1990): Very positive beginning*

From 1957 until 1991 there were only reported five cases⁴⁰ where States have willingly incomed with interim measures issued by the European Commission.⁴¹ This can be deemed a very positive evolution at the time, given that when the Commission started to function, the instrument of the provisional measures was not included in a legal document concerning the Commission, *i.e.*, the European Convention or the Commission's Rules of Procedure.

In the mid 1960s however, thus predating the inclusion of a rule on provisional measures in the Rules of Procedure of the Commission, the clean sheet on interim measures ended when a Member State (*i.e.*, Austria) for the first time (*X. v Austria and Yugoslavia*) refused to comply with a provisional measure issued by the Commission to halt an extradition to Yugoslavia of a person sentenced to nine years of imprisonment for embezzlement. The petitioner had alleged that he would be ill-treated upon arrival in his country of origin. The letter from Strasbourg addressed to the State that 'it might wish not to take any positive decision on the request for extradition made by the Yugoslav Government until the Commission [...] had an opportunity to examine the complaints at a plenary session' was thus set aside.⁴² In a subsequent letter the Austrian Government explained, without referring to the Commission's request, that it had proceeded with the extradition, in essence because the applicant had been refused refugee status and because the European

⁴⁰ The former European Commission's assertion that, until the moment of the expulsion of the petitioner in the Cruz Varas case, no State had ever refused to abide by an interim measure indicated by the European Commission has therefore never been correct.

⁴¹ Here, it has to be mentioned that for a long time, the former European Commission was the only organ that issued provisional measures (at the outset through informal requests to Member States and, as from 1974, following the formal inclusion of the instrument of provisional measures in its Rules of Procedure, in a formal manner), given that, while the European Court had included the measures in 1959 in its original Rules of Court, the Court did not issue interim measures until thirty years later in the *Soering* case, given that before, interim measures were adopted at the beginning of the proceedings, when the petition was lodged with the Commission, which meant that the Court only dealt with the measures when the case was referred to the Court by the Commission or State(s).

⁴² *X. v Austria and Yugoslavia*, App. no. 2143/64, Eur. Comm'n on H.R. (Jun. 30, 1964), 7 Y.B. EUR. CONV. on H.R. at 318.

Convention could not limit to a great extent extradition law or amend fundamental aspects of such law.⁴³ The case was subsequently declared inadmissible.⁴⁴

During the 1970s-1980s; in four cases concerning three States; Switzerland (*Lynas*), the Netherlands (*Geller*) and Sweden (*Mansi; Cruz Varas*), there was non-compliance of interim measures indicated by the former Commission, which were formally based on its Rules of Procedure. In the *Lynas c. Switzerland* (1975) and *Geller c. The Netherlands* (1984)⁴⁵ the petitioners had argued that if they were extradited to the United States, their life would be exposed to risk. In both cases as soon as the European Commission informed to the Member States that it would be desirable to suspend the applicant's extradition,⁴⁶ the States the same day decided to extradite the petitioners.⁴⁷ The applications were later declared inadmissible.⁴⁸

It was the *Cruz Varas c. Sweden* (1989) that brought the issue of the incompliance of interim measures completely to the legal surface. In this case, the application to the Commission was introduced on 5 October 1989 by a Chilean married couple and their young son, who had fled to Sweden after the coup by general Pinochet, when the father, Hector Cruz Varas, had been jailed after having participated in some political manifestations. The applicants alleged before the European Commission that his deportation to Chile would expose him to imminent, serious and irreparable damage in the form of ill-treatment contrary to Article 3 ECHR, due to his past political activities. One day later, at 9.00h, the Commission decided to indicate to the Swedish Government not to deport the applicants until the

⁴³ *Id.* at 320.

⁴⁴ *Id.*

⁴⁵ See, Bert Barnhoorn, Netherlands Judicial Decisions involving Questions of Public International Law, 1984-1985, 17 N. Y.B. INT'L L., at 280-284, (1986).

⁴⁶ *Lynas v. Switzerland*, App. 7317/75, 6 Eur. Comm'n H.R. Dec. & Rep. 159,160, para., 1. (1977).

⁴⁷ *Id.* at 160, para., 3.

⁴⁸ See, *inter alia*, Barnhoorn, *supra* note 45.

Commission had had an opportunity to examine the application in-depth. In short (at 16.40h) Hector Cruz Varas was deported while his wife and child went into hiding in Sweden.⁴⁹

On 9 November 1989 the Commission took a second interim measure, asking Sweden on the one hand not to deport to Chile the mother or son and on the other hand that the Government take measures enabling Hector Cruz Varas' return to Sweden as soon as possible.⁵⁰ In 1989 and 1990 requests by Hector Cruz Varas to be allowed to return to Sweden were rejected. Subsequently, the Court held in its final judgment that the power to order binding interim measures could not be inferred from Article 25(1) ECHR (the right being of a procedural rather than a substantive nature) or from other (international) sources.⁵¹ In this regard, for the Court, an unwillingness or failure on the part of a respondent State to comply with an interim measure could eventually only constitute an 'aggravated liability (or breach)', in case a substantive provision was (*ex post facto*) held to be violated.⁵²

In the *Mansi* case also against Sweden, that developed virtually at the same time as the Cruz Varas case, Abdel-Qader Hussein Yassin Mansi, the applicant, a Jordanian citizen of Palestinian origin, had introduced his application on 19 October 1989. Before the Commission it was alleged that Article 3 ECHR had been violated on the basis that his deportation to Jordan would expose him to a risk of torture. On the same day the President of the Commission indicated to the Swedish Government that it was desirable in the interests of the parties and the proper conduct of the

⁴⁹ See, *supra* note 5 *Cruz Varas and Others*, App. no. 15576/89, at paras. 56-60.

⁵⁰ By letter of 22 November 1989 the Commission was informed that a request from Mr Cruz Varas for permission to enter and remain in Sweden was to be examined by the Board, that the question of the execution of the expulsion order in respect of Mrs. Bustamento Lazo and Richard Cruz was also pending before it and therefore the Commission's provisional measure had been communicated to the Board. On 7 June 1990, following the adoption of the Commission's report, the measure was lifted.

⁵¹ *Id.* at paras. 99-102.

⁵² *Id.* at para., 103.

proceedings before the Commission not to deport Mansi to Jordan until the Commission had had the opportunity to examine the application. However, by letter the European Commission was informed by Sweden that the applicant had been expelled on 21 October 1989.⁵³ Subsequently, the applicant informed the Commission that he had been tortured in Jordan after his expulsion and further alleged that Sweden had violated Articles 1 and 25 ECHR when he was deported in spite of the provisional measure.⁵⁴ However, a friendly settlement was reached, in which Mansi would receive a permanent residence permit in Sweden. After that the Swedish Government voiced their regrets for having expelled Mansi to Jordan after the indication of a provisional measure.⁵⁵

It is relevant to mention from the above-mentioned cases that in three instances the in compliance by States concerned extraditions for common criminal facts (*X.*; *Lynas*; *Geller*), while in two cases it concerned expulsions (*Cruz Varas*; *Mansi*). With regard to one expulsion the beneficiary was returned to a country that was governed by or at least still under the influence of a military dictator, who had once come to power after a *coup*. At that point in time, it remained to be seen whether the blank check given by the European Court in its *Cruz Varas* judgment would incite Member States to further in comply with interim measures issued by the European Commission and the European Court.

B. The Next 8 Years (1991-1999): Repeatedly Non-compliance of France

During the following decade (1991-1999), most Member States – rather surprisingly, in view of the above-mentioned *Cruz Varas* case– complied with the interim measures issued by the European Commission and the European Court, except for

⁵³ *Mansi v. Sweden*, App. no. 15658/89, 64 Eur. Comm'n H.R. Dec. & Rep. 254, 256. (1990).

⁵⁴ *See id.* at 256-257.

⁵⁵ *Id.* at 257-258, paras. 16-17.

France, that bluntly refused to comply with an interim measure on no less than four occasions (*D.S., S.N. and B.T.; Urrutikoetxea; Berke; A.B.*).

In the case of *D.S., S.N. and B.T.* against France (1992), three Sri Lankan citizens of Tamil origin, forming part of a larger group, had arrived at the Paris Charles de Gaulle Airport by plane on 14 June 1991. Their request for admission to the French territory to ask asylum had been denied and they had been held in the international zone of the airport in a hotel. They lodged an application arguing that, if returned to Sri Lanka, they would run the risk of being exposed to torture, inhuman or degrading treatment. On the evening of 19 July 1991, the President of the Commission issued an interim measure to the French Government not to proceed with the deportation of the applicants before the Commission had the opportunity to examine more fully the application. However next day evening, the applicants were taken on board of a flight for Colombo.⁵⁶ The European Court held – in line with its *Cruz Varas* case law – that the power to order interim measures could not be inferred from either the obligation not to hinder the right to individual application under Article 25 ECHR (the right being of a procedural rather than a substantive nature), nor from any other (international) source.⁵⁷

The second case concerned the pending extradition of an ETA member, *José Antonio Urrutikoetxea*, who had been involved in all kinds of illegal activities in France and across the border. After fleeing from Spain he had been granted refugee status in France until 1979. In 1981 he allegedly became the military ETA leader; in January 1989 he was served with an expulsion order and sentenced to ten years in prison for attempted murder, conspiracy and terrorism offences. The applicant

⁵⁶ *D.S., S.N. and B.T. v. France*, App. no. 18560/91, Eur. Comm'n H.R. (Oct. 16, 1992).

