Rule 39 and the Rule of Law

Richard Ekins KC (Hon)

Foreword by Lord Sumption

Preface by Lord Hoffmann

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Policy Exchange

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Foreword

Lord Sumption, former Supreme Court Justice

Rule 39 of the European Court of Human Rights empowers the Strasbourg Court to recommend interim measures in proceedings before the court. The procedural rules of courts do not often make headlines. But Rule 39 has hit the news in a big way as a result of its use to stop refugee deportations to Rwanda.

The circumstances were remarkable. A deportee had applied in the English courts for an injunction to stop his removal to Rwanda pending his challenge to the Rwanda scheme. The issue was fought right up to the Supreme Court, which ruled that the deportations could go ahead because no irreparable damage would be done. This was because he could challenge the deportation order from Rwanda and satisfactory arrangements had been made to bring him back if he succeeded. The decision was effectively overturned by an unnamed judge in Strasbourg, after what can only have been a cursory examination of the question, without the British government having any opportunity to be heard and without any reasons being given. What made it more remarkable was that there was no challenge to the Rwanda scheme before the Strasbourg Court. The relevant proceedings were happening in the English courts which had ruled that interim measures were unnecessary and undesirable.

The case was an object-lesson in the tactical importance of interim measures. In theory they decide nothing, but simply hold the position pending the hearing of the case on the merits. In practice, as every litigation lawyer knows, they are often decisive. The Rwanda scheme is such a case. Its object is to remove illegal immigrants quickly without prejudice to their right to challenge the deportation order later. The rationale, right or wrong, is that speedy deportation deters others from coming into the country illegally. This objective is frustrated if deportees are able to hold up their removal for years while their challenge goes through potentially three tiers of appeal followed by a petition to Strasbourg. The process commonly takes years. The Rwanda scheme is extremely controversial, and I am neither attacking or defending it. But whatever one thinks about it, the ability of a court to torpedo a critical legislative policy without any hearing or substantial consideration of the merits by a purely procedural mechanism, ought to cause concern. If interim measures are available in cases like this, it is probable that no legislative scheme for the prompt removal of illegal immigrants can succeed.

It is not often realised how slender the legal basis of interim measures under Rule 39 really is. Rule 39 speaks of recommendations, not orders.

The European Convention on Human Rights, which is the only instrument that the state parties have actually agreed, does not, on the face of it, empower the Strasbourg Court to enlarge its own jurisdiction through its internal procedural rules. It confers binding force on final rulings of the Court, but not on interim measures. Professor Ekins argues that Rule 39 has no binding force in international law. His arguments will no doubt be contested, but they cannot simply be brushed aside. With a bill currently before Parliament which would authorise ministers to disregard Rule 39 recommendations in appropriate cases, his analysis is timely, and important.

Preface

Lord Hoffmann, former Law Lord

A ruling of a court such as the European Court of Justice is binding upon the parties only if the court had jurisdiction to make it. If it did, a party must comply and cannot complain that it was wrong. If the court did not have jurisdiction, the parties can ignore it.

The European Convention on Human Rights confers upon the Strasbourg Court jurisdiction in all matters "concerning the interpretation and application of the Convention": article 32. It exercises this jurisdiction by the judgments of its Chambers, which, after submissions and argument by the parties, become final in accordance with articles 42 and 44. In this paper, Professor Ekins demonstrates that the Convention does not confer upon the Court, still less upon one of its judges, a power to make orders binding upon a Member State which require it to do or refrain from doing something on the ground that it might at a later stage be held to have been an infringement of the Convention. Not only is there nothing in the language of the Convention which expressly confers such a power but the usual aids to the construction of a treaty – the *travaux preparatoires*, the subsequent practice of the court – reflect a clear understanding that no such power exists.

What has happened is that one of the rules which the Court has itself made to regulate its own procedureshas included a power to "bring to the attention of the Parties any interim measure the adoption of which seems desirable" to avoid a violation of the Convention. The existence of a power to fire such a shot across the bows is practical and sensible. It does not involve the assertion of any jurisdiction to impose a legal obligation. But what has happened in the court's recent jurisprudence is that this advisory power has been assumed to be a power to grant legally binding interlocutory relief. As Professor Ekins demonstrates, a court cannot in this way enlarge its jurisdiction by its own bootstraps. And if the Court had no jurisdiction to make such an order, Member States are free to ignore it.

Introduction

In domestic legal proceedings, a court will often exercise a power to grant interim relief, making an order that protects the interests of one (or both) parties until the court has had an opportunity to hear argument and to make a substantive decision on the merits. In the usual case, the court will hear argument from the parties about whether it should exercise this power and the court will make a reasoned decision to grant, or withhold, interim relief. In an emergency, interim relief may be granted without hearing from both parties, but in this case the court will invite a hearing at the earliest possible opportunity to decide whether interim relief should be maintained.[1]

Some international tribunals have – or claim – an analogous power to grant interim relief, protecting the interests of one of the parties to the dispute until the tribunal has an opportunity to resolve the substance of the dispute. The International Court of Justice exercises such a power under Article 41 of the Statute of the International Court of Justice. The European Court of Human Rights (ECHR) has asserted that it too enjoys such a power, which is exercised when a (single) judge of the Court indicates to the parties, usually the member state against whom proceedings have been brought, "interim measures" that "should be adopted in the interests of the parties or of the proper conduct of the proceedings". These interim measures are made under the authority of Rule 39 of the Rules of Court, rules which the whole Court (the plenary Court) adopts under Article 25 of the European Convention on Human Rights.

Rule 39 has risen to prominence in the UK since 14 June 2022, when a judge of the Strasbourg Court indicated "interim measures" restraining the UK from removing asylum-seekers to Rwanda until three months after the conclusion of the domestic proceedings. This intervention was surprising because British courts – including the Court of Appeal and Supreme Court – had concluded that interim relief was *not* warranted, issuing reasoned judgments explaining their conclusion. In a press release published late on 14 June, a judge of the European Court of Human Rights ruled otherwise. The identity of the judge, and thus his or her nationality, is still not publicly known. But whoever the judge was, he or she did not hear argument from the UK before making the Rule 39 order. The UK did not press ahead and remove the asylum-seekers and much public commentary has taken for granted that for the UK to have done so would have been obviously unlawful.

This report considers the legal status of Rule 39 interim measures. Many lawyers and jurists take it to be obvious that the UK would breach its

1. Civil Procedure Rules 1998 Practice Direction 25A, paragraph 5.1 provides, in relevant part, that any order for an injunction, unless the court orders otherwise, must contain: "if made without notice to any other party, a return date for a further hearing at which the other party can be present".

international legal obligations if it failed to comply with a Rule 39 order. They argue that if the UK were to fail to comply with a Rule 39 ruling, this would undermine the rule of law, in much the same way that it would be outrageous for a minister to fail to comply with an interim ruling of a domestic court. This analysis is mistaken. The Strasbourg Court has no authority to grant interim relief and member states of the Convention have no obligation in international law to comply with Rule 39 rulings. In refusing to accept the Court's assertions to the contrary, the UK would be vindicating the rule of law, not flouting it. This report considers the foundations of the Court's claim to have jurisdiction to grant interim relief and shows that the purported jurisdiction is groundless. Moreover, the Court's practice is impossible to reconcile with the rights to which member states are entitled under the express terms of the Convention.

The legal force of Rule 39 interim measures is relevant to questions that have arisen in the course of parliamentary deliberation about the Illegal Migration Bill, which is now before the House of Lords and which includes a clause that addresses Rule 39. In the second reading debate on 10 May, the House of Lords considered a motion, put forward by Lord Paddick, proposing the House decline to give the Bill a second reading on grounds that included that the Bill "undermines the rule of law by failing to meet the United Kingdom's international law commitments and by allowing Ministers to ignore the directions of judges". The motion was rejected, but the debate confirms that many peers agree with Lord Paddick that non-compliance with Rule 39 undermines the rule of law.

This report explains why the Lord Paddick view is wrong, outlining the understanding of the law and the rule of law on which parliamentarians should deliberate about the Bill's merits. But the report's implications are not limited to the immediate controversy about the Illegal Migration Bill. In asserting a power to grant interim relief, the European Court of Human Rights has created for itself a power that member states chose not to confer upon it. This is relevant to an assessment of the Court and its record. The UK and its legal representatives should not accept, and on the contrary should robustly challenge, the lawfulness of the Court's practice. And parliamentarians and others in public life who, rightly, take the principle of the rule of law seriously should recognise that the Court's actions are incompatible with that principle and should be resisted and corrected. Parliament's long-established constitutional powers would be appropriately exercised by forbidding our courts and public officials from complying with interim orders of the Strasbourg Court in relation to matters on which Parliament has legislated.

The history of Rule 39

Rule 39 of the Rules of Court, in force today, provides:

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

The "Obligation to comply with interim measures"

In its *Factsheet – Interim Measures*, the European Court of Human Rights reproduces the text of Rule 39 and then summarises its operation in the following terms:

> Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.
>
> In the majority of cases, the applicant requests the suspension of an expulsion or an extradition.
>
> The Court grants requests for interim measures only on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm. Such measures are

> then indicated to the respondent Government. However, it is also possible for the Court to indicate measures under Rule 39 to applicants.

Later in the Factsheet, in a section entitled "Obligation to comply with interim measures", the Court says:

> Although interim measures are provided for only in the Rules of Court and not in the European Convention on Human Rights, States Parties are under an obligation to comply with them. Two Grand Chamber judgments (see below) have given the Court an opportunity to clarify this obligation, based particularly on Article 34 (individual applications) of the European Convention on human rights.

The judgments are *Mamatkulov and Askarov v Turkey*[2] and *Paladi v Moldova*.[3] The former is especially important. Before *Mamatkulov* was decided in 2005, it was settled law that member states were *not* under an obligation to comply with "interim measures". The Court held this authoritatively in 1991 in *Cruz Varas v Sweden*.[4] In *Mamtkulov*, the Court reversed the ruling on interim measures in *Cruz Varas* (and the more recent case of *Čonka v Belgium*)[5] and held (by majority) that Turkey had breached Article 34 of the ECHR by failing to comply with a Rule 39 interim measure.

The majority's volte-face in *Mamatkulov* was surprising because, as the Factsheet notes, the ECHR does not make any provision for the Court to make interim measures in relation to proceedings before the Court, let alone to make interim measures that have binding effect on states. The Court's supposed power to make (binding) interim measures was conferred on the Court by itself, in exercise of its power under Article 25 to make rules of court.

The decisions not to empower the Court to grant binding interim relief

The absence from the ECHR of a power to make (binding) interim measures is no accident. In 1949, representatives of the Council of Europe's member states met to draft the European Convention on Human Rights. One question the representatives considered was whether the adjudicative bodies the Convention would establish (the Commission and the Court) should be empowered to issue interim measures. On 12 July 1949, a draft Convention was presented to the Committee of Ministers of the Council of Europe. That draft contained a provision expressly conferring a "power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".[6] This draft provision was *not* included in the final version ratified by its signatories, including the United Kingdom. Nothing close to such a provision is to be found in the agreed text of the Convention.

Soon after it came into force, the Commission charged with adjudicating claims under the Convention began to make requests to the parties before

2. *Mamatkulov and Askarov v Turkey* (GC) 46827/99; 46951/99 [2005] ECHR 64, 4 February 2005 at [99].
3. *Paladi v Moldova* (GC), 39806/05 [2009] ECHR 450, 10 March 2009.
4. *Cruz Varas and Others v Sweden* 15576/89 [1991] ECHR 26, 20 March 1991 at [102]
5. *Čonka v Belgium* (dec.) no 51564/99, 13 March 2001
6. Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* 8 vols (The Hague: Martinus Nijhoff, 1975-85) vol 1, 302-320.

it. An early example is *Greece v United Kingdom*.[7] In the midst of an insurgency against British rule in Cyprus, the UK enacted a set of emergency regulations to govern the island. Greece brought a claim before the Commission, arguing that these emergency regulations violated the Convention. On 1 July 1957, the Commission asked the UK to delay executing a prisoner under one of those emergency regulations.[8] All parties clearly understood this request to be voluntary.

