

K.F. v. Russia

Application no. 39552/16

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF
JURISTS (ICJ)

INTERVENER

*pursuant to the Section Registrar's notification dated 13 March 2017 that the
President of the Section had granted permission under Rule 44 § 3 of the Rules of
the European Court of Human Rights*

3 April 2017

I. Introduction

In this submission, the International Commission of Jurists (ICJ) provides the Court with an analysis, based on international law sources, of the positive obligations of States parties to the European Convention to ensure that no transfer is carried out of persons subject to interim measures enjoining such transfer by the European Court. It will include a comparative analysis of the law, jurisprudence and practice of other regional human rights systems (section 1). It will also assess the capacity of the Russian legal system to protect against transfers in violation of the Convention rights and, in particular, of the interim measures of the Court (section 2).

II. Positive obligations of States to implement interim measures effectively

Interim measures, or equivalent “precautionary” measures or “provisional” measures,¹ are a well-established and essential component in the procedures of international tribunals, including human rights courts and quasi judicial or non-judicial mechanisms. Their binding nature is based on the need to preserve the rights of a party pending adjudication of the case, so as to prevent irreparable damage to the interests of one of the parties until the dispute can be settled by a competent organ.² Interim measures also serve the function of preserving the capacity of human rights courts and mechanisms to provide real and effective protection of the human rights guaranteed by their governing treaties, and to provide an effective remedy for breach of those rights.³ With regard to cases encompassing the compliance with the principle of *non-refoulement*, interim measures play a key role in light of the high risk that the transfer will cause irreparable damage to the applicant. Indeed, once a person has been subjected to transfer, the protective armour of *non-refoulement* has in fact been stripped away.

1. Interim measures and positive obligations under the ECHR

Under the European Convention on Human Rights (ECHR), the binding nature of interim measures has been repeatedly affirmed.⁴ In the leading case of *Mamatkulov and Askarov v. Turkey*,⁵ the Grand Chamber’s finding that interim measures were binding was based on the necessity of such measures to prevent irreparable damage to the rights of the parties to a case, pending the decision of the Court. The Courts stressed their importance in ensuring the effective operation of the individual petition

¹ Precautionary and provisional measures are used in the Inter-American human rights system, provisional measures by the International Court of Justice.

² See, CAT, Rules of Procedure, UN Doc. CAT/C/3/Rev.6, 1 September 2014 (‘CAT Rules of Procedure’), rule 114, provides for “such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.” See also, Human Rights Committee, Rules of Procedure, UN Doc. CCPR/C/3/REV.10, 11 January 2012 (‘CCPR Rules of Procedure’), Rule 92: interim measures may be indicated “to avoid irreparable damage to the victim of the alleged violation.”

³ See, in particular, jurisprudence of the IACtHR and CCPR, considered *infra*. See, Judge Antônio Augusto Cançado Trindade: “In addition to the conventional basis of Article 63(2) of the American Convention, Provisional Measures under said convention are reinforced by the general duty of the States Party, pursuant to Article 1(1) of the Convention, to respect and ensure the respect, without discrimination, of protected rights, in favor of all the persons subject to their respective jurisdictions”, *Matter of the persons imprisoned in the “Dr. Sebastião Martins Silveira” Penitentiary in Araraquara, São Paulo regarding Brazil*, IACtHR, Resolution on provisional measures, 30 September 2006, Separate Opinion, para 3. See further, Eva Rieter, *Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication*, Intersentia, 2010, p. 12 and following.

⁴ See, *Mamatkulov and Askarov v. Turkey*, ECtHR, GC, Applications Nos. 46827/99 and 46951/99, Judgment of 4 February 2005; *Shamayev and Others v. Georgia and Russia*, ECtHR, Application No. 36378/02, Judgment of 12 April 2005; *Aloumi v. France*, ECtHR, Application No. 50278/99, Judgment of 17 January 2006; *Paladi v. Moldova*, ECtHR, Application No. 39806/05, Judgment of 10 March 2009; *Aleksanyan v. Russia*, ECtHR, Application No. 46468/06, Judgment of 22 December 2008; *Shtukaturov v. Russia*, ECtHR, Application No. 44009/06, Judgment of 27 March 2008; *Ben Khemais v. Italy*, ECtHR, Application No. 246/07, Judgment of 24 February 2009.

⁵ *Mamatkulov and Askarov v. Turkey*, ECtHR, *op. cit.*, para. 108.

system and in allowing the Court to discharge its role in securing the Convention rights.⁶

In assessing State compliance with an interim measures, regard must be had to "the spirit of the interim measure indicated ... and, indeed, its very purpose."⁷ The "intentions or reasons underlying the acts or omissions [to be refrained from] are of little relevance [but what] matters is whether the situation created as a result of the authorities' act or omission conforms with article 34 ECHR."⁸ In cases of transfer, whether via extradition, expulsion, or abduction, this Court has held that their purpose is to prevent the alleged or potential victim's "exposure to a real risk of ill-treatment"⁹ or other violations of the principle of *non-refoulement* at the hands of the authorities of the State of destination.