⁵⁷ *Supra* note 5 *Cruz Varas and Others* App. no. 15576/89, at para., 98.

alleged that the expulsion would, *inter alia*, expose him to treatment contrary to Article 3 ECHR. The same day that the case was registered (22 April), the President of the Commission asked the French Government through an interim measure not to expel the applicant pending a more in-depth examination of the case. However, the Commission was informed by the applicant's lawyer that Urrutikoetxea had been deported on 3 May 1996 following the minister's order.⁵⁸

In its decision on the admissibility the Commission confirmed that the '[French] Government evidently did not see fit to comply with [its] indication, since the French police handed the applicant over to the Spanish police' on the earlier-mentioned day.⁵⁹ France argued that Rule 36 of the Commission's Rules of Procedure could not be considered to give rise to a binding obligation on Member States, referring to the European Court's (then) leading Cruz Varas case, while stressing, however, that the decision not to comply with the Commission's provisional measure 'was made after due consideration had been given to the risk of a violation of Article 3' and in the light of the fact that the applicant 'did not appeal against the decision [...] to withdraw his refugee status', nor 'did he submit a new request' or 'tr[ie]d to find another host country'. Also, the applicant had not been ill-treated upon his return to Spain, according to a letter of the applicant's lawyer.⁶⁰ The case was subsequently unanimously dismissed by the Commission as being manifestly ill-founded.⁶¹

In the third French case (*Berke*), the applicant had lodged his complaint before the Commission on 29 August 1996. One day later an interim measure had been issued, in which the State was requested to suspend the deportation of the applicant,

⁵⁸ Urrutikoetxea v. France, App. no 31113/96, Eur. Ct. H.R. (Dec. 5, 2006) at 152-154.

⁵⁹ See *Id.* at 154.

⁶⁰ *Id.* at 155-156.

⁶¹ *Id.* at 158-159.

a Mauritanian citizen who alleged in Strasbourg that, having been tortured on various occasions in his home country, *inter alia* for having participated in an election campaign of an opposition party, his life would be in danger where he deported. Nonetheless, on 31 August, and thus in blatant violation of the interim measure, the applicant was brought to one of the Paris airports with the objective to put him on a plane to be sent back. Having refused to board the aircraft, the applicant was taken into custody. Later on, he was released by a French tribunal but fined for staying illegally in France. Subsequently, the interim measure was prolonged and the French authorities respected the measure. The Government informed the Commission that the decision to implement the order to deport the applicant, notwithstanding the application lodged before the European Commission and the interim measure issued by the latter, had been taken precisely because the risks alleged by the applicant had at no time appeared to be established. Leaving aside the argument that the existing Rule 36 of the Commission's Rules of Procedure did not create a legal obligation on a Government – reference was made in this regard to the European Court's then leading Cruz Varas judgment –, the French State also argued that 'the appeal exercised by the applicant before the Commission only had as an objective to obstruct the deportation measure and to oppose the application of the law with the sole aim to remain in France'. The Government also held that 'it had no intention to challenge its tradition of cooperation with the Convention organs, but that it had appeared, in the case at issue, "that implementing the request to suspend was not justified and could lead to a questioning of the credibility of the right of asylum and the authority that has to be attached to the decisions taken by the authorities and the French judicial organs to ensure the control of the conformity of administrative

decisions with the human rights instruments".⁶² The case was later struck off the list of cases after the applicant was granted refugee status on 1 September 1997.⁶³

Finally, the *A.B.* case (1997) concerned a Tunisian who at the age of 16 years had entered France illegally and had been expelled 10 years later. A few years later he had again entered France in a clandestine way and was consequently condemned to a prison sentence in 1988. Due to the fact that during his time in prison he had been diagnosed as seropositive, his sentence had been converted into house arrest. However, on various occasions between 1989 and 1995 the applicant was condemned to prison sentences, accompanied by a prohibition to enter the territory, *inter alia*, for not abiding by his house-arrest, for dealing drugs and for theft. In January 1997 the house arrest was lifted and the applicant received a decision that he would be expelled to Tunisia. Before the European Commission the applicant alleged that, given the gravity of his state of health, removing him from French territory would constitute a treatment in violation of Article 3 ECHR. The European Commission asked the French Government to postpone the expulsion until it had had the opportunity to take a deeper look at the case. However, the same day the applicant was effectively expelled.⁶⁴ In the end, the applicant was readmitted in France some days later after a decision by a domestic court. Therefore the Commission decided to strike the case off the list, given that the applicant had lost his victim status and the case had thus been resolved.⁶⁵

C. The Last 12 Years (1999-May 2010): Arising the number of incompliances despite the Leading Mamatkulov-judgment

⁶² *Berke v. France*, App. no. 32824/96, Eur. Comm'n H.R. (Jan. 23, 1997) at paras. 4-7, 10 and 13.

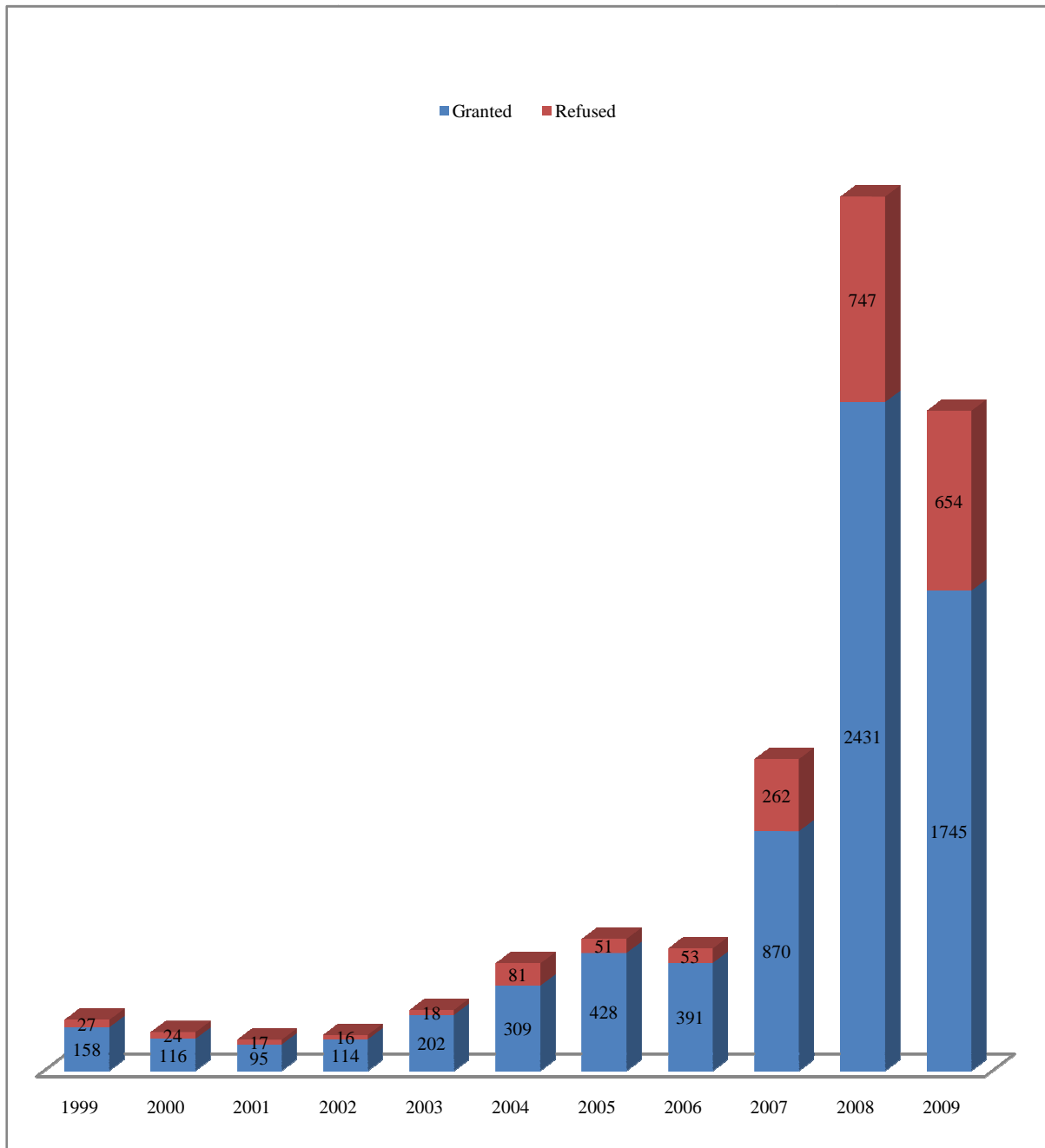
⁶³ *See id.* at para., 13.

⁶⁴ *A.B. v. France*, App. no. 26106/95, Eur. Comm'n H.R. (May. 28, 1997).

⁶⁵ *Id.*

Since the formation of the new single European Court on 1 November 1998, there have had at least 22 refusals (divided over 20 cases) in which old Member States, such as Belgium (*Conka*), France (*Aoulmi*), Italy (*Hamidovic, Ben Khemais, Toumi, Trabelsi, Mannai*), Spain (*Olaechea Cahuas*), Turkey (*Mamatkulov and Askarov, Öcalan, Mostafa and Others*) and the United Kingdom (*Al-Saadoon and Mufdhi*) as well as new member States, such as Russia (*Shamayev, Muminov, Shtukaturov, Kamaliiev and Kamaliieva*), Georgia (*Shamayev*), Slovakia (*Labsi*) did not wish to comply with the interim measures that have been issued, or have unduly delayed their compliance, such as Moldova (*Paladi*), Russia (*Aleksanyan*) and Albania (*Groni*).

Table 2: Number of interim measures granted or refused by European Court (1 Nov. 1998 – 31 Dec. 2009)



The number of requests for interim measures has risen exponentially in the past years (see Table 2). This is due to the rising number of expulsion or extradition cases in combination with the *Mamatkulov* case law of 2005, in which for the first time a violation of Article 34 ECHR was established after the incompilance of a State with an interim measure.

