

Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights

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The authors are very grateful to Professor *Sir Nigel Rodley*, member of the UN Human Rights Committee, *Carmen Rueda* and *Anita Trimaylova* from the OHCHR, *Stephen Phillips* from the Registry of the ECtHR and former Vice-President and Judge at the ECtHR *Françoise Tulkens* for the invaluable information provided during the preparation of this contribution. Special thanks also go to *Corina Heri* for proofreading the article. The views and statements expressed in this article are strictly personal.

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Abstract

The institution of interim measures is a powerful instrument to the human rights judiciary, and one of great practical significance. Interim measures safeguard the effectiveness of the human rights protection system by preventing particularly harmful violations that would not be reparable by a decision on the merits. This article undertakes a comprehensive comparison of the UN Human Rights Committee's and the European Court of Human Rights' use of interim measures. It argues that, while the practice of the Committee and the Court displays surprisingly strong similarities with respect to key issues, there exist some important procedural and substantive divergences which could arguably lead to forum shopping with respect to interim relief.

I. Introduction

The UN Human Rights Committee (hereinafter HRC) and the European Court of Human Rights (hereinafter ECtHR) are, as part of their (quasi-) judicial function and as is virtually every international adjudicator,¹ vested with the power to indicate interim measures.² The purpose of interim meas-

¹ R. Wolfrum, Interim (Provisional) Measures of Protection, in: R. Wolfrum (ed.), MPEPIL, 2006, online edition, margin number 1, available at <<http://www.mpepil.com>>. All links in this article were last accessed in May 2013.

² Rule 39 (1) of the Rules of Court of the ECtHR, amended by the Plenary Court on 14.1.13 and 6.2.2013, entered into force 1.5.2013; Rule 92 of the Rules of Procedure of the HRC, adopted at the Committee's 2852nd meeting during its 103rd session, CCPR/C/3/Rev.10,

ures in international adjudication is to preserve the equal rights of the parties pending the examination of a case in order to ensure the effectiveness and integrity of a final decision.³ In the particular context of international human rights law, this usually means the protection of persons from “irreparable damage to the enjoyment”⁴ of certain fundamental rights in situations of urgency.⁵ The institution of interim measures offers the human rights judiciary a unique and powerful instrument for safeguarding the effectiveness of the protection it affords by preventing particularly harmful human rights violations that would not be reparable by a decision on the merits.⁶ Not without reason, the power to issue interim measures has therefore been referred to as a procedural “weapon in the arsenal of the adjudicator”.⁷

Despite the significance and practical relevance of interim measures in human rights adjudication, their use in practice has been fairly ambiguous. This holds true not only for the range of situations in which interim measures are applied, but also for the procedure through which they are requested, granted or denied. Said abstruseness stems from the fact that granting interim relief is largely discretionary and that adjudicators such as the Committee or the Court neither publish nor give reasons for a decision to apply or deny interim measures. Recently, the issue of interim measures has increasingly become the focus of attention. For the HRC’s 107th session, *Sir Nigel Rodley* prepared a draft report on the Mandate of the Special Rapporteur on New Communications and Interim Measures;⁸ similarly, at the

11.1.2012; interim measures are sometimes also termed “provisional measures” or “precautionary measures”.

³ S. *Rosenne*, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, 2005, 3 and 4; C. *Brown*, *A Common Law of International Adjudication*, 2007, 121; W. A. *Thirlway*, *The Indication of Provisional Measures by the International Court of Justice*, in: R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, 1994, 5 and 6; see also Article 41 of the Statute of the International Court of Justice (hereinafter ICJ), 26.6.1945, 33 U.N.T.S. 993, entered into force 24.10.1945.

⁴ ECtHR, *Mamatkulov and Askarov v. Turkey* (GC), Appl. Nos. 46827/99 and 46951/99, 4.2.2005, ECHR 2005-I, § 108.

⁵ E. *Rieter*, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication*, 2010, 1088.

⁶ ECtHR, *Savridin Dzburayev v. Russia*, Appl. No. 71386/10, 25.4.2013, § 212; *Mamatkulov and Askarov v. Turkey* (note 4), § 125.

⁷ J. M. *Pasqualucci*, *Interim Measures in International Human Rights: Evolution and Harmonization*, *Vand. J. Transnat’l L.* 38 (2005), 3 et seq.; S. *Ghandbi*, *The Human Rights Committee and Interim Measures of Relief*, *Canterbury L. Rev.* 13 (2007), 203.

⁸ Interview with *Sir Nigel Rodley*, member of the HRC and former Special Rapporteur on New Communications and Interim Measures (Geneva, 25.3.2013).

Council of Europe, the Steering Committee for Human Rights (CDDH) published a report on interim measures under Rule 39 of the Rules of Court.⁹ These efforts to examine and review practice under both systems provides a timely opportunity to undertake a comprehensive comparison of the HRC's and the ECtHR's use of interim measures. On the basis of the co-author's personal experience as a Judge at the ECtHR and former member of the HRC, this article gives insight into the functioning and case-law of the two adjudicators with a view to identifying commonalities and differences in their approaches to interim protection.

Relying on the premise that the prospect of effective interim relief can under certain circumstances be a decisive factor for forum choice, such a comparison can provide applicants in a situation of urgency with a better understanding of how and before which adjudicator they can most effectively request interim measures in a given context.¹⁰ It is discussed that both adjudicators primarily indicate interim measures with respect to risks for life and limb, but that outside this mutual field of application the HRC may occasionally grant interim measures in situations in which the Court would not, and vice versa. Moreover, this article reveals that, under the Committee, a practice of indicating so-called protection measures – a new category of measures unknown to the Court – emerged to accommodate risks which do not necessarily affect the object of the dispute but can arise out of the submission of a complaint. Regarding the ECtHR, on the other hand, since the Izmir Conference and the introduction of a new centralised unit within the Registry dealing with requests for interim measures, a clear intent to keep the number of cases in which interim measures are granted to a strict minimum can be observed.

⁹ Council of Europe, Steering Committee for Human Rights (CDDH), Report on interim measures under Rule 39 of the Rules of Court, CDDH(2013)R77 Addendum III, 22.3.2013; Drafting Group C on the Reform of the Court (GT-GDR-C), Article 39 of the Rules of Court: Modalities of Application and Procedure, Information document by the Registry of the Court, GT-GDR-C(2012)009, 7.12.2012; the High Level Conference in Brighton recalling the Izmir Declaration “invited the Committee of Ministers to consider further the question of interim measures (...)” and “(...) propose any necessary action” (High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20.4.2012, para. 12 lit. e)).

¹⁰ As to the Court's use of interim measures in the field of asylum and migration, two very useful reports were recently published; UNHCR, Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, February 2012, available at <<http://www.refworld.org>>; European Council on Refugees and Exiles (ECRE)/ European Legal Network on Asylum (ELENA), Research on ECHR Rule 39 Interim Measures, April 2012, available at <www.ecre.org>.

The present comparison may, however, not only be of interest to applicants but may also help to increase the HRC's and the ECtHR's self-perception regarding their approaches in a field that has, until now, largely been shaped by informal practices and procedures. A look beyond their own systems can assist these bodies in scrutinising their current practice and developing criteria that could lead to a more consistent and transparent use of interim measures within and also between the two systems.

Part II of this article compares the procedures through which the HRC and the ECtHR grant, deny or revisit the indication of interim relief. Part III discusses the material, temporal and personal scope of interim protection as well as the legal effect of interim measures. Without claiming to be exhaustive, Part IV then exemplifies the typology of cases in which interim measures are usually granted followed by a digression on the special category of protection measures used by the Committee (Part V). Part VI turns to the issue of non-compliance. It discusses and compares the establishment of non-compliance as well as the legal and diplomatic consequences thereof as reflected in the current practice of the two adjudicators.

II. Procedural Issues

1. Authority to Indicate Interim Measures

The ECtHR and the HRC are entrusted with ensuring the observance of the commitments undertaken by states and to that effect have the competence to receive individual or interstate complaints about violations of the rights set forth in the ECHR (or its Optional Protocols) and the ICCPR, respectively.¹¹ In order to be able to assume this function, they are entitled to establish their own rules of procedure.¹² Both the Court and Committee adopted relatively broad rules wherein provision is made for the indication of interim measures. Rule 39 (1) of the Rules of Court states that

¹¹ Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights, 16.12.1966, 999 U.N.T.S. 302, ratified by 114 states (status May 2013), entered into force 23.3.1976; Article 41 of the International Covenant on Civil and Political Rights, 16.12.1966, 999 UNTS 171, 6 ILM 368 (1967), ratified by 167 states (status May 2013), entered into force 23.3.1976; Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, 213 U.N.T.S. 222, E.T.S. 5, ratified by 47 states (status May 2013), entered into force 3.9.1953, as amended by Protocols Nos. 11 and 14, which entered into force 1.11.1998 and 1.6.2010, respectively.

¹² Article 39 (2) ICCPR; Article 25 (d) ECHR.

the 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 92 of the Rules of Procedure of the HRC similarly provides that

(t)he Committee may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation (...).

Although it would certainly be desirable to also codify such an explicit legal basis for the adoption of interim measures at treaty level,¹³ the lack thereof in the ECHR or the Optional Protocol to the ICCPR should, however, not lead to doubt regarding the Court's or Committee's authority to grant interim relief. Today, the institution of interim measures is widely accepted as being an inherent or implied power flowing from the very judicial function that an international court, tribunal or (quasi-)judicial organ was set up to perform.¹⁴

2. Requesting Interim Measures

While interim measures can, in principle, be requested by either of the parties to the proceedings,¹⁵ recourse to the institution of interim measures in the field of human rights law has always been fairly one-sided. In almost all cases, it is the individual seeking redress for an alleged human rights violation before the relevant adjudicator who asks for interim relief. Before the ECtHR, it is usually the (potential) applicants in an individual application or their legal representatives who submit a request for interim measures; before the HRC, the authors of a communication or the alleged victims

¹³ The attempt to give Convention status to Rule 39 has not been successful thus far, but is not off the table (CDDH Report, note 9, para. 7).

¹⁴ One can thus argue that the provisions providing for the indication of interim measures are only declaratory in nature. *C. Brown* (note 3), 127 et seq.; *K. Oellers-Frahm*, Expanding the Competence to Issue Provisional Measures — Strengthening the International Judicial Function, *GLJ* 12 (2011), 1283; *R. St. J. Macdonald*, Interim Measures in International Law, With Special Reference to the European System for the Protection of Human Rights, *ZaöRV* 52 (1992), 726 et seq.; *D. McGoldrick*, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, 1991, 131 and 132.

¹⁵ Rule 39 (1) of the Rules of Court.

usually request interim protection.¹⁶ State parties, on the other hand, hardly ever make use of this possibility – an exception being interstate cases such as *Georgia v. Russia (II)*.¹⁷

The adjudicator may also indicate interim relief *proprio motu*,¹⁸ although this is rarely the case in practice. Currently, the HRC does generally not afford interim relief on its own motion, and the ECtHR only applied Rule 39 *ex officio* in an interstate case in 1970¹⁹ and more recently on two occasions to request that a lawyer be appointed for an applicant who was not represented before the Court.²⁰ Lastly, with respect to the ECtHR, a request for interim measures can also stem from “any other person”.²¹ So far, no practice has emerged in this category.

3. The Underlying Application

Based on the fact that the institution of interim measures is part of an adjudicator’s judicial function to settle disputes it also follows that interim measures do not have autonomous character but must, in principle, relate to an individual or interstate complaint procedure.²² The specific nexus required between the request for interim relief and the underlying application differs, however, under the ECHR and the ICCPR. Before the Committee, interim measures can only be requested in the context of a submitted communication, which was already registered by the Special Rapporteur.²³ Before the Court, in contrast, a request for interim measures may precede the actual lodging of an application as long as it discloses elements that suggest an arguable case under the Convention. In this case, the Court can apply

¹⁶ For the sake of simplicity, the terms “applicant” and “application” are henceforth used whenever issues are discussed that relate to proceedings both before the ECtHR and the HRC.

¹⁷ ECtHR, *Georgia v. Russia (II)* (dec.), Appl. No. 38263/08, 13.12.2011, § 5.

¹⁸ Rule 39 (1) of the Rules of Court; HRC, General Comment No. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights (advanced unedited version), CCPR/C/GC/33, 5.11.2008, para. 19.

¹⁹ ECtHR, *Denmark, Norway and Sweden v. Greece* (dec.), Appl. No. 4448/67, 26.3.1970, Y.B. Eur. Conv. Hum. Rts. 13 (1970), 110.

²⁰ ECtHR, *X v. Croatia*, Appl. No. 11223/04, 17.7.2008, §§ 2 and 61; ECtHR, *Öcalan v. Turkey* (GC), Appl. No. 46221/99, 12.5.2005, ECHR 2005-IV, § 5.

²¹ See Rule 39 (1) of the Rules of Court.

²² When an applicant does not pursue his or her application, the interim measure is lifted; see, for example, ECtHR, *H.N. v. the United Kingdom* (dec.), Appl. No. 56676/10, 13.12.2011; *G. J. Naldi*, Interim Measures in the Human Rights Committee, ICLQ 53 (2004), 447.

²³ Interview with *Sir Nigel Rodley* (note 8).