An applicant may, in principle, renounce the protection of interim measures, as he or she is entitled to withdraw the application to the Court. However, even in respect of such cases, the Court has ruled that "regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities."¹⁰ It is important that any renunciation of this form of protection be done freely and genuinely.

When the petitioner who is the subject of interim measures is in a particularly vulnerable situation, the State has an obligation under the ECHR to grant "effective protection ... not only in law, but also in practice."¹¹ In such cases there are "weighty reasons warranting extraordinary measures of protection."¹² This Court has found that persons subjected to abductions in breach of its interim measures find themselves in a "particularly vulnerable situation."¹³

a. State Responsibility

This Court has affirmed repeatedly that States are responsible for the transfer of persons subject to interim measures of the Court to countries where they are at risk of torture or inhuman or degrading treatment or punishment, or other serious violations of human rights, whether by direct action, authorisation or acquiescence, including situations where the transfer is carried out by private actors or authorities of another State. It has found that this responsibility arises with regard to the State's positive obligations of *non-refoulement* and, under article 34 of the Convention, to respect and ensure the implementation of the Court's interim measures.¹⁴

For instance, where a suspect is transferred via plane from the State's jurisdiction, the State's complicity, active or by acquiescence, is presumed, considering the need to pass through checkpoints by authorities in airports. Where authorities holding such responsibilities have not been held to account, the presumption of State responsibility for complicity is reinforced.¹⁵ The Court has found that

⁶ *Ibid.*, paras. 123-125.

⁷ *Savridin Dzhurayev v. Russia*, Application no. 71386/10, 25 April 2013, para. 216. *Konovchaluk v. Ukraine*, Application no. 31928/15, 13 October 2016, para. 79.

⁸ *Paladi v. Moldova*, GC, Application no. 39806/05, 10 March 2009, para. 87-88.

⁹ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 216. See other objectives, medical, access to a lawyer etc, in *Shtukurov v. Russia*, Application no. 44009/05, 27 March 2008, para. 141 ; *Pivovarnik v. Ukraine*, Application no. 29070/15, 6 October 2016, paras. 56-62 ; *Klimov v. Russia*, Application no. 54436/14, 4 October 2016, para. 49.

¹⁰ *Ahmed v. United Kingdom*, Application no. 59727/13, 2 March 2017, para. 69.

¹¹ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 262.

¹² *Kasymakhunov v. Russia*, Application no. 29604/12, 14 November 2013, para. 185.

¹³ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 262.

¹⁴ See, *Ermakov v. Russia*, Application no. 43165/10, 7 November 2013, para. 284; *Kasymakhunov v. Russia*, *op. cit.*, para. 184.

¹⁵ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 218.

responsibility under the Convention is engaged where a person subject to interim measures has been released from detention and 'disappeared', and "the authorities failed to take any measure to protect"¹⁶ the person. This responsibility arises from a breach of the State's preventive positive obligation to avoid the transfer.¹⁷ Therefore, the State remains responsible for the violation irrespective of whether or not it has been established that the transfer to the country of destination actually took place¹⁸ or that particular State authorities have been complicit in the conduct.¹⁹ Indeed, this Court has consistently ruled that "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"²⁰ is irrelevant to the assessment of its compliance with the obligations under article 34 ECHR.

b. Implementation of interim measures through protection programmes

This Court, in its extensive jurisprudence on implementation of interim measures, has addressed transfer by abduction in disregard of interim measures. In *Savridin Dzhurayev v. Russia*, the Court held that the establishment of "**an appropriate mechanism, tasked with both preventative and protective functions** should be put in place to ensure that [...] applicants benefit from immediate and effective protection against unlawful kidnapping and irregular removal from the national territory"²¹ (see, *infra* section 2).

The issuance of binding rulings by superior courts stressing the need to abide by interim measures, their meticulous application by the lower courts²² and the setting up of a practical procedure to receive and process information from the Court²³ may sometimes be sufficient measures by themselves where a violation of article 34 ECHR has occurred in a single isolated case.²⁴ However, they will not be sufficient where repetitive violations or established practices disclose the ineffectiveness of these procedures to protect against *refoulement* or other practices leading to violations of human rights.²⁵ Even in cases of isolated incidents, the Committee of Ministers, in overseeing the effectiveness of the implementation of a judgment, will need to be satisfied that the system of compliance with interim measures is operational and effective in practice.²⁶

This Court has additionally held that accountability, including through effective investigation, prosecution and sanction,²⁷ for infringements of interim measures, is necessary to "send a clear message that such actions would not be tolerated, especially when these involve abduction."²⁸ The promptness of investigations is key, as "in the event of a disappearance of a person belonging to a vulnerable

¹⁶ *Nizomkhon Dzhurayev v. Russia*, Application no. 31890/11, 3 October 2013, para.144, 146. See also, *Mamazhonov v. Russia*, Application no. 17239/13, 23 October 2014, para. 189.