Table 3: Number of interim measures in compliance

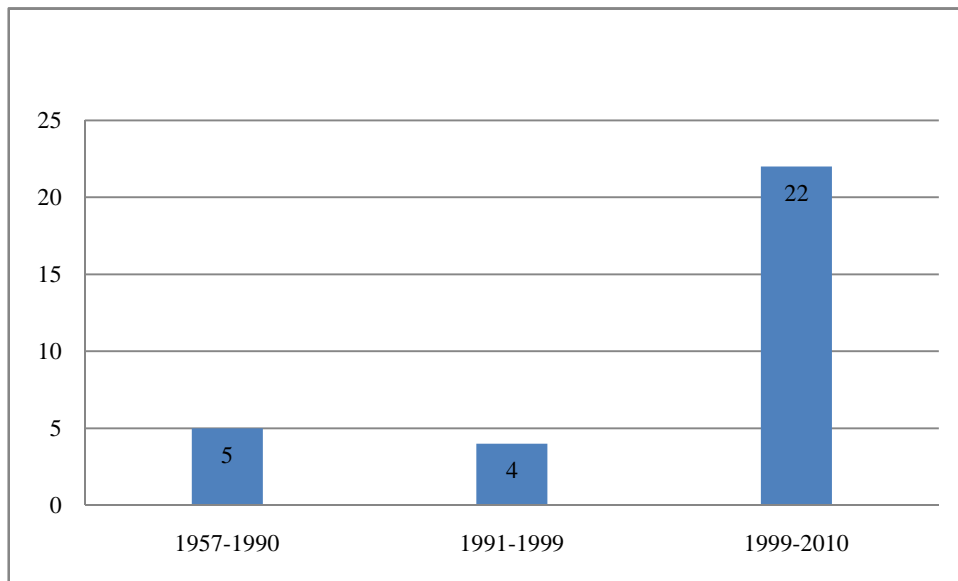


Table 2 and 3 shows that during this period of time (1999-2010) the European Court adopted in total 1940 provisional measures and 22 of them were non-complied. The cases were organized into eleven groups depending on to which State refuse to comply and the year in what the final judgment was delivered (if there was). A brief reference to each of them follows.

1. *Belgium*

Conka Case (2001-2002):

Shortly after its coming into being, the new European Court was confronted with the first willing in compliance by a State in the *Conka* case.⁶⁶ In this case the applicants, a number of Slovak gypsies, were, after their asylum request had been denied, rounded up by the Belgian police on a false pretext, and with a view to deportation to Slovakia, they were transferred to a closed transit centre in the

⁶⁶ *Supra* note 4 *Conka and Others*, App. no. 51564/99.

immediate vicinity of Brussels airport. On 4 October 1999 their lawyer submitted an application to the European Court alleging a violation of Articles 3 ECHR (prohibition of torture), 8 ECHR (protection of family life) and 14 ECHR (prohibition of discrimination) as well as Article 4 of the Fourth Protocol (prohibition of collective expulsion) and requested the Court to indicate an interim measure. On 5 October, the Belgian government was requested to suspend the deportation temporarily but the same day, short time after the notification, the Belgian authorities decided to deport the beneficiaries.⁶⁷ Subsequently, in its decision on the admissibility, the European Court confirmed the non-binding character of its interim measures and refused to condemn the Belgian State and endorsed its earlier Cruz Varas jurisprudence.⁶⁸

2. Turkey

Mamatkulov and Askarov (2005):

In the ensuing *Mamatkulov and Askarov* case, the applicants, two Uzbek nationals who were members of an opposition party, were arrested on the airport of Istanbul under an international arrest warrant on suspicion of involvement in terrorist activities in their home country. On 11 and 22 March 1999, the applicants presented their application to the European Court. They stated, *inter alia*, that, if extradited to Uzbekistan, their lives would be at risk (Article 2 ECHR) and they were in danger of being subjected to torture (Article 3 ECHR). They asked the Court under Rule 39 of the Rules of Court to issue an interim measure to Turkey not to extradite them. The President of the First Section indicated to the Turkish Government that it was desirable in the interest of the parties and the proper conduct of the proceedings not

⁶⁷ With regard to the whereabouts of the Minister of Justice and the Minister of Internal Affairs at the moment of the incoming telephone call from Strasbourg, see *Binnenlandse Zaken wist van Europees voorbehoud (Internal Affairs knew of European reservation*, De Standaard, Feb. 17, 2003, (<http://www.standaard.be>)

⁶⁸ See, *supra* note 4 *Conka and Others*, App. no. 51564/99.

to extradite the applicants until the Court had had an opportunity to examine the applications further. On 19 March 1999, the Turkish Cabinet issued a decree for the applicants' extradition and handed information to the Court on the guarantees obtained by the Uzbek government. Notwithstanding the decision of the Chamber of 23 March to extend the interim measures until further notice, the applicants were extradited on 27 March.⁶⁹ Based on its 'living instrument' doctrine in combination with the current convergent trend for other international organs (Human Rights Committee, International Court of Justice, Inter-American Court on Human Rights) the European Court declared for first time that its provisional measures were compulsory, while pointing to the increasing importance of the right to individual application in the Convention mechanism. In this key-case the European Court thus overturned its previous *Cruz Varas* jurisprudence and found that Turkey had violated Article 34 by incompiling the interim measure.⁷⁰

Abdullah Öcalan (2005):

Another Turkish case concerning the PKK-leader *Abdullah Öcalan*, who had been arrested in Kenya, transferred to Turkey and brought before a court where he faced the death penalty, led the European Court on different occasions to indicate an interim measure. On 4 March 1999, the Court, after having refused a first request of this nature, granted a second request by the lawyers of Öcalan to indicate interim measures. In the light of the danger that the applicant was risking the death penalty, the European Court requested the Turkish Government to make every effort to ensure that the rights of the applicant under Article 6 ECHR would be guaranteed, and that the rights of defence would be respected, especially that the applicant would

⁶⁹ See, *supra* note 5 *Mamatkulov and Askarov*, App. nos. 46827/99 and 46951/99, at paras. 24-27 and 74.

⁷⁰ *Id.* at para., 110.

have unrestricted and effective access to his lawyers in private, and that he would effectively have the opportunity to exercise his individual right of petition to the European Court, through lawyers of his choice.⁷¹ Turkey was also asked to inform the Court regarding any measure taken to that effect.⁷² The Turkish Government complied with the first part of the request (under Rule 39(1)), but refused to answer the questions of the Court (under Rule 39(3)) on the grounds that they went far beyond the scope of application of Rule 39 of the Rules of Court.⁷³ On 30 November 1999, the European Court addressed a new interim measure to the Turkish State, in which the latter was requested to take the necessary steps to ensure that the death penalty, which had in the meantime been pronounced, would not be enforced pending the investigation of the case by the European Court.⁷⁴ The Turkish State complied without hesitation with this measure.⁷⁵ In the end, Turkey was not found in violation of Article 34, following the Government's delay in replying to the Chamber request for information, given that, though regrettable, the applicant had not been prevented from setting out his complaints about the criminal proceedings that had been brought against him.⁷⁶

Mostafa and Others (2008):

Mamatkulov and Askarov should have been a warning sign for recalcitrant Member States. Nonetheless, shortly after Turkey had been condemned in the *Mamatkulov* case, Turkey again incomed with a Strasbourg interim measure. In *Mostafa and*

⁷¹ See, *supra* note 24 *Öcalan*, App. no. 46221/99, at para., 5, see also Information Note no. 4, Eur. Ct. H. R. at 25-26.

⁷² *Id.*

⁷³ Information Note no. 5, Eur. Ct. H. R. at 8.

⁷⁴ See, *supra* note 24 *Öcalan*, App. no. 46221/99, at para., 5; Press Release 683, Registry Eur. Ct. H. R. (Nov. 30, 1999). The Court requests the respondent State to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention. See also Information Note no. 12, Eur. Ct. H. R. at 23.

⁷⁵ *Id.* *Öcalan*, at para., 170.

⁷⁶ *Id.* at paras. 201-202.

Others, an Iraqi family of six had been denied political asylum by the United Nations High Commissioner for Refugees in Ankara on the ground that the father had been convicted of a serious non-political offence in Iraq.⁷⁷ On 6 August 2003 the Turkish authorities had decided to extradite the applicants, a decision that had unsuccessfully appealed. Almost two years after the decision was taken, the Minister of the Interior informed the decision to have them extradited, finding that they did not fulfill the necessary conditions to be granted political refugee status. On 4 May 2005, the Court indicated to the Turkish Government under Rule 39, that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicants to Iraq pending the Court's decision on the case.⁷⁸ However, 7 days later they were deported to northern Iraq. The European Court did not accept the arguments of the respondent State that the domestic authorities were not able to apply the provisional measure indicated by the Court because of the notification thereof to the Permanent Representation of Turkey in Strasbourg on 4 May 2005, late in the afternoon, just before the holidays. In the eyes of the authorities, they would only have been aware of the urgent nature of the communication on Monday 9 May in the morning. They would therefore not have had the opportunity to apply the measure in question and the applicants had been extradited.⁷⁹ Given that the applicants were only extradited on 11 May, it was concluded that Turkey had not implemented the provisional measure,⁸⁰ and consequently had violated Article 34 ECHR.⁸¹

⁷⁷ *Mostafa and Others v. Turkey*, App. no. 16348/05, Eur. Ct. H.R. (Jan. 15, 2008) at paras. 7, 8 and 10-15.