Rule 39 under the presumption that an application may follow. In some cases, this more lenient approach has led to abuse. It is, for example, not uncommon for applicants whose removal was stayed under Rule 39 to disappear into hiding once interim measures are applied.²⁴

The purpose of interim relief requires that the adjudicator be able to issue interim measures before deciding on the admissibility (or merits) of the case.²⁵ At the stage when a request for interim measures is examined, neither the time nor the necessary information is available to analyse the underlying application in depth.²⁶ For this reason, the granting or refusal of interim measures remains without prejudice to any decision as to the admissibility or the merits of the case.²⁷ At the same time, however, the Committee and the Court – the latter where an application has already been lodged – do assess *prima facie* whether the underlying application meets the basic admissibility criteria and has a reasonable likelihood of success on the merits before considering applying interim measures.²⁸

Under the ECHR, a decision to apply Rule 39 leads to a prioritisation in the processing of the application and is usually combined with a decision to communicate the case to the Government. A refusal to apply Rule 39, on the other hand, is often coupled with a decision on inadmissibility.²⁹

²⁴ See, for example, ECtHR, *J.Z. v. France and R.Z. v. France* (dec.), Appl. Nos. 43341/09 and 43342/09, 11.12.2012 or ECtHR, *Kaderi and Others v. Switzerland* (dec.), Appl. No. 29919/12, 18.6.2013, §§ 16 and 17.

²⁵ ECtHR, *M.S.S. v. Belgium and Greece* (GC), Appl. No. 30696/09, 21.1.2011, § 355: “At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it would need in order to do so (...).”

²⁶ The government has usually not yet submitted any observations on the case at that point.

²⁷ See, for example, ECtHR, *Evans v. the United Kingdom* (GC), Appl. No. 6339/05, 10.4.2007, ECHR 2007-I, § 5.

²⁸ See the approach of the Committee against Torture, which applies also to the HRC (CAT, Annual Report, 45th [1.-19.11.2010] and 46th session [9.5.-3.6.2011], A/66/44, paras. 91 et seq.).

²⁹ CDDH Report (note 9), para. 14; this practice serves to ensure that applications in which interim measures are indicated are dealt with speedily; Rule 41 of the Rules of Court.

4. Requirements Surrounding a Request for Interim Relief

Thus far, only the Court has, in its Practice Direction, codified some formal and substantive requirements as to requests for interim measures.³⁰ Research undertaken by the authors, however, shows that similar requirements also apply to requests before the HRC.

Firstly, what can be described as formal conditions require that a request be made in writing, that it indicates in some way that it concerns interim relief (expressly or in substance)³¹ and that it be submitted in good time, so as to allow the adjudicator to intervene effectively. In “good time” means as soon as possible – with respect to deportation cases before the ECtHR, submission must come at least one working day before the removal, the date of which must be indicated in the request. Further “where the final domestic decision is imminent and there is a risk of immediate enforcement (...) applicants and their representatives should submit the request for interim measures without waiting for that decision, indicating clearly the date on which it will be taken and that the request is subject to the final domestic decision being negative”.³²

Secondly, a request for interim measures must meet the threshold of gravity and urgency applied by both the HRC and the ECtHR. Therefore, the requesting person must demonstrate that he or she faces an imminent risk of irreparable harm if the interim measure is not applied.³³ Although there is no formal obligation to exhaust domestic remedies in the context of interim relief, with respect to removal cases, the threshold of imminence requires an applicant under both the ICCPR and the ECHR to make use of domestic avenues capable of suspending a removal (remedies with suspensive effect) before applying for interim measures at international level.³⁴

Finally, it rests upon the applicant to substantiate his request. As a request for interim measures is usually submitted at the very outset of the proceedings and in a situation of urgency, the standard of proof it has to

³⁰ Practice Direction, Requests for interim measures issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5.3.2003 and amended on 16.10.2009 and on 7.7.2011, available at <<http://www.echr.coe.int>>.

³¹ Before the ECtHR, requests are to be made by facsimile or letter and should be marked with “Rule 39 – Urgent” (Practice Direction, note 30), 2.

³² Practice Direction (note 30), 1 and 2.

³³ Practice Direction (note 30), 1 and 2; see below III. 1., 339 et seq.

³⁴ This requirement has to be distinguished from the formal obligation to exhaust domestic remedies with respect to the underlying application, although both often overlap in practice; Practice Direction (note 30), 1; see *mutatis mutandi* CAT, Annual Report (note 28), para. 91.

meet is lower than what is required for the underlying application at the stages of admissibility or merits of the case.³⁵ In abstract terms, a request for interim measures must make plausible the existence of an imminent risk of irreversible harm. In this context, both the HRC and the ECtHR seem to rely on the plausibility and credibility of the applicant's assertions.³⁶ In order to meet this level of proof, a request must include relevant supporting documents such as, for example, domestic court decisions,³⁷ medical reports, or specific country information compiled by NGOs or UN bodies such as the UNHCR or the OHCHR.³⁸

The burden of proof resting on the applicant does not, however, hinder the adjudicator from seeking information *proprio motu*. In removal cases, for example, the ECtHR can double-check or complete the applicants' submission by using its own or other relevant databases.³⁹ Furthermore, sometimes, in cases where the substantiation of an alleged risk is particularly difficult, for example when a prisoner complains about inadequate medical treatment, the Rapporteur, the Registry, or even the Court's President have requested further information from the government concerned.⁴⁰ The HRC, on the other hand, cannot solicit information from the State party prior to the registration of a communication.

³⁵ C. Burbano Herrera/Y. Haeck, Staying the Return of Aliens from Europe through Interim Measures: The Case-law of the European Commission and the European Court of Human Rights, *European Journal of Migration and Law* 13 (2011), 33; these authors consider very *prima facie* evidence sufficient; E. Rieter (note 5), 874, refers to *prima prima facie* evidence.

³⁶ *M.S.S. v. Belgium and Greece* (note 25), § 40: "On 2 July 2009, having regard to the growing insecurity in Afghanistan, the *plausibility* of the applicant's story concerning the risks he had faced and would still face if he were sent back to that country and the lack of any reaction on the part of the Greek authorities, the Court decided to apply Rule 39 and indicate to the Greek Government, in the parties' interest and that of the smooth conduct of the proceedings, not to have the applicant deported pending the outcome of the proceedings before the Court" (emphasis added); *Mamatkulov and Askarov v. Turkey* (note 4), § 108; *H. R. Garry*, When Procedure Becomes a Matter of Life or Death: Interim Measures and the European Court of Human Rights, *European Public Law* 7 (2001), 410.

³⁷ Practice Direction (note 30), 1, according to which "(a) mere reference to submissions in other documents or domestic proceedings is not sufficient".

³⁸ *H. R. Garry* (note 36), 411.

³⁹ ECtHR, *Hilal v. the United Kingdom*, Appl. No. 45276/99, 6.3.2001, § 60: "In determining whether it has been shown that the applicant runs a real risk, if deported to Tanzania, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu* (...)."

⁴⁰ Rule 54 para. 2 (a) of the Rules of Court; ECtHR, *M.S.S. v. Belgium and Greece* (note 25), § 39: "The Greek authorities were given until 29 June 2009 to provide this information, it being specified that: 'Should you not reply to our letter within the deadline, the Court will seriously consider applying Rule 39 against Greece.'"

5. Examination of the Request and Decision-Making

In practice, both systems have delegated the competence to issue interim measures within the adjudicator and have developed a streamlined procedure to process and examine incoming request individually and in a prompt and efficient manner.

Under the ECHR, requests are subject to a first triage by the Registry's case lawyers.⁴¹ They identify requests that either fall short of meeting the threshold of a real risk of irreversible harm (requests outside the scope of Rule 39 *stricto sensu*), are incomplete (not substantiated) or were sent too late. Even though it is not an absolute rule, and exceptions can be made in particularly serious cases, these requests are usually directly rejected as belonging to the category of those "outside the scope of Rule 39".⁴² For all other requests, a checklist is prepared that is first subject to a centralised quality control by the Registry's Rule 39 unit and then submitted for decision to one of three Section Vice-Presidents, who constitute the decision centre for the application of Rule 39.⁴³ This new centralised procedure was put into place in 2011 as a response to the influx of requests⁴⁴ and after the Contracting Parties expressed their expectations during that Izmir Conference of "a significant reduction in the number of interim measures granted by the Court (...)".⁴⁵

While the centralised procedure "aims at ensuring better consistency and increasing the legibility of decisions taken by the Court in the matter"⁴⁶ it is particularly striking that, since its establishment, a person's prospect of benefitting from interim measures has declined considerably: during the year 2010, for example, roughly 40 % of all decisions taken under Rule 39

⁴¹ Information document by the Registry (note 9), para. 7.

⁴² Information document by the Registry (note 9), para. 9. Thus, a request that fails to comply with the requirements set out in the Practice Direction risks not being examined by the competent Vice-President. "It must be emphasised that failure to comply with the conditions set out in the Practice Direction may lead to such cases not being accepted for examination by the Court." (Statement on requests for interim measures issued by the President of the Court on 11.2.2011, available at <<http://www.echr.coe.int>>).

⁴³ Information document by the Registry (note 9), para. 3; Rule 39 (1) of the Rules of Court; the Vice-President usually consults with the rapporteur judge (the national judge) concerned, who also receives a copy of the checklist.

⁴⁴ Between 2006 and 2010 the number of requests for interim measures increased by 4,000 %. At the time, the Court's President voiced his concern about "the alarming rise in the number of requests for interim measures and its implications for an already overburdened Court" (Statement on requests for interim measures, note 42).

⁴⁵ High level Conference on the Future of the European Court of Human Rights, Izmir Declaration, 27.4.2011, Follow-up Plan (Implementation), para. 4.

⁴⁶ Information document by the Registry (note 9), para. 3.

resulted in the use of interim measures. This number has dropped to only 5 % in 2012.⁴⁷

Under the HRC, the Committee member appointed Special Rapporteur on New Communications and Interim Measures applies Rule 92 upon the recommendation of the Committee's Secretariat.⁴⁸ Usually, all requests are submitted to the Special Rapporteur for decision. In addition, a practice has emerged in the Committee that leads to a certain easing or shifting of the burden of proof. In cases of doubt as to the imminence, credibility or irreparability of the alleged harm, it can indicate so-called "provisional" interim measures. If "provisional" interim measures are applied, the Special Rapporteur explicitly informs the State party that his decision can be revised in light of further information provided by the State party.⁴⁹

By far the largest category of requests for interim measures in practice concerns the staying of removals/deportations allegedly contrary to the *non-refoulement* principle. The examination of such requests is particularly delicate because it requires the adjudicative body to evaluate, usually in a very short period of time, the applicant's hypothetical situation in the receiving state.⁵⁰ The report prepared by the Registry of the Court provides an idea of the elements taken into consideration by the ECtHR when exam-

⁴⁷ See official statistics published by the Court on Rule 39 requests granted and refused in 2008, 2009 and 2010, 2011 and 2012 by responding state, available at <<http://www.echr.coe.int>>. The statistic relates to the total number of decisions taken by the Court under Rule 39. It does not provide any information as to the number of requests submitted to the Court (CDDH Report, note 9, para. 10).

⁴⁸ The HRC lacks resources and technical means to collect statistical data on the number of requests for interim relief submitted. Its annual reports, however, provide some information as to the Committee's use of interim measures. Over the last three reporting periods, from 1.8.2009 to 30.3.2012, for instance, the Special Rapporteur issued a total of 42 decisions calling for interim measures with respect to a total of 256 registered cases; from 1.8.2011 to 30.3.2012 the Special Rapporteur issued 10 requests for interim measures (HRC, Annual Report, A/67/40 [Vol. I], para. 128); from 1.8.2010 to 31.7.2011 and from 1.8.2009 to 31.7.2010 the Special Rapporteur issued 16 requests respectively (HRC, Annual Reports, A/66/40 [Vol. I] and A/65/40 [Vol. I], paras. 10).

⁴⁹ Interview with *Sir Nigel Rodley* (note 8).

⁵⁰ In general, both the ECtHR and the HRC attach more importance to the personal situation of the applicant than to the general situation in the receiving state. Hence, the systematic application of interim measures with a view to halting deportations to a particular country remains the exception. Under the ECHR, Somalis facing deportation to Mogadishu have benefitted from the systematic application of Rule 39. In 2010, a similar practice was temporarily applied with respect to removals to Iraq (*F. Tulkens*, La procédure d'urgence devant la Cour européenne des droits de l'homme, Colloque L'Europe et les droits de l'homme, Conseil National des Barreaux / Délégation des Barreaux de France, Bruxelles, 1.4.2011, 30 and 31, available at <www.dbfbruxelles.eu>). Sometimes Rule 39 was applied in a quasi-systematic manner pending the adoption of a lead judgment by the Court; see, for example, ECtHR, *NA. v. the United Kingdom*, Appl. No. 25904/07, 17.7.2008, § 21.

ining a request for interim measures in this field. These include the general situation in the destination country, the existence of a personal risk for the applicant established by a substantiated account, the seriousness of the damage alleged in the case of return, the elements of proof provided and their *prima facie* authenticity (arrest/search warrant, medical certificates etc.), the relevant case-law of the Court (judgments and decisions, but also precedents relating to Rule 39) and the reasoning behind the decisions of national authorities and courts.⁵¹ As to the last element, the Registry also emphasised that the Court attaches particular importance to the conclusions reached by national bodies. As the ECtHR considers national courts to be better placed to evaluate evidence presented before them, a “detailed and precise reasoning of national courts constitutes a solid base allowing the Court to be assured that the examination of the risks alleged by the applicant has been in conformity with the requirements of the Convention, and consequently to conclude by the possible rejection of the request for interim measures”.⁵² Thus, in certain situations, the principle of subsidiarity may lead the adjudicator to exercise particular restraint when examining a request for interim relief.⁵³

Under both the ECHR and the ICCPR, the decision to grant or deny interim relief is communicated to the parties only, usually without disclosing the reasons for which interim relief was ordered or denied.⁵⁴

6. Re-Examination and Challenging of Interim Measures

The adjudicator may revisit its initial decision to issue interim measures in the course of the proceedings and reassess whether the application of a specific interim measure is still justified and should be prolonged or even adapted to new circumstances, or alternatively whether the measures should be lifted. The adjudicator can do so of its own motion, but most often, such re-examination is performed on request of the State party concerned. Even though the decision to afford interim protection can, formally, not be appealed, both the HRC and the ECtHR allow the challenging of an interim

⁵¹ Information document by the Registry (note 9), para. 28.