¹⁷ *Mamazhonov v. Russia*, *op. cit.*, para. 208.

¹⁸ *Ibid.*, para. 182.

¹⁹ *Ibid.*, para. 208.

²⁰ *Paladi v. Moldova*, GC, *op. cit.*, para. 89. See, *Shtukaturv v. Russia*, *op. cit.*, para. 147; *Konovalchuk v. Ukraine*, *op. cit.*, para. 78.

²¹ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 262 (emphasis added).

²² *Ibid.*, para. 259.

²³ *Muminov v. Russia*, Application 42502/06, 11 December 2008, para. 136.

²⁴ *Trabelsi v. Belgium*, Application 140/10, 4 September 2014, see Committee of Ministers in June 2016:

<http://hudoc.exec.coe.int/eng?i=004-1241> ; Committee of Ministers, *Olaechea v. Spain*, Application no. 24668/03, 10 August 2006, <http://hudoc.exec.coe.int/eng?i=001-96910>

²⁵ *Mukhitdinov v. Russia*, Application no. 20999/14, 21 May 2015, para. 93 ; *Mamazhonov v. Russia*, *op. cit.*, para. 216.

²⁶ <http://hudoc.exec.coe.int/eng?i=004-6962> (September 2016).

²⁷ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 263.

²⁸ *Ibid.*, para. 260. See also, *Nizomkhon Dzhurayev v. Russia*, *op. cit.*, para.145-146.

group of people facing the risk of abduction, any protracted and unjustified delay diminishes the effectiveness of any subsequent action."²⁹

2. Interim measures and their implementation through protection programmes under other regional human rights systems

In the Inter-American system, when precautionary measures³⁰ are issued in expulsion cases, the Commission, like the European Court, typically indicates that the State should not carry out the transfer until the case can be considered on the merits.³¹ Sometimes, the Commission also indicates that the State should guarantee access to the refugee status determination procedure.³² This is also the case before the Inter-American Court of Human Rights in respect of its provisional measures.³³

The Inter-American Commission dedicates particular attention to the decision-making procedures of national authorities for the implementation of precautionary measures.³⁴ It has prescribed that States must assess the situation and agree the measures with the beneficiary and his or her representatives and inform periodically the Commission.³⁵ For its part, the Inter-American Court has sometimes requested the State to provide it with "a diagnosis of the current risk situation" of the target person or group.³⁶ States in the Inter-American system have typically established special protection programmes to implement precautionary and provisional measures respectively by the Inter-American Commission and Court, in particular in cases of threats to the life or integrity of human rights defenders. These constitute the most common situations in which these measures are issued.

In describing the Inter-American system of precautionary measures, the Inter-American Commission has stressed that

*"States must **create systems for diligent and effective implementation of the protective measures** To that end, one of the principles that must be followed ... is that they be planned and applied with the participation of the beneficiaries and their respective representatives."³⁷ ... The States have to guarantee this right of the beneficiaries of precautionary measures and its representatives have to cooperate*

²⁹ *Mamazhonov v. Russia*, *op. cit.*, para. 190.

³⁰ They are called precautionary, when issued by the Inter-American Commission on Human Rights, or provisional measures, when coming from the Inter-American Court of Human Rights

³¹ See, MC 291/11 – José Antonio Cantoral Benavides y otros v. Bolivia ; MC 5/11 – Gary Resil, Harry Mocombe, Roland Joseph, Evelin Camelién y Pierre Louis v USA, 1 February 2011.

³² MC 141/14 – Manuel Escalona Sánchez, Wilfredo Matos Gutiérrez y Ortelio Abrahante Bacallao, Bahamas.

³³ *I/A Court H.R., Wong Ho Wing v. Peru*, Provisional Measures, 28 May 2016.

³⁴ In PM 277/13 – Members of the Otomí-Mexica Indigenous Community of San Francisco Xochicuautla, Mexico, the Commission lists the agreed measures (and still found them insufficient to ensure the applicants' life and integrity: "*Las medidas acordadas fueron las siguientes: ii) otorgamiento de diez líneas telefónicas y equipo de telefonía celular, con aplicación de localización para sistemas de reacción inmediata (botón de pánico); ii) programación de la instalación de medidas de protección que no requieren energía eléctrica; iii) solicitud de intervención de la Comisión para el Diálogo con los Pueblos Indígenas, a fin de realizar un proceso de diálogo entre la Comunidad indígena y las autoridades competentes; iv) "rondines aleatorios bitacorados de carácter preventivo"; y v) solicitud de intervención de la Comisión Ejecutiva de Atención a Víctimas, a fin de brindar asistencia a los integrantes de la Comunidad.*" In PM 112/16 – Members of COPINH, Berta Cáceres' relatives and other, Honduras, the State provided information indicating that the competent authorities provided the beneficiary Gustavo Castro Soto with a security scheme, including several escorts, armored vehicles, patrols during displacements and permanent devices located in their place of residence.