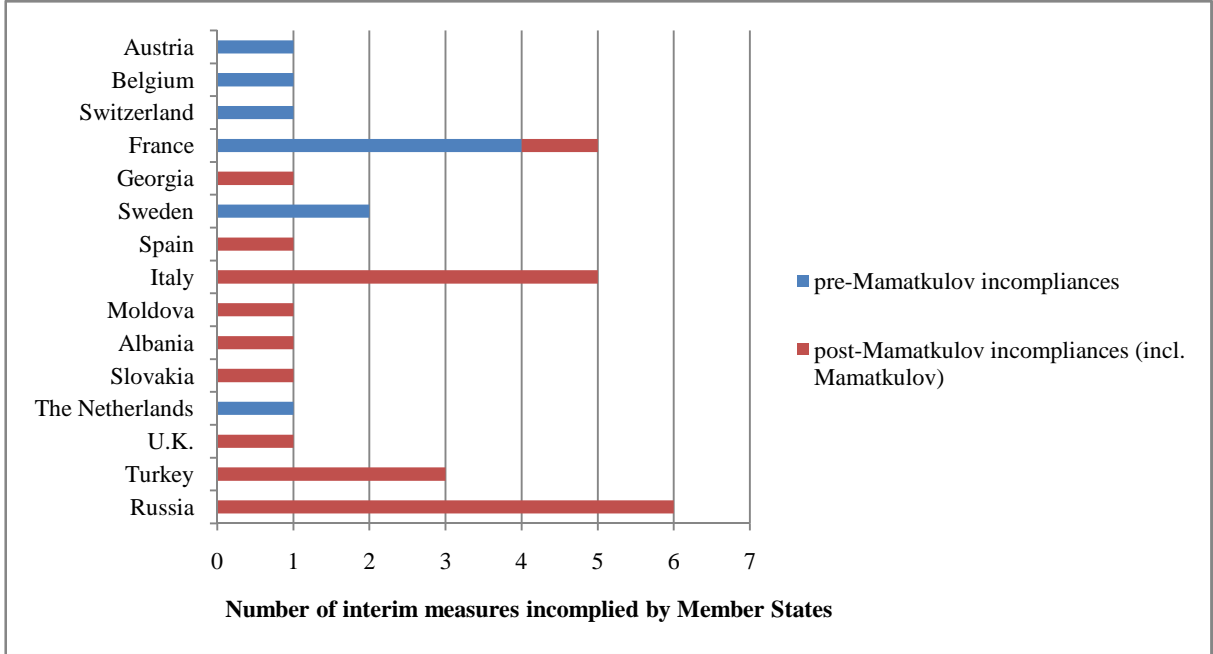
⁷⁸ *See id.* at para., 16.

⁷⁹ *Id.* at para., 32.

⁸⁰ *Id.* at para., 38.

⁸¹ *Id.* at paras. 39-44.

Table 4: Interim measures incompilied from 1957 to May 2010, taking into account Mamatkulov Case



Ten cases date from before the *Mamatkulov* case (1957-2003), while in the post-*Mamatkulov* period (including the *Mamatkulov* case, 2003-2010) on no less than 21 occasions States have incompilied with interim measures. There is thus indeed a clear rise in the number of non-abidances (see Table 4), but that coincides with the steep rise in the number of requests for and therefore issuances of interim measures during the past years (see Table 2).

3. Spain

Olaechea Cahuas (2006):

In the *Olaechea Cahuas* case, the Spanish authorities did not comply with a provisional measure issued to stay the extradition to Peru of a Peruvian national. The beneficiary of the measure was Mr Adolfo Olaechea Cahuas, an alleged member of *Sendero Luminoso* (the Shining Path) in Europe, who was sought in his home

country for supporting terrorist activities of that Maoist guerrilla movement. Indeed, on 6 August the European Court decided to issue an interim measure in order to temporarily suspend the imminent extradition of the person concerned to Peru. Nevertheless the Spanish State one day after dismissed the indication to suspend the extradition arguing that the applicant had first accepted a short track extradition, and was aware of the facts for which his extradition was requested. In addition, assurances were received from the Peruvian government that the terrorist acts of which the applicant had been accused were not punishable with the death penalty and that a life sentence, which would normally be applicable regarding those crimes, would also not apply. Moreover, the protection of the physical integrity of the person concerned and his right to a fair trial would be guaranteed.⁸² Spain was subsequently held to have violated Article 34 for having incomed with the provisional measure.⁸³

4. *Georgia and Russia*

Shamayev (2005):

The *Shamayev* case concerned 13 Russian and Georgian nationals of Chechen origin, who were arrested by the Georgian police in August 2002 in the border area and charged with crossing the border illegally, carrying offensive weapons and arms trafficking. Russia applied for their extradition, asserting that the persons detained were terrorist rebels who had taken part in the fighting in Chechnya.⁸⁴ In the light of the gravity of the charges against the persons concerned in Russia, and Georgia's deputy procurator-general decided to authorise the extradition of five of the applicants. In the night of 3 to 4 October 2002, the applicants learned from the television that the extradition of some of their number was imminent. Attending the

⁸² See, *supra* note 13 *Olaechea Cahuas*, App. no. 24668/03, at paras. 7-17.

⁸³ *Id.* at paras. 81-83.

⁸⁴ See, *supra* note 13 *Shamayev and Others*, App. no. 36378/02, at paras. 6, 16 and 21.

petition of the applicants, the Court decided, one day after the application was lodged, to indicate to the Georgian Government, through an interim measure, that it would be in the interests of the parties and the proper conduct of the proceedings not to extradite the 11 applicants to Russia until the Chamber had had an opportunity to examine the application in the light of the information which the Georgian Government would provide. The Government were also invited to submit information on the grounds for the applicants' extradition and the measures that the Russian Government intended to take in their regard should the extradition go ahead.⁸⁵ The Georgian authorities had apparently handed five of the applicants (Shamayev, Adayev, Aziev, Khadjiev and Vissitov) over to the Russians at Tbilisi airport. Once extradited they had been held in isolation. The Court observed that in addition to its obligations under Article 34 the Russian Government had a duty to comply with the specific undertakings it had given the Court on 19 November 2002, including the undertaking to ensure that all the applicants, without exception, would have unobstructed access to the Court. On the basis of those unequivocal undertakings the Court had lifted the interim measure indicated to Georgia. Yet despite the Court on 17 June 2003 had decided to ask the Russian Government, as an interim measure, to allow the lawyers unhindered access to the extradited applicants with a view to the hearing on admissibility, they were never granted access to the applicants.⁸⁶

It was clearly stated by the Court that the Russian Government did not comply with the interim measure.⁸⁷ The European Court first held Georgia accountable in that, by failing to abide by the interim measure concerning the suspension of the

⁸⁵ See *Id.* at paras. 7 and 9-12.

⁸⁶ *Id.* at paras. 24, 228-229 and 511-512.

⁸⁷ *Id.* at para., 310.

extradition of Mr Shamayev, Mr Aziev, Mr Khadjiev and Mr Vissitov, Georgia failed to discharge its obligations under Article 34 of the Convention.⁸⁸ Secondly, the Court considered that the measures taken by the Russian Government have hindered the effective exercise by Mr Shamayev, Mr Aziev, Mr Vissitov, Mr Khadjiev, Mr Adayev, Mr Khashiev and Mr Baymurzayev (Alkhanov) (the latter two were kept in Russian detention after their original release in Tbilisi, followed by their disappearance) of the right to apply to the Court, as guaranteed by Article 34 of the Convention and found Russia to have violated that provision.⁸⁹

5. *Russia*

Muminov (2008):

In the *Muminov* case, the Uzbek authorities had charged an applicant with several criminal offences, including propaganda of the ideas supported by an extremist religious organisation, distribution of its materials and engaging others in the organisation's activity. The applicant who was arrested in Russia feared that, if expelled to Uzbekistan, he would be subjected to ill-treatment and would not receive a fair trial.⁹⁰ The Government held that they had informed the prosecutor's office and the authorities under the Ministry of the Interior, but the applicant had been deported on that same day, 3 minutes after the European Court had issued an injunction to suspend the deportation. The applicant's representative maintained that the applicant had been put on board a plane leaving for Tashkent the same day but much more late. While the Court on the one hand accepted that the applicant most likely left Russian territory some hours after the request, on the other hand it found no violation of the right of application, due to the fact that there was an insufficient factual basis to

⁸⁸ *Id.* at para., 479.

⁸⁹ *Id.* at para., 518.

⁹⁰ *Muminov v. Russia*, App. no. 42502/06, Eur. Ct. H.R. (Dec. 11, 2008) at paras. 3 and 133-134.

conclude that, having been put on notice about the Court's decision to apply Rule 39, the respondent Government deliberately omitted to comply with the measure or deliberately prevented the Court from taking its decision on the applicant's Rule 39 request or notifying it of that decision in a timely manner, in breach of its obligation to cooperate with the Court in good faith.⁹¹

Aleksanyan (2008):

In a similar case, *i.e.*, the *Aleksanyan*, the applicant, a Russian national, currently detained in Moscow, and held in Town Hospital no. 60, had worked as the head of the legal department and as executive vice-president of Yukos, was arrested and remanded in custody from 2006 and his detention was since extended, most recently until January 2009. Over this period the applicant's eyesight, which was poor at the time of his arrest, worsened to the extent that he was effectively blind, he developed AIDS and was suffering from a number of infections.⁹² The doctors concluded that the applicant needed to undergo treatment in a specialist hospital. Before the European Court, with which he had lodged an application on 16 November 2006, the applicant alleged, amongst others, that, in light of his medical condition, his detention amounted to inhuman and degrading treatment. The Court indicated two interim measures to the Russian Government. On 26 November the European Court issued to Russia to secure immediately, by appropriate means, the in-patient treatment of the applicant in a specialised hospital⁹³ and in addition the Court requested Russia through a second interim measure to form a medical commission, to be composed on

⁹¹ *Id.* at paras. 136-137.

⁹² *Aleksanyan v. Russia*, App. no. 46468, Eur. Ct. H.R. (Dec. 22, 2008) at paras. 4 and 76.