Similar voluntary requests were made in *X v Federal Republic of Germany*,[9] *Denmark, Norway, and Sweden v Greece*,[10] among other cases. Thereafter, attempts were once again made to confer an express power on the Commission to make interim measures. In 1971, the Consultative Assembly (now the Parliamentary Assembly) of the Council of Europe asked the Committee of Ministers to adopt such measures.[11] The Committee declined. However, in 1974, as part of a broader reform, the Commission revised its procedural rules, introducing Rule 36, which stated:

> The Commission or, where it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.[12]

With the ratification of Protocol 11 of the Convention in 1998, the Commission was abolished. The European Court of Human Rights, which had previously played a more limited role, took over the Commission's responsibilities. The Court, too, claims the power to indicate provisional measures. The first Rules of Court, promulgated in 1959, included Rule 34 (Interim measures):

> 1. Before the constitution of a Chamber, the President of the plenary Court may, at the request of a Party, of the Commission, of any person concerned or *proprio motu*, bring to the attention of the Parties any interim measure the adoption of which seems desirable. The Chamber, when constituted, or, if the Chamber is not in session, its President, shall have the same right.
>
> 2. Notice of these measures shall be immediately given to the Committee of Ministers.

Note how tentatively the provision is framed. The Court may "bring to the attention of the Parties any interim measure the adoption of which seems desirable". This is not the language of a legal power to grant interim relief, imposing new legal obligations on a member state. The Commission, in making Rule 36, and the Court, in making Rule 34, clearly understood that they were not exercising – and could not lawfully assert – a power to grant binding interim relief.

Protocol 11 constituted a significant change in the structure of the Council of Europe. Prior to its enactment, many lobbied for the Protocol to include yet another change: to empower the European Court of Human

7. *Greece v United Kingdom*, no 176/56, 26 September 1958.
8. *Greece* at [41].
9. *X v Federal Republic of Germany* no 2396/65, 19 December 1969, [1970] 13 *Yearbook of the European Convention on Human Rights* 900.
10. *Denmark, Norway, and Sweden v Greece* no 4448/70, 4 October 1976, 6 *Decisions and Reports* (DR) 5.
11. (1971) 14 *Yearbook of the European Convention on Human Rights* 68-71. In the text of its recommendation, the Assembly expressed "regret" that "there is no provision in the European Convention on Human Rights authorising its organs ... to order interim measures". It went on to say that it considered that "this gap in the system established by the European Convention on Human Rights should be filled" and recommended the drafting of an additional Protocol conferring this power on the European Commission of Human Rights.
12. "Amendments to the Rules of Procedure of the European Commission of Human Rights" (1974) 17 *Yearbook of the European Convention on Human Rights* 16.

Rights to issue binding interim measures. This included the Court itself. When asked to comment on a draft version of the Protocol, it expressed dismay at the omission:

> Conversely, the Court regrets that, in the context of this radical overhaul of the Convention's machinery of protection, the opportunity has not been taken to fill at least one evident legislative gap, namely the power to indicate interim measures.[13]

But the Court was not the only body to advocate this change. The Commission, and the Committee on Migration, Refugees, and Demography of the Parliamentary Assembly of the Council of Europe, all asked the Committee of Ministers to empower the Court in this way.[14] At the Committee of Ministers, the Swiss delegation, in particular, was receptive to such an addition.[15] The Committee, however, declined the recommendation. It enacted Protocol No 11 without making any mention of interim measures.

In the wake of the Brighton Declaration 2012, the Steering Committee for Human Rights (CDDH)[16] issued its Report on interim measures under Rule 39,[17] which says that the report does:

> …not address the issue of whether to give a new legal basis to interim measures [but] recalls that its work on this issue took place in the context of work on a simplified procedure for amendment of certain provisions of the Convention, including the possibility of creating a Statute for the Court. The Committee of Ministers agreed to return to this issue once work has been completed on the priority issues set out in its decisions for the biennium 2012-13.

The Committee of Ministers does not seem to have returned to the issue, but the earlier work to which the CDDH refers is its Final Report on a simplified procedure for amendment of certain provisions of the European Convention of Human Rights,[18] in which the CDDH:

> …examined which provisions of Section II of the Convention should be subject to a simplified amendment procedure and which not … [and] in the context of the possible introduction of a simplified amendment procedure, considered the possible treatment of provisions or matters not found in the Convention, notably interim measures under Rule 39 of the Rules of Court…

The CCDH concluded that interim measures under Rule 39 of the Court "should have their normative status enhanced by 'upgrading' either into the Convention or, preferably, a Statute." Later in the report, the CDDH states "that the Statute should contain the essential principle underpinning the Court's competence to indicate interim measures and States' obligation to abide by them and that all aspects of the issue should be addressed

13. Opinion of the Court on Draft Protocol No 11 to the European Convention on Human Rights DH-PR (94)4, 31 January 1994, p 3
14. Hannah R Garry, "When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights" (2001) 7 *European Public Law* 399, 409.
15. Yves Haeck and Clara Burbano Herrera, "Interim Measures in the Case Law of the European Court of Human Rights" (2003) 21 *Netherlands Quarterly of Human Rights* 625, 627, n 5
16. CDDH was set up by the Committee of Ministers in 1976 to advise and give its legal expertise to the Committee of Ministers.
17. 2 April 2013
18. 6 July 2012

in a single, separate article, for clarity and visibility." This report was written after *Mamatkulov* and *Paladi* and the CCDH's report does not question whether those decisions were rightly decided. But it is clear that, in the absence of any grounding in the ECHR, or any legislative instrument, the CDDH perceived a problem in need of a solution that would enhance the "normative status" of interim measures and, relatedly, would introduce an express obligation to abide by them. No Protocol has since been agreed that would empower the Court to grant binding interim relief.

The changing text of Rule 39 and its significance

The European Court of Human Rights regularly amends the Rules of Court. On 1 November 1998, when Protocol 11 came into force, Rule 34 was replaced by Rule 39, which then provided:

> 1. 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.
>
> 2. Notice of these measures shall be given to the Committee of Ministers.
>
> 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

Like Rule 34, the language remains tentative, even if there is a shift from "desirable" to "should be adopted". The Chamber, or the Chamber's President, may "indicate to the parties any interim measure which they consider should be adopted in the interest of the parties or of the proper conduct of the proceedings." This is (still) not the language of legal obligation. The judges who framed this Rule, exercising their authority under Article 25 to make rules of court, clearly recognised that they had no authority in so doing to create a power to grant binding interim relief.

It bears noting, however, that Rule 34 and the original Rule 39 is different in two important respects from the current Rule 39, which it seems came into force on 14 January 2013. Rule 34 is limited to the President of the Plenary Court or the Chamber (and its President, if the Chamber is not in session). The original Rule 39 is limited to the Chamber or, where appropriate, its President. The current Rule 39 is much wider, extending not only to the Chamber or, where appropriate, the President of the Section, but also to "a duty judge appointed pursuant to paragraph 4 of this Rule". This is striking. The language of "duty judge" implies a similarity in standing to domestic judges who are responsible, inter alia, for providing interim relief in emergency situations, relief which is of course binding. Paragraph 4 empowers the President to appoint Vice-Presidents of Section to serve as duty judges. There are five Vice-Presidents,

any one of whom might decide a particular Rule 39 application. Thus, interim measures indicated under Rule 34 or the original Rule 39 were made by judges (or one leading judge) who had responsibility for the proceedings in question and whose identity was known to the parties. Interim measures made under the current Rule 39 may be made by a judge who is simply "on duty", who is not otherwise responsible for the proceedings, and whose identity is not made public and may not be known in fact by the parties.

Rule 34 does say that "Before the constitution of a Chamber, the President of the plenary Court may… bring to the attention of the Parties any interim measure the adoption of which seems desirable."[19] But it was always clear that Rule 34 measures were *not* binding. Rule 39 as it stood in 2005, when the Court first said that interim measures were binding, limited the making of interim measures to the Chamber, or to a judge speaking for the Chamber. For a Chamber to be properly constituted, it must have before it an application that has been made to the Court and has not been declared inadmissible by a single judge (Article 27) or by a committee of three judges (Article 28). In contrast, the current Rule 39 purports to empower a single judge, an anonymous "duty judge", to make interim measures *before* the application has reached a Chamber. The significance of this sequence is that the current Rule 39 makes provision for interim measures, which the Court now says impose binding obligations on states, to be made outside the procedure that the ECHR mandates. This procedural novelty is confirmed by the practice of applying for interim measures *before* a domestic appellate court has decided whether to grant interim relief. Later in this paper, I discuss this mismatch between the Court's Rule 39 practice and the detail of the provisions of the ECHR that confer and limit the Court's jurisdiction.

The second difference is that Rule 34 and the original Rule 39 required notice of interim measures to be given (immediately in the case of Rule 34) to the Committee of Ministers. The current Rule 39 simply provides that such notice *may* be given when it is considered appropriate (who must consider it appropriate is unclear). This is an important difference, confirming a drift in the Court's practice away from the state of affairs in which the Court might indicate action that it considers desirable, which it has no authority to make legally binding, informing the Committee of Ministers and leaving it to the Committee to apply such pressure as it thinks appropriate. In not requiring the Committee of Ministers to be informed, the current Rule 39 does not rely on the Committee to support the judge's indication of what is desirable. The language of the current Rule 39 remains tentative, eschewing any intention to impose legal obligations, but the procedural framework it outlines, with "duty judges" and no requirement to notify the Committee, is much closer to a state of affairs in which the Court understands itself to be making legally binding rulings. And indeed, since the *Mamatkulov* decision in 2005, and especially since the *Paladi* decision in 2009, this is how the Court has purported to act.

19. Emphasis added

Article 34 and the *Mamatkulov* decision

The Strasbourg Court now clearly asserts that Rule 39 rulings impose (new) legal obligations on states. The *Mamatkulov* case was the watershed. In that case, the Grand Chamber held that Turkey's failure to abide by an interim measure violated the Convention.[20] This was a direct repudiation of its previous position in *Cruz Varas*, where a plenary session of the Court expressly recognised that interim measures (indicated by the Commission under Rule 36) were not binding.[21]

The majority leaned heavily on Article 34 of the Convention, which provides:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the exercise of this right.

The majority reasoned that by extraditing the applicants, in the face of an interim measure requiring extradition be delayed, Turkey had hindered the exercise of an individual's right to make applications to the Court, because the extradition resulted in the applicants' lawyers losing touch with their clients.

There are a host of problems with the Court's reasoning. First and foremost, the Court cannot answer the charge that the ECHR does not confer a power to grant binding interim relief and that the member states made a deliberate decision in 1949, and again at subsequent junctures, not to empower the Commission or the Court in this way. As I explain in this section, Article 34 of the Convention does not support a power on the part of the Court to grant binding interim relief. In any case, the argument for such a power would need to rely on the combination of Article 34 and Article 25, which empowers the Plenary Court to make rules of court. Neither Article 34 considered alone nor the combination of Articles 25 and 34 can support the creation of this power. In addition, as I explain later in this paper, the power that the Court purports to introduce cannot be squared with several other express provisions of the Convention. In purporting to grant binding interim relief against member states, the Court acts *ultra vires* and unlawfully.

In holding that it is a breach of the ECHR for a member state not to

20. *Mamatkulov* at [99].
21. *Cruz Varas* at [102].

comply with a Rule 39 interim measure, the Court in *Mamatkulov* broke sharply with precedent. The Court's treatment of its own precedent is entirely unconvincing.[22] The majority attempts to avoid *Cruz Varas*, which had held that interim measures were not binding, on the grounds that the judgment concerned the Commission's power to make interim measures rather than the Court's power.[23] The attempt fails. True, the Court may make final judgments about the violation of Convention rights and thus differs from the Commission, whose task "with regard to the merits was of a preliminary nature".[24] But the indication of interim measures is likewise of a preliminary nature – whether interim measures are indicated by the Commission or the Court. This explains why, in *Čonka v Belgium*, a case which comes four years before *Mamatkulov*, the Court straightforwardly applied *Cruz Varas* to its own interim measures.[25] Nonetheless, in *Mamatkulov*, the majority abruptly reversed course. As the dissent recognises, in doing so it ran roughshod over these precedents.[26]

The majority may have been emboldened by the International Court of Justice's decision in *LaGrand (Germany v United States)*, on 27 June 2001, handed down only months after *Čonka*. But as the dissent explains the majority's attempt to deploy the practice of other international tribunals – the International Court of Justice and the Inter-American Court of Human Rights –wholly fails, because the empowering legal instrument for both tribunals includes express power to make provisional measures. I say more below about the significance of the International Court of Justice's practice, but for now the critical point is that the practice of other tribunals does not support the Court's conclusion that it too has a power to grant binding interim relief.