³⁵ MC 291/11 – José Antonio Cantoral Benavides y otros v. Bolivia, 8 August 2011 ; MC 150/11 – Sandra Viviana Cuéllar v. Colombia, 13 June 2011 ; MC 359/10 – Integrantes de la Corporación Justicia y Dignidad v. Colombia, 28 June 2011 ; *Second Report on the situation of human rights defenders in the Americas*, IACHR, Doc. OEA/Ser.L/V/II., Doc. 66, 31 December 2011, para. 460: "States must examine the situation and, in consultation with the beneficiaries, determine what protective measures will be adopted to protect his/her rights. It is this analysis that will enable the State to effectively and diligently comply with requests for protective measures."

³⁶ *I/A Court H.R., Matter of Members Choréachi Indigenous Community regarding Mexico*, Provisional Measures, 25 March 2017.

³⁷ *I/A Court H.R., Matter of Alvarado Reyes et al. regarding Mexico*. Provisional Measures, Order of April 1, 2010, para. 14.

*in order to facilitate the effective implementation of the measures.*³⁸ [Furthermore,] States must have laws prescribing which authorities are responsible for the measures' implementation, what kind of authority they have to coordinate with the authorities in other areas and levels of government, the internal procedures for implementation, the criteria used to determine the protective measures that will be provided ..., and how the implementation of the measures will be monitored, all the time ensuring that they are effective and are arranged with the beneficiaries, which will also necessitate logistical and budgetary resources.³⁹

In the follow-up of its recommendations to Colombia, the Inter-American Commission stressed the need for transparency of protection programmes for persons under threat to their life or integrity, including when subject to interim measures, and to generate suitable accountability mechanisms.⁴⁰

In analysing the measures applied to ensure implementation of interim measures, it is useful to consider protection programmes established to safeguard human rights defenders. Indeed, in several countries, especially in the Americas, protection programmes for human rights defenders have been put in place specifically in order to comply with the precautionary and provisional measures of the Inter-American system for persons threatened with killing, ill-treatment, enforced disappearance or other abduction. Research carried out by the NGO Protection International into the effectiveness of such protection programmes provides, *mutatis mutandis*, informative comparative practice. This independent research has concluded that the effectiveness of such programmes was often undermined by mistrust of the beneficiaries towards the institutions providing for protection, due to their lack of independence from the Executive⁴¹ and, sometimes, collusion with the very authorities or persons they fear may perpetrate human rights violations⁴²

The African Commission on Human and Peoples' Rights has looked to investigation of past violations of the rights of the beneficiaries as a way to implement provisional measures when the concerned person is a member of a group generally subject to practice in violation of the African Charter of Human and Peoples' Rights.⁴³ Similarly, the Inter-American Commission has found that a protection programme for persons under threat to their life or integrity, including when subject to interim measures, must be assessed against "its effectiveness to reduce the risk situations that the beneficiaries of the current program are facing."⁴⁴ The Commission identifies investigation as a measure of prevention, the lack of which "could generate a cumulative effect with regard to the constant increase of beneficiaries in the

³⁸ I/A Court H.R., Matter of Alvarado Reyes *et al.* Provisional measures, 1 April 2010, para. 14; I/A Court H.R., *Case of the Mampiripán Massacre*, Provisional measures, 2 September 2010, para. 20. .

³⁹ *Second Report on the situation of human rights defenders in the Americas*, IACHR, Doc. OEA/Ser.L/V/II., Doc. 66, 31 December 2011, para. 439 and 447 (emphasis added). This assessment is in relation to human rights defenders, one of the target groups to which they are most often issued. Since, however, the objective of these measures is usually that of impeding the person's killing, ill-treatment, enforced disappearance or other abduction, they provide a useful comparative practice for the enforcement of interim measures for persons finding themselves at risk of similar violations, albeit without being part of the same group.

⁴⁰ Inter-American Commission on Human Rights (IACHR), *Annual Report 2015*, Chapter V, available at <http://www.oas.org/en/iachr/docs/annual/2015/TOC.asp>, para. 76

⁴¹ Protection International, *Protection of human rights defenders: Best practices and lessons learnt*, Maria Martin Quintana and Enrique Eguren Fernandez, 2012, p. 40 : "[i]ndependence is a key element in protection work and for gaining the trust of human rights defenders, who in many cases refuse contact with government offices."