⁹³ *Id.* at para., 78.

a bipartisan basis, to diagnose the applicant's health problems and suggest treatment.⁹⁴

On 27 December 2007 the Government replied that the applicant could receive adequate medical treatment in the medical facility of the detention centre, and that his examination by a mixed medical commission was against Russian law.⁹⁵ It was not until 8 February that the applicant had been transferred to an external haematological hospital.⁹⁶ Even assuming that this hospital could be considered a specialist institution, it was clear that for over two months the Government had continuously refused to implement the interim measure indicated by the Court, thus putting the applicant's health and even life in danger. In the circumstances, the non-implementation of the measure was fully attributable to the authorities' reluctance to cooperate with the Court. In respect of the second measure, the Russian authorities had not permitted the applicant's examination by a mixed medical commission including doctors of his choice. The Court held that, bearing in mind that the applicant was seriously ill, was detained, and was therefore unable to collect all necessary information himself, such a position on the part of the authorities amounted, in the circumstances, to an attempt to hinder the applicant in pursuing his application under Article 34 of the Convention. In sum, by failing to comply with both interim measures, Russia had failed to honour Article 34 ECHR.⁹⁷

Shtukaturov (2008):

In *Shtukaturov*, a Russian national who was diagnosed with schizophrenia, was deprived of his legal capacity without his knowledge by a domestic court at the request of his mother, who, as such, was authorised by law to act on his behalf in all

⁹⁴ *Id.* at para., 80.

⁹⁵ *Id.* at para., 82.

⁹⁶ *Id.* at para., 94.

⁹⁷ *Id.* at paras. 230-232.

matters, and on November 2005 confined her son to a psychiatric hospital after the applicant, having come across a copy of the judgment at his mother's home, contacted a lawyer of an NGO. The applicant and his lawyer requested permission to meet, which was refused. The applicant did, however, manage to get a form to his lawyer which authorised the lodging of an application with the European Court on his behalf. From December 2005, the applicant was refused all contact with the outside world. He also alleged that he was treated with strong medication against his will. On 6 March 2006 the European Court issued an interim measure, in which the Russian Government was directed to organise, by appropriate means, a meeting between the applicant and his lawyer. That meeting could take place in the presence of the personnel of the hospital where the applicant was detained, but outside their hearing. The lawyer was to be provided with the necessary time and facilities to consult with the applicant and help him in preparing the application before the European Court. The Russian Government was also requested not to prevent the lawyer from having such meeting with his client at regular intervals in the future. The lawyer, in his turn, would be obliged to be cooperative and comply with reasonable requirements of the hospital regulations.⁹⁸

However, the applicant's lawyer was refused access to the applicant. In fact, the authorities refused to comply with the interim measure as Russian law did not consider the European Court's interim measures binding. They also stated that the applicant could not act without the consent of his mother and that his lawyer could not therefore be considered his lawful representative.⁹⁹ Although the applicant had eventually been released, met his lawyer and continued the proceedings before the Court, it had not in any way been connected with Russia having implemented the

⁹⁸ *supra* note 34 *Shtukurov*, App. no. 44009/05 at paras. 4, 33 and 141.

⁹⁹ *Id.* at paras. 34-39.

interim measure. The Court concluded that, by having prevented the applicant for a long period of time from meeting his lawyer and communicating with him the Russian Federation had prevented the applicant from complaining to the Court and had therefore failed to comply with its obligations under Article 34 not to hinder the right to individual petition.¹⁰⁰ The applicant was ultimately discharged from hospital on 16 May 2006 but his mother apparently readmitted him in 2007.

Kamaliiev and Kamaliieva (2007):

In *Kamaliiev and Kamaliieva*, on 9 February 2006, following an earlier request of the Uzbeki authorities, the first applicant was arrested in Russia and remanded in custody in view of his extradition, as he was wanted in Uzbekistan for endangering the security of the state. The applicant was arrested and placed in the detention center in Tumen region No. IZ-72 / 1 for his extradition. On March, the authorities of Uzbekistan sought the extradition of the applicant on the grounds that he was accused of belonging to the religious extremist organization 'Vakhabii'. On 26 December 2006 however, the Prosecutor ordered the applicant's release on the grounds that the extradition request had in December 2006 been dismissed by the Prosecutor-General of Russia. In February, the first applicant's Russian passport was confiscated because it was deemed invalid. On November 2007, during an identity check, the applicant was arrested for being an illegal alien. The same day, he was condemned and fined for breach of the rules of residence for foreigners, and his expulsion of the Russian territory was ordered. The applicant's lawyer appealed against the decision, arguing the absence of proof of foreign nationality of the first applicant and the fact that deportation would break the close family ties with his Russian family. On 3 December 2007 an NGO lodged a request to the European

¹⁰⁰ *Id.* at paras. 142-149.

Court to order the suspension of the applicant's expulsion to Uzbekistan. Before the Court the first applicant complained that he was likely to suffer treatment contrary to Article 3 if expelled to Uzbekistan. On the same day the Court issued an interim measure to suspend the deportation of the applicant. Nonetheless, on 4 December 2007, the applicant was deported to Uzbekistan. The Russian Government held that the in-compliance was accidental and that it was the result of various time differences between Strasbourg and Russia, *i.e.*, Moscow and Tumen.¹⁰¹ In this case the Court holds unanimously that there has been a violation of Article 34 of the Convention.

6. France

Aoulmi (2008):

In the case of *Aoulmi*, an Algerian national, who had moved to France with his parents in 1960 at the age of four, had been convicted in the 1980s on several occasions of drug trafficking, and an order was eventually issued for his permanent exclusion from French territory. Before the European Court, he alleged among others that his removal would constitute a violation of Article 3, because on the one hand, as the son of a *harki* (*i.e.*, Algerian loyal to the French during the Algerian War of Independence), he would be liable to reprisals, and on the other hand he would not be able to receive the necessary treatment in Algeria for his chronic active hepatitis. Meanwhile, on 11 August 1999, the European Court had issued a provisional measure, requesting France to stay the applicant's deportation until 24 August, the date on which the Chamber dealing with the case was due to meet to examine the application.¹⁰² The French authorities agreed to stay the execution of the deportation order until 16 August 1999 to allow a medical report to be prepared, but on 19 August

¹⁰¹ Kamaliiev and Kamaliieva v. Russia, App. no. 52812/07, Eur. Ct. H.R. (Jun. 3, 2010).

¹⁰² *Supra* note 34 *Aoulmi*, App. no. 50278/99, at paras. 5 and 34.

1999 the applicant was deported to Algeria.¹⁰³ In their defence before the Court the Government maintained that they had used their best endeavours to take into account the interim measure and that the applicant's removal had accordingly been postponed to allow a re-examination of his situation. The new assessment had shown that there were no grounds relating to the applicant's health that stood in the way of his removal.

The Government stressed that the applicant had not been taking medication and that the only treatment considered desirable by doctors for the future was not currently available in France or Algeria. It was also held that an interim measure was, according to the very wording of its Rules, 'simply an indication given to the State and not a legally binding order for action' on the part of the State. With reference to the Cruz Varas case, it was also said that the applicant's deportation had not interfered with his right under Article 34 of the Convention to lodge an individual application with the Court without the effective exercise of that right being hindered in any way by the State. Finally, the applicant's expulsion had taken place before the delivery of the Mamatkulov case and thus the European Court was obliged to come to a conclusion on the basis of the applicable legal context at the time of the impugned measure.¹⁰⁴ France was nevertheless found to have acted in breach of its obligations in the present case under Article 34 of the Convention, given that it had failed to comply with the interim measure indicated under Rule 39 of the Rules of Court.¹⁰⁵ Subsequently, on 13 December 2000 a French administrative court set aside the deportation order, in view of the 'exceptionally serious consequences' which the measure was likely to entail for the applicant's health. The applicant, according to his

¹⁰³ See *Id.* at paras. 35-36.

¹⁰⁴ *Id.* at paras. 97-100.

¹⁰⁵ *Id.* at paras. 101-112.

lawyer, was, however, unable to return to France owing to administrative barriers in both countries.

7. Slovakia

Labsi (2008 No judgment):

In the case of *Labsi*, the authorities extradited an Algerian, who had entered in Slovakia in 2006 without any identity documents, accused of posing a threat to national security. In Algeria he had been sentenced to life imprisonment in his absence for being a member of a terrorist organization. In 2008, the Slovak Constitutional Court held that allowing Labsi's extradition, would violate his human rights. This was followed by a Supreme Court decision that Labsi could indeed not be extradited to Algeria because he faced the risk of torture and other ill-treatment, despite diplomatic assurances from the Algerian authorities. On 13 August 2008 the European Court issued an interim measure requiring that Slovakia refrain the extradition until the appeals on his new asylum claim had been completed. He was released from detention but immediately detained again on the basis of a 2006 deportation order. The applicant's new asylum claim was rejected and Labsi fled from a refugee camp to Austria in December 2009, but was deported to Slovakia and the Slovak Supreme Court rejected the final appeal on Labsi's asylum claim. On 16 April, the European Court notified Mustapha Labsi's representative that its order for interim measures issued remain in effect until Mustapha Labsi had the opportunity to file a claim with the Constitutional Court and that claim was ruled upon. Mustapha Labsi's lawyer received the Supreme Court ruling in writing on Friday 16 April and the applicant was forcibly returned to Algeria on Monday 19 April. His lawyers and family members were not notified of the expulsion and Mustapha Labsi had no opportunity

to challenge the decision of the Ministry of Interior to return him to Algeria.¹⁰⁶ According to Amnesty International, the Slovak Internal Affairs Minister was reported to have justified the non-abidance of the European Court's provisional measure by 'invoking national security and claiming that the penalty for such a violation was only a "couple of thousand euros"'.¹⁰⁷ The proceedings before the European Court are still pending.