⁵² Information document by the Registry (note 9), para. 29.

⁵³ The principle of subsidiarity also has bearing in the context of interim relief. As concerns the ECtHR, this was explicitly expressed during the Izmir Conference, where it was recalled that the Court is not an immigration appeals tribunal or a court of fourth instance and that interim protection must be granted in accordance with the principle of subsidiarity (Izmir Declaration, note 45, Follow-up Plan, A. para. 3).

⁵⁴ CDDH Report (note 9), para. 33.

measure⁵⁵ and thereby alleviate, to a certain extent, the fact that the State party is normally not consulted during the initial examination. Under the ECHR, a state “(...) which considers that it is in possession of materials capable of convincing the Court to annul the interim measure (...)”⁵⁶ can ask for the lifting of the measure at any time.⁵⁷ The same possibility exists before the HRC, particularly but not only when it indicates “provisional” interim measures.⁵⁸

7. Transparency

The lack of transparency with which the human rights judiciary handles interim relief has raised some criticism among legal scholars, first and foremost regarding decision-making. *Rieter* for example has argued that adjudicators should publish and give reasons for their decisions on interim measures for grants and refusals alike. This would render their practice more consistent, coherent and thereby also more predictable and persuasive vis-à-vis states.⁵⁹ Recent developments show that these concerns have been heard – at least to a certain extent. Under the Convention system, the Committee of Experts on the Reform of the Court recently discussed whether the Court could give reasoning for its grants of interim measures “(...) to better understand what amounts to irreparable harm, to address necessary issues at the domestic level (i. e. the need for a more thorough examination of risk by domestic courts) and to enable States to more appropriately challenge the imposition of interim measures”.⁶⁰ The Registry of the Court, however, took the position that, for practical reasons, motivating decisions could only

⁵⁵ For an example regarding the ECtHR in which an interim measure was lifted upon request of the Government, see *Shamayev and Others v. Georgia and Russia*, Appl. No. 36378/02, 12.4.2005, ECHR 2005-III, §§ 20 and 21; in *Paladi v. Moldova* (GC), Appl. No. 39806/05, 10.3.2009, the ECtHR held in § 90: “(...) while a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly (...)”; for an example from the HRC, in which an interim measure was extended and adapted, see *Liliana Assenova Naidenova et al. v. Bulgaria*, Communication No. 2073/2011, 30.10.2012, para. 10.

⁵⁶ *Paladi v. Moldova* (note 55), § 90.

⁵⁷ Information document by the Registry (note 9), para. 21.

⁵⁸ HRC, *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, 30.10.1996, para. 4.1.; see also *S. Ghandhi* (note 7), 215.

⁵⁹ *E. Rieter* (note 5), 1083 et seq.; see also, for example, *Y. Haeck/C. Burbano Herrera/L. Zwaak*, Non-compliance with a Provisional Measure Automatically Leads To a Violation of the Right of Individual Application ... or Doesn't It?, *EuConst* 4 (2008), 57 et seq.

⁶⁰ CDDH Report (note 9), para. 33.

be envisaged in exceptional circumstances and on an *ad hoc* basis.⁶¹ A compromise favoured by the CDDH could consist in publishing a summary of the reasons for which interim relief was granted or denied over a given period.⁶² The Special Rapporteur on New Communications and Interim Measures recently suggested such an approach also for the HRC.⁶³

III. Scope of Interim Protection

1. Threshold for Interim Protection

a) Gravity

In line with the case-law of the ICJ,⁶⁴ the HRC and the ECtHR rely on the criterion of “irreparable harm” to decide whether the indication of interim measures is justified in a given case. While the HRC has codified, in Rule 92 of the Rules of Procedure, that interim measures are only meant to “avoid *irreparable damage* to the victim of the alleged violation” (emphasis added), the ECtHR has held in its case-law that in practice it “applies Rule 39 only if there is a *risk of irreparable damage*” (emphasis added).⁶⁵ What – exactly – constitutes irreparable damage, however, is determined on a case-by-case basis by both the HRC and the ECtHR.⁶⁶ The closest that the case-law of the two adjudicators has come to a general definition of irreparability was in *Charles E. Stewart v. Canada*, in which the HRC held:

The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a

⁶¹ Information document by the Registry (note 9), para. 31.

⁶² CDDH Report (note 9), para. 44.

⁶³ Interview with *Sir Nigel Rodley* (note 8). The fact that the issue of interim measures is currently examined by the adjudicators or related expert bodies can by itself contribute its part on rendering practices and procedures more transparent.

⁶⁴ ICJ, *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Interim Protection, Order of 17.8.1972, I.C.J. Reports 1972, 16, § 21.

⁶⁵ *Mamatkulov and Askarov v. Turkey* (note 4), §§ 104 and also § 103 and 108: “(...) The grounds on which Rule 39 may be applied are not set out in the Rules of Court but have been determined by the Court through its case-law. (...) As far as the applicant is concerned, the result that he or she wishes to achieve through the application is the preservation of the asserted Convention right before irreparable damage is done to it.”

⁶⁶ HRC, *Charles E. Stewart v. Canada*, Communication No. 538/1993, 1.11.1996, para. 7.7: “(...) what may constitute *irreparable damage* to the victim within the meaning of rule 86 [now rule 92] cannot be determined generally” (emphasis added). *Mamatkulov and Askarov v. Turkey* (note 4), § 103.

finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 [now rule 92] where it believes that compensation would be an adequate remedy.⁶⁷

Compared to the extensive catalogue of guarantees the observance of which the ECtHR and the HRC are tasked with monitoring, the risk of a violation of only a very limited number of rights has been considered “irreparable” in practice so far.⁶⁸ The Court has repeatedly held that interim measures are only applied in limited spheres;⁶⁹ most recently, it has even stated that it “(...) issues them, as a matter of principle, in truly exceptional cases”.⁷⁰ Typically, interim measures are granted in cases that involve asserted violations of the right to life (Article 2 ECHR, Article 6 ICCPR) and the right not to be subjected to torture or inhuman treatment (Article 3 ECHR, Article 7 ICCPR).⁷¹ Irreparable harm is therefore first and foremost understood as physical harm to life and limb.⁷² Aside from this “common core”,⁷³ a certain expansion of the interpretation of irreparability can be observed. Accordingly, alleged violations of the right to respect for private and family life (Article 8 ECHR, Article 17 ICCPR) have occasionally also led the HRC and the ECtHR to grant interim relief.⁷⁴ In very exceptional cases, the HRC has even issued interim measures to prevent potential violations of the freedom of thought, conscience and religion (Article 18), the freedom of expression (Article 19 ICCPR) or the rights of indigenous peoples (Article 27 ICCPR).⁷⁵ On its part, the ECtHR may exceptionally apply interim measures to prevent allegedly flagrant violations of the right to a fair trial (Article 6 ECHR) or the right to liberty and security (Article 5 ECHR) but also with respect the right of individual petition (Article 34 ECHR) or the right to property (Article 1 Protocol 1).⁷⁶

⁶⁷ *Charles E. Stewart v. Canada* (note 66), para. 7.7.

⁶⁸ *Mamatkulov and Askarov v. Turkey* (note 4), § 104; for an overview see ECtHR, Press Unit, Factsheet – Interim measures, January 2013, available at <<http://www.echr.coe.int>>.

⁶⁹ *Mamatkulov and Askarov v. Turkey* (note 4), § 104.

⁷⁰ *Savridin Dzhurayev v. Russia* (note 6), § 213.

⁷¹ *Mamatkulov and Askarov v. Turkey* (note 4), § 104.

⁷² *Savridin Dzhurayev v. Russia* (note 6), § 213.

⁷³ *E. Rieter* (note 5), 1089.

⁷⁴ *Mamatkulov and Askarov v. Turkey* (note 4), § 104.

⁷⁵ Interview with *Sir Nigel Rodley* (note 8).

⁷⁶ Information document by the Registry (note 9), para. 26.

b) Temporal Urgency

The alleged risk of harm must not only be of certain gravity, but must also be imminent. Interim measures are only applied where the temporal proximity of the risk requires urgent action on the part of the adjudicator. The assessment of whether a risk is imminent will, again, depend on the nature and circumstances of a given case. In the context of deportations, “imminent” means that the deportation is about to take place or the person concerned can be removed without any further decisions being taken. This is regularly the case where a removal date is already scheduled or a person is subject to an enforceable removal order. On the other hand, both the Court and the HRC do not consider a risk as imminent where domestic avenues capable of suspending removal are available.⁷⁷ In general, whenever it is still possible for the applicant to obtain what he seeks by his request for interim relief also at domestic level, a risk is likely not to be regarded imminent.

Länsman et al. v. Finland (I) is one of the only instances in which one of the adjudicators, the HRC in this particular case, explicitly discussed the requirement of imminence in its views on the merits. The authors of the communication, a group of indigenous people, feared that the quarrying of stone could cause irreparable damage to their rights under Article 27 of the Covenant. The HRC agreed with the Government’s position and refused to apply interim measures. Because only limited test quarrying in a specific area had been carried out at the time, the indication of interim protection would have been premature.⁷⁸

2. Addressees and Beneficiaries

Addressees of an interim measure are almost exclusively states. The ECtHR usually directs its orders under Rule 39 towards the Government of the responding state, while the HRC addresses its interim measures to the State party concerned. On few occasions only, the ECtHR has asked an applicant who was on hunger strike in prison to end the strike while his case

⁷⁷ For the requirement to exhaust domestic remedies with suspensive effect, see above II. 4., 333.

⁷⁸ HRC, *Länsman et al. v. Finland (I)*, Communication No. 511/1992, 14.10.1993, paras. 4.3 and 6.3.

was under consideration by the Court. This remains a rare category of cases in which applicants have been the addressees of interim measures.⁷⁹

Inversely, the applicants or alleged victims of a violation are the beneficiaries of interim measures. Exceptionally and unlike under the ECHR, individuals in the immediate environment of the author or alleged victim have also benefitted from interim relief before the Committee. In *Gunaratna v. Sri Lanka*, for example, the Special Rapporteur asked “the State party, under Rule 92 of its rules of procedure, to afford the author *and his family* protection against further intimidations and threats” (emphasis added).⁸⁰ An unspecified circle of beneficiaries, potentially including all individuals under the jurisdiction of the State parties, was protected in *Georgia v. Russia (II)*, where the Court called “upon both the High Contracting Parties concerned to honour their commitments under the Convention, particularly in respect of Articles 2 and 3 of the Convention”.⁸¹

3. Duration of Protection

Theoretically, interim measures are only necessary as long as the imminent risk of irreparable harm, which led to the adoption of the measure in the first place, persists. As, however, a periodical re-assessment of a given risk is not practicable, interim measures are normally adopted for the duration of the proceedings.⁸² This is usually the case where an interim measure is indicated “until further notice” (ECtHR)⁸³ or while the case is “under examination” (HRC)⁸⁴. In some instances, the ECtHR applied Rule 39 for a specified period, mostly to allow it to gather further evidence.⁸⁵ Since incomplete requests are now increasingly dismissed under the centralised processing system, interim measures with a time limit will probably be indicated less often in future. The so-called provisional interim measures developed by the Committee are not adopted for a specified duration, but remain

⁷⁹ See, for example, EComm, *Bhuyian v. Sweden* (dec.), Appl. No. 26516/95, 14.9.1995; in a recent case the Court refused to apply Rule 39 (ECtHR, *Rappaz v. Switzerland* [dec.], Appl. No. 73175/10, 26.3.2013).

⁸⁰ HRC, *Gunaratna v. Sri Lanka*, Communication No. 1432/2005, 17.3.2009, para. 1.2.

⁸¹ *Georgia v. Russia (II)* (note 17), § 5.

⁸² CDDH Report (note 9), para. 34.

⁸³ CDDH Report (note 9), para. 34.

⁸⁴ See, for example, HRC, *Lyubov Kovaleva and Tatyana Kozyar v. Belarus*, Communication No. 2120/2011, 29.10.2012, para. 1.2.

⁸⁵ See, for example, ECtHR, *F.H. v. Sweden*, Appl. No. 32621/06, 20.1.2009, §§ 40 and 44.

in force during the consideration of the communication if not challenged and lifted.

Where the application of a particular measure is re-assessed, the adjudicator may decide to lift an interim measure if it considers that the imminent risk of irreparable harm never existed or does not exist anymore. Alternatively, if it finds that a risk persists, an interim measure can be maintained or extended.⁸⁶ An interim measure is usually lifted when an applicant does not pursue his application, the judgment or decision becomes final (ECtHR), or the Committee has rendered its views, respectively.⁸⁷

4. Nature of Protection

The content and nature of an interim measure varies from case to case and depends on the characteristics of the risk of irreparable harm the realisation of which it is designed to prevent. Mostly, an interim measure consists of a simple request to the state to abstain from a particular action, such as not to deport, evict or execute a person. Less often, the HRC and the ECtHR require states to take positive action. The degree of specificity of such positive measures may, however, vary considerably. For example, in the context of the protection of detainees, both the HRC and ECtHR have issued rather specific measures requiring a state to, *inter alia*, provide adequate medical treatment, transfer a detainee to a specialised medical institution or grant him access to a lawyer.⁸⁸ In other situations, more general measures were adopted, such as the call upon the State parties “to honour their commitments under the Convention, particularly in respect of Articles 2 and 3 of the Convention”,⁸⁹ “to avoid any action that might cause irreparable harm to the alleged victim”⁹⁰ or to “take all necessary measures in order to guarantee the applicants’ personal security”.⁹¹

⁸⁶ See above II. 6., 337, in particular note 55.

⁸⁷ See note 22.

⁸⁸ See below IV. 3., 353.