⁴² *Ibid.*, pp. 15 and 20: the report found that in Mexico and in Colombia, one of the main deficiencies of these programmes was mistrust of the beneficiaries towards the institutions providing for protection. It was even found that "[o]ccasionally the institutions they fear are the very same ones entrusted with their protection." See also, p. 37, in Colombia : "good deal of mistrust, especially since it transpired that this institution [in charge of the protection programme] was carrying out intelligence activities and a dirty war against groups of human rights defenders." In Guatemala, a serious limitation of the protective measures taken was their provision by "the National Civil Police and the Ministry of Internal Affairs." (p. 18)

⁴³ See, *Abubakkar Ahmed Mohamed and 28 Others (Represented by X and Y) v. Ethiopia; Ibrahima Halawa and 493 Others v. Egypt*.

⁴⁴ IACHR, *Annual Report 2015*, *op. cit.*, Chapter V, para. 84.

protection program and the powers of revision of the decisions adopted on protection."⁴⁵ Public condemnation of the practices that led to these violations is key to ensure their non-repetition, as well as official directives and trainings to the security services.⁴⁶

3. Conclusion

Based on this Court's jurisprudence and on the comparative practice of other regional human rights bodies, the ICJ submits that, where there is a systemic practice of violations of interim measures, effective implementation of interim measures in accordance with article 34 ECHR requires that the State:

- Establish an effective protection programme to ensure compliance with such measures that, at least,
 - ensures the participation of the concerned person in the assessment of the situation and the selection of the measures;
 - is independent of the authorities from which the threat or violations is alleged to originate and is trusted by the beneficiaries;
 - is transparent in its functioning and provides means for lodging a complaint;
 - is effective to uphold the aim of the interim measure and allows for a prompt response to any threat of violation.
- Provides effective, independent and impartial investigation, prosecution and sanctions in cases where such practices have arisen, as well as public condemnation of the practices and effective guarantees of non-repetition.

III. The Russian legal system and protection against transfers

This Court has ruled that the repetitive practice in the Russian Federation of extraditions, expulsions and, sometimes, abductions by unknown actors, of persons suspected of extremism or terrorism offences wanted in Central Asian States (especially Tajikistan and Uzbekistan) demonstrates "a flagrant disregard for the rule of law and suggest[s] that certain State authorities have developed a practice in breach of their obligations under the Russian law and the Convention."⁴⁷ The Court has stressed that its interim measures cannot be circumvented simply by changing the method by which a transfer occurs.⁴⁸

In order to remedy this situation and ensure the effectiveness of its interim measures in these cases, the Court ordered the Russian Federation to put in place *an appropriate mechanism, tasked with both preventative and protective functions, ... to ensure that such applicants benefit from immediate and effective protection against unlawful kidnapping and irregular removal from the national territory and the jurisdiction of the Russian courts. [It] should be subject to close scrutiny by a competent law-enforcement officer at an appropriate level capable of intervening at short notice to prevent any sudden breach of interim measures that may occur on purpose or by*

⁴⁵ *Ibid.*, Chapter V, para. 139.

⁴⁶ *Ibid.*, Chapter V, para. 3060.

⁴⁷ *Savridin Dzhurayev v. Russia*, *op. cit.*, para. 257. See also, *Nizomkhon Dzhurayev v. Russia*, *op. cit.*, para.146 ; *Kasymakhunov v. Russia*, *op. cit.*, para. 186.

⁴⁸ *Ibid.*, para. 217. See also, *Ermakov v. Russia*, *op. cit.*, para. 284 ; *Kasymakhunov v. Russia*, *op. cit.*, para. 184 ; *Mukhitdinov v. Russia*, *op. cit.*, para. 92. The attitude to circumvent interim measures by deciding at the national level how to implement them despite the Court's wording has been found also in a series of cases on ill-treatment in detention and access to medical assistance ; *Klimov v. Russia*, Application no. 54436/14, 4 October 2016, para. 49 ; *Kondrulin v. Russia*, Application no. 12987/15, 20 September 2016 ; *Adrey Lavrov v. Russia*, Application no. 66252/14, 1 March 2016 ; *Maylenskiy v. Russia*, Application no. 12646/15, 4 October 2016 ; *Patranin v. Russia*, Application no. 12983/14, 23 July 2015 ; *Khloyev v. Russia*, Application no. 46404/13, 5 February 2015 ; *Amirov v. Russia*, Application no. 51857/13, 27 November 2014.

accident. Applicants and their legal representatives should be allowed easy access to the State officers concerned in order to inform them of any emergency and seek urgent protection."⁴⁹

This Court has also stressed that Russian authorities should put in place "appropriate procedures and institutional arrangements to ensure effective investigation into every case of breach of such measures [and c]lose scrutiny of such investigations at an appropriate official level ... in order to ensure that they are conducted with the necessary diligence and to the required standard of quality."⁵⁰

1. The role of international law in the Russian legal system

The Russian authorities have repeatedly communicated to the Committee of Ministers (CMCE) that the judgments of the Court on the binding nature of interim measures are transmitted to its courts and national authorities. Russian translation of relevant CMCE decisions,⁵¹ judgments of this Court,⁵² and explanatory notes of UNHCR⁵³ are reportedly sent to the competent State authorities⁵⁴ and are forwarded to relevant inferior courts, their territorial bodies, structural divisions and subordinate.⁵⁵ While these measures are useful and necessary, they do not appear sufficient to discharge the State's protective obligations in light of this Court's jurisprudence.