8. Moldova

Paladi (2009):

In *Paladi*, the applicant, a Moldovan national and former deputy mayor of Chisinau, was arrested and placed in a detention centre for fighting economic crime on suspicion of abuse of position and power and then he was transferred to a remand centre. Suffering from a number of serious illnesses (diabetes, angina, heart failure, hypertension, chronic bronchitis, pancreatitis and hepatitis), whilst in detention, the applicant was examined by various doctors who all recommended medical supervision. Certain doctors considered that operations, which could only be carried out in specialised units, were necessary. He was transferred to a Neurological Centre (Republican Neurological Centre or RNC) and he received a special therapy at the Republican Clinical Hospital and that hospital prescribed a continuation of the therapy. In the meantime, however, the Neurological Centre had recommended his release from hospital.

¹⁰⁶ Labsi v. Slovakia, App. no. 33809/08, Information Note no. 129, Eur. Ct. H. R. (Apr. 2010) at 28. See also Press Release 354(2010), Parliamentary Assembly, Disregard by Slovakia of binding interim measures ordered by the Strasbourg Court "unacceptable", (Apr. 29, 2010).

¹⁰⁷ Amnesty International, *Slovakia: Expulsion of Mustapha Labsi Violated International Law*, Public Statement, Document, (Apr. 28, 2010), AI Index: EUR 72/001/2010, available at <http://www.amnesty.org/en/library/asset/EUR72/001/2010/en/d618050d-05b8-4737-bfec-4ea2d132723f/eur720012010en.html> .

Although on the evening of 10 November the European Court of Human Rights indicated by fax to the Moldovan Government an interim measure under Rule 39 of the Rules of Court, stating that the applicant should not be transferred from the RNC until the Court had had the opportunity to examine the case, the next day Paladi was transferred to the prison hospital. Finally, following requests by the applicant's lawyer and the Agent of the Government, the district court ordered the applicant to be transferred back to the RNC on 14 November. Ultimately, on 15 December 2005, Paladi's detention pending trial was replaced with an obligation not to leave the country.

According to the Court, there had been various instances of negligence incompatible with the requirement to take all reasonable steps to ensure immediate compliance with the interim measure. As to whether Paladi's medical condition should be taken into account in assessing compliance with Article 34 ECHR, the Court dismissed the Government's arguments and medical evidence showing that the risk to the applicant had not been as serious as previously thought and, in particular, that the special therapy concerned was not essential for treating any of the applicant's illnesses, thereby arguing that the authorities had complied with the interim measure three days after being informed of it had not affected the applicant's ability to pursue his application before the European Court and had not exposed him to a risk of irreparable damage. The fact that, ultimately, the risk did not materialise and that information obtained subsequently suggests that the risk may have been exaggerated did not alter the fact that the attitude and lack of action on the part of the authorities were incompatible with their obligations under Article 34 ECHR.¹⁰⁸ By

¹⁰⁸ See, *Id.* at paras. 103-104.

complying with the interim measure only four days after the measure had been issued, Moldova had violated Article 34 ECHR.

9. Albania

Groni (2009):

In another case, *i.e.*, *Groni*, between 24 September 2003 and 16 February 2004, an Albanian national, who was serving a 15-year prison sentence for international narcotics trafficking and a life sentence for murder and illegal possession of firearms in Albania, likewise had requested an appropriate medical examination in view of the deterioration in his health. In 2004 he was diagnosed with multiple sclerosis, the doctors reporting that his disease could cause him shock, organ damage, permanent disability or death. In 2005, he brought several sets of criminal proceedings against the prosecution and the head of the prison hospital complaining of negligence in the provision of medical care to him given that it had been delayed and he was being treated mainly with drugs prescribed to cure rheumatism. On 10 January 2008, upon his request, the Court ordered the Albanian Government as an interim measure to transfer him immediately to a civilian hospital for examination and appropriate medical treatment.¹⁰⁹ According to the European Court, Albania had therefore incomplied with the interim measure for 17 days and there had been no objective obstacles preventing the authorities to do so. Albania was therefore found to have violated Article 34 ECHR.¹¹⁰

10. Italy

Ben Khemais (2009):

¹⁰⁹ *Groni v. Albania*, App. no. 25336/04, Eur. Ct. H.R. (Jul. 7, 2009) at paras. 64-77.

¹¹⁰ *Id.* at paras. 181-195.

Quite recently Italy has on four occasions blatantly refused an interim measure in order to protect Tunisians. This implied that the beneficiaries were effectively deported, notwithstanding the respective interim measures issued by the Strasbourg Court. In *Ben Khemais* the beneficiary was a Tunisian national who was to be expelled by the Italian authorities back to his country of origin, where he had allegedly been sentenced *in absentia* to 10 years imprisonment for being a member of a terrorist organisation. Out of fear of being denied justice if sent back, and thus of an increase of his sentence without a proper trial, and of being subjected to ill-treatment or even tortured, he applied to the European Court for an interim measure. On 29 March 2007, the European Court invited the Italian Government not to expel the applicant pending a decision on the merits.¹¹¹ The Italian Government nonetheless decided to ignore the provisional measure and deported the Tunisian. In a fax of 11 June 2008, the Court was informed that a deportation order had been issued on 31 May 2008 (thus after the interim measure) against the applicant for the role he had played in the activities of Islamic extremists, and the Milan Criminal Court had given its authorisation to the expulsion by observing that the person represented a threat to state security because he was in a position to renew contracts aimed at resuming terrorist activities, including on an international level.¹¹² On account of its failure to abide by the interim measure, Italy was held to have acted in violation of Article 34 ECHR.¹¹³ This case proved to be only the first case in a –for the moment being small, but quickly expanding – series of cases.

Mourad Trabelsi (2010):

¹¹¹ *Ben Khemais v. Italy*, App. no. 246/07, Eur. Ct. H.R. (Feb. 24, 2009) at para., 18.

¹¹² *Id.* at para., 23.

¹¹³ *Id.* at paras. 80-88.

On 13 December 2008, the Tunisian *Mourad Trabelsi*, who had served his term in prison in Italy for terrorism-related issues and had been convicted in absentia in Tunisia for similar allegations, was expelled to Tunisia by Italy after a second expulsion order had been signed by the authorities. The President of the Second Section of the European Court – after the initial expulsion order – had issued an interim measure to Italy not to do so until further notice,¹¹⁴ and the Italian authorities had received a second letter, informing them that the Section President – who had been informed by the applicant’s lawyer that his client had been brought to a temporary closed centre in view of his deportation – had confirmed that her interim measure, which had moreover never been lifted – was therefore still in place, in spite of the fact that the expulsion was based on a new order.¹¹⁵ In its judgment the European Court, *inter alia*, noted that the respondent Government, before expelling the applicant had not requested the lifting of the provisional measure and had proceeded with the expulsion even before obtaining diplomatic assurances from Tunisia which it had relied on in its observations.¹¹⁶ Italy was held to have violated Article 34 ECHR.¹¹⁷

Ali Toumi (2009 no judgment):

Subsequently, on 6 August 2009, the Italian State deported *Ali Toumi*, who had been released after serving a prison sentence for recruiting militants to fight in Iraq, in spite of an interim measure issued and notified and reiterated to Italy.¹¹⁸ Toumi was arrested after his return to Tunisia and the case is currently pending before the

¹¹⁴ *Trabelsi v. Italy*, App. no. 50163/08, Eur. Ct. H.R. (Apr. 13, 2010) at para., 13.

¹¹⁵ *Id.* at paras. 15-18.

¹¹⁶ *Id.* at paras. 69.

¹¹⁷ *Id.* at paras. 67-71.

¹¹⁸ *Ali Toumi v. Italy*, App. No. 25719/09. See, Press Release 615 (2009), Secretary General of Council of Europe, Hera Däuber-Gmelin and Christos Pourgourides: blatant disregard yet again, by Italy, of biding interim measures ordered by the ECH (Aug. 6, 2009). *available at* <https://wcd.coe.int/ViewDoc.jsp?id=1481061&Site=COE>

European Court. In a reaction to the deportation, The Italian Minister of Internal Affairs denied that it was a matter of Italy contravening the European Court's decisions, and stated that '[w]e respect the European Court's decisions, and I stress decisions. However, when I receive a fax from an official that says that it is necessary to suspend the expulsion while awaiting the Court's decision, I prefer to continue and expel an alleged terrorist. We cannot await the slowness of the Court, whose decisions we are nonetheless willing to receive. However, while awaiting their arrival, we apply our law. We have done so now and will continue to do it.'¹¹⁹

Mohamend Mannai (2010 no judgment):

Finally, on 1 May 2010, the Italian authorities once again deported an applicant, Mr. Mannai, to Tunisia, in spite of an interim measure indicated by the European Court. Mannai, a Tunisian national, was arrested in Austria in 2005 on the basis of an Italian arrest warrant issued in the ambit of an investigation concerning international terrorism. He was expelled to Italy and sentenced to five years imprisonment. The judgment provided for the expulsion of Mr. Mannai after his conviction. On 19 February 2010, the European Court of Human Rights asked the Italian authorities not to expel the applicant to Tunisia until further notice but on 1 May Mannai was expelled.¹²⁰

Hamidovic (2005):

¹¹⁹ See Gabriela Petti, *Allowing someone to live or letting them die. Italy contravenes European Court of Human Rights instructions by deporting Tunisian*, Statewatch, (Dec. 19, 2008) available at <http://www.statewatch.org/news/2008/dec/12italy-tunisia.htm> and <http://www.statewatch.org/news/2009/sep/italy-echr-tunisia.pdf>.