In this section, I consider the use of Article 34 to transmute Rule 39 into a source of binding obligations. The move is ingenious but fails. Section I of the ECHR, entitled Rights and Freedoms, consists of Articles 2-18. Section II of the ECHR, entitled European Court of Human Rights, consists of Articles 19-51.[27] Article 34 (Individual applications) provides that the Court may receive applications from individuals claiming to be a victim of a violation of the rights set out in the Convention. It forms a pair with Article 33 (Inter-State cases), which provides that a member state may refer to the Court alleged breaches of the Convention by another member state. In other words, Article 34 is a provision that authorises the Strasbourg Court to hear individual applications. Individuals make an application to the Court alleging breach of the Rights and Freedoms set out in Part I of the ECHR, or the Protocols to the Convention, not Article 34 itself.

The majority in *Mamatkulov* focuses on the last sentence of Article 34, which provides that member states "undertake not to hinder in any way the effective exercise of this right." What this means is that the state undertakes not to stop an individual from making an application to the Court, for example by making it unlawful to apply, or to apply without state permission, or by placing pressure on a person not to apply.[28] Article 34 constitutes a "right" only in the limited sense that the individual is to

22. Even Chester Brown, in a case note which is otherwise wholly supportive of the *Mamatkulov* judgment, concedes that its treatment of precedent is "not unproblematic": "Strasbourg Follows Suit on Provisional Measures" (2003) *Cambridge Law Journal* 532, 533. This appears to be a common pattern in the *Mamatkulov* litigation. The decision of the First Section in *Mamatkulov* (later affirmed by the Grand Chamber) has also been criticised on this basis. See Christian J Tams, "Interim Orders by the European Court of Human Rights—Comments on *Mamatkulov and Abdurasulovic v Turkey*" (2003) 63 *Heidelberg Journal of International Law* 681, 689, calling the First Section's treatment of precedent "the most troubling aspect of the decision … [the court] almost seem to suggest that the question of bindingness had never arisen before".
23. *Mamatkulov* at [119].
24. *Mamatkulov* at [119].
25. *Čonka v Belgium* (dec.) no 51564/99, 13 March 2001.
26. *Mamatkulov*, Joint Partly Dissenting Opinion at [5]-[6].
27. For completion: Section III, entitled Miscellaneous Provisions, consists of Articles 52-59.
28. Another example would be a country's President publicly stating that the continued detention of an applicant's comrades was due to the applicant's refusal to withdraw his application before the Court: see *Ila?cu and Others v Moldova and Russia* (GC) no 48787/99, 8 July 2004, 2004-VII ECHR 179 at [285], [482].

be free to apply to the Court, making an application which the Court is entitled to hear by virtue of the main part of the provision, without state interference. I doubt that the obligation extends to state acts that have the side-effect of making it more difficult for an individual in fact to apply to the Court or to make an application that is likely to succeed. Cuts in legal aid, for example, should not be held to breach Article 34, unless perhaps the point of cutting them is precisely to disable applications to the Court. Likewise, removing a non-citizen from the member state's jurisdiction does not hinder his right to apply to the Court (or the Court's freedom to hear the application), in the relevant sense of Article 34, unless the point of the deportation – the state's intention – was to prevent him from applying to the Court.

The majority in *Mamatkulov* sets out two reasons why Turkey's decision to deport the applicant, despite an interim measure indicating that it would be desirable for him not to be deported, breached the applicant's Article 34 right to apply to the Court.[29] The first was that the deportation caused "irreparable damage" to the "subject matter of the application". The second was that the deportation caused the applicants to have "lost contact with their lawyers" and therefore to be "denied an opportunity to have further inquiries made in order for evidence in support of their allegations". The problem with this line of argument is that what matters is whether deportation had these consequences, not whether the deportation was made despite an interim measure. The best that one could say is that a Rule 39 ruling might put a member state on notice that it is at risk of breaching Article 34 if it goes ahead with a deportation, but it would still remain the case that whether a breach had taken place would not turn on the indication of "interim measures".

Imagine two cases in which a person is deported. The only difference between the cases is that in one the Court makes a Rule 39 order that the person should not be deported, but the person is deported anyway. In the other case, no Rule 39 order is made before the person is deported. The majority in *Mamatkulov* offers no reason for thinking that it is only the former that involves breach of Article 34 or any justification for substituting a requirement to comply with the interim measures for a practical test of whether the requirements of Article 34 had been satisfied.

The majority's reference to the risk of irreparable damage to the subject matter of the application implies that the application will be moot if an eventual (final) judgment for the applicant will not have the effect of restoring the applicant to the position he would have enjoyed had his rights not been breached. But this is wrong. The individual exercises without hindrance his or her right to apply to the Court if he or she is able to initiate legal proceedings before the Court. Article 34 does not require states to forbear from acting in ways that would be difficult or impossible to unwind if the Court eventually finds for the applicant. In conflating the freedom to apply to the Court with absence of risk that the individual's position will be seriously compromised, the majority assumes what it needs to establish, namely that Article 34 supports binding interim

29. *Mamatkulov* at [108].

relief. In fact, Article 34 has nothing whatsoever to do with interim relief, but instead concerns an individual's right to apply to the Court, and the freedom to exercise that right without state interference.

The concern with avoiding irreparable damage does of course bring to mind the rationale for interim relief in domestic legal proceedings, namely the importance of preserving the position of the parties pending argument about the merits and a reasoned judgment resolving the dispute. This might be a good reason for the member states to amend the Convention to empower the Court to make binding interim measures. It is not a good reason for the Court to conclude that an obligation to comply with the interim measures that it makes is somehow already implicit in the state's duty not to hinder exercise of the right to apply to the Court. And in fact, there are good reasons to think that the European Court of Human Rights does not stand to member states as a duty judge stands to the government in domestic proceedings, where the judge should be able to stay (at least some) government action to preserve the position of the individual. These reasons are confirmed by Protocol 15 to the Convention, which introduced a new preamble to the ECHR:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention…

In short, Article 34 cannot ground the Court's conclusion that interim measures are binding.

The Strasbourg Court's "well-established practice"

The nominal rationale of *Mamatkulov* implies that a state might defend its non-compliance with interim measures – might argue that its action did not breach Article 34 – by addressing the risks that deportation would sever an applicant's connection to his or her lawyers and/or by undertaking to return the applicant to the state if need be.[30] However, subsequent cases appear to foreclose this line of argument. In *Shamayev and Others v Georgia and Russia*, the Second Section held that, despite the Court being able to "complete its examination of the merits" of the applicant's complaint, the deportation nonetheless caused difficulties which "seriously obstructed" the exercise of the right to bring an application.[31] In other words, Article 34 is violated when the right is hindered, even if it falls short of fully preventing a hearing on the merits.[32]

In *Olachea Cahuas v Spain*, the Fifth Section went further, jettisoning the need to show some obstruction to the exercise of the right:

> Even in such cases [when *no* risk materialises to the effective exercise of the right of individual application], however, the interim measure must be considered to have binding force. The State's decision as to whether it complies with the measure cannot be deferred pending hypothetical confirmation of the existence of a risk.[33]

In *Paladi v Moldova*, the second of the two leading cases, this line of reasoning is taken to extremes.[34] The Court had indicated an interim measure preventing the transfer of the applicant from a neurological centre back to a prison hospital. Because of a communication failure, the transfer nonetheless went ahead. But the applicant was transferred back to the separate neurological centre within three days. No risk to the applicant's health materialised within those three days. And, since the applicant was in stable condition before the transfer occurred, no serious risk to his health could be expected.[35] Nonetheless, the Grand Chamber found a violation of Article 34 which, again, concerns the *right to bring an application*.[36] On this point, *Paladi* could only command a bare majority. Nine judges found a violation of Article 34; eight did not.

Yet this bare majority, it seems, was enough to crystallise Strasbourg's position.[37] Immediately following *Paladi*, the Second Section, in *DB v Turkey*, unanimously found Turkey in violation of Article 34.[38] On 26 August 2008, an interim measure was indicated which told Turkey to permit the

30. The section of the judgment in which the majority transforms the status of Rule 39 is entitled "*Did the applicants' extradition hinder the effective exercise of the right of application?*"

31. no 3637/02, 12 April 2005, 2005-III ECHR 153 at [478]

32. For the same point, see *Shtukaturov v Russia* no 44009/05, 27 March 2008, 2008-II ECHR 353 at [147].

33. no 24668/03, 10 August 2006, 2006-X ECHR 113 at [81].

34. no 39806/05 (GC), 10 March 2009.

35. *Paladi*, Partly Dissenting Opinion of Judge Šikuta at [2]; Partly Dissenting Opinion of Judge Malinverni (joined by Judges Costa, Jungwiert, Myjer, Sajó, Lazarova Trajkovska, and Karaka?) at [3].

36. *Paladi* at [106].

37. As may also be confirmed by the change in the text of Rule 39 in June 2009, introducing the idea of "duty judges" for the first time.

38. no 33526/08, 13 July 2010 at [67].

applicant to see his lawyer by 3 October 2008. But Turkey only authorised the meeting on 16 October 2008, with the meeting taking place on 21 October 2008. There was thus an eighteen-day delay in seeing a lawyer. The Court did not consider whether this delay hindered the applicant's ability to present his case before the Court. Turkey's lack of a reasonable excuse for the delay sufficed.[39] In *Abdulkhakov v Russia*, the First Section flatly asserted that "a failure by a Contracting State to comply with an interim measure" just is, as a matter of course, "regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right of application and, accordingly, as a violation of Article 34."[40] Less than a year later, the First Section articulated the new rule even more succinctly: "A respondent State's failure to comply with an interim measure entails a violation of that right."[41]

The Court's current position is thus now even less defensible than its ruling in *Mamatkulov*, which was itself indefensible. When there is a failure to "comply with an interim measure", the Court now insists that it is *always* prevented from "effectively examining the complaint", and so the right to make an application under Article 34 is violated.[42] This is a remarkable leap of logic. Some of the matters that interim measures concern may be necessary for a court to examine the complaint – applicants must have the ability to speak to their lawyers, for example – but not all.

It is hard to avoid the conclusion that Article 34 has simply been an excuse for the Court to confer upon itself a power that the member states repeatedly chose to deny it. In the case law that follows *Mamatkulov*, the Court shows ever less concern to explain how non-compliance with interim measures constitutes a breach of Article 34. Once the practice is underway, the Court simply asserts that a breach of a Rule 39 order is always unlawful. This analysis is confirmed by the Court's recent use of Rule 39 to purport to grant binding interim relief in relation to inter-state cases. Here, there is no individual application; the case is referred to the Court under Article 33, which does not oblige the (other) state to refrain from interfering with such a reference. When a state fails to comply with a Rule 39 interim measure in the context of an inter-state case, there is no possible argument that it interferes with either Article 33 or Article 34. But this does not stop the Court now asserting that states have an obligation to comply with Rule 39 rulings.[43]

The Strasbourg Court's case law about Rule 39 is groundless and thus lawless. It is also expanding in its reach. Many of the early Rule 39 cases involve deportation or extradition that poses a serious risk to life. However, the trend in the Court's case law has been to indicate interim measures in a much wider class of cases. A recent article notes that the Court has started to make Rule 39 rulings in relation to Article 8 cases about deportation that may interfere with family life, Article 6 cases concerning fair trial rights, and Article 10 cases involving free expression.[44] The same article notes that the Court is increasingly willing to indicate interim measure that (a) impose positive obligations on states, not simply to insist that the state stay its hand and (b) are framed in general terms and apply to an indeterminate

39. *DB* at [67].

40. no 14743/11, 2 October 2012 at [225].

41. *Savriddin Dzhurayev v Russia* no 71386/10, 25 April 2013, 2013-III ECHR 133 at [211].

42. *Abdulkhakov* at [225].

43. See the interim measure indicated in the case of *Armenia v. Azerbaijan* (no. 42521/20), lodged on 27 September 2020. The Court's press release notes that the Court "reminded both parties of their obligation to abide by all interim measures issued pursuant to Rule 39."

44. Kanstantsin Dzehtsiarou and Vassilis P Tzevelekos, 'Editorial' (2021) 2 *European Convention on Human Rights Law Review* 1, 3-6

number of persons and cases. In relation to (b), I note that some interim measures may have this effect even if not framed in such terms. The 14 June interim measure was addressed to one flight to Rwanda, and was not strictly general or indeterminate, but did have the effect of grounding all flights to Rwanda and thus delaying implementation of the Government's entire policy, not simply one application of the policy.