Furthermore, the ICJ is concerned that recent developments in the jurisprudence of the Supreme Court of Russia may jeopardise the effectiveness of efforts to ensure the respect for interim measures. Although the Russian Constitution and the Code of Criminal Procedure provide for the primacy of international law in the domestic legal order,⁵⁶ in its ruling no. 21-П, dated 14 July 2015, the Constitutional Court held that this Court's judgments may be implemented only insofar as they do not contravene the Russian Constitution. As a result, the ability of Russian institutions, pursuant to their domestically recognized competencies, to effectively execute the decisions of this Court has been weakened. This may also have repercussions on the execution of interim measures of this Court, since national law, including secondary legislation may, *de facto*, take precedence over Russia's international human rights obligations.⁵⁷

2. The execution of article 34 ECHR rulings of the Court

a) An effective protection mechanism

⁴⁹ *Ibid.*, para. 262.

⁵⁰ *Ibid.*, para. 263.

⁵¹ It was already mentioned in the 01.02.2013 (DH-DD(2013)93) that a CMCE decision was forwarded to the competent authorities.

⁵² The sending of translated landmark judgments and the review was already mentioned in the 09.02.2012 Action plan (DH-DD(2012)152). It also stated that in 2011, summaries of the relevant case-law was sent to the PGO.

⁵³ Action plan of 15.07.2014 (DH-DD(2014)887).

⁵⁴ Action plan of 15.07.2014 (DH-DD(2014)887).

⁵⁵ Action plan of 15.07.2014 (DH-DD(2014)887). See last action plan, Doc. DH-DD(2017)177, 20 February 2017, para. 1.

⁵⁶ See, article 15(4) of the Russian Constitution, article 1.3 Criminal Procedure Code (CPC). The CPC provides that general principles and norms of international law and international treaties of the Russian Federation are a constituent part of its legislation concerning criminal proceedings and in case of conflict between provisions of an international treaty and those in the Code, the international norms prevail.

⁵⁷ Opinion expressed by Eleonor Davidyan, lawyer of the project "Right to Asylum" of the Institute for Human Rights, Russian Federation, in an interview with the ICJ. Similar opinion is expressed on the basis of analysis of normative legal acts and administrative practices by Asker Chermit, in PhD dissertation "Institute of extradition in the Russian Federation: Constitutional legal foundations", Moscow 2004, available at the library of the Russian Academy of the State Service under the President of the Russian Federation.

In its action plans presented to the Committee of Ministers of the Council of Europe for the execution of this Court's judgments in similar cases, the Russian Federation has explained in that its authorities have arranged a series of meetings with the persons subject to interim measures of this Court where the situation of the applicant is clarified⁵⁸ and has aimed to protect their physical safety and to prevent the risk of forced removal. Authorities reportedly explain to such individuals that, in case of any real threat of criminal offence against them, they should apply to the nearest competent body, and request special State protective measures within the framework of criminal proceedings.⁵⁹ The Russian authorities, when asked about the legal basis of this protection mechanism, have referred to Federal Law no. 119-FZ *On the State Protection of Victims, Witnesses and Other Participants of Criminal Proceedings* and Resolution of the Russian Government of 27 October 2006 no. 630 *On the Approval of the Rules of Application of Certain Security Measures for Victims, Witnesses and Other Participants in Criminal Proceedings*.⁶⁰

Notwithstanding this explanation, it must be emphasized that the Law on State Protection expressly applies only to "actors in criminal proceedings"⁶¹ and is not tailored to victims of human rights violations or persons covered by interim measures of this Court. There is no reference whatsoever in the Law to the European Court of Human Rights, its interim measures or the situation of vulnerability of the persons at risk of abduction. It is not clear whether these measures actually apply to the persons subject to interim measures. Contradictory statements have appeared in the Russian Federation's action plans of 2013⁶² and of 2014.⁶³ What is coherent throughout the action plans is that such a protection system is applicable only "after assessment of each particular situation in case of real risk of criminal offence in respect of a person."⁶⁴ However, currently, no internal investigation has concluded that a provision of Russian criminal law has been violated in any of the cases of the 'Garabayev' group. That group includes all cases of extradition, expulsion or abduction of suspects of security-related offences from the Russian Federation to Central Asian States. Furthermore, the Russian Federation has not yet provided a clear picture of the criminal law applicable to these cases.