¹²⁰ Mohamed Mannai v. Italy. See, e.g., Press Release 403 (2010), Secretary General of Council of Europe, Concerns over repeated Italian expulsions, (May. 19, 2010); Interim Resolution CM/ResDH(2010)83, Committee of Ministers, Ben Khemais against Italy, (Jun. 3, 2010), (<https://wcd.coe.int>); See also, *Rome: l'expulsion d'un Tunisien déplorée*, Le Figaro, Jun. 20, 2010, (<http://www.lefigaro.fr>).

These weren't the first cases in which Italy refused to abide by the European Court's interim measures. Indeed, in the case of *Hamidovic*, in 2005 a mother of Roma descendance was deported by the Italian Government to Bosnia, notwithstanding an interim measure indicated by the European Court to stay the expulsion. The Government tried to justify their action by saying that the expulsion of the applicant was 'a regrettable shortcoming in the chain of transmission of information', but that it had never been the intention of the State to deal with the case in this way. According to the Government, the Permanent Representation of Italy in Strasbourg had been notified of the interim measure on Friday 2 September at 18.30h. During the ensuing weekend nobody had taken cognizance of the provisional measure and on Monday the information had been communicated to the Ministry of Internal Affairs by a fax on 15.30h., while on Tuesday 7 September Hamidovic had been deported. The Italian Government talked about 'a regrettable loss' of two days during the weekend and admitted 'a certain delay in the transmission of the fax from Strasbourg to Rome (it could have been sent in the morning instead of the afternoon at 3.30 p.m.) and in the transmission, by the competent authorities to the enforcement bodies, of the order to stay execution'.¹²¹ The case is still pending before the Court.

11. United Kingdom

Al-Saadoon and Mufdhi (2010):

The case of *Al-Saadoon and Mufdhi* concerns events that have taken place in Iraq in 2008. On 30 December 2008, the European Court tried – in vein – to halt the imminent transfer of two Iraqi nationals accused of murdering two British soldiers to

¹²¹ *Hamidovic v. Italy*, App. no. 31956/05. See, Annual Activity Report 2005, Eur. Ct. H. R. Third Section (Jan. 2006) at 12, available at <http://www.echr.coe.int/NR/rdonlyres/3EA19A2A-D445-4C52-AA51-3D50C013A69F/0/Section3.pdf>

the Iraqi authorities by the British forces in Iraq (whose UN Mandate was to expire on 31 December 2008) through the application of Rule 39. This was following allegations that the beneficiaries would run a real risk of being killed in violation of their right to life (Article 2 ECHR) or the abolition of the death penalty (Article 1 Protocol No. 13), being ill-treated in violation of the prohibition of torture and/or inhuman and degrading treatment (Article 3 ECHR), or receiving an unfair trial (in violation of Article 6) upon being transferred. *In casu*, despite the European Court's provisional measure indicated the same day (shortly after it had been informed of the ruling of the Court of Appeal) to the UK Government that the applicants should not be removed or transferred from their custody until further notice, the Iraqis were handed over to the Iraqi authorities on 31 December 2009.

By a letter dated 31 December, the UK Government informed the European Court that the applicants had been transferred, principally because the UN Mandate which authorised the role of British forces in arrest, detention and imprisonment tasks in Iraq was due to expire at midnight on 31 December 2008, they could exceptionally not comply with the measure indicated.¹²² The Government regard the circumstances of this case as wholly exceptional. It remains the Government policy to comply with Rule 39 measures indicated by the Court as a matter of course where it is able to do so.¹²³ The objective impediments under UK law or legal obligations towards Iraq, claimed by the Government, for not complying with the interim measure, such as the absence, on 31 December 2008, of any available course of action consistent with respect for Iraqi sovereignty other than the transfer of the applicants, was deemed by the European Court to be of the respondent State's own making, and was therefore

¹²² See, *supra* note 20 Al-Saadoon and Mufdhi, App. 61498/08, at paras. 4 and 78-81, in the same case, Dec. (Jun. 30, 2009) at para., 56.

¹²³ *Id.* at para., 81.

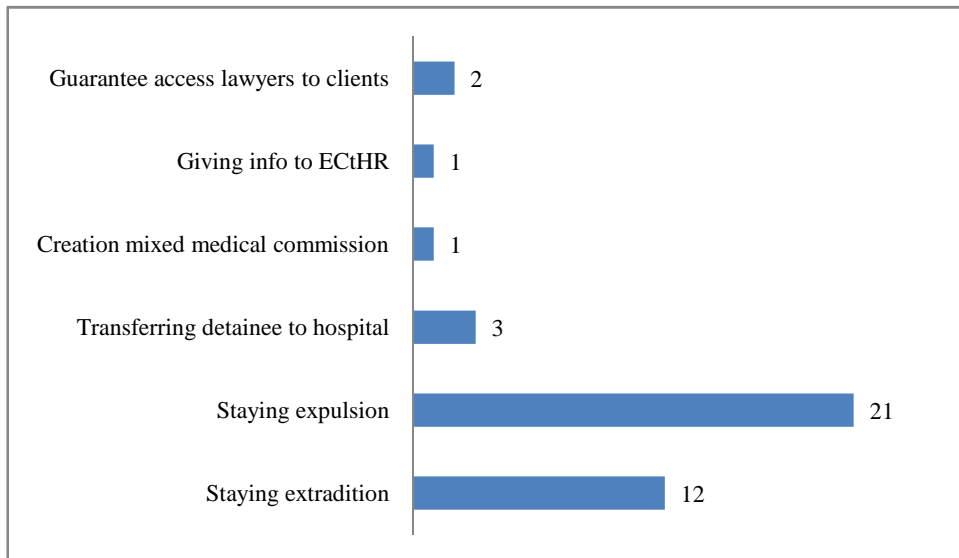
dismissed. The Court did not consider that the UK authorities had taken all steps which could reasonably have been taken in order to comply with the interim measure. The failure to comply with the interim measure and the transfer of the applicants out of the United Kingdom's jurisdiction exposed them to a serious risk of grave and irreparable harm and the United Kingdom was deemed to have violated Article 34 ECHR.¹²⁴

III. Analysis and Evaluation

The study of the case law shows that although provisional measures have been complied in most of the cases unfortunately the percentage of non-complies has been increasing during last years. The statistics reveals that 50% of them were not complied during the last 12 years (of a period of 53 years). Interim measures incomed with by States (31), compared to the reported number of interim measures issued (2.207), is low, if not derisory, *i.e.*, +/- 1%. Of these, 61% can be attributed to Russia, France, Italy and Turkey.

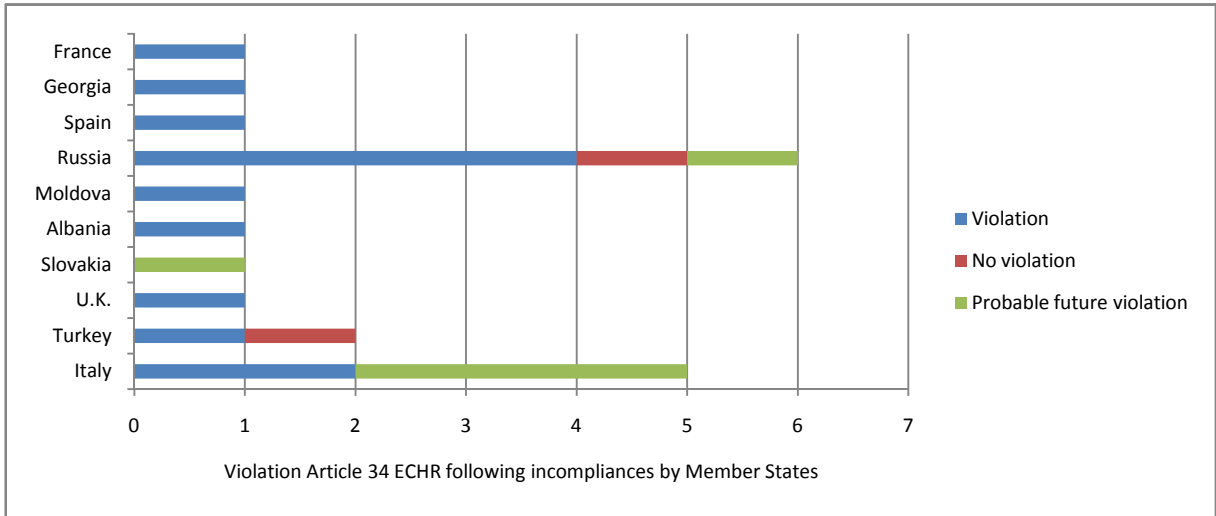
Table 5: Typology of cases in which Member States have incomed with interim measures

¹²⁴ *Id.* at paras. 162-165.



It is crystal clear that the absolute majority of cases concern expulsion cases (21 times) and extradition cases (12). In three cases it concerned the refusal of a Member State to abide by or to delay its abidance by an interim measure, in which it were requested to transfer a detainee in a bad state of health to a specialised institution or hospital. In two cases it concerns the refusal to give lawyers unhindered access to their clients. The remaining cases concerns the unwillingness of a State to provide the European Court with information requested by the Court (single case) or the establishment of a bipartisan medical commission (single case). The two cases in which States were let off the hook (Turkey in *Öcalan* and Russia in *Muminov*) concerned the obligation to give info to the European Court and an expulsion respectively (see Table 5).