⁸⁹ *Georgia v. Russia (II)* (note 17), § 5.

⁹⁰ HRC, *Katombe L. Tshishimbi v. Zaïre*, Communication No. 542/1993, 25.3.1996, para.

4.1.

⁹¹ ECtHR, *R.R. and Others v. Hungary*, Appl. No. 19400/11, 4.12.2012, § 4.

5. The Legal Effect of the Protection

The effectiveness of interim protection depends on the legal force the indicated measure is capable of producing. Both the HRC and the ECtHR acknowledged this when they, relying on an evolving interpretation of the relevant provisions, endowed their interim measures with obligatory character. Although neither the HRC's nor the Court's constitutive document or rules of procedure contain provisions on the effect of interim measures, and the issue has long been the subject of controversy, both adjudicators used their case-law to establish a state obligation to abide by a request for interim measures.⁹²

In *Dante Piandong et al. v. The Philippines*, the Committee held that a failure to implement an interim measure is incompatible with the obligation of a state under the Optional Protocol to cooperate in good faith with the Committee and abstain from any action that could frustrate the consideration or examination of a communication or render its views nugatory or futile.⁹³ It held that "(...) interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol" and that "(f)louting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol".⁹⁴

In addition to the obligation to cooperate in good faith flowing from the Optional Protocol, the Committee also inferred a duty to respect interim measures from the Covenant itself. In its Concluding Observations with respect to the second periodic report submitted by Uzbekistan, the Com-

⁹² It should be noted here that it was the Committee against Torture that established, as the first international adjudicator to do so, an obligation to respect interim measures (CAT, *Cecilia Rosana Nunez Chipana v. Venezuela*, Communication No. 110/1998, 10.11.1998). The HRC followed in 2000 and, in the same year, the IACtHR was the first international court to state that its provisional measures were mandatory. In its *LaGrand* judgment in 2001, the ICJ similarly held that its provisional measures, as indicated under Article 41 of the ICJ Statute, are binding on the parties. In 2005, it was then up to the ECtHR to reconsider its previous case law, in which it had until then denied the obligatory character of interim measures. Thus, in *Mamatkulov and Askarov v. Turkey* (note 4), the Grand Chamber ruled that interim measures would be obligatory also under the Convention system from that point on (*K. Oellers-Frahm* [note 14], 1280 et seq.). See also *J. M. Pasqualucci* (note 7), 20 et seq. who refers to an inter-system harmonisation of the legal effect of interim measures in international human rights law.

⁹³ HRC, *Dante Piandong et al. v. The Philippines*, Communication No. 869/1999, 19.10.2000, paras. 5.1, 5.2 and 5.4; General Comment No. 33 (note 18), para. 19.

⁹⁴ *Dante Piandong et al. v. The Philippines* (note 93), para. 5.4.

mittee stated that “a disregard of the Committee’s requests for interim measures constitutes a grave breach of the State party’s obligations *under the Covenant* and the Optional Protocol (...)” (emphasis added)⁹⁵ and in General Comment No. 31 [80] it specified that the right to an effective remedy set forth in Article 2 (3) ICCPR may require State parties to provide for and implement provisional or interim measures.⁹⁶ Thus, even though the HRC has never used the term “binding” – a decision probably due to its sensitivity to the fact that, unlike the ECtHR’s judgments, the Committee’s views on the merits are not considered to be legally binding under international law⁹⁷ – it has implicitly endowed its interim measures with obligatory character in so far as it considers in compliance as a separate or autonomous breach of the Optional Protocol and the Covenant.⁹⁸ While the majority of States seems to have accepted this approach, a few openly contest the Committee’s practice. Only recently, for instance, Belarus argued, that a request for interim protection is “beyond the mandate of the Committee and (...) not binding in terms of its international legal obligations”.⁹⁹ A similar argument was relied upon by the Canadian Government in *Abani v. Canada*, in which the Government argued “(...) that neither the Covenant nor the Optional Protocol provide for interim measures requests and (...) that such requests are recommendatory, rather than binding”.¹⁰⁰

The origin of the Court’s current approach to the effect of interim measures is to be found in the impactful Grand Chamber judgment of 2005 in *Mamatkulov and Askarov v. Turkey* and is very much based on the HRC’s

⁹⁵ The HRC further held that “(t)he State party should adhere to *its obligations under the Covenant* and the Optional Protocol, in accordance with the principle of *pacta sunt servanda* (...)” (emphasis added) (HRC, Concluding Observations with respect to Uzbekistan, CCPR/CO/83/UZB, 31.3.2005, para. 6). The second paragraph was later reproduced with respect to Canada (HRC, Concluding Observations with respect to Canada, CCPR/C/CAN/CO/5, 28.10.2005, para. 7).

⁹⁶ HRC, General Comment No. 31 (80), Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 29.3.2004, para. 19: “The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavor to repair at the earliest possible opportunity any harm that may have been caused by such violations.” See also *S. Ghandhi* (note 7), 216.

⁹⁷ *C. Tomuschat*, *Human Rights: Between Idealism and Realism*, 2nd ed. 2008, 220.

⁹⁸ *G. J. Naldi* (note 22), 449: “Although the Committee did not explicitly hold that requests for interim measures are legally binding as such on States the end result, for all practical purposes, is essentially the same.” See also *J. Harrington*, *Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection*, McGill L. J. 48 (2003), 67 et seq.

⁹⁹ *Lyubov Kovaleva and Tatyana Kozyar v. Belarus* (note 84), para. 6.3.

¹⁰⁰ HRC, *Abani v. Canada*, Communication No. 1051/2002, 29 March 2004, para. 5.3; for a detailed discussion of the case see the article of *J. Harrington* (note 98).

practice of finding an autonomous violation of the Optional Protocol.¹⁰¹ After recalling that interim measures “play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted” the Court held in *Mamatkulov and Askarov v. Turkey* that “a failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his or her right of [individual petition] and, accordingly, as a violation of Article 34”.¹⁰² More generally, the Court stated that “the effects of the indication of an interim measure to a Contracting State (...) must be examined in the light of the obligations which are imposed on the Contracting States by Articles 1 (...) and 46 of the Convention”.¹⁰³ By virtue of the latter, a State party has to abide by the final judgment of the Court in any case to which it is party. On the basis of this reasoning, the Court explicitly stated in its subsequent practice that its interim measures have binding force on states.¹⁰⁴ The Contracting Parties have confirmed this position in the Follow-up Plan to the Izmir Declaration, in which they reiterated the requirement to comply with interim measures.¹⁰⁵

IV. Typology of Cases

1. Executions

Probably the most obvious manifestation of “irreparable” damage or harm is where the applicant is executed before the international adjudicative

¹⁰¹ *Mamatkulov and Askarov v. Turkey* (note 4), § 42. Among other international cases, the ECtHR referred to the HRC’s views in *Dante Piandong et al. v. The Philippines*. For a detailed discussion of the case, see, for example, A. Mowbray, A New Strasbourg Approach to the Legal Consequences of Interim Measures, HRLR 5 (2005), 377 et seq.; L. Burgorgue-Larsen, Interim Measures in the European System of Human Rights, Inter-American and European Human Rights Journal/Revista Interamericana y Europea de Derechos Humanos, 2 (2009), 99 et seq.; or H. Jorem, Protecting Human Rights in Cases of Urgency: Interim Measures and the Right of Individual Application under Article 34 ECHR, Nordic Journal of Human Rights 4 (2012), 404 et seq.

¹⁰² *Mamatkulov and Askarov v. Turkey* (note 4), §§ 125 and 128.

¹⁰³ *Mamatkulov and Askarov v. Turkey* (note 4), § 126.

¹⁰⁴ ECtHR, *Aoulmi v. France*, Appl. No. 50278/99, 17.1.2006, ECHR 2006-I, § 111; *Savridin Dzhurayev v. Russia* (note 6), § 213.

¹⁰⁵ Izmir Declaration (note 45), Follow-up Plan, A. para. 3; see also CDDH Report (note 9), para. 2.

body can determine whether his or her execution contravenes human rights guarantees. Accordingly, interim measures have served the purpose of requesting governments to suspend the execution of an applicant on death row. As the death penalty has been either abolished or is no longer applied among member states of the Council of Europe,¹⁰⁶ the Strasbourg organs have only made three such requests.¹⁰⁷ Before the HRC, on the other hand, halting executions has long been the main field of application of interim measures.¹⁰⁸ The case of *Lyubov Kovaleva and Tatyana Kozyar v. Belarus* is a recent example. *Mr. Kovaleva* was sentenced to death by the Belarusian authorities after he had been found responsible for the Minsk bombing of 2011. He petitioned the Committee, complaining, *inter alia*, that he would be arbitrarily deprived of his life (Article 6 ICCPR) as the criminal proceedings brought against him had allegedly violated several of his fair trial rights under Article 14 of the Covenant. He also claimed that he had been subjected to ill-treatment during his interrogation “with the purpose to secure a confession of guilt” from him.¹⁰⁹ The Special Rapporteur on New Communications and Interim Measures granted the petitioner’s request for interim relief and asked Belarus not to execute *Mr. Kovaleva* while his case was under consideration by the Committee.¹¹⁰

2. Deportations

a) General Remarks

Today, interim measures are mainly used in *refoulement* cases where it seems plausible that the applicant runs a “real and personal risk”¹¹¹ of being deprived of his or her life or subjected to treatment contrary to the prohibi-

¹⁰⁶ Article 1 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3.5.2002, E.T.S. 187, ratified by 43 states (status May 2013), entered into force 1.7.2003.

¹⁰⁷ See, for example, *Öcalan v. Turkey* (note 20), § 5.

¹⁰⁸ HRC, Annual Report, 103rd (17.10.-4.11.2011) and 104th session (12.-30.3.2012), A/67/40 (Vol. I), para. 155.

¹⁰⁹ *Lyubov Kovaleva and Tatyana Kozyar v. Belarus* (note 84), paras. 3.2 and 3.8.

¹¹⁰ *Lyubov Kovaleva and Tatyana Kozyar v. Belarus* (note 84), para. 1.2; however, Belarus did not comply with the interim measure, see below VI. 2. a), 364.

¹¹¹ See, *inter alia*, *A.A. and Others v. Sweden*, Appl. No. 14499/09, 28.6.2012, § 67; for the general principles of the Court’s case-law in this field see, for example, ECtHR, *Saadi v. Italy* (GC), Appl. No. 37201/06, 28.2.2008, §§ 124-133 or ECtHR, *Salah Sheekh v. the Netherlands*, Appl. No. 1948/04, 11.1.2007, §§ 135-137.

tion of torture or inhuman treatment in the receiving state.¹¹² In a few cases, interim measures were also indicated to stay deportations or removals allegedly contrary to the right to family life, the right to a fair trial or the right to liberty and security.

b) Risk of Being Subjected to the Death Penalty in the Receiving State

Both the HRC and the ECtHR have afforded interim protection to an applicant with a view to halting his or her deportation to a country where he or she could be subjected to the death penalty. As mentioned above, unlike under the ICCPR, the *espace juridique* of the Council of Europe is a *de facto* death penalty free zone.¹¹³ An extradition or expulsion by a Contracting party of person to a country where he or she runs the risk of being subjected to the death penalty violates not only Article 2 ECHR (right to life) and Article 3 ECHR (prohibition of torture and inhuman or degrading treatment) but is also contrary to Article 1 of Protocol 13 (abolition of the death penalty).¹¹⁴ In a recent case, the ECtHR ordered the Albanian Government not to extradite an applicant to the US, where he had been charged with several criminal offences, one of which allowed – in case of a conviction by the US courts – for the application of the death penalty.¹¹⁵ In *Al-Saadoon and Mufdhi v. the United Kingdom*, Rule 39 was applied to request the Government of the United Kingdom not to remove or transfer two Iraqis from the custody of the British army, *inter alia* because of their fear that they would be sentenced to death by the Iraqi authorities.¹¹⁶

Under the ICCPR, the extradition of a petitioner to a State that practises capital punishment may interfere with Articles 6 (2) and 7. The former states that “(i)n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide”.¹¹⁷ In

¹¹² For a comprehensive overview of the Court’s use of interim measures in this field, see *C. Burbano Herrera/Y. Haeck* (note 35).

¹¹³ See note 106.

¹¹⁴ ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Appl. No. 61498/08, 2.3.2010, § 137.

¹¹⁵ ECtHR, *Rrapo v. Albania*, Appl. No. 58555/10, 25.9.2012, §§ 31 and 32.

¹¹⁶ *Al-Saadoon and Mufdhi v. the United Kingdom* (note 114), § 4.

¹¹⁷ The article further reads “(t)his penalty can only be carried out pursuant to a final judgement rendered by a competent court”.

Maksudov et al. v. Kyrgyzstan for example, the HRC asked Kyrgyzstan not to remove four Uzbek nationals to their home country, where they feared the imposition of the death penalty in a manner inconsistent with the requirements of Articles 6 (2) and 7 of the Covenant.¹¹⁸

c) Other Risks for Life and Limb in the Receiving State

Besides the possibility of being subjected to the death penalty, other alleged risks for life and limb in the receiving state have triggered the application of interim relief. In most cases, the asserted risk originates from public authorities; however, it may also stem from private actors or even parties to an armed conflict. Similarly, the reasons for which an applicant is allegedly exposed to such risk may vary. Often, an applicant claims to be prosecuted for political reasons. In *F.H. v. Sweden*, for example, the expulsion of a former officer in *Saddam Hussein's* regime to his home country was stayed in light of his claims that he faced execution (not only by death penalty but also through extra-judicial killing), torture and imprisonment if returned.¹¹⁹ In other cases, it was the applicants' ethnic background or religious beliefs that would allegedly put them at risk vis-à-vis the receiving states' authorities. Thus, in the case of *Abdulkhakov v. Russia*, the ECtHR asked for the halting of the extradition of an applicant of Muslim belief to Uzbekistan, where he was wanted for belonging to "an extremist organisation of a religious, separatist or fundamentalist nature" and several criminal offences related thereto. The applicant claimed that he risked being ill-treated if returned to Uzbekistan.¹²⁰ The ECtHR applied Rule 39 despite the fact that Russia had received assurances from the Deputy Prosecutor General of Uzbekistan "that the applicant would not be subjected to torture, violence or other forms of inhuman or degrading treatment and that the rights of the defence would be respected (...) and (...) that the Uzbek authorities had no intention of persecuting the applicant for political motives or on account of his race or religious beliefs".¹²¹

Other risks raised under Articles 2 or 3 of the Convention that led to the application of Rule 39 include, *inter alia*, the risk of being sentenced to life

¹¹⁸ HRC, *Maksudov et al. v. Kyrgyzstan*, Communication Nos. 1461, 1462, 1476 and 1477/2006, 16.7.2008, para. 1.2.