Under the Law, the authorities responsible to decide on the protection requests are those in charge of the part of criminal procedure in which the person is involved.⁶⁵ They decide on such requests within three days or immediately in case of emergency.⁶⁶ Protection measures may be issued before the institution of criminal proceedings⁶⁷ and must respect the rule of law, uphold individual rights and freedoms and mutual responsibility of authorities and individuals in the protection.⁶⁸ They are

⁵⁸ Action plan of 13.04.2015 (DH-DD(2015)424) – but a regular control was already mentioned in the 02.07.2013 (DH-DD(2013)763) Action plan; DH-DD(2017)177, 20 February 2017, para. 7

⁵⁹ Action plan of 11.11.2014 (DH-DD(2014)1357); Action plan of 13.04.2015 (DH-DD(2015)424).

⁶⁰ See, Actions plans DH-DD(2013)763, DH-DD(2014)887.

⁶¹ Article 2.1, Federal Law no. 119-FZ *On the State Protection of Victims, Witnesses and Other Participants of Criminal Proceedings* (unofficial translation). Among these are the victim, witness, private prosecutor, suspect, accused, defendant, defence counsel and any other accessory actors in a criminal trial or investigation.

⁶² Action Plan, DH-DD(2013)763, para. 6.1: "At the same time these measures cannot be taken outside the framework of criminal proceedings, only because of extradition request was received in respect of a person or interim measures were indicated by the Court in his respect. The other member states of the Convention use the same approach."

⁶³ Action Plan, DH-DD(2014)58E, para. 4: "Such measures can be applied to persons, in respect of whom extradition requests have been received and the European Court applied interim measures, after the application of relevant person and within the initiated criminal proceedings. Therefore, guarantees had been created in Russia ensuring that in the case of a real risk of criminal offence against such person, after assessment of a particular situation the authorities can make a decision to apply special protective measures."

⁶⁴ Action Plans, DH-DD(2013)763, para. 6.1; DH-DD(2014)58E, para. 4.

⁶⁵ See, article 3.2, Federal Law no. 119-FZ.

⁶⁶ See, article 18.2, Federal Law no. 119-FZ. The decision can be appealed to a higher authority, prosecutor or court and a decision is taken within 24 hours, see, article 18.3

⁶⁷ See, article 2.2, Federal Law no. 119-FZ.

⁶⁸ See, article 4.1, Federal Law no. 119-FZ.

supervised and monitored by prosecutors.⁶⁹ According to the Russian authorities, prosecutors take prompt responsive measures to all detected violations⁷⁰ and must inform the concerned persons of the possibility to request protection upon their release.⁷¹ Protection is ensured by police authorities, the Federal Security Service (FSB) or other assigned authorities.⁷² They select the protection measures, at their own discretion, and, once decided, they must reach an agreement with the person under protection on the terms and conditions of their implementation and the rights and responsibilities of the executing body and on the individuals.⁷³

The latest statistics provided by the Russian Federation on the functioning of this mechanism are of 2013, when it was applied to 3,300 persons. However, no person subject to interim measure of the Court has applied for this protection scheme.⁷⁴ The situation remained the same as of 20 February 2017.⁷⁵ In 2015, after these communications on the Law on State Protection by the Russian Federation, the Court found that no effective protection mechanism had been put in place.⁷⁶

Finally, Russian authorities have stated that a practice has begun to ensure at least temporary protection to the persons subject to this Court's interim measures that are at risk of persecution if sent to their country of origin.⁷⁷ Temporary protection under Russian law is a form of international protection issued to those who do not qualify for refugee status and lasts only for renewable terms of one year.⁷⁸ While some of the victims of the 'Garabayev' group cases have been granted this status, the Russian Government reported that "a number of applicants ... preferred not to apply ... for the extension of temporary asylum previously granted to them."⁷⁹

b) Effective investigations

With regard to effective investigations, so far, none carried out by Russian authorities in abduction cases before this Court has produced any meaningful results.⁸⁰ The investigations reveal a series of shortcomings. For example, in the case of *Mukhitdinov*, the victim was interrogated about the abduction while in custody, while serving his criminal sentence, of the Uzbek authorities. It is in this environment that he affirmed that he arrived 'voluntarily' in Uzbekistan.⁸¹ Russian authorities have closed the case, a decision that, they stress, was not appealed.⁸² A similar situation concerned the *Yu. Kasymakhunov* case.⁸³ The Russian action plans reveal that no effective investigation was carried out in the case of *Abdulkhakov*, who was allegedly free in Tajikistan.⁸⁴ *Savridin Dzhurayev* is in detention in Tajikistan, but the Russian

⁶⁹ See, article 4.2, Federal Law no. 119-FZ.