Interim relief and the structure of the ECHR

The Strasbourg Court's assertion that it has power to bind member states by making interim measure under Rule 39 is impossible to accept when one examines the express terms of the Convention. The Court's understanding of Rule 39, and its practice in indicating binding interim measures, is incompatible with – breaches – multiple provisions of the ECHR.

The scope of the power to make rules of court

The Rules of Court are made under the authority of Article 25 (Plenary Court), which requires the plenary Court to elect its President, set up Chambers, elect Presidents of the Chambers, adopt the rules of the Court, and elect the Registrar of the Court. The power to make rules is a power to control the Court's own proceedings, not a power to expand, or modify, the Court's jurisdiction, still less to empower a single judge to act in place of the Court. The power cannot lawfully be used to introduce a power to grant interim relief which the member states chose not to confer. It is absurd to reason that the ECHR confers upon the Court the power to establish – and to amend or repeal – a power to grant interim relief by making rules of court. This foundational point, which the Court has never addressed, is confirmed by the extent to which the rules that the plenary Court has made require judges to act in breach of other provisions of the Convention. In short, the Court has misused its power to make rules of court to expand its de facto authority.

The express obligation to abide by final judgments

Article 46 of the Convention obliges member states to abide by the final judgment in any case to which they are a party. The logical corollary of this provision is that member states have no obligation, under the terms of the Convention, to abide by a judgment of the Court that is not final, still less with any other act (or purported act) of the Court that falls short of constituting a "final judgment" as that term is defined in Article 44.

Reasons for judgments and decisions

Article 45 requires the Court to give reasons for judgments, as well as for decisions declaring applications admissible or inadmissible. It does not apply to interim measures because the ECHR does not recognise such acts.

The limited competence of single judges

Article 26 provides that in considering cases brought before it, "the Court shall sit in a single-judge formation, in committee of three judges, in Chambers of seven judges [or five, if the Committee of Ministers unanimously approves the Court's request for a temporary reduction in number] and in a Grand Chamber of seventeen judges." Article 27 addresses the competence of single judges, who are authorised only to declare inadmissible or to strike out an application submitted under Article 34, where such a decision can be taken without further examination.

The Court's understanding of Rule 39 confers a radical new legal power on a single judge. Acting under Rule 39, a "duty judge" may impose new legal obligations on the member state, obligations that the state may not have the opportunity to contest, and which may be imposed without any opportunity for those obligations to be questioned by other judges of the Court. (The obligations may be general or indeterminate and need not be concerned with cases of imminent danger.) The judge is not required to give reasons and the identity of the judge is not made public. The Court's practice implicates individual judges (including the "duty judges") in a course of action whereby they pretend to sit as the Court in breach of the terms of the Article 27. Articles 26 and 27 do not authorise the Court to exercise authority over a member state in a single judge formation. On the contrary Article 27 expressly limits the competence of a single judge. The plenary Court has no authority under Article 25 to make rules of court that contradict this express limitation.

The sequence of decision-making

I noted above the sequence of decision-making for which the ECHR makes provision. Applications under Article 34 are to be considered by a single judge (Article 27), who may declare the application inadmissible, or a committee of three judges (Article 28), who may (if unanimous) declare it inadmissible or declare it admissible and at the same time make a judgment on the merits if the underlying question in the case is already the subject of well-established case law. If no decision is taken under Article 27 or 28, or no judgment made under Article 28, a Chamber shall decide on the admissibility and merits of the application, although the decision on admissibility may be taken separately.

Compare this careful sequence of decision-making, expressly mandated by the ECHR, to the Court's practice in relation to Rule 39. Before a single judge or a committee has considered whether an application is admissible under Article 35, and before a Chamber has been constituted to hear the application (including to determine whether the application is admissible), a "duty judge" may grant binding interim relief. The Court's own Factsheet on Rule 39 says that "Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question."[45] But in what sense are proceedings before the Court until a decision is made about their admissibility? Article 27 provides for a judge

45. Emphasis added.

to declare an application inadmissible; Article 28 provides for a committee of three judges unanimously to declare an application "admissible and render at the same time a judgment on the merits".[46] The Chamber may consider admissibility, and the merits of the application, but only if a single judge or committee of judges has first decided not to declare it inadmissible. The Court's Rule 39 practice bypasses all these restrictions. The duty judge may indicate interim measures, which the Court now says are always binding on member states, in relation to proceedings that have not yet been considered for their admissibility by a single judge (or committee of judges), which have not yet come before a Chamber, and which may not be admissible in accordance with Article 35.

The entire idea of "duty judges" standing ready to provide emergency relief is incompatible with the process for which section II of the ECHR makes express provision.

Exhaustion of domestic remedies

The Court's practice is to accept applications for interim measures under Rule 39 before individuals have exhausted their domestic remedies.[47] The rationale for this practice would seem to be to ensure that the Strasbourg Court stands ready to provide emergency relief if need be. In *Al-Saadoon*,[48] the Chamber notes:

> 78. On 22 December 2008, prior to the Court of Appeal hearing on interim relief, the applicants lodged an urgent application for interim measures under Rule 39 of this Court's Rules. The Government made written representations to the Court as to why the applicants' application should not be granted, copies of which were provided to the applicant.
>
> 79. Shortly after being informed of the ruling of the Court of Appeal on 30 December 2008, the Court gave an indication under Rule 39, informing the Government that the applicants should not be removed or transferred from the custody of the United Kingdom until further notice.

In this case the UK was at least heard by the Court. But when an application was made to the Strasbourg Court on 22 December, the application should have been heard by a single judge who should have been responsible for deciding only whether to declare the application inadmissible. And in so doing, the terms of Article 35(1) would have been controlling:

> The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.

The application before the Court must have alleged that the UK *would* breach the Convention if the Court of Appeal did not grant interim relief

46. Emphasis added.

47. Practice Direction, Requests for interim measures: "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."

48. *Al-Saadoon and Mufdhi v United Kingdom* (no. 61498/08) [2010] ECHR 279 (02 March 2010)

and if the transfer of custody from the UK to Iraq went ahead. But the Strasbourg Court does not have authority, under the express terms of the Convention, to restrain anticipated breaches in this way. It had no application properly before it, no proceedings underway, in relation to which the terms of Rule 39 could bite.

In addition, in *Al-Saadoon*, the UK court denied interim relief but remained seized of a substantive challenge to the action in question. The same was true in relation to the Rwanda flights last June. If the Strasbourg Court had considered the question of admissibility before purporting to grant binding interim relief, it would have had to confront the fact that the applicants had *not* exhausted their domestic remedies for the proceedings were ongoing. The riposte may be that the applicants had exhausted their remedies at least so far as interim relief was concerned.[49] But the riposte takes for granted that the Strasbourg Court enjoys jurisdiction to restrain breaches of the Convention by way of interlocutory relief, in advance of hearing argument and making a judgment and in advance even of making a decision about admissibility. On the contrary, the Court's role is to consider applications that there has been a violation of the Convention and it should not – indeed may not – consider such applications when the applicant has a domestic remedy. Transferring the applicants into Iraqi custody or removing the applicants to Rwanda arguably breached the Convention. But UK law provided a remedy to the applicants, a remedy which they were actively pursuing by way of ongoing legal proceedings when the Strasbourg Court intervened to make a Rule 39 order.

In short, the Strasbourg Court's practice is in some cases to indicate interim measures under Rule 39 in breach of the express limitations in the Convention, which dictate how applications are to be handled by the Court and how – and when – the question of admissibility is to be decided. Not unrelatedly, the Court's practice cannot possibly be reconciled with the principle of subsidiarity and, importantly, the Court has not even attempted such reconciliation. The Court routinely acts, protestations aside, like the ultimate appellate court in the Council of Europe, standing ready to grant interim relief when the Court of Appeal or Supreme Court has decided it is not warranted. This is not only an extraordinary way for the Strasbourg Court to engage with other courts, who have hearings, provide reasons and take public responsibility for their decisions, but is also very unlikely to improve the quality of the decision-making in question.

Express limits on final relief

The Convention expressly limits the relief that the Court may offer. The state is obliged to abide by a final judgment of the Court (Article 46(1)), but the form of the Court's judgment is to find (declare) that the state has violated the Convention, leaving to the state the question of how to respond to this finding, subject to the supervision of the Committee of Ministers (Article 46(2)).[50] The exception is Article 41 (Just satisfaction) which provides:

49. Practice Direction, Request for interim measures: "The Court does not hear appeals against decisions of domestic courts, and applicants in expulsion or extradition cases should pursue domestic remedies which are capable of suspending removal, before applying to the Court for interim measures. Where it remains open to an applicant to pursue domestic remedies which have suspensive effect, the Court will not apply Rule 39 to prevent removal." (Emphasis added.) Article 35 refers to domestic remedies, not domestic remedies with suspensive effect. The Court's practice is incompatible with Article 35.

50. The Court's own *Practice Direction – Just Satisfaction* (3 June 2022) says, at para 28:

"The Court's judgments are essentially declaratory in nature. In general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the individual and general measures to be used to discharge its obligations under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. In practical terms, this means that only in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to the situation which has given rise to the finding of a violation, other than the payment of sums of money by way of just satisfaction under Article 41. Most often, this happens in cases addressing systemic problems, in particular pilot judgments."

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Thus, the Court in a final judgment is able to impose on a state an obligation to pay a sum of money to the injured party, in accordance with the terms of Article 41. The Grand Chamber in a reasoned judgment, subject to supervision by the Committee of Ministers, is not able to impose on the state obligations of the kind that anonymous judges of the Court now routinely purport to impose by way of Rule 39 interim measures. This confirms that the structure of the ECHR is incompatible with the purported jurisdiction to grant binding interim relief.

The *ex officio* membership of the Chamber and Grand Chamber

Article 26, paragraph 3 prevents a single judge from considering applications made against his or her state, which is necessary to avoid unfairness to the applicant. Article 26, paragraph 4 provides that an *ex officio* member of any Chamber or Grand Chamber will be the judge elected from the state against whom the application is made, which is necessary to avoid unfairness to the state.[51] The text of the Convention is thus highly attentive to the need for adjudication to be fair to applicants and member states. The latter have an obligation to abide only by decisions made against them by a multi-member judicial body on which one of their nationals ordinarily sits, a body that hears argument (in public save in exceptional cases, per Article 40) and gives reasons for its judgments. Judgments of a seven-judge Chamber may be brought before the seventeen-judge Grand Chamber, which provides a further opportunity for procedural fairness and error correction. Rule 39 measures are not made by a multi-member Court on which the member state has an *ex officio* member. The jurisdiction the Court purports to exercise thus compromises a key procedural protection.

51. Article 26(4) continues: "If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge."

The irrelevance of the "living instrument" doctrine

The Strasbourg Court asserts that Article 25 confers a power on the plenary Court, in making the Rules of the Court, to empower a single, often anonymous, judge of the Court, acting without a hearing and without giving reasons, to impose new legal obligations on the state, obligations that the Court may choose to lift but which the state cannot strictly challenge (appeal). This is a groundless legal argument and an insupportable jurisdiction, which subverts the procedural protections that the Convention provides for member states. In other words, the power the Court claims to grant binding interim relief is flatly incompatible with the scheme of the Convention, with its careful provision for the obligations of member states and for fair adjudication. The Court should never have asserted this jurisdiction and should now recognise that it had no grounds for introducing the jurisdiction in 2005, or for maintaining and expanding it since.

It is no answer to invoke the "living instrument" doctrine and to say that the Court has an open-ended authority to develop the meaning of the Convention over time. The living instrument doctrine is a technique of lawless adjudication, in which the Court more or less openly departs from the terms agreed by the member states, substituting for their intended meaning some other unintended meaning which the Court finds more congenial.[52] The rule of law condemns this mode of treaty interpretation, and its analogues in statutory and constitutional interpretation, which involves a clear failure of judicial fidelity to the law that should govern the dispute. In remaking the Convention in the course of adjudication, departing from terms the member states agreed, the European Court of Human Rights acts incompatibly with the rule of law.

But even if one thinks the living instrument doctrine is a reasonable, or at least excusable, technique to adopt in relation to the open-ended, somewhat vague rights and freedoms set out in section I of the ECHR (and in the Protocols), it is obviously much less defensible in relation to the structural provisions in section II, which establish the Court and discipline its procedure. In remaking these provisions over time, the Court simply shrugs off the legal instrument that grounds its jurisdiction and thus its authority to adjudicate disputes involving member states.