¹¹⁹ *F.H. v. Sweden* (note 85), § 4.

¹²⁰ ECtHR, *Abdulkhakov v. Russia*, Appl. No. 14743/11, 2.10.2012, §§ 18 and 3.

¹²¹ *Abdulkhakov v. Russia* (note 120), §§ 23 and 4.

imprisonment without the possibility of parole,¹²² of ill-treatment related to the sexual orientation of the applicant,¹²³ of being prosecuted for adultery,¹²⁴ of female genital mutilation,¹²⁵ of sexual exploitation,¹²⁶ or of family vengeance^{127 128}.

Although there is a general presumption that every Contracting State honours its obligations under the ECHR,¹²⁹ the ECtHR has also halted removals between states of the Council of Europe. In *Shamayev and Others v. Georgia and Russia*¹³⁰ and in *Gasayev v. Spain*,¹³¹ for example, the Court requested the suspension of the extraditions of Chechens to Russia, where they were wanted for alleged terrorist activities. More recent applications of Rule 39 concerned mostly transfers of asylum seekers under the Dublin II Regulation to the country of first entry, such as Greece, Malta or Italy. Applicants whose transfer to Greece was stayed claimed that inhuman and degrading detention conditions in Greek holding centres and the deficiencies in the state's asylum procedure (risk of indirect *refoulement*) would expose them to the risk of a violation of Articles 2 and 3 ECHR.¹³² With respect to transfers to Malta and Italy, particularly vulnerable people who feared the inhumane living conditions of asylum seekers and refugees have benefitted from a request to stay their Dublin transfer for the duration of the proceedings before the Court.¹³³

Under the ICCPR, several cases in this category concern the removal of persons to Sri Lanka, *inter alia* by Canada. In *Pillai et al. v. Canada*, for example, the HRC stopped the repatriation of an asylum-seeking family.¹³⁴

¹²² ECtHR, *Babar Ahmad and Others v. the United Kingdom*, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10.4.2012.

¹²³ ECtHR, *K.N. v. France and 5 other applications* (dec.), Appl. No. 47129/09, 19.6.2012.

¹²⁴ ECtHR, *Jabari v. Turkey*, Appl. No. 40035/98, 11.7.2000, ECHR 2000-VIII.

¹²⁵ ECtHR, *Abraham Lunguli v. Sweden* (dec.), Appl. No. 33692/02, 1.7.2003.

¹²⁶ ECtHR, *M. v. the United Kingdom* (dec.), Appl. No. 16081/08, 1.12.2009. The applicant in this case also invoked Article 4 of the ECHR (prohibition of slavery and forced labour).

¹²⁷ ECtHR, *H.N. v. the Netherlands*, Appl. No. 20651/11 (case pending at the time of writing).

¹²⁸ Factsheet - Interim measures (note 68).

¹²⁹ *M.S.S. v. Belgium and Greece* (note 25), § 32.

¹³⁰ *Shamayev and Others v. Georgia and Russia* (note 55), § 6.

¹³¹ ECtHR, *Gasayev v. Spain* (dec.), Appl. No 48514/06, 17.2.2009.

¹³² See, for example, ECtHR, *Shakor and 48 other applications v. Finland* (dec.), Appl. No. 10941/10, 28.6.2011.

¹³³ With respect to Italy, see, for example, ECtHR, *M.S.M. and Others v. Denmark* (dec.), Appl. No. 25404/12, 27.11.2012; with respect to Malta, see, for example, ECtHR, *F.S. and Others v. Finland*, Appl. No. 57264/09, 13.12.2011.

¹³⁴ HRC, *Pillai et al. v. Canada*, Communication No. 1763/2008, 25.3.2011, para. 1.2.

The family left Sri Lanka for Canada in 2003 after the spouses were allegedly arrested and tortured twice by police forces that suspected them of supporting the Tamil Tigers. When the Canadian authorities rejected their refugee claim, they petitioned the Committee, alleging that they would again risk torture and ill-treatment if returned.¹³⁵ On the basis of similar claims, the Special Rapporteur requested, in *Warsame v. Canada*, the suspension of the removal of a Somali to his home country. The request was upheld although the Canadian Government asked that the interim measure be lifted, arguing that the petitioner posed a danger to public security and failed to present a *prima facie* case.¹³⁶ In *Israil v. Kazakhstan*, the State was asked not to extradite a Chinese national of Uighur origin pending the Committee's consideration of the case. The petitioner, who provided a radio station with information on the alleged killing of Uighurs by the police, feared torture and the death penalty upon return to China.¹³⁷

d) Health Risks

Occasionally, the ECtHR has also granted interim measures in cases where applicants claimed that their state of health would render removal contrary to Articles 2 and/or 3 ECHR. In *Ahmed v. Sweden*, the ECtHR halted the deportation of an applicant who "complained that his expulsion to either Somalia or Kenya would amount to a violation of Article 3 of the Convention since the specific medical treatment and medicines required by his HIV infection were not available in these countries".¹³⁸ Rule 39 was, however, also applied in cases where the risk lay in the effects of the deportation itself. Thus, in *Einborn v. France*, the extradition of a suicidal applicant was stayed. The measure was lifted after the Government submitted a medical certificate demonstrating that the applicant's medical condition allowed for the transfer.¹³⁹

¹³⁵ *Pillai et al. v. Canada* (note 134), para. 3.1.

¹³⁶ HRC, *Warsame v. Canada*, Communication No. 1959/2010, 21.7.2011, paras. 1.2 and 6.1.

¹³⁷ HRC, *Israil v. Kazakhstan*, Communication No. 2024/2011, 31.10.2011, paras. 1.2, 2.1 and 3.1; other examples by the HRC are *Mahmoud Walid Nakrash and Liu Qifen v. Sweden*, Communication No. 1540/2007, 30.10.2008; *Kaur v. Canada*, Communication No. 1455/2006, 30.10.2008.

¹³⁸ See, for example, ECtHR, *Ahmed v. Sweden*, Appl. No. 9886/05, 22.2.2007, §§ 20 and 4.

¹³⁹ ECtHR, *Einborn v. France* (dec.), Appl. No. 71555/01, 16.10.2001, §§ 9 and 10.

e) **Risks of a Flagrant Breach of Fair Trial Rights and Indefinite Arbitrary Detention**

In *Othman (Abu Qatada) v. the United Kingdom* the ECtHR stayed an expulsion on the basis of an application alleging not only a violation of Articles 2 and 3, but also of Articles 6 (right to a fair trial) and 5 (right to liberty and security) of the ECHR.¹⁴⁰ The case concerned a Jordanian applicant who was convicted *in absentia* “of conspiracy to carry out bombings in Jordan, which resulted in (...) attacks on the American School and the Jerusalem Hotel in Amman in 1998”.¹⁴¹ Having fled Jordan, the applicant was granted refugee status in the UK until the Secretary of State decided to remove him on the basis of a memorandum of understanding (MOU) with Jordan. The applicant feared that, if he were to be removed to Jordan, he would be retried and run a real risk of being tortured for the purpose of obtaining a confession (alleged violation of Articles 3 and 6 ECHR). Under Article 5 ECHR, he further complained that he would be at a risk of being held for up to 50 days in *incommunicado* detention. On the merits, while the Court did not consider that there was a risk of ill-treatment for the applicant, it did find, for the first time, that the extradition of the applicant would violate Article 6 ECHR. According to the Court, the fact that evidence obtained by the torture of third persons could be admitted at the applicant’s retrial amounted to a risk of a flagrant denial of justice, rendering an extradition to Jordan contrary to the Convention.¹⁴² Further, the Court held that, while a risk of a grave breach of the rights enshrined in Article 5 in the receiving state may also, in principle, as under Article 6, forbid the expulsion or extradition of a person, the alleged risk of *incommunicado* detention put forward by the applicant did not have the gravity required.¹⁴³ It seems possible that, in future, an Article 5 or Article 6 claim alone may trigger an intervention by the ECtHR under Rule 39. However, the threshold to be reached is high: an applicant will have to demonstrate that he or she is at risk of a flagrant denial of justice for Article 6 claims or of indefinite arbitrary detention for Article 5 claims.¹⁴⁴

¹⁴⁰ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Appl. No. 8139/09, 17.1.2012, §§ 3 and 4.

¹⁴¹ *Othman (Abu Qatada) v. the United Kingdom* (note 140), § 10.

¹⁴² *Othman (Abu Qatada) v. the United Kingdom* (note 140), §§ 269-286.

¹⁴³ *Othman (Abu Qatada) v. the United Kingdom* (note 140), §§ 231-235.

¹⁴⁴ Information document by the Registry (note 9), para. 26.

f) Risks for a Child's Well-Being

Under the ECHR, an alleged violation of the right to respect for private and family life (Article 8 ECHR) has also exceptionally led to the adoption of interim measures, mostly for the purpose of preventing the separation of parents from children or vice versa where the child's well-being was in danger.¹⁴⁵ In *B. v. Belgium*, interim measures were ordered to suspend the Hague Convention return of a girl to her allegedly violent father in the US.¹⁴⁶ Similarly, in *Neulinger and Shuruk v. Switzerland*, the ECtHR requested Switzerland not to enforce the return of *Noam Shuruk* to Israel, where he would have risked suffering harm from his unstable father (alleged violation of Article 8, taken separately and in conjunction with Articles 3 and 9 of the Convention).¹⁴⁷ The Court has also applied Rule 39 to halt the expulsion or extradition of a parent in cases in which the child was not to be removed. It does not, however, grant interim measures where the family can be expected to accompany the expelled parent or child if no risk of harm for the child is shown or in cases that do not involve a child at all.

3. Detention

Interim measures have served the purpose of protecting detainees from risks arising out of their situation in detention. Both the ECtHR and the HRC have indicated interim measures to ensure a detainee's access to adequate medical care and legal assistance during detention.

In the case of *Yakovenko v. Ukraine*, for instance, the applicant, relying on Article 3 ECHR, complained about a lack of medical assistance during his detention in a Ukrainian prison. He was infected with HIV and suffered from tuberculosis but, despite his poor health, had never been hospitalised. Under Rule 39, the President of the Chamber requested that the Government "ensure that the applicant was transferred immediately to a hospital or other medical institution where he could receive the appropriate treatment for his medical condition".¹⁴⁸

¹⁴⁵ In some cases, the risk for the child may also raise an issue under Article 2 or 3 ECHR.

¹⁴⁶ ECtHR, *B. v. Belgium*, Appl. No. 4320/11, 10.7.2012, § 35.

¹⁴⁷ ECtHR, *Neulinger and Shuruk v. Switzerland*, Appl. No. 41615/07, 6.7.2010, §§ 5 and 3.

¹⁴⁸ ECtHR, *Yakovenko v. Ukraine*, Appl. No. 15825/06, 25.10.2007, § 3; see also ECtHR, *Tymoshenko v. Ukraine*, Appl. No. 49872/11, 30.4.2013, § 122; for a similar recent case, in which the interim measure was not complied with and the applicant died in detention, see ECtHR, *Salakhov and Islyamova v. Ukraine*, Appl. No. 28005/08, 14.3.2013.

It appears from its case-law, however, that the ECtHR only applies Rule 39 where the applicant has a life-threatening condition, is in serious pain or suffers great psychological distress. Untenable detention conditions in general, which might admittedly be contrary to Article 3 but do not pose a specific and grave risk for the health of the applicant, have not led the Court to apply Rule 39. In *Lorsé and Others v. the Netherlands*, an applicant claiming that the maximum security detention regime to which he was subjected constituted inhuman or degrading treatment asked the Court to order his transfer to another prison under Rule 39. Although the ECtHR found, on the merits, that “the combination of routine strip-searching with the other stringent security measures (...) amounted to inhuman or degrading treatment in violation of Article 3 of the Convention”, it did not grant the applicant’s request for interim measures.¹⁴⁹

An interesting application of Rule 39 can be found in *Aleksanyan v. Russia*, a case which also concerned a HIV-positive detainee. In complement to requesting the applicant’s transfer to a specialised medical institution, the Court asked the Government to form a medical commission, composed on a bipartisan basis, to diagnose the applicant’s health problems, suggest treatment and decide whether the applicant’s medical conditions could be adequately treated in the medical facility of the detention centre.¹⁵⁰ In its judgment on the merits, the Court explained that, by requesting the establishment of a mixed commission, “it sought to obtain more detailed information about the applicant’s state of health and the medical facilities existing in the remand prison, which would allow it to corroborate or rebut the parties’ conflicting accounts”.¹⁵¹ Though, whilst the indicated measure aims to assure the proper establishment of the facts of the case, it may also have helped the applicant to substantiate his claim and thereby to protect the Convention rights he had asserted (Articles 2 and 3 ECHR).