⁷⁰ Action plan of 02.07.2013 (DH-DD(2013)763).

⁷¹ Action plan of 20.11.2014 (DH-DD(2014)1431).

⁷² See, article 3.3, Federal Law no. 119-FZ.

⁷³ See, article 18.5-6, Federal Law no. 119-FZ, and articles 2-3, Resolution of the Russian Government of 27 October 2006 no. 630 *On the Approval of the Rules of Application of Certain Security Measures for Victims, Witnesses and Other Participants in Criminal Proceedings*. The implementing secondary law, however, mentions this agreement only in relations to the measure of replacing identity documents or change physical appearance. See, article 11, Resolution of the Russian Government of 27 October 2006 no. 630.

⁷⁴ Action plan, DH-DD(2014)887.

⁷⁵ Action plan, DH-DD(2017)177, 20 February 2017, para. 7.2

⁷⁶ *Mukhitdinov v. Russia*, *op. cit.*, para. 94 ; *Mamazhonov v. Russia*, *op. cit.*, para. 216-217.

⁷⁷ Action plan, DH-DD(2017)177, 20 February 2017, para. 4

⁷⁸ Article 12.2, Refugees Act.

⁷⁹ Action plan, DH-DD(2017)177, 20 February 2017, para. 4.1.

⁸⁰ Action plan of 15.07.2014 (DH-DD(2014)887).

⁸¹ Action plan, DH-DD(2017)177, 20 February 2017, para. 12.2. See last assessment of the investigations at, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806e43fb

⁸² Action plan, DH-DD(2017)177, 20 February 2017, para. 12.2

⁸³ Action plan, DH-DD(2017)177, 20 February 2017, para. 12.7

⁸⁴ Action plan, DH-DD(2017)177, 20 February 2017, para. 12.3. *Nizomhon Dzhurayev's* well-being is supported by a video in which Russian authorities say he declared to have arrived 'voluntarily'. He is reported to have been arrested once in Tajikistan and placed under the prohibition to live in his residence. However, it has since absconded, a behaviour that clashes with the

investigations have found no lead on his 'disappearance' and the investigation has been closed.⁸⁵ The same is true for *Iskandarov*.⁸⁶

The Secretariat of the Committee of Ministers has stressed that "any discrepancies between the domestic investigations' results and the findings of the Court must be convincingly explained."⁸⁷ It pointed out that, "due to the applicants' vulnerable situation, statements made by them through the authorities of the requesting States do not obviate the need for effective investigations capable of establishing a convincing account of the events, with due regard for the Court's findings."⁸⁸ Consequently, in its most recent assessment of these cases, the Committee of Ministers 'encouraged' the Russian Federation "to continue the investigation of the specific facts pointing to the applicants' unlawful removal as presented in the Court's judgments."⁸⁹

3. Conclusions

Based on the above, the ICJ submits that the Russian authorities have not yet provided an effective protection programme that would ensure the respect of this Court's interim measures in cases of alleged abductions. The current system does not apply directly to persons protected by this Court's interim measures at risk of abduction, and is not tailored to their needs. The interpretation as to the nature and scope of its application is left to the discretion of responsible authority.

Furthermore, the authorities that will most often lead this programme are prosecutors and the FSB, who are not independent from the Executive. The lack of any use of the current programme in cases of transfer of persons subject to interim measures demonstrates a lack of trust of the potential beneficiaries. In addition, the law does not provide for meaningful participation of the beneficiaries in the assessment of the situation and the design of individual protection measures and programmes.

The ICJ further stresses that the lack of any effective investigations and public condemnation of practices of abduction is detrimental to the effective implementation of the Court's interim measures. Indeed, most of the national investigations into cases of abducted persons appear to have been directed towards discrediting this Court's findings instead of seeking those responsible. In these conditions, guarantees of non-repetition of the violation of article 34 ECHR are not provided.

The ICJ submits that this continued lack of compliance by Russian authorities with the rulings of this Court under article 46 ECHR in *Savriddin Dzhurayev* and related cases affects the whole system of compliance with the Court's interim measures. The recurrence of this situation therefore requires the formulation of specific measures to enhance systemic changes in Russian law and practice in order to ensure the respect of article 34 ECHR.

alleged willingness of the person to come back to the country and give up to the authorities, Action plan, DH-DD(2017)177, 20 February 2017, para. 12.4.

⁸⁵ Action plan, DH-DD(2017)177, 20 February 2017, para. 12.5

⁸⁶ Action plan, DH-DD(2017)177, 20 February 2017, para. 12.6

⁸⁷ See at, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806e43fb

⁸⁸ See at, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806e43fb

⁸⁹ Interim Resolution, CM/Del/Dec(2017)1280/H46-23, 10 March 2017, para 4, available at https://search.coe.int/cm/Pages/result_details.aspx?Objectid=09000016806fab9c