Further, for the living instrument doctrine to be relevant, one would have to ask which provision of the Convention is to be updated in this way, to be glossed with some new meaning that the member states did

52. See further the essays by Lord Sumption, Lord Hoffmann and John Finnis in N Barber, R Ekins and P Yowell (eds.), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016).

not intend. The answer might be Article 34, but the problem with the Court's Rule 39 jurisprudence is not first and foremost its reading of that provision but rather its assertions that non-compliance with an interim measure is necessarily a breach of Article 34. The answer might instead be Article 25, for this is the power the Court purports to use to establish its new power to grant interim relief. But of course, it is absurd to say that the power to make rules of court must now be read differently – more expansively and liberally – than in 1950. In addition, one asks in vain what had changed between *Cruz Varas* (1991) (or *Čonka* [2001]) and *Mamatkulov* (2005) that would warrant updating the intended meaning of Article 25 to empower the Court in this way.

What the Court has done in its Rule 39 jurisprudence is to turn the scheme of the Convention on its head, deploying a power to make rules of court in order to avoid and overcome many of the Convention's most important structural provisions.

The International Court of Justice's power to make provisional measures

For the majority in *Mamatkulov*, the answer to my question about what had changed since *Cruz Varas* (or *Čonka*) might be that in 2001, in the *LaGrand* case,[53] the International Court of Justice (ICJ) had concluded that the provisional measures it made were binding on parties. Some legal commentators take for granted,[54] with the practice of the ICJ in mind, that the power to grant binding interim relief is a power that all international tribunals require and which they are thus entitled to assert or develop. There is a surface analogy between the ICJ's decision that the provisional measures that it indicates are binding, rather than merely advisory, and the Strasbourg Court's decision that interim measures under Rule 39 are binding. But the analogy collapses when one looks more closely. The grounds on which the ICJ has acted and the practice it has developed are sharply different to the jurisprudence of the European Court of Human Rights.

Article 41 of the Statute of the International Court of Justice provides that:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
>
> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

The provision's language is somewhat tentative, with the ICJ empowered to "indicate", rather than to impose, and with the second paragraph referring to "the measures suggested", which is not what one would expect if the ICJ had authority to grant binding interim relief. That said, the language is much stronger than the Rule 39 equivalent (and its antecedents). The expression "any provisional measures which ought to be taken to preserve the respective rights of either party" is what one would expect in the context of a power to grant binding interim relief, for its focus is on the importance of protecting (preserving) the status quo in anticipation of final judgment.

53. *LaGrand (Germany v United States)*, 27 June 2001, 2001 ICJ 466.

54. See for example Professor Cathyrn Costello, oral evidence to the Joint Committee of Human Rights, Legislative Scrutiny: Illegal Migration Bill, 29 March 2023.

The significance of *LaGrand* is that it authoritatively interprets Article 41, despite the tentative language, to confer a power to grant binding interim relief. One might question this interpretation. But the difference with the Strasbourg Court and Rule 39 could not be more obvious. The ICJ has a clear textual foundation in the Statute on which to ground its power to grant interim relief. The European Court of Human Rights has no equivalent provision in the Convention within which to find a power to grant interim relief. Rule 39 is a mere rule of court. The attempt to extract the jurisdiction in question from Article 34 is unpersuasive and misconceived. Likewise, Article 25(d) clearly does not authorise the plenary Court to make rules of court that empower any judge of the Strasbourg Court (or the Registrar or some other person or body) to grant binding interim relief. One need only state this argument to see that it fails. The member states did not empower the plenary Court to transform the ECHR's structure, including the limits that otherwise sharply constrain the composition of the Court and the procedure by which it acts, by making rules of court. In addition, the ICJ in *LaGrand* clarified a legal question that was uncertain, which did not require a break with precedent. In *Mamatkulov*, the Strasbourg Court reversed clear precedent that it should have considered had conclusively and finally resolved the matter.

The Statute of the ICJ empowers the ICJ to indicate provisional measures; the European Convention on Human Rights does not empower the European Court of Human Rights, let alone a single judge of the Court, to indicate interim measures. The Strasbourg Court's practice is legally groundless. There are also major procedural differences between the practice of the ICJ and the practice of the Strasbourg Court, some of which follow from this relative lack of foundation.

Consider the different procedures by which the two courts go about deciding whether to indicate interim or provisional measures. When a party makes a request that the ICJ adopt provisional measures, the ICJ under Rule 74 of its Rules of Court (1978) invites written submissions of the parties in relation to the request and affords the parties a hearing to argue the matter before the ICJ. The Strasbourg Court's practice, which is set out in a practice direction rather than in the Rules of Court, is not to consider itself bound to afford the parties an opportunity to exchange written submissions or to argue the matter before the Court.

I speak of "the Strasbourg Court" indicating interim measures, but in an important sense interim measures are not made by the Court at all but only by a single judge, who, per Articles 26 and 27, lacks competence to act as the Court save in declaring an application inadmissible by applying the criteria in Article 35. That is, interim measures made under Rule 39 are simply *not* a decision of the European Court of Human Rights. By contrast, and in line with the text of Article 41 of the Statute, which empowers the ICJ itself to make provisional measures, the ICJ adopts an order granting provisional measures by majority decision of the Court. The power to bind a sovereign state is not exercised by a single judge, let alone an anonymous judge acting *ex parte*.

Finally, when the ICJ exercises its power to grant interim relief, it publishes an order granting provisional measures, expressing in the order the reasoning upon which the Court adopted the requested measure. Individual ICJ judges may, and in practice often do, append separate or dissenting opinions to orders of the Court granting provisional measures. Again, the contrast with the Strasbourg Court is stark. The form of the decision is, at best, a press release which does not elaborate the reasoning on which the judge in question acts. The judge is not named and thus does not take responsibility for an exercise of adjudicative power. Article 45 of the Convention requires the Court to give reasons for its judgments as well as for its decisions declaring applications admissible or inadmissible. It does not, however, apply to interim measures indicated under Rule 39, which confirms that such measures are not, properly understood, exercises of the Court's jurisdiction under the Convention. Once again, the lack of legal foundation is telling. The Strasbourg Court has invented a practice that is procedurally indefensible, in which the Court does not take responsibility for its purported exercise of legal authority by providing reasons for its decisions or by identifying the judge who made the decision.

Moreover, it should not need pointing out that the procedures adopted in the case of the Strasbourg Court (unilateral decision-making in closed proceedings without any requirement to provide reasons and with no opportunity for revision or appeal) are difficult to reconcile with the "rule of law" standards of procedural fairness which, for example, the general principles of UK law, and indeed the Convention itself, impose in relation to judicial functions exercised under domestic law.

The alleged necessity of binding interim relief

For some jurists, Rule 39 interim measures should be treated as legally binding because it is necessary, as a practical matter, for an international tribunal such as the Strasbourg Court to enjoy a power to grant binding interim relief.[55] Without such a power, the Court would be unable to discharge its responsibility for helping to secure Convention rights and in particular to intervene to protect persons who are at risk of imminent harm. This argument fails. There was no legal black hole before 2005, when the Court first held that Rule 39 generates legal obligations, or before the subsequent cases that have expanded the range of subjects in relation to which interim measures have been made and the generality and indeterminacy of such measures. (And of course, even if a gap existed in the Court's power, it would not be for the Court to fill it.)

The Court misunderstands its role insofar as it sees itself as the adjudicative body of last resort, providing "duty judges" for the Council of Europe who should restrain states from acting in ways that may later be found to breach Convention rights. The adoption of Protocol 15, which affirms subsidiarity and the primary responsibility of member states for securing ECHR rights, reinforces the point. Protocol 15 postdates *Mamatkulov* and *Paladi* and the Court has not considered whether its Rule 39 practice is compatible with subsidiarity. The Court's responsibility is to adjudicate disputes about whether a state has breached Convention rights, not to restrain possible future breaches by ordering states to refrain from certain actions or to undertake other actions. In clarifying the application of the ECHR, the Court of course helps ensure that future action will be compliant, but it does not have a jurisdiction to intervene to restrain arguable breaches. The process and structure of the Court, per Section II of the Convention, excludes such a jurisdiction.

In refusing to empower the Court (or Commission) to grant interim relief, the member states were concerned to protect their sovereignty. Their concern was warranted, as developments since 2005 confirm. The inaptness of the Court's new role is confirmed by the spike in applications for interim measures after 2005, with tens of thousands of asylum-seekers, foreign criminals and overstayers understandably looking to the Court for eleventh hour relief from removal from the state in question. The Court itself has complained about the misuse of its procedures to this end.[56] The unacceptable growth in the workload of the Court was an important part of the context of the Brighton Declaration that led amongst other things

55. This argument is developed in *Mamatkulov* itself at [113].

56. Governments, applicants and their lawyers urged to co-operate fully with European Court, following "alarming rise" in requests to suspend deportation, Press Release no 127 issued by the Registrar of the Court on 11 February 2011, quoting a statement from the Court's President: "Between 2006 and 2010 the Court saw an increase of over 4,000 % in the number of requests it received for interim measures under Rule 39 of the Rules of Court".

to Protocol 15.[57]

The argument from necessity is similar in kind to the argument by analogy to the ICJ. The argument does not stand up to a response that focuses on and emphasises the importance of the actual terms of the Convention and the relevant parts of the *travaux préparatoires* and of subsequent proposals for amending the Convention. It is not open to the Strasbourg Court simply to assert whatever jurisdiction it thinks would better enable it to pursue its vision of its future role. As has been noted domestically, necessary implication is not merely what "would have been sensible or reasonable… to have [been] included or what… would, if it had thought about it, probably have included". It is a matter of what *was* included.[58] The member states settled the point authoritatively in deciding not to empower the Court to grant interim relief, a decision which is confirmed by the scheme of the Convention and the detail of its terms (limiting the state's obligation to final judgments only; specifying the composition of the Court; making provision for procedural protections for states). The unfairness and irresponsibility of the procedure the Court has developed on its own initiative confirms the good sense of the decision not to empower the Court to grant binding interim relief. It may be that the Court's practice, before 2005, of indicating interim measures that were clearly understood to be desirable but not legally obligatory was unobjectionable. The argument from necessity founders in part because it assumes that the Court (and the Commission before it) was helpless without a power to making binding orders. In the absence of a legal power, the Court (and Commission) was forced to rely more squarely on the Committee of Ministers, notifying the Committee whenever it indicated interim measures. This practice, which the current text of Rule 39 has let slip, provided the Committee with an opportunity to help support the interim measures in question, while also encouraging oversight of the Court's decision-making.

57. See para 6 of the Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012.

58. *R (Morgan Grenfell) v Inland Revenue Commissions* [2002] UKHL 21 at [45], per Lord Hobhouse.

Subsequent state practice

Perhaps the strongest case that could be made for the proposition that interim measures made under Rule 39 are (now) legally binding is an argument from subsequent state practice. The UK has not objected to the Strasbourg Court's practice since 2005, has largely complied with Rule 39 interim measures, and has called on other states to comply with such measures. But the question is not just how the UK alone has acted since *Mamatkulov*. The UK does not have authority to change the meaning of the ECHR by unilateral action – not even only for itself – and it is not estopped now from raising objections to the Court's Rule 39 practice simply because it has until now largely complied with them, even if, as it has, it has supported resolutions and declarations that assume that Rule 39 is legally binding.

This section considers one resolution and two declarations. The three statements are ambiguous, incomplete and not unequivocal in accepting the case law, about which they record practical and principled concerns (centring on the failure of the Court's practice adequately to respect the role of national authorities, which the principle of subsidiarity was later introduced to vindicate).[59] It is also relevant to note that in 2012-2013, the CDDH was undertaking work, considered earlier in this report, with a view to inviting the Committee of Ministers to support treaty change to provide the Court's Rule 39 practice with a proper legal foundation, change which never eventuated.

In any case, subsequent state practice at best informs interpretation of the treaty – it cannot amend it – and thus would fall to be considered alongside the clear limitations on the Court set out in the text of the ECHR, as well as the history of the ECHR's making and amendment, including the repeated failure to authorise the Court to grant binding interim relief. It follows that state practice, whether arising from the statements in question or from the acts of the individual member states (which this section briefly reviews), cannot provide a legal foundation for the Court's Rule 39 practice.

The 2010 Resolution

Consider the recital to *Resolution CM/Res(2010)25 on member states' duty to respect and protect the right of individual application to the European Court of Human Rights*:[60]

> The Committee of Ministers:
>
> ...