Umarova v. Uzbekistan is a recent example in which the HRC used interim measures to protect a person in detention and ensure adequate access to medical treatment. The author of the communication claimed that her husband was arbitrarily detained, tortured and ill-treated. She addressed the Committee with a request for interim measures, submitting that her husband’s health had severely deteriorated during his detention. In a rather broad manner the Special Rapporteur requested the State party to adopt all necessary measures to protect *Mr. Umarova*’s life, safety and personal integrity, in particular by providing him with the necessary and appropriate

¹⁴⁹ ECtHR, *Lorsé and Others v. the Netherlands*, Appl. No. 52750/99, 4.2.2003, § 74.

¹⁵⁰ ECtHR, *Aleksanyan v. Russia*, Appl. No. 46468/06, 22.12.2008, §§ 80 and 76.

¹⁵¹ *Aleksanyan v. Russia* (note 150), § 231.

medical care and by abstaining from administering any drugs detrimental to his mental or physical health, so as to avoid irreparable harm to him, while the case was under consideration of the Committee.¹⁵²

Furthermore, interim measures have been applied to ensure that detained applicants had access to a lawyer. In the case of *Shtukaturov v. Russia*, the applicant alleged “that by depriving him of his legal capacity without his participation and knowledge the domestic courts had breached his rights under Articles 6 and 8 of the Convention”. In addition, he put forward that his detention in a psychiatric hospital would infringe upon Articles 3 and 5 of the Convention.¹⁵³ In its judgment on the merits, the Court reproduced – in unprecedented detail – the order for interim measures it had indicated in the case:

(T)he respondent 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 a meeting with his client at regular intervals in future. The lawyer, in turn, was obliged to be cooperative and comply with reasonable requirements of the hospital regulations.¹⁵⁴

The HRC has issued similar requests. In the above-mentioned case of *Umarova v. Uzbekistan*, the Special Rapporteur, in complement to ordering interim relief with respect to the victim’s state of health, asked the State party to allow *Mr. Umarova* to see his lawyer.¹⁵⁵

4. Safety and Physical Integrity in General

Both adjudicators have also intervened outside the context of detention pending the proceedings when an applicant’s safety, security or life has allegedly been in danger. In *Bitiyeva and X. v. Russia*, the ECtHR granted interim relief to a woman who claimed that she was being threatened and harassed by the military and law-enforcement bodies in Chechnya. She

¹⁵² HRC, *Umarova v. Uzbekistan*, Communication No. 1449/2006, 19.10.2010, paras. 5.1 and 5.2.

¹⁵³ ECtHR, *Shtukaturov v. Russia*, Appl. No. 44009/05, 27.3.2008, § 3.

¹⁵⁴ *Shtukaturov v. Russia* (note 153), § 33.

¹⁵⁵ *Umarova v. Uzbekistan* (note 152), para. 5.2.

seized the Court under Articles 2, 3, 13 and 34 of the Convention after her mother, a political figure and the second applicant in the case, had been killed by a group of uniformed gunmen. She submitted that she had felt intimidated ever since and stated that the police was looking for her and had questioned her aunt about the proceedings in Strasbourg. In addition, she claimed that, after the killing of her mother, her brother had been detained and ill-treated by military forces. Acting under Rule 39 the Court “requested the Russian Government to take all measures to ensure that there was no hindrance in any way of the effective exercise of the second applicant’s right of individual petition as provided by Article 34 of the Convention”.¹⁵⁶ While the indicated measures referred explicitly to the protection of the effective right of individual petition under Article 34 ECHR, given the context of the case, one can also argue that it aimed at guaranteeing the applicant’s general safety and security, thereby protecting her rights under Articles 2 or 3 of the Convention. A request similarly broad as the one in *Bitiyeva and X. v. Russia* was recently made in *R.R. and Others v. Hungary*. The case concerned an applicant who agreed to collaborate in a case against a drug trafficking mafia, of which he was once an active member. After he and his family were removed from a witness protection programme that should have shielded them from acts of vengeance, the Court requested the Hungarian government to take all necessary measures in order to guarantee the applicants’ personal security pending the Court’s examination of the case.¹⁵⁷

Another, although peculiar, example of this category of interim measures can be found the recent interstate case of *Georgia v. Russia (II)*, in which the Court applied Rule 39 in the context of an armed conflict. Following the outbreak of hostilities in August 2008, Georgia requested the application of Rule 39 against Russia. The President of the Court himself “decided to apply Rule 39 of the Rules, calling upon both the High Contracting Parties concerned to honour their commitments under the Convention, particularly in respect of Articles 2 and 3 of the Convention”.¹⁵⁸

An example of the Committee’s use of interim measures to protect a petitioner’s safety, security or life can be found in *Katombe L. Tshishimbi v. Zaire*, for instance, where the alleged victim of an enforced disappearance benefitted from an interim measure. *Mr. Tshishimbi*, a military advisor to the oppositional Government of the time, had allegedly been abducted and was being ill-treated in the headquarters of the National Intelligence Ser-

¹⁵⁶ ECtHR, *Bitiyeva and X v. Russia*, Appl. Nos. 57953/00 and 37392/03, 21.6.2007, § 63.

¹⁵⁷ *R.R. and Others v. Hungary* (note 91), § 4.

¹⁵⁸ *Georgia v. Russia (II)* (note 17), § 5.

vice. The Special Rapporteur requested the State “to avoid any action that might cause irreparable harm to the alleged victim”.¹⁵⁹ In *Gunaratna v. Sri Lanka*, a more recent case, the HRC granted interim protection to the petitioner and his family. Mr. *Gunaratna*, who was allegedly tortured by police forces, claimed to have received several death threats after he took legal action against his ill-treatment. The Special Rapporteur asked “the State party, under Rule 92 of its rules of procedure, to afford the author and his family protection against further intimidations and threats. The State party was also requested to provide the Committee, at its earliest convenience, with its comments on the author’s allegations that he and his family have been denied such protection.”¹⁶⁰

5. Evictions

More recently, the HRC and the ECtHR have indicated interim measures to prevent evictions from being carried out. In *Yordanova and Others v. Bulgaria*, an illegal Roma settlement was about to be destroyed and its members to be forcibly removed. The ECtHR “indicated to the Government of Bulgaria, under Rule 39 of the Rules of Court, that the applicants should not be evicted from their houses (...) pending receipt by the Court of detailed information about any arrangements made by the authorities to secure housing for the children, elderly, handicapped or otherwise vulnerable individuals to be evicted”. After the Court had received information that “two local social homes could provide five rooms each and that several elderly persons could be housed in a third home” and “that none of the applicants was willing to be separated from the community and housed under such conditions, not least because it was impossible, according to them, to earn a living outside the community”, the Court “decided (...) to lift the interim measures, specifying that the decision was taken on the assumption that the Court and the applicants would be given sufficient notice of any change in the authorities’ position for consideration to be given to a further measure under Rule 39 of the Rules of Court”.¹⁶¹

The above-cited passages suggest that the ECtHR only applies interim measures if the eviction is likely to be conducted in a manner that would raise an Article 3 issue of extreme hardship, most notably vis-à-vis vulner-

¹⁵⁹ *Katombe L. Tshishimbi v. Zaire* (note 90), paras. 4.1 and 2.1-2.5.

¹⁶⁰ *Gunaratna v. Sri Lanka* (note 80), paras. 1.2 and 2.1-3.2, in particular para. 2.4.

¹⁶¹ ECtHR, *Yordanova and Others v. Bulgaria* (dec.), Appl. No. 25446/06, 14.9.2010, A. para. 4.

able people.¹⁶² In its case-law concerning forced evictions, the Court has, in multiple cases, not only found a violation of Article 3, but also of Articles 8 and 1 of Protocol 1.¹⁶³

Only recently, a very similar case has come before the HRC and led to the first use of interim measures by the Special Rapporteur for the purpose of suspending an eviction. The case concerned the eviction order against a Roma community in Bulgaria whose housing had been *de facto* recognised by the public authorities. Acting under Rule 92, the Special Rapporteur on New Communications “requested the State party not to evict *Liliana Assenova Naidenova* and the other authors, and not to demolish their dwellings while their communication was under consideration by the Committee”.¹⁶⁴ At a later stage, this request was reiterated and “the State party was requested to re-establish water supply to the community”, which had been cut off in the meanwhile. The Special Rapporteur “was informed that, while the authors have not been forcibly evicted, cutting off the water supply to the Dobri Jeliakov community could be considered as indirect means of achieving eviction”.¹⁶⁵ On the merits, the HRC found that, if enforced, the eviction order would amount to an unlawful and arbitrary interference with the victims’ homes (Article 17 ICCPR) as long as no satisfactory replacement housing was available and they risked becoming homeless. Thus, with respect to evictions and unlike the ECtHR, the HRC seems to apply interim measures also in cases in which the applicant has not claimed a risk of ill-treatment.

6. Protection of Indigenous Peoples

The HRC has, in several cases, adopted interim measures to protect the rights of indigenous peoples and the environment in which they live. As early as 1990, in *Lubicon Lake Band v. Canada*, interim relief was afforded to a group of indigenous people whose land was expropriated by the Canadian Government for the exploration of oil and gas. The author of the complaint alleged a violation of the right to self-determination and the right of

¹⁶² In *A.M.B. and Others v. Spain*, Appl. No. 77842/12 (case pending at the time of writing), the Court halted the expulsion of a mother and her children from their residence. The applicants seized the Court under Article 3 and 8 ECHR.

¹⁶³ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 20.3.1952, E.T.S. 9, ratified by 45 states (status May 2013), entered into force 18.5.1954.

¹⁶⁴ *Liliana Assenova Naidenova et al. v. Bulgaria* (note 55), para. 1.2.

¹⁶⁵ *Liliana Assenova Naidenova et al. v. Bulgaria* (note 55), para. 10.

the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources, as granted in Articles 1 and 27 ICCPR.¹⁶⁶ “In view of the seriousness of the author’s allegations that the Lubicon Lake Band was at the verge of extinction”, the HRC requested the State party “to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band”.¹⁶⁷ In another case involving an alleged violation of Article 27 ICCPR, the HRC even went a step further and adopted interim measures aiming at the protection of the environment itself. In *Länsman (Jouni E.) et al. v. Finland*, in which the logging of an area used by the Sami people for reindeer-breeding was at issue, the HRC requested Finland “to refrain from adopting measures which would cause irreparable harm to the environment which the authors claim is vital to their culture and livelihood”.¹⁶⁸

7. Miscellaneous Cases

Exceptionally, other situations not falling into one of the above categories have led to the application of interim measures. In *Hak-Chul Shin v. Republic of Korea*, the HRC asked the State party not to destroy a painting that, according to its author, was protected by the freedom of expression under Article 19 (2) of the Covenant.¹⁶⁹ The ECtHR, on the other hand, has, in multiple cases, indicated the preservation of embryos and fetuses that were the subject of an Article 8 claim (right to respect for private and family life)¹⁷⁰ and in *Guidi v. Italy*¹⁷¹ it issued interim measures to order the Italian Government to expedite the payment of a so-called Pinto compensation. It also applied Rule 39 to request that a lawyer be appointed for an applicant who was not represented,¹⁷² and – very exceptionally – in a death penalty case “to ensure that the requirements of Article 6 were complied with”.¹⁷³

¹⁶⁶ HRC, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, 26.3.1990, para. 2.1.

¹⁶⁷ *Lubicon Lake Band v. Canada* (note 166), para. 29.3.

¹⁶⁸ *Jouni E. Länsman et al. v. Finland* (note 58), para. 4.1.

¹⁶⁹ HRC, *Hak-Chul Shin v. Republic of Korea*, Communication No. 926/2000, 16.3.2004, paras. 1.2 and 3.1.

¹⁷⁰ For a recent case, see ECtHR, *Knecht v. Romania*, Appl. No. 10048/10, 2.10.2012, §§ 4 and 18; see also *Evans v. the United Kingdom* (note 27), § 5.

¹⁷¹ ECtHR, *Guidi v. Italy*, Appl. No. 18177/10 (case pending at the time of writing).

¹⁷² See note 20.

¹⁷³ *Öcalan v. Turkey* (note 20), § 5.

8. Outside the Scope of Application

By implication, cases that do not fall within the above-proposed typology will, according to current practice, most likely not give rise to the application of interim measures by the Court or the Committee. Under the ECHR, this is particularly the case for requests regarding property and financial matters, such as a request to prevent bankruptcy or the destruction of property (Article 1 Protocol 1 claims).¹⁷⁴ The same goes for requests related to the right to respect for private and family life outside the context of removals. Furthermore, both the HRC and the ECtHR regularly refuse to indicate interim measures to order a person's release from detention allegedly contrary to Articles 5 ECHR and 9 ICCPR respectively, or to prevent potential violations of fair trial rights (Articles 6 ECHR and 14 ICCPR claims).

V. The Special Category of Protection Measures Before the HRC

In its use of interim measures under Rule 92, the Committee has developed a distinct category of measures, so-called protection measures. The proposal for a definition of these measures put forward by *Sir Nigel Rodley* reads as follows:

Protection measures are to be distinguished from interim measures in that their purpose is not to prevent irreparable damage affecting the object of the communication itself, but simply to protect those who might suffer adverse consequences for having submitted the communication, or to call the State party's attention to their aggravating situation linked to the alleged violations of their rights.¹⁷⁵

The Committee currently applies protection measures without mentioning them in its Views and despite the fact that it lacks a legal basis for doing so. For this reason, it is difficult at this point to grasp, in detail, the threshold required for the application of such measures or their use in practice. Similarly, the requirements on a request for protection measures have yet to be clearly delineated.

¹⁷⁴ *F. Tulkens* (note 50), 33.

¹⁷⁵ Interview with *Sir Nigel Rodley* (note 8).