Table 6: Overall number of violation of Article 34 ECHR, following incompliances by Member States (2005 – May 2010)



Interim measures have only found in the Rules of its supervisory organs. It has resulted in a debate as to their binding character. In the beginning the European Court argued that the lack of this figure in the Convention was a clear indication that the measures were not true orders that must be followed by the States parties, nevertheless the Court now holds that article 34 of the Convention is violated automatically when an order of interim measures is not complied with. In concrete from 2005 the European Court has made interim measures legally binding and given teeth to the establishment of an incomppliance by holding States accountable under Article 34 ECHR. In the pre-*Mamatkulov* period (before 2005) the cases in which States preferred not to comply with a provisional measure, have invariably led either to a decision of inadmissibility (8 times) or a friendly settlement (once) or a judgment on the merits, in which the alleged violation of Article 34 ECHR was dismissed (once). However, in the post-*Mamatkulov* period (after 2005), while not all incompliances have led to the establishment of a violation of Article 34 ECHR, this Article has been found violated in no less than 13 instances (on a total of 21)

(including *Mamatkulov* itself), while only twice a State (Turkey in *Öcalan* and Russia in *Muminov*) was able to escape its conviction, and four cases remain undecided for the moment being (although in each of the latter cases the Court will most probably find a violation of Article 34) (see Table 6)

If one takes a more in-depth look at the kinds of cases where States have incomplied with interim measures and the motives for which they have acted in this way, one can detect some tendencies. First of all, States have been reluctant to comply with Strasbourg interim orders, especially in ‘conflict-related’ cases (in a broad sense), *i.e.*, pure domestic (alleged) terrorism cases (*Shamayev*; *Öcalan*), extraditions or expulsions of (alleged) terrorists to conflict or post-conflict areas (*Urrutikoetxea*; *Mamatkulov and Askarov*; *Ben Khemais*; *Toumi*; *Trabelsi*; *Shamayev*; *Olaechea Cahuas*; *Al-Saadoon and Mufdhi*; *Muminov*; *Kamaliiev*; *Labsi*; *Manna*), expulsions of (alleged) political opponents (*Cruz Varas*; *Berke*) or persons belonging to a targeted group of the population (*D.S.*, *S.N. and B.T.*) in a third country to conflict or post-conflict areas.¹²⁵

The special feature of the ‘conflict-related’ incompliances is undoubtedly due to the fact that such cases are very sensitive (and exceptionally also high-profile cases) cases at the domestic political level (e.g. *Öcalan*). In the above-mentioned other cases governments do not wish public opinion to think that they are harbouring alleged or proven terrorists or people recruiting terrorists on their territory.

Secondly, in the same sense, governments of Member States also do not wish to create a perception with their population that they are pampering foreign common criminals but instead want to show their willingness to go down hard on such people

¹²⁵ In the *Mansi* case it is not clear under which type this case can be categorized.

by expelling and extraditing them to recipient countries outside the Council of Europe (X.; *Lynas; Geller, A.B.; Aoulmi*) which may sometimes have a doubtful track record as to the protection of fundamental rights. The same ideas may also apply as to the treatment by some Member States of their own common criminals within their prison system, even if their state of health is (allegedly) very bad (*Paladi; Aleksanyan; Grori*). Thirdly, and in the same line of events, governments in Europe, once requests for asylum have been rejected by their domestic courts, wish to be seen as very diligent in expelling the failed asylum seekers, again to third countries with very few things to offer as to the protection of human rights (*Conka and Others; Mostafa and Others; Hamidovic*). In all those cases, it can be argued that the *raison d'état* sometimes seems to prevail over the wish of governments to abide by the interim measure of the European Court.

In order not to have to abide by an interim measure, apart from the recurring idea that interim measures are not-binding, State governments, sometimes – at least partially – hide behind the argument that their legislation or practice (X.; *Olaechea Cahuas; Shamayev; Paladi; Aleksanyan; Shtukurov*) or the lack of international legislation (*Al-Saadoon and Mufdhi*) does not permit them to act or that their competence does not allow them to act. In a number of cases it is clearly stated that it is instead the competence and thus the responsibility of the domestic courts and tribunals to decide and to act as to the interim measure (*Olaechea Cahuas; Shamayev; Paladi; Aleksanyan; Shtukurov*).

In such cases, governments see themselves as innocent and neutral bystanders, that have no impact on the development of events. While this argument has been rejected by the European Court on a number of occasions, given that states can obviously not invoke their own (national) legislation as an excuse for

breaching their international obligations, this problem touches on one of the main shortcomings as to the entire system with regard to interim measures, namely the lack of a coherent, in national legislation embedded follow-up system of the interim measures, whereby the legally binding force of provisional measures is thus guaranteed under national law, also when domestic judicial authorities are confronted with an interim measure. The adaptation of national legislation should also be accompanied by the effective implementation on the ground. While Jean-Paul Costa, President of the European Court, back in 2008 was absolutely right when he held that '[e]ffective cooperation is in fact indispensable when it comes to dealing, often urgently, with such requests' and was further happy to underline that he knew that 'schemes had been put in place both within the [European Court's] Registry and [...] [the] Services [of the State Agents] to ensure a smooth and especially a fast transmission of measures requested by the Court',¹²⁶ legal practice with regard to non-compliances shows that this is not always the case.

Indeed, in a number of cases, States have tried to justify their late or non-compliance by pointing at problems as to different time zones or unfortunate time issues ('it was weekend or holidays') which for example jeopardized the coordination of the timely transmission of their measures (*Kamaliiev and Kamaliieva; Hamidovic; Aleksanyan*). The European Court has in general dismissed such justifications, but the problem remains. The already existing national mechanisms (secure server between Strasbourg and the Member States) should therefore be improved. In the age of mobile internet, it does not seem illogical nor far-fetched to for the Committee of Ministers to request States to put systems into place which allow Ministries, State

¹²⁶ Jean-Paul Costa, Speech on the 'Séminaire sur le rôle des agents des gouvernements dans la protection effective des droits de l'homme', Bratislava, 3 April 2008; available at http://www.echr.coe.int/NR/rdonlyres/A0F348A0-1551-420F-90AE-B6F52FA8EECF/0/Bratislava_3avril.pdf

Agents (or their deputies) to take cognizance of decisions on interim measures, even when they are not in the office. Costa also mentioned the 'role [of a State Agent] as intermediary in such cases it is not easy and it is often [his] responsibility to make authorities other than [his] understand that the expulsion of an individual must be avoided.'¹²⁷ While in the majority of the cases, State Agents remarkably succeed in bring the message across to the persons in charge of the eventual implementation of interim measures, additional awareness-raising would still be an asset.

CONCLUSIONS

Presumably one of the most effective instruments on the European continent at the disposal of those persons who proves that he/she is in a situation of extreme gravity and urgency and who is a potential victim of a violation of a right set forth in the European Convention on Human Rights may be protected by provisional or interim measures. It is interesting to note that in the majority of the cases the European organs have protected persons who are under an order of expulsion or extradition because once in the receptor State (normally their country of origin is not a State party to the Convention) they could run some type of risk. The beneficiaries are for the most part aliens who have arrived in a State Party not always in regular circumstances, looking for refugee status, political asylum or residency for humanitarian reasons. Some of them managed to enter the State party in search of a better life, escaping from violence in their country or avoiding being punished with penalties prohibited in the European system, such female genital mutilation or capital punishment. Fewer do not want to leave the State party because this would imply being separated from their families or because in their country of origin they would not find the necessary drugs or medical treatment. States have, for the most part,

¹²⁷ *Id.*

respected interim measures. Nevertheless, there is unfortunately that the number of cases where States do not comply is growing.

Indeed, the increased effectiveness of the interim measures due to the quasi automatic link of non-compliance by a State to the establishment of a violation of the right of petition by that State is very relative. The rising number of non-abidances and States that have incomed in the past years is rather worrisome. But even more worrisome is the fact that five of the ten 'founding fathers' of the Council of Europe (Belgium, France, Italy, the Netherlands, Sweden and the United Kingdom) and four other 'older' member States (Austria, Spain, Switzerland, Turkey) are co-responsible for no less than 21 incomeds (on a total of 31). And if one only takes into account the post-*Mamatkulov* period (including the *Mamatkulov* judgment), then four founding Member States (France, Italy and the United Kingdom) are responsible for nine incomeds on a total of 18 incomeds (and six violations and three probable violations of Article 34 ECHR), while two older Member States (Spain and Turkey) are responsible for two incomeds (and two violations of Article 34 ECHR). Such state actions, and especially the fast-growing number of incomeds by Italy is more than worrisome, may induce other – for the moment being virgin – Member States to try their luck and incomed with unpopular interim measures, thereby undermining the authority of the European Court and the Strasbourg system as whole.

While every kind of case in which a Member State willingly incomed with an interim measure should be treated as an extremely heavy encroachment on the right to application and may thus disrupt the Strasbourg system in the mid-long term, the non-compliances with interim measures aimed at staying extraditions and expulsions to countries struck by internal armed conflict, post-conflict areas or countries ruled by

autocratic or dictatorial regimes, should be followed up with utmost urgency by the Council of Europe's organs dealing with human rights, preferably in a more coordinated way than is the case nowadays. In turn the European Court should have to do its piece of the bargain by reasoning to a certain extent its interim measures (although of course no more doubts can be raised in the future as to the binding legal force of interim measures).

It cannot be denied that the institute of the interim measures has been a key instrument in the hands of the European organs to prevent violations of human rights. It has become part of the Court's daily life but in order to improve the compliance rate of Member States, it is advisable that the instrument of the interim measures receives a legal basis in the European Convention through an amending protocol (although such a protocol would of course need to be ratified by all Member States to enter into force), without the need of providing much more than has now been included in the European Court's Rules of Procedure. In the future one may (also) be tempted to further develop the figure of the interim measures in the so-called Statute to be set up (as an intermediate level between the European Convention and the Rules of Court), but one should beware to circumscribe this extremely useful legal instrument in a legal text that for example would only be amendable following approval from a large majority of Member States, whereby evolutions in de case law of the European Court could theoretically be downgraded or turned back. Much more important is the need for the Committee of Ministers to take initiatives which would oblige the Member States to adopt additional legislation and measures to further streamline their domestic system to receive and deal with interim measures issued by the European Court. Such initiatives would truly embed the legal figure of the interim measures

both at the European and the domestic levels and consequently enhance the effectiveness of the European human rights system as a whole.

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