59. Protocol 15 came into force on 1 August 2021.

60. Adopted by the Committee of Ministers on 10 November 2010 at the 1097th meeting of the Ministers' Deputies

> Recalling also that the Court's case law has clearly established that Article 34 of the Convention entails an obligation for States Parties to comply with an indication of interim measures made under Rule 39 of the Rules of Court and that noncompliance may imply a violation of Article 34 of the Convention;
>
> Noting therefore with concern that there have been isolated, but nevertheless alarming, failures to respect and protect the right of individual application (such as obstructing the applicant's communication with the Court, refusing to allow the applicant to contact his lawyer, bringing pressure to bear on witnesses or bringing inappropriate proceedings against the applicant's representatives), as found in recent years by the Court…

Note that the Committee's concern is with obstruction of an individual's communication with the Court or his or her lawyers and pressure being brought to bear on witnesses or lawyers. The Committee calls upon member states to (1) refrain from putting pressure on applicants and others to deter applications or to encourage them to withdraw or discontinue proceedings and (2) to protect applicants and others from reprisals, (3) "in this context, take prompt and effective action with regard to any interim measures indicated by the Court so as to ensure compliance with their obligations under the relevant provisions of the Convention", (4) identify and investigate cases of alleged interference with the right of individual application, and (5) to take appropriate action, including prosecution, against persons who interfere with this right.

This resolution wrongly infers – takes for granted – that the Court had authority to establish that Article 34 "entails" an obligation to comply with Rule 39 interim measures. The Committee of Ministers does not address Article 25, which is essential if this argument is to work, let alone the other provisions which the Court's Rule 39 practice flouts. The Committee recalls "that noncompliance may imply a violation of Article 34" (emphasis added) and addresses various failures to respect the right of individual application, in which context the Committee calls for state to "take prompt and effective action with regard to any interim measures indicated by the Court". The failures involve state interference with the right to apply to the Court and, perhaps, state failure to protect applicants from interference by third parties. The Committee's reasoning thus focuses on the substance of Article 34, with compliance with Rule 39 measures taken to be required on the premise that, and by implication to the extent that, they restrain breaches of Article 34 (by, for example, enabling an applicant to communicate with his lawyers). Notwithstanding the terms of the recital, this resolution falls well short of accepting that the Court has lawful authority to grant binding interim relief at its discretion.

Izmir Declaration 2011

Consider next the Izmir Declaration, on 27 April 2011.[61] In the Follow-up Plan, A. Right of individual petition, the Conference says (emphasis added):

- Welcoming the improvements in the practice of interim measures already put in place by the Court and recalling that the Court is not an immigration Appeals Tribunal or a Court of fourth instance, emphasises that the treatment of requests for interim measures must take place in full conformity with the principle of subsidiarity and that such requests must be based on an assessment of the facts and circumstances in each individual case, followed by a speedy examination of, and ruling on, the merits of the case or of a lead case. In this context, the Conference:

- Stresses the importance of States Parties providing national remedies, where necessary with suspensive effect, which operate effectively and fairly and provide a proper and timely examination of the issue of risk in accordance with the Convention and in light of the Court's case law; and, while noting that they may challenge interim measures before the Court, reiterates the requirement for States Parties to comply with them;

- Underlines that applicants and their representatives should fully respect the Practice Direction on Requests for Interim Measures for their cases to be considered, and invites the Court to draw the appropriate conclusions if this Direction is not respected;

- Invites the Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances;

- Further invites the Court to consider, with the State Parties, how best to combine the practice of interim measures with the principle of subsidiarity, and to take steps, including the consideration of putting in place a system, if appropriate, to trigger expedited consideration, on the basis of a precise and limited timeframe, of the merits of cases, or of a lead case, in which interim measures have been applied

The Conference's concern to stress that the Strasbourg Court is not an immigration appeals tribunal should be read alongside its expression of concern, in paragraph 12 of the declaration, "that since the Interlaken Conference, the number of interim measures requested in accordance with Rule 39 of the Rules of Court has greatly increased, thus further increasing

61. Council of Europe Committee of Ministers, High Level Conference on the Future of the European Court of Human Rights (26-27 April 2011), Final Declaration, 27 April 2011

the workload of the Court". Later in the Declaration, the Conference:

> Reiterating the calls made in the Interlaken Action Plan and considering that the authority and credibility of the Court constitute a constant focus and concern of the States Parties, invites the Court to:
>
> a. Apply fully, consistently and foreseeably all admissibility criteria and the rules regarding the scope of its jurisdiction, *ratione temporis*, *ratione loci*, *ratione personae* and *ratione materiae*;
>
> b. Give full effect to the new admissibility criterion in accordance with the principle, according to which the Court is not concerned by trivial matters (de minimis non curat praetor);
>
> c. Confirm in its case law that it is not a fourth-instance court, thus avoiding the re-examination of issues of fact and law decided by national courts;

The Declaration is by no means unequivocal. It combines (1) concern about the Court's Rule 39 practice, which implicates the Court in breach of the principle of subsidiarity, especially in relation to immigration and asylum questions, (2) a call for member states to provide effective suspensive remedies in domestic law *and* to comply with Rule 39 measures, and (3) a call for the Court to comply with the limits on its jurisdiction, including the criteria for admissibility, and to reform its practice to avoid breach of the principle of subsidiarity. The Declaration confirms that the Conference assumed that Rule 39 measures were binding (without explaining on what basis or to what extent) but also thought that the Court's practice was open to serious question.

Brussels Declaration 2015

Finally, consider the Brussels Declaration, on 27 March 2015.[62] In the recital, the Conference:

> Underlines the obligations of States Parties under Article 34 of the Convention not to hinder the exercise of the right to individual application, including by observing Rule 39 of the Rules of the Court regarding interim measures, and under Article 38 of the Convention to furnish all necessary facilities to the Court during the examination of the cases

This falls short of an assertion that compliance with Rule 39 is legally obligatory, although it certainly implies that a failure to observe an interim measure may breach Article 34. Interestingly, the Conference immediately goes on to underline "the importance of Article 46 of the Convention on the binding force of the Court's judgments, which stipulates that the States Parties undertake to abide by the final judgments of the Court in any case

62. High Level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility', Brussels Declaration, 27 March 2015

to which they are parties". The contrast between interim measures and final judgments is apparent in this pairing, although the Conference does not pursue it (and may not have recognised it). Later in the Declaration, the Conference "welcomes the intention expressed by the Court to provide brief reasons for the inadmissibility decisions of a single judge, and invites it to do so as from January 2016" and "invites the Court to consider providing brief reasons for its decisions indicating provisional measures and decisions by its panel of five judges on refusal of referral requests." The Conference does not spell out the implication of the first point, which is that the Court is in breach of Article 45. The invitation to the Court to provide reasons in relation to "provisional measures" (ordinarily termed "interim measures") does articulate, very politely, dissatisfaction with the Court's failure to explain the grounds on which it purports to grant binding interim relief.

Relevance to interpretation of the ECHR

The question thus arises whether these three statements are arguable instances of subsequent state practice within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Each takes for granted, and does not question, the Court's Rule 39 case law, assuming, perhaps for reasons of comity or perhaps due to inattention, that an obligation to comply with Rule 39 is compatible with the Convention. The statements do not consider the legal arguments that had been made, and might in future be made, against the Court's decisions, including arguments made in dissenting opinions. They cannot be construed as rejecting those arguments.

The officials who drafted, and the ministers who approved, these statements may well have been insufficiently careful, too ready to assume that in finding a breach of Article 34 the Court was acting within its jurisdiction. That said, the statements do also recall state concern about the tension between the Court's practice and the principle of subsidiarity and about the Court's failure to give reasons. And importantly, the statements focus on state acts that seem clearly to constitute an interference in individual applications to the Court and thus fall within the scope of Article 34. Putting the point at its lowest, the statements fall short of subsequent practice that constitutes agreement to *Paladi*. They are all explicable on the understandable premise that the Court would only issue Rule 39 interim measures where a substantive breach of Article 34 could be expected and any obligation to comply with an interim measure would merge with (and go no further than) the obligation in Article 34. Nothing in them clearly legitimises anything more than that.

In any case, while subsequent practice can affect the interpretation of the treaty, it cannot change the treaty itself. Subsequent state practice "may result in narrowing, widening or otherwise determining the range of possible interpretations", but "[t]he possibility of amending or modifying a treaty by subsequent practice has not generally been recognised".[63] Thus, the apparent acceptance by states of the Court's conclusion that

63. International Law Commission, *Conclusions on Subsequent Practice and Subsequent Agreement*, 2018, conclusions 7.1 and 7.3

non-compliance with Rule 39 interim measures breaches Article 34 is a factor to be taken into account in interpretation of Article 34, alongside the ECHR's history, text and structure. But, for the Court's purported jurisdiction to be coherent, it cannot be grounded on Article 34 alone but must also rest on Article 25, which is the foundation for introducing Rule 39. There is no state practice accepting that Article 25 empowers the Court in this way. The reason for this may be that the statements do not consider carefully how the ECHR should be interpreted, and do not examine the foundations of the Court's Rule 39 practice, instead uncritically accepting the conclusion that breach of a Rule 39 order may be incompatible with Article 34. This is relevant to the force that the practice has in interpretive argument. In short, the practice disclosed in these statements does not amend the ECHR to introduce the jurisdiction the Court purports to exercise.

State non-compliance in *Al-Saadoon* and other cases

Beneath the high-level statements, there is of course the actual practice of individual member states. In relation to the UK, it is true and noteworthy that the Government has complied with Rule 39 interim measures, including the measures indicated in June last year. However, the UK in *Al-Saadoon* did not comply, transferring the applicant to the Iraqi authorities notwithstanding a Rule 39 order to the contrary. In a letter to the Court, the Government advised that:[64]

> ... the Government took the view that, exceptionally, it could not comply with the measure indicated by the Court; and further that this action should not be regarded as a breach of Article 34 in this case. The Government regard the circumstances of this case as wholly exceptional. It remains the Government policy to comply with Rule 39 measures indicated by the Court as a matter of course where it is able to do so.

Thus, the Government argued that non-compliance with the relevant Rule 39 order did not breach Article 34 and stated that its policy was to comply. The letter takes for granted that at least some failures to comply with an interim measure would breach Article 34, but also frames compliance with Rule 39 is a matter of policy rather than legal obligation. The Court of course rejected the UK's argument and it may be that the Government's policy has now changed and that it will now prioritise compliance with a Rule 39 measure over the UK's obligations under international law. However, the Government will still not be able to comply with a Rule 39 measure when compliance would involve breach of domestic law, including of course any statutory duty.

The practice of other states, and the extent of their compliance with interim measures, is difficult fully to discern. The concerns about state non-compliance made express in the 2010 Resolution, and lying in the background of the 2011 and 2015 Declarations, confirm that state practice

64. *Al-Saadoon* at [81]

has not been uniform. A 2010 report of the Parliamentary Assembly of the Council of Europe noted:

> Whilst cases of non-compliance with interim measures ordered by the Court are still relatively rare, the growing number of breaches of Rule 39 measures, which also result in violations of the Convention, is of grave concern because the individual involved is subject to irreparable harm and the integrity of the Convention system as a whole is undermined.

Writing in 2011, three scholars observed a trend:[65]

> While prima facie the compliance rate seems extremely high (99%), about 70% of the incompliances have been committed over the past 12 years (1999–2010), which is rather awkward in the light of the fact that although it has been established (since 2003) that non-compliance can generate the violation of Article 34 ECHR, the tendency not to follow the orders of provisional measures continues to increase.

In *Aoulmi v France*,[66] France declined to comply, arguing "that the Court's request, according to the very wording of its Rules, was simply an indication given to the State and not a legally binding order for action on its part". In *Ben Khemais v Italy*,[67] Italy declined to comply, making a very similar argument to the French government in *Aoulmi*. In *Mannai v Italy*, Italy declined to comply, explaining their departure from the interim measure on national security grounds.[68] In *Labsi v Slovakia*,[69] and *Rrapo v Albania*,[70] Slovakia and Albania each declined to comply. This is clearly not a full review of the relevant case law, but does help support the conclusion, which is echoed indirectly in official commentary, that there is no uniform practice of state compliance.