In a series of disappearance complaints against Algeria, *Grioua v. Algeria*,¹⁷⁶ *Boucherf v. Algeria*¹⁷⁷ and *Kimouche v. Algeria*,¹⁷⁸ the HRC asked the State party not to invoke the provisions of a draft amnesty law against individuals who had submitted or might submit communications to the Committee.¹⁷⁹ In each of the cases, counsel for the victims had argued that the draft law would put “(...) at risk those persons who were still missing, and (...) deprive victims of an effective remedy”.¹⁸⁰ These remain the only cases to date in which the HRC indicated a measure without referring to Rule 92 or the term “interim”. One can therefore assume that the HRC applied protection measures in these particular cases. In *Alzery v. Sweden*, although the Committee explicitly based the measure it indicated on Rule 92, the protection afforded did not relate to the object of the complaint. Accordingly, it could represent another example of the indication of a protection measure. *Mr. Alzery*, an Egyptian national, entered Sweden in 1999 as he was allegedly persecuted in Egypt for his opposition to the government. In 2002, the Swedish authorities expelled him and handed him over to Egyptian military security at Cairo airport. Subsequently, he was held in different prisons, where he was allegedly tortured and ill-treated. In 2005, he lodged a complaint with the HRC, claiming, *inter alia*, that Sweden – by expelling him to Egypt – had violated the Covenant. During his detention in Egypt, the Swedish Embassy approached *Mr. Alzery* on several occasions and inquired about different issues of his complaint, which, according to his counsel, put him at great risk vis-à-vis the Egyptian authorities.¹⁸¹ The Special Rapporteur “in the light of counsel’s comments on the State party’s submissions (...) and of the material before the Committee related to the author’s situation, requested, pursuant to Rule 92 of its Rules of Procedure, that the State party take necessary measures to ensure that the author was not exposed to a foreseeable risk of substantial personal harm as a result of any act of the State party in respect of the author”.¹⁸²

In practice “interim” and “protection” measures may overlap and can be difficult to distinguish: the alleged victim, for example, might benefit from an interim measure preventing irreparable harm to his or her person or claim, whereas protection measures could be indicated for the alleged victim’s family or legal counsel.

¹⁷⁶ HRC, *Grioua v. Algeria*, Communication No. 1327/2004, 10.7.2007.

¹⁷⁷ HRC, *Kimouche v. Algeria*, Communication No. 1328/2004, 10.7.2007.

¹⁷⁸ HRC, *Boucherf v. Algeria*, Communication No. 1196/2003, 30.3.2006.

¹⁷⁹ See, for example, *Kimouche v. Algeria* (note 177), paras. 1.3 and 9.

¹⁸⁰ *Kimouche v. Algeria* (note 177), para. 1.2.

¹⁸¹ HRC, *Alzery v. Sweden*, Communication No. 1416/2005, 25.10.2006, para. 6.2.

¹⁸² *Alzery v. Sweden* (note 181), para. 2.3.

VI. Non-Compliance With Interim Measures

1. Establishing Non-Compliance

As *Louis Henkin* might say, most states implement most of the requests for interim measures most of the time.¹⁸³ Nonetheless, in both of the systems considered, there have been some significant exceptions to this rule. In practice, it is usually the applicant who brings the alleged non-compliance to the attention of the adjudicator. It is then up to the latter to ultimately decide, at the stage of the merits of a case,¹⁸⁴ whether an interim measure was complied with or not. Yet, both the HRC and the ECtHR can already express their views on the issue of compliance at an earlier stage of the proceedings: first, the adjudicator may reiterate an interim measure which was not yet – but could still be – implemented, and second, in cases where non-compliance has already resulted in the exposure of the applicant to a risk of irreparable harm, the adjudicator can decide to deplore it by way of a *note verbale* to the government concerned.¹⁸⁵

As most cases of interim measures take the form of requests for a specific abstention, establishing non-compliance is a relatively simple task and a factual rather than a legal question that is often undisputed by the parties (e. g., a determination of whether the applicant was executed or extradited). However, if an interim measure requires positive action or is formulated in a very general manner, establishing (non-)compliance can be more complicated. While not much is known about the HRC's approach in such situations, the ECtHR held in *Paladi v. Moldova*, with reference to the ICJ's judgment in *LaGrand (Germany v. United States of America)*,¹⁸⁶ that "(t)he point of departure for verifying whether the respondent State has complied with the measure is the formulation of the interim measure itself (...)" and that the Court must examine "whether the respondent State complied with the letter and the spirit of the interim measure indicated to it".¹⁸⁷

In *Makharadze and Sikharulidze v. Georgia*, for example, the Court had to interpret a positive interim measure that required the applicant be placed

¹⁸³ For the Court see ECRE/ELENA Report (note 10), 17 and 18.

¹⁸⁴ *Paladi v. Moldova* (note 55), § 90: "It is for the Court to verify compliance with the interim measure (...)."

¹⁸⁵ See below, VI. 2. b), 368 et seq.

¹⁸⁶ ICJ, *LaGrande Case (Germany v. United States of America)*, Judgment of 27.6.2001, I.C.J. Reports 2001, 466, §§ 111-115.

¹⁸⁷ *Paladi v. Moldova* (note 55), § 91.

“in a specialised medical establishment capable of dispensing appropriate anti-tuberculosis treatment”:

(...) the major qualifying element of the measure was for a medical establishment in question, whether in the civil or penitentiary sector, to be specialised in treatment of tuberculosis. Consequently, a legitimate question arises as to whether the new prison hospital could have represented, at the material time, such a specialised medical unit (...). However, the response is negative, since, as was already established above, that hospital did not possess either the necessary laboratory equipment or the second-line anti-tuberculosis drugs, and, most importantly, its medical staff did not possess, at the material time, the necessary skills for the management of complex treatment of multi-drug resistant forms of tuberculosis. All those serious deficiencies of the prison hospital were or should have been known to the respondent Government, as the qualified medical experts had denounced on several occasions the adequacy of the treatment dispensed to the applicant in the penitentiary sector, noting his rapid decline and equally recommending his transfer to a hospital specialised in tuberculosis treatment (...).¹⁸⁸

In *Abdulkhakov v. Russia*, relying on the spirit rather than the letter of the measure, the Court held that the transfer of an applicant to Tajikistan amounted to a failure to comply with the interim measure that was, by nature of its wording, supposed to prevent the applicant’s removal to Uzbekistan.¹⁸⁹

In another case, *Savridin Dzhurayev v. Russia*, where the Court also requested the Russian Government to suspend an extradition to Tajikistan, the applicant was forcibly removed by way of a special operation in which State agents were found to have been involved. The Government argued that it complied with the indicated measure as the applicant’s “(...) transfer to Tajikistan had not taken place through the extradition procedure, which had been immediately stayed following the Court’s (...)” request. Rejecting this overly literal interpretation of the measure, the Court held in reference to *Paladi v. Moldova* that it “must have regard not only to the letter but also to the spirit of the interim measure indicated (...) and indeed, to its

¹⁸⁸ ECtHR, *Makharadze and Sikharulidze v. Georgia*, Appl. No. 35254/07, 22.11.2011, §§ 35 and 101.

¹⁸⁹ *Abdulkhakov v. Russia* (note 120), §§ 4 and 227: “The Court considers that in certain circumstances a transfer of an applicant against his will to a country other than the country in which he allegedly faces a risk of ill-treatment may amount to a failure to comply with such an interim measure. If it were otherwise, the Contracting States would be able to transfer an applicant to a third country which is not party to the Convention, from where they might be further removed to their country of origin, thereby circumventing the interim measure applied by the Court and depriving the applicant of effective Convention protection.”

very purpose”. In the case at hand, the purpose of the measure was “to prevent the applicant’s exposure to a real risk of ill-treatment in the hands of the Tajik authorities. (...) By using another domestic procedure for the applicant’s removal to the country of destination or, even more alarming, by allowing him to be arbitrarily removed to that country in a manifestly unlawful manner (...) the State frustrated the purpose of the interim measure (...)” and consequently acted in disrespect thereof.¹⁹⁰

2. Consequences of Non-Compliance

a) Autonomous Treaty Violation

If the HRC considers a State party to have failed to comply with an interim measure, it is its established practice to find, at the stage of the merits, a breach of the Optional Protocol “apart from any other violation of the Covenant charged to a State party in a communication”.¹⁹¹ The Committee reiterated this principle in the above-mentioned case of *Lyubov Kovaleva and Tatyana Kozyar v. Belarus*, a particularly severe case of state failure to abide by interim measures. On 13.5.2012, the Belarusian authorities executed *Mr. Kovaleva* notwithstanding the HRC’s repeated request to refrain from doing so. Referencing the relevant passages from its views in *Dante Piandong et al. v. The Philippines*, the Committee held that “(h)aving been notified of the communication and the Committee’s request for interim measures, the State party breached its obligations under the Protocol by executing the alleged victim before the Committee concluded its consideration of the communication”.¹⁹²

Other countries have, in the recent past, similarly disregarded requests for interim relief. Strikingly many of these are central Asian states. In *Shukurova v. Tajikistan* and *Tolipkhuzhaev v. Uzbekistan*, petitioners were executed even though the Committee had requested the suspension of their executions,¹⁹³ and in *Israil v. Kazakhstan* and *Maksudov et al. v. Kyr-*

¹⁹⁰ *Savridin Dzhurayev v. Russia* (note 6), §§ 215-217.

¹⁹¹ *Dante Piandong et al. v. The Philippines* (note 93), para. 5.2; see, *inter alia*, HRC, *Saidova v. Tajikistan*, Communication No. 964/2001, 8.7.2004, paras. 4.1-4.4; HRC, *Shukurova v. Tajikistan*, Communication No. 1044/2002, 17.3.2006, paras. 6.1-6.3; HRC, *Tolipkhuzhaev v. Uzbekistan*, Communication No. 1280/2004, 22.7.2009, paras. 6.1-6.4.

¹⁹² *Lyubov Kovaleva and Tatyana Kozyar v. Belarus* (note 84), para. 9.4.

¹⁹³ *Shukurova v. Tajikistan* (note 191); *Tolipkhuzhaev v. Uzbekistan* (note 191).

guzstan, the State parties extradited the applicants in defiance of the HRC's grant of interim relief.¹⁹⁴

While the Committee found a breach of the Optional Protocol in all of these cases, three observations can be made. Firstly, it is interesting to note that the Committee never specified which exact article(s) of the Protocol a State party has contravened by not complying with an interim measure. Rather, it has limited itself to referring to the state's general obligation to cooperate in good faith. Secondly, although it considers a failure to implement interim measures to also contravene the Covenant, more precisely Article 2 (3) thereof,¹⁹⁵ this consideration never found its way into the Committee's case-law. And thirdly, according to the Committee's practice, non-compliance can never be justified, but instead always entails a breach of the Optional Protocol. Hence, the Committee has, in its case-law, never addressed the different reasons put forward by a State party for disregarding a measure.¹⁹⁶

Under the ECHR, a failure by a Contracting State to comply with interim measures usually amounts to a separate violation of the right of individual application guaranteed by Article 34 *in fine* of the ECHR. After *Mamatkulov and Askarov v. Turkey*, some doubts remained as to whether non-compliance must lead to an actual hindrance of the effective exercise of the right of individual application in order for the Court to find a violation of Article 34 ECHR.¹⁹⁷ In its subsequent case-law, the Court clarified that any disrespect for a Rule 39 request is in itself to be seen as such a violation, regardless of whether the applicant experienced any difficulties pursuing his application with the Court.¹⁹⁸ This is reflected in the Court's current for-

¹⁹⁴ *Israil v. Kazakhstan* (note 137); *Maksudov et al. v. Kyrgyzstan* (note 118).

¹⁹⁵ See above III. 5., 344.

¹⁹⁶ The only exception being *Dante Piandong et al. v. The Philippines* (note 93), para. 5.3.

¹⁹⁷ These doubts stemmed from the following statement of the Court: "(...) In the present case, because of the extradition of the applicants to Uzbekistan, the level of protection which the Court was able to afford the rights which they were asserting under Articles 2 and 3 of the Convention was irreversibly reduced. (...) In the present case, the applicants were extradited and thus, by reason of their having lost contact with their lawyers, denied an opportunity to have further inquiries made in order for evidence in support of their allegations under Article 3 of the Convention to be obtained" (*Mamatkulov and Askarov v. Turkey* [note 4], § 108).

¹⁹⁸ ECtHR, *Olaechea Cabuas v. Spain*, Appl. No. 24668/03, 10.8.2006, ECHR 2006-X, §§ 75-83, particularly § 81 *in fine*: "Failure to comply with an interim measure indicated by the Court because of the existence of a risk is in itself alone a serious hindrance, at that particular time, of the effective exercise of the right of individual application." See also *Paladi v. Moldova* (note 55), § 89: "For the same reasons, the fact that the damage which an interim measure was designed to prevent subsequently turns out not to have occurred despite a State's failure to act in full compliance with the interim measure is equally irrelevant for the assessment of whether this State has fulfilled its obligations under Article 34." For a detailed discus-

mula, which was first applied in *Paladi v. Moldova* and stipulates that “(...) Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court”.¹⁹⁹

In the same judgment, the Court also introduced an exception to this rule. In cases in which there was an “objective impediment which prevented compliance” with the interim measure and as long as the Government took “all reasonable steps to remove the impediment” and kept the Court “informed about the situation”, a State would not be held accountable under Article 34 ECHR.²⁰⁰ The Court construes this exception very narrowly and has only allowed States to thus discharge their responsibility under Article 34 in a very few cases. Examples include cases in which an interim measure was indicated only very shortly before the litigious act was to be carried out, making it impossible for the Court to determine whether the authorities could have reacted in due time. Thus, in *M.B. and Others v. Turkey*, for instance, the Court held that “(h)aving regard to the short time which elapsed between the receipt of the fax message by the Government and the deportation of the applicants, the Court considers that it has not been established that the Government had failed to demonstrate the necessary diligence in complying with the measure indicated by the Court”.²⁰¹ Another constellation in which non-compliance might not necessarily amount to a violation of Article 34 ECHR is that where an applicant consented to the litigious act that is to be prevented by the interim measure.²⁰² This could be inferred from *Rajaratnam Sivanathan v. United Kingdom*, where the Court struck a complaint off the list after the applicant had wished to pursue his deportation although the Court requested the latter to be stayed under Rule 39.²⁰³

sion of *Olaechea Cabuas v. Spain*, see *Y. Haeck/C. Burbano Herrera/L. Zwaak* (note 59), 41 et seq.