65. Y Haeck, C Burbano Herrera and 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?" (2011) *European Yearbook of Human Rights* 375, 380.
66. 50278/99, 17 January 2006
67. 246/07, 24 February 2009
68. 9961/10, 27 March 2012
69. 33809/08, 15 May 2012
70. 58555/10, 25 September 2012

Respectable arguments and the limits of adjudicative authority

Are the merits of *Mamatkulov* now beside the point? Almost two decades later, the Court has repeatedly upheld the binding nature of Rule 39 interim measures and indeed expanded their use and force. On one view, which may lean heavily on subsequent state practice,[71] it might be argued that it is now no longer open to member states to object. That argument might be advanced in the context of the fact that, in the event of a dispute about whether the Court has jurisdiction, Article 32 provides that the Court itself is to decide. This argument appeals to the rule of law value of stability and to respect for adjudicative authority. The question is thus whether, even if one accepts that *Mamatkulov* was mistaken, the point is now so firmly settled that there is no realistic prospect of persuading the Strasbourg Court to reverse course? Would the UK's legal representatives have no respectable legal argument to make before the Strasbourg Court meaning that the UK would be unable to defend its non-compliance with a Rule 39 measure?

The argument is unsustainable. The law that the Court has made is incompatible with the terms of the Convention, which member states are still entitled to insist the Court should honour. The two leading judgments about Rule 39 are majority decisions, with vigorous dissent. *Mamatkulov* itself reversed an earlier authoritative ruling, which confirms that the point is open to change over time. The jurisdiction the Court has invented does not underpin other legal arrangements, such that unravelling it would put legal certainty in doubt. On the contrary, the logical contradictions and procedural unfairness of the Rule 39 regime are increasingly obvious and can be corrected without having to unsettle other, related legal transactions or public expectations. Further, while the dissenting opinions in *Mamatkulov* and *Paladi* are forceful, the Strasbourg Court has never been confronted with the full range of arguments that can be made against its Rule 39 practice, which this report aims to outline. In addition, the two pivotal judgments predate Protocol 15, which affirmed the principle of subsidiarity, which is in obvious tension – I would say outright contradiction – with the Court's Rule 39 practice, as recent official statements record. The Court should be made to defend the lawfulness of its practice, which I say is indefensible.

In any case, in thinking about whether interim measures are binding in international law, the question is not whether the Strasbourg Court is likely to accept an argument that its new jurisdiction has clay feet and that

71. Andreas Saccucci, "Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges" in Fulvio Maria Palombino, Roberto Virzo and Giovanni Zarra (eds.), *Provisional Measures Issued by International Courts and Tribunals* (Springer, 2021), 215, n9.

it should restore *Cruz Varas*. It may well be that an argument to this effect would be likely to be rejected by the Court. Still, member states have a compelling legal argument to make against the binding legal effect of Rule 39 rulings. The legal reasoning that persuaded the Court in *Cruz Varas* and the minority in *Mamatkulov* is a respectable position for a state to adopt in argument before the Court. Like domestic courts, international tribunals may well come to think that a dissenting judgment in an earlier case was right after all.[72] In any case the decisive question for the member state is not whether the Strasbourg Court would accept the argument but whether a sovereign state should accept that the Court has authority to expand its jurisdiction in this way. The state may reasonably, and lawfully, deny that the Court (especially a single judge) has power to grant binding interim relief and deny also that the Court (even the Grand Chamber) has lawful authority to introduce such a power to grant binding interim relief, including by way of a mistaken ruling that the Court (now) enjoys such a power. In other words, a state may reasonably be satisfied that a refusal to comply with a particular interim measure does not thereby place the state in breach of its treaty obligations.

It is wrong to assume that the UK is required, by virtue of Article 46 or the principle of the rule of law, to accept the lawfulness of the European Court of Human Rights's disregard for jurisdictional limits set out on the face of the Convention. In *Pham v Home Secretary*,[73] Lord Mance reflected on the jurisdictional limits that concerned the Court of Justice of the European Union (CJEU), saying:

> A domestic court faces a particular dilemma if, in the face of the clear language of a Treaty and of associated declarations and decisions, such as those mentioned in paras 86-89, the Court of Justice reaches a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements. But, unless the Court of Justice has had conferred upon it under domestic law unlimited as well as unappealable power to determine and expand the scope of European law, irrespective of what the Member States clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice.

Lord Mance's reflections in this passage concern what is to be done when an international tribunal fails to observe the jurisdictional limits imposed upon it by treaty. He aims to defend the lawfulness in principle of a domestic court, in interpreting and applying legislation that gives domestic effect to the tribunal's decisions, refusing to give effect to decisions that flout clear treaty limits. That is, the CJEU might act ultra vires, in which

72. There are multiple examples from domestic and international legal practice.

73. [2015] UKSC 19 at [90]

case its decision would not be recognised by the domestic court to be lawful or to be given effect within domestic law. In *Pham*, the force of this argument turned on how to read the European Communities Act 1972 and on whether Parliament truly intended to give domestic effect to *all* decisions of the CJEU. The relevance of this point to Rule 39 is that the European Court of Human Rights, like the CJEU, may overstep jurisdictional limits clearly set out in the Convention. When it does so, as I say it has in relation to its purported jurisdiction to grant binding interim relief, it is open to member states to refuse to accept the lawfulness of its actions.

Such refusal would not mark the UK as an outlier amongst European nations. The German Bundesverfassungsgericht (Federal Constitutional Court) has long asserted a power to find actions of EU institutions (including the CJEU) *ultra vires* the powers conferred in the EU treaties.[74] In 2020, despite an earlier CJEU ruling to the contrary,[75] it found that the European Central Bank had created new competencies for itself and set a deadline after which German authorities would be required not to comply with them.[76]

In rejecting the Strasbourg Court's actions in excess of jurisdiction, the UK (like Germany) would not be failing to honour its international legal obligations; it would be inviting the Court to honour its own legal obligations.

74. *Maastricht Decision*, 12 October 1993.

75. Case C-493/17 *Weiss*

76. Judgment of the Second Senate of 5 May 2020

Rule 39 and the Illegal Migration Bill

The Illegal Migration Bill imposes a duty on the Home Secretary to remove from the UK a person who enters the UK unlawfully (without entry clearance) from a safe country. The Bill is intended to make it futile to contract with people smugglers to enter the UK on a small boat from France, because entry by this means does not result in the person remaining, let alone settling, in the UK. The risk of such a policy being interrupted by Rule 39 interim measures was readily apparent in the aftermath of the Strasbourg Court's intervention last June. For this reason, Policy Exchange proposed that legislation giving effect to this policy would need to mandate removal, rather than merely to empower the Home Secretary to carry out removal, for such a discretion would be difficult to exercise in the face of a Rule 39 ruling, not least because commentators, civil servants and government lawyers would be likely to argue that non-compliance would be unlawful. For the removal of doubt, we argued that the legislation should make express that the Home Secretary's statutory duty was not cancelled, or suspended, by the making of a Rule 39 order.

The Bill was introduced to the House of Commons with a placeholder clause, clause 49, authorising the Secretary of State to make regulations about the effect that the Strasbourg Court's interim measures would have on the statutory duty to remove persons from the UK. The clause has now been replaced with clause 53, which applies when the Strasbourg Court indicates an interim measure in relation to the intended removal of a person from the UK. The clause provides that a Minister of the Crown may, but need not, determine that the statutory duty to remove the person is not to apply in relation to that person. This determination must be made by the Minister personally and when such a determination is not made civil servants and (Upper Tribunal) judges are not to have regard to the interim measure in applying the legislation. In other words, the clause confers a discretion on the Minister, and the Minister alone, to disapply the statutory duty to remove a person in relation to whom a Rule 39 ruling has been made. The clause makes clear that in exercising this discretion, the Minister may consider anything that seems relevant. The clause also specifies that the Minister may consider, in particular (a) whether the UK was given an opportunity to be heard before the interim measure was indicated, (b) the form of the decision to indicate the interim measure, (c) whether the Strasbourg Court will consider the UK's representations that the interim measure should be reconsidered without delay, and (d)

the likely duration of the interim measure and timing of any substantive decision by the Court. However, the Minister is not confined to procedural matters and the power to disapply the statutory duty has to be construed in accordance with clause 1 to achiever the purpose of the Bill set out in that clause.[77]

In one sense, this is a curious clause. Even without the clause, the statutory duty would require removal notwithstanding the Rule 39 order. The application of Acts of Parliament is not, in our law, conditional on the absence of interim measures. Part of the point of imposing a mandatory statutory duty on the Home Secretary is to avoid argument about whether or not she should exercise her discretion to remove a person who has secured a Rule 39 order barring the UK from removing him from our country. The risk is that a policy dependent on the exercise of discretion would fall apart in the face of a series of Rule 39 applications, with the Strasbourg Court making it unworkable for the UK to attempt to remove unlawful migrants to safe third countries. But the effect of clause 53 is to reintroduce a statutory discretion to the Bill, authorising the Minister to choose to disapply the statutory duty and to be free, as a matter of domestic law, to comply with the interim measure. The importance of this framing is that the Bill makes clear that the legal default, which binds civil servants and judges, is that the statutory duty is *not* disapplied whenever a duty judge purporting to act on behalf of the Strasbourg Court makes a Rule 39 order. The clause reserves to the Minister alone the question of whether to cancel the duty, making clear that it is lawful for the Minister *not* to disapply the duty, and providing some grounds on which she may so decide, namely various lamentable aspects of the Strasbourg Court's procedures that are themselves inconsistent with familiar desiderata of the rule of law.

If Parliament enacts the Bill, it will authorise the Minister to decline to disapply the statutory duty when the Strasbourg Court indicates an interim measure. There must be a risk that the discretion will evaporate in practice, with the Minister coming under pressure from commentators, civil servants and government lawyers to choose to comply with the interim measure, on the supposed grounds that the alternative course of action would be a flagrant breach of international law. The Minister may also be advised that to decline to disapply the duty would be unconstitutional, because such a decision would breach the principle of the rule of law. Some civil servants may even assert that the Civil Service Code authorises them to refuse to support government action – removing a person in relation to whom an interim measure has been indicated – that would place the UK in breach of its international obligations. These are not good constitutional or legal arguments. It is not open to civil servants to defy ministerial instructions that are lawful in domestic law (including exercises of statutory discretion), still less to defy an Act of Parliament that mandates a course of action, on the grounds that the Minister's action, or in the case of clause 53 her inaction, risks placing the UK in breach of its international obligations.

77. Clause 1(1): "The purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control."

In addition, the UK has long had a historical constitutional commitment to dualism, whereby the UK's treaty obligations only have force in our domestic law when Parliament enacts legislation to this effect. This rule reflects an important point of principle. It is for the UK's political authorities – Parliament and Government – to decide how to act and what our law should be. The rule of law does not require the UK to abandon this feature of its constitution. On the contrary, the rule of law includes this legal rule, which the Supreme Court has been at pains to uphold in a number of recent judgments.[78] It will often be appropriate – maybe standardly so – for Parliament to legislate and the Government to exercise its statutory powers in a way that avoids placing the UK in breach of its treaty commitments or which would risk an international tribunal ruling against the UK. But whether to act in a way that is incompatible with our treaty obligations, or when to run the risk of an adverse ruling, are questions that are not simply settled by the principle of the rule of law but require ethical reflection and pragmatic political judgement.

This analysis is all the more forceful when, as in relation to Rule 39 orders, there is a strong argument to be made that the UK is *not* under an international legal obligation to comply with the rulings in question. Whether or when or how to advance this argument before the Strasbourg Court, or in discussion at the Committee of Ministers, are again questions that requires political judgement. But the merits of the argument, qua legal argument, turn on the considerations this report has outlined. Much of the commentary about Rule 39, including leaked reports about civil service disquiet about this aspect of the Bill, takes for granted that non-compliance with Rule 39 is exactly the same as to refuse to abide by a final judgment of the Strasbourg Court (or, worse, a refusal to obey a domestic court order) and that in indicating interim measures the Court acts lawfully and has power to change the UK's international legal obligations, imposing a new obligation on the UK.

In response to news that the Government intended to table the amendment to the Bill that is now clause 53 (but before the text of the clause had been made public), the Deputy Vice-President of the Law Society of England and Wales, Richard Atkinson, said:

> If the UK were to refuse to comply with a European Court of Human Rights ruling this would entail a clear and serious breach of international law.
>
> The rule of law means governments respect and follow domestic and international law and disputes are ruled on by independent courts.
>
> This amendment would undermine the global rules-based order, set a dangerous precedent within the international community and damage the UK's standing in the world.

78. See for example *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [55]; *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 at [108]; *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [77]-[79]; *In the matter of an application by James Hugh Allister for Judicial Review (Northern Ireland)* [2023] UKSC 5 at [30].

> For all these reasons the Law Society would be unequivocally opposed to such an amendment.

This simply misses the point. The UK has an obligation to abide by final judgments of the Court, but this should be sharply distinguished from an obligation to comply with interim measures, which are made by a single judge in purported exercise of a power that cannot be reconciled with the terms of the Convention and which the member states repeatedly chose not to authorise. In standing on its rights under the Convention, and disputing the Court's assertion of a power to grant interim relief, the UK would not be defying the rule of law or questioning the importance of independent courts adjudicating disputes. On the contrary, in challenging the Court's assertion of a jurisdiction that lacks legal foundation and implicates the Court in an unfair process that is much less disciplined than ICJ practice, the UK would actually be vindicating the rule of law.

In an interview on the Today Programme on BBC Radio 4,[79] the former Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd said that ignoring interim measures would be an "immensely serious step" and warned it "sets an extraordinarily bad example". More specifically, he is reported to have said that:

> Many people would say having the power to ignore a court order is something [that], unless the circumstances were quite extraordinary, [that] this is a step a government should never take because it is symbolic of a breach of the rule of law.

With respect, Lord Thomas does not ask whether the court had jurisdiction to make the order in question. There is a world of difference between a court order, made by a court acting within its jurisdiction, and interim measures indicated under Rule 39. Judges of the Strasbourg Court have no authority under the terms of the Convention to order member states to act or refrain from acting. Their authority is limited by the Convention, which does not authorise the Court, let alone an anonymous "duty judge", to grant binding interim relief. It would be remarkable for Parliament to confer statutory power on the Government to cancel (not ignore) the legal effect of a court order. Remarkable but not unprecedented, for an executive override might be appropriate in view of the subject matter under consideration (say, whether the public interest requires disclosure of protected information) and might be an important protection for the public interest, a power which would in turn be disciplined by political accountability.[80]

In any case, our domestic law clearly authorises the Government to ignore (that is, not to comply with) orders of international tribunals, leaving it to Ministers, accountable to Parliament, to decide whether to comply with the orders and how best to proceed if compliance would require enactment of new legislation, which requires Parliament's assent. Quite apart from clause 53 of the Bill, our law permits ministers to ignore Rule 39 interim measures. In failing to comply with such measures, the Government would risk the Strasbourg Court later ruling against the UK

79. 20 April 2023; reported in Helen Catt and Joshua Neven, "Migration bill: Home secretary set to win powers to ignore European court" BBC website, 20 April 2023.

80. See *R (Evans) v Attorney General* [2015] UKSC 21 and R Ekins and C Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, 2015)

for breach of Article 34. But this is a course of action that the law leaves open to Ministers. Whenever Parliament enacts legislation that imposes duties on the Government, it is not open to Ministers to set aside their statutory duty if or when an international tribunal directs them to act otherwise. The significance of clause 53 is that it addresses the likely prospect of Rule 39 rulings and affirms that the statutory duty continues unless the Minister decides otherwise. In other words, this is a power to comply with interim measures, not a power to ignore them. It would be better, I argue, for the Bill to provide that the making of a Rule 39 order has no effect on the Home Secretary's statutory duty (and thus on the duty of civil servants who act on her behalf). Leaving the question of whether to comply to the Minister invites further controversy, including the provision of civil service advice or legal advice that, if accepted, would make it in effect impossible to decide not to disapply the duty – which would risk frustrating the Bill's policy.

But there is a logic to the clause, for it maintains the statutory duty as the default position, makes provision for the Minister to disapply the duty in relation to the particular person who secures a Rule 39 order, and also affirms that the Minister may lawfully refuse to disapply the duty, especially when the Strasbourg Court has acted by way of an unfair process. The clause is framed, I suggest, to make it clear (especially to civil servants, but also to Upper Tribunal judges) that the statutory duty is not suspended whenever a "duty judge" in Strasbourg exercises Rule 39. The clause also rules out the argument, in this context at least, that section 2 of the Human Rights Act 1998 requires judges to take "interim measures" into account.[81] The argument should fail in any case because interim measures are not a "judgment, decision, declaration or advisory opinion of the European Court of Human Rights", per section 2(1), but it may well be that courts are unsure about this point. Thus, while a more categorical rule would be better, the clause does vindicate the rule of law by helping clarify and secure the relevant statutory duty.

81. This argument is made by JUSTICE in its written evidence to the Joint Committee on Human Rights, 6 April 2023, at [24], n25.

Conclusion and recommendations

The rule of law requires adjudicative bodies to observe their jurisdictional limits, to uphold and faithfully apply the relevant law to the dispute, and to act fairly towards the parties. In asserting a power to grant binding interim relief, the European Court of Human Rights has flouted these requirements. Unlike the Statute of the International Court of Justice, the European Convention on Human Rights does not empower the Strasbourg Court to grant interim relief. Rule 39 is a rule of court, made under the authority of Article 25, a provision which enables the Court to govern its own proceedings but which clearly cannot permit the plenary Court to empower itself, or single judges, to grant binding interim relief, which is to impose new legal obligations on states.

The current understanding of Rule 39 dates from at earliest 2005, when a majority of the Court concluded that Turkey had breached Article 34 by failing to comply with an interim measure. The majority judgment cannot be reconciled with the Court's earlier case law, which made a compelling case for the conclusion that interim measures indicated under Rule 39 are not binding. The Court's reliance on the practice of the International Court of Justice is unpersuasive, for the latter tribunal is expressly authorised to make provisional measures. The Court has never explained why non-compliance with a Rule 39 order constitutes a breach of Article 34, for the simple reason that there is no logical connection between the two. Tellingly, the Court has now left this foundation far behind, simply asserting boldly that to breach an interim measure is to breach Article 34.

The terms of the Convention itself are incompatible with the asserted jurisdiction. Articles 26 and 27 strictly limit the competence of single judges, who have authority to declare applications inadmissible. The Court's reading of Rule 39 empowers them to impose new legal obligations on sovereign states, obligations never agreed by the states and which are inconsistent with the terms of Article 27 of the Convention. Member states have an obligation to abide by a final judgment in a case to which they are a party. The Convention sets out procedural protections for member states including the important protection that the adjudication of disputes to which they are a party will only ordinarily be carried out by a multi-member judicial body (a Chamber or Grand Chamber) in which one

judge is a national of their state. The Court's new practice sweeps away this protection, empowering a single judge to impose new obligations on states without hearing argument or taking public responsibility for his or her decision, which in any case is not supported by reasons. This is a shameful state of affairs to which member states have good reason to object and are entitled to resist.

The controversy about the Government's Rwanda plan and now about the Illegal Migration Bill may have encouraged commentators to overlook, or disregard, these fundamental problems with the current interpretation and practice of Rule 39 by the Strasbourg Court. But the illegitimacy of that interpretation and the illegality of that practice are both entirely severable from contingent details about UK asylum and migration policy and legislation. One may object to the Government's policy and to the new Bill while at the same time decrying the Strasbourg Court's assertion of a jurisdiction that the member states chose not to confer and which has not been conferred other than by the Court investing itself with it. What is happening (and has happened) with Rule 39 does imperil the rule of law. But the rule of law is not imperilled by the fact that the UK may (sometimes, not always) act incompatibly with an interim measure indicated by an anonymous judge. Rather the threat to the rule of law is the assumption by the Strasbourg Court of a new jurisdiction that has no lawful foundation and which implicates judges in a pattern of unfair adjudication. There is some irony in the invocation of the rule of law, not to object to this abuse of adjudicative authority, but instead to seek to compel member states to accept it, or even welcome it.

The main aim of this report has been to clarify how parliamentarians, Ministers and their legal advisers should think about the Strasbourg Court's Rule 39 practice and about the rule of law. The report has touched on the question of how the Government and Parliament should act in light of the relationship between Rule 39 and the rule of law, but has not run this question to the ground. However, subject to the important caveat that how best to engage Strasbourg calls for careful political judgement, the argument of this report supports the following course of action.

The Government should make a statement indicating that the UK does not accept that the ECHR authorises the Strasbourg Court to grant binding interim relief or to make rules of court that authorise one or more judges of the Court to exercise a power to grant binding interim relief.

In particular, the statement should record the UK's understanding that:

(1) Article 25 does not authorise the plenary Court to confer a power on any formation of the Court, still less on a single judge, to grant binding interim relief,

(2) the Court's Rule 39 practice is incompatible with the terms and structure of the ECHR and with the procedural rights to which member states are entitled,

(3) non-compliance with an interim measure indicated under

> Rule 39 does not necessarily (for that reason alone) constitute a breach of Article 34,
>
> (4) the Court has no authority to find a breach of Article 34 in circumstances where the state's action (or inaction) did not hinder the making of an application to the Court, and
>
> (5) the Court has no authority to grant binding interim relief in the context of inter-state cases, where there is no question of any breach of Article 34.

The Government should aim to work with other member states to adopt a new protocol reforming the Strasbourg Court, restoring the congruity between the terms of the ECHR and the Court's practice and case law that the principle of the rule of law demands.

In the course of their deliberation about the Illegal Migration Bill, parliamentarians should reject Lord Paddick's argument that the Bill "undermines the rule of law… by allowing Ministers to ignore judges". The rule of law does not mean the rule of judges. Parliamentarians should recognise that the Strasbourg Court has no lawful authority to issue binding interim relief and that the UK is not, therefore, under an obligation in international law to comply with interim measures indicated under Rule 39.

Relatedly, parliamentarians should recognise that in enacting legislation that authorises Ministers to act incompatibly with the Court's interim measures, they would not be defying legitimate adjudicative authority or putting the integrity of international law in doubt. Instead, they would be vindicating two fundamental propositions of our constitutional law:

> (1) the implementation and application of Acts of Parliament is not contingent on whether the Strasbourg Court decides to indicate interim measures restraining action, and
>
> (2) no one (including civil servants) is entitled to disapply statutory duties, or to refuse to carry out Ministerial directions that are lawful in domestic law, by reference to international obligations that have not been incorporated into UK law

If Parliament supports the policy to which the Illegal Migration Bill aims to give effect, it should resist attempts to condition application of the policy on Rule 39. If it does not support the policy, it should reject the Bill, rather than adopt the surreptitious technique of attempting to equip the Strasbourg Court to frustrate it. Parliament should certainly reject amendments to the Bill that would, for the first time in UK law, give domestic legal effect to the Strasbourg Court's interim measures and give them more authority in UK law than the final judgments of the ECHR.

In relation to clause 53 in particular, Government and Parliament should consider replacing the clause with a rule providing that the statutory duty of removal should proceed regardless of any Rule 39 interim measure.[82]

82. R Ekins and S Laws, How to Legislate about Small Boats (Policy Exchange, 2023) and R Ekins, "Small Boats, Braverman's Bill, and new Government amendments. They're a move in the right direction", Conservative Home, 24 April 2023

This would clarify the law and avoid the prospect of unpredictable litigation challenging the Minister's decision to decline to comply with the interim measure.

In the alternative, Parliament should consider amending clause 53 to make clear that in addition to the process followed by the Strasbourg Court, which the clause refers to expressly, the Minister is also free to take into account whether the individual's removal from the UK would be unlikely significantly to hinder him in making an application to the Strasbourg Court. In this regard, the amended clause might usefully allow the Minister to consider in particular whether removal would significantly interfere with the individual's communication with the Court or contact with his lawyers. In this exercise, the Minister should also be expressly authorised to consider whether these questions had already been considered by UK authorities, to take into account any reasons that the Strasbourg Court may have provided in support of the interim measure, and to consider whether the interim measure has been made in relation to an application to the Strasbourg Court that the Court should have declared inadmissible on the grounds that the applicant has not exhausted his domestic remedies, not merely suspensive domestic remedies. Amending clause 53 in this way would help to make clear that the UK's concerns about the Rule 39 practice are not merely about the fairness and integrity of its process, but also about the grounds of the jurisdiction. (If or when a Minister declines to disapply the statutory duty of removal in response to an interim measure, the Minister's inaction is likely to be challenged by way of domestic judicial review proceedings. The challenge should fail – how to exercise the discretion is for the Minister, subject to parliamentary accountability, to decide, and the limitation on a domestic court's power to grant interim relief set out in clause 52 should also apply to a case in which the Minister declines to disapply the statutory duty – but it is important for parliamentarians to draft clause 53, and perhaps to amend clause 52, to minimise this risk.)

It is possible that the Strasbourg Court might improve its procedures in response to the UK's concerns.[83] But the UK should maintain that it objects just as much to the substance of the Court's assertion of a jurisdiction to grant binding interim relief