¹⁹⁹ *Paladi v. Moldova* (note 55), § 88; for a recent case, see *Rrapo v. Albania* (note 115), § 82, or *Al-Saadoon and Mufdhi v. the United Kingdom* (note 114), § 161.

²⁰⁰ *Paladi v. Moldova* (note 55), § 92.

²⁰¹ ECtHR, *M.B. and Others v. Turkey*, Appl. No. 36009/08, 15.6.2010, § 48; another example is ECtHR, *Muminov v. Russia*, Appl. No. 42502/06, 11.12.2008, § 137.

²⁰² See *Y. Haeck/C. Burbano Herrera/L. Zwaak*, Strasbourg’s Interim Measures Under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?, *European Yearbook on Human Rights* 11 (2011), 393 et seq.

²⁰³ ECtHR, *Rajaratnam Sivanathan v. United Kingdom* (dec.), Appl. No. 38108/07, 3.2.2009: “The Court notes that the Government are unable to provide a copy of the document signed by the applicant but accepts that such a document was signed. It further accepts that the applicant’s return to Sri Lanka was entirely voluntary and that he gave written informed consent to that effect. The Court also recognises that new procedures have been im-

No objective impediment is posed, however, by conflicting international obligations stemming, for example, from extradition treaties²⁰⁴ or domestic law, which cannot be relied upon for not implementing the measure ordered.²⁰⁵ This is illustrated by the above-mentioned case of *Rrapo v. Albania*, in which the Albanian authorities extradited *Mr. Rrapo* to the US even though he benefitted from an interim measure issued by the Court.

Similarly, the argument that the competent authorities were not aware of the indication of interim relief, although the Government was informed of the application of Rule 39 in due time, has so far failed to justify non-compliance with Article 34 of the Convention.²⁰⁶ Further, in *Makharadze and Sikharulidze v. Georgia*, the Court rejected the Government's claim that a waiting list constituted an objective impediment to the transfer of the applicant "to an establishment specialised in tuberculosis treatment". The Court noted that "the only possible objective impediment to the fulfilment of the measure in question could have been the absence of such a specialised establishment in Georgia at the material time".²⁰⁷

In *D.B. v. Turkey*, the Turkish authorities initially prevented an applicant in detention from meeting with a lawyer because the latter did not submit a power of attorney proving that he was the applicant's representative. The

plemented by the Government which ensure that in all future cases of voluntary departure the appropriate documentation will be available. Finally, the Court observes that the applicant has not communicated with the Court since his removal and, prior to his removal, he did not provide any address in Sri Lanka or in the United Kingdom at which he could be contacted. It therefore considers that, in these circumstances, the applicant may be regarded as no longer wishing to pursue his application, within the meaning of Article 37 § 1 (a) of the Convention. Furthermore, in accordance with Article 37 § 1 in fine, the Court finds no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require the continued examination of the case. Accordingly, it is appropriate to discontinue the application of Article 29 § 3, lift the interim measure indicated under Rule 39 of the Rules of Court and strike the case out of the list."

²⁰⁴ *Al-Saadoon and Mufdhi v. the United Kingdom* (note 114), § 162; *Rrapo v. Albania* (note 115), § 86.

²⁰⁵ *Rrapo v. Albania* (note 115), § 87: "...(N)either the existing state of national law expounded by the Government, notably the alleged legal vacuum concerning the continuation of detention beyond the time-limit provided for in Article 499 of the CCP, nor deficiencies in the national judicial system and the difficulties encountered by the authorities in seeking to achieve their legislative and regulatory objectives, can be relied upon to the applicant's detriment, in the absence of a final domestic court judgment authorising his extradition, or avoid or negate the respondent State's obligations under the Convention(...)."

²⁰⁶ See, for example, ECtHR, *Zokhidov v. Russia*, Appl. No. 67286/10, 5.2.2013, § 196: "Accordingly, it was for those State bodies, including the Russian GPO and the Office of the Representative of the Russian Federation at the European Court of Human Rights, to ensure that the information on the Court's application of the interim measure was brought to the attention of all authorities involved."

²⁰⁷ *Makharadze and Sikharulidze v. Georgia* (note 188), § 102.

Court dismissed what it described as “administrative obtuseness”, considering that it applied Rule 39 precisely to enable a lawyer to meet with the applicant “with a view to obtaining a power of attorney and information concerning the alleged risks that the applicant would face in Iran”.²⁰⁸

In *Aleksanyan v. Russia*, the Russian Government failed, for over two months, to transfer the detained applicant to a specialised medical institution as requested by the Court under Rule 39. The Court rejected the Government’s argument “that the delay in the implementation of this measure was fully imputable to the applicant himself, who refused to be subjected to specific analysis and treatment”.²⁰⁹

Finally, if non-abidance with an interim measure amounts to a violation of Article 34, the Court may, in addition to finding a violation of the Convention, afford just satisfaction to the applicant for any pecuniary and non-pecuniary damage suffered.²¹⁰ Hence, in *Mamatkulov and Askarov v. Turkey*, the Court awarded each applicant EUR 5,000 for the non-pecuniary damage caused by Turkey’s failure to comply with the interim measures and thereby with its obligations under Article 34.²¹¹

b) A Diplomatic Way of Addressing Non-Compliance

Apart from by finding an autonomous treaty violation, non-compliance has also been reproved by non-legal means. The ECtHR’s judgment in *Rrapo v. Albania*, for example, discloses the content of a letter sent by the Registrar of the Court to the Albanian Government on the same day that the latter had confirmed to the Court that it had disregarded the interim measure indicated by the Court.

The President of the Court ... has instructed me to express on his behalf his profound regret at the decision taken by your authorities to extradite *Mr. Almir Rrapo* to the United States of America in flagrant disrespect of the Court’s interim measure adopted under Rule 39 of the Rules of Court.²¹²

²⁰⁸ ECtHR, *D.B. v. Turkey*, Appl. No. 33526/08, 13.7.2010, § 67.

²⁰⁹ *Aleksanyan v. Russia* (note 150), § 223 and § 230: “The Government did not suggest that the measure indicated under Rule 39 was practically unfeasible; on the contrary, the applicant’s subsequent transfer to Hospital no. 60 shows that this measure was relatively easy to implement. In the circumstances, the Court considers that the non-implementation of the measure is fully attributable to the authorities’ reluctance to cooperate with the Court.”

²¹⁰ Article 41 ECHR.

²¹¹ *Mamatkulov and Askarov v. Turkey* (note 4), § 134.

²¹² *Rrapo v. Albania* (note 115), § 38.

In addition to asking for further information as to the reasons why the interim measure was not complied with, the Registrar also noted:

As an indication of the seriousness with which he views this turn of events, the President has asked that the Chairman of the Committee of Ministers, the President of the Parliamentary Assembly, the Commissioner for Human Rights and the Secretary General of the Council of Europe be informed immediately.²¹³

Sending such a letter seems to have become standard procedure in removal cases before the ECtHR where there has been non-compliance with the interim measures indicated. This practice certainly serves to gather more information for a possible judgment on the merits, in which the Court must determine whether the state can be held accountable under Article 34 ECHR for its failure to implement the interim measure. Moreover, the message of regret conveyed and the fact that other bodies of the Council of Europe are informed, which puts the issue of non-compliance on their agenda,²¹⁴ can create useful diplomatic pressure for the purpose of strengthening future observance of such measures. This is particularly important in cases which are declared inadmissible or struck out at a later stage. In these instances, non-compliance with an interim measure would otherwise not be reproved at all.

The HRC has also deplored non-compliance by way of a diplomatic note from the Committee Chairperson to the Government concerned, and has requested additional information from the State party. In *Sholam Weiss v. Austria*, for example, the Chairperson asked the Government for “an explanation of how it intended to secure compliance with such requests in the future”.²¹⁵ Belarus’s repeated failure to suspend the execution of death row inmates has even led the Committee to issue press releases during the course of its sessions informing the public about the State party’s breach of the Optional Protocol and expressing its dismay and indignation.²¹⁶

²¹³ *Rrapo v. Albania* (note 115).

²¹⁴ See, for example, Council of Europe, Parliamentary Assembly Resolution 1788 (2011), Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights, 26.1.2011; see also Rule 39 (2) of the Rules of Court: Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. In the context of its task to supervise the execution of judgments of the Court according to Article 46 (2) ECHR, the Committee of Ministers has also dealt with the issue of non-abidance with interim measures (Council of Europe, Committee of Ministers, Interim Resolution CM/ResDH(2010)83, Execution of the judgments of the European Court of Human Rights, *Ben Khemais against Italy*, 3.6.2010).

²¹⁵ HRC, *Sholam Weiss v. Austria*, Communication No. 1086/2002, 3.4.2003, para. 5.1.

²¹⁶ HRC, Annual Report, 100th (11.-29.10.2010), 101st (14.3.-1.4.2011) and 102nd session (11.-29.7.2011), A/66/40 (Vol. I), para. 50/51.

VII. Conclusion and Outlook

This comprehensive comparison has shown that, with respect to key issues, the HRC's and the ECtHR's use of interim measures displays surprisingly strong similarities. However, closer analysis also reveals the existence of some important divergences, an awareness of which can be important for applicant and adjudicator alike.

Broad statutory provisions allowed the ECtHR and the HRC to develop a flexible and pragmatic procedure to take into account the urgency with which and the very early stage of the proceedings in which interim relief is decided upon. While, under both systems considered, an applicant requesting interim relief must in principle make plausible that he faces an imminent risk of irreversible harm, the Committee has adopted a more lenient approach by indicating provisional interim measures in cases of doubt as to the imminence, credibility or irreparability of the alleged harm.

The ECtHR has partly codified some formal and substantive requirements that a request for interim measures is expected to meet in order to be properly examined and potentially successful. Although research has shown that these requirements also largely hold true before the HRC, there is currently no information document available on the matter. Because knowledge of the requirements that must be met by a request for interim relief is crucial for applicants, it is suggested that the HRC publishes a document similar to the Court's Practice Direction.

As to transparency in general, it is to be welcomed that, with respect to the Committee and the Court, suggestions have been put forward to provide more information on the adjudicators' reasons for granting or refusing interim measures in particular cases. It remains to be seen, however, if and in what form these suggestions can be put into practice.

The most striking difference between the Committee's and the Court's uses of interim measures lies in the scope of application of their respective measures. Although both adjudicators grant interim relief primarily to protect applicants from risks for life and limb, they also do so in other situations. It is the use of interim measures beyond this mutual field of application that is not identical for the Committee and the Court. In the context of deportations, the ECtHR has adopted a more inclusive approach and can indicate – based on its broader understanding of the *non-refoulement* principle – interim measures to prevent potential violations of Articles 5, 6 or 8 ECHR. Outside of the *refoulement* context, however, it is the Committee that uses interim measures in a broader way, as is illustrated by recent examples of its jurisprudence concerning eviction, the protection of the envi-

ronment, indigenous peoples or the freedom of expression. In addition, the Committee has developed a practice of indicating a new category of measures, thereby further broadening the scope of possible protection pending the consideration of a communication. Even though the Committee has yet to define the precise contours of these protection measures and is certainly well advised to create an explicit legal basis for their use, this development must be welcomed.

The Committee's willingness to broaden the scope of interim relief can be explained by virtue of the greater leeway enjoyed by the Special Rapporteur for New Communications and Interim Measures. At the Court, on the other hand, it seems that the current situation is not favourable to such an expansion of interim protection. On the contrary: the influx of requests for interim measures to the already overburdened ECtHR has alerted Court and Contracting parties alike and one observes that, since the establishment of the centralised procedure, a stricter threshold for granting interim relief is being applied.

While arguments can be made in favour as well as against an expansion of the use of interim measures, the eviction case of *Liliana Assenova Naide-nova et al. v. Bulgaria* demonstrates that divergences in practice between the Committee and the Court may result in increased forum shopping with respect to interim relief.²¹⁷ Consequently, applicants who could take their claims to either Geneva or Strasbourg may envisage petitioning the Committee rather than the Court if they seek protection in a situation not involving risks for life and limb and outside the *refoulement* context. However, it must also be borne in mind that the Court will not consider an application that has already been submitted to the Committee.²¹⁸ Thus, an applicant must decide at the very outset of the litigation whether the more auspicious prospects of interim relief before the Committee outweigh the possibility of obtaining a legally binding judgment and eventually being awarded just satisfaction in Strasbourg.

The Court and the Committee have both established an obligation for states to abide by a request for interim measures. The reluctance of the Committee to refer to its interim measures as legally binding in the way that the Court does is arguably linked to the non-binding nature of its Views on

²¹⁷ In *Sholam Weiss v. Austria* (note 215), paras. 2.9, 2.11 and 1.2, an applicant who was refused interim relief before the ECtHR withdrew his application from the Court and petitioned the HRC, which subsequently requested the staying of his extradition, see also *J. F. Flauss*, Discussion, in: G. Cohen-Jonathan/J.-F. Flauss (eds.), *Mesures conservatoires et droits fondamentaux*, 2005, 212 et seq.

²¹⁸ Article 35 (2) (b) ECHR.

the merits. In order to reinforce and consolidate the authority of interim measures, it is suggested to codify, if possible at treaty level, the binding effect of interim measures. Codification of their binding nature could foster compliance with interim measures, which is key for the effectiveness of interim relief and ultimately also for the protection system as a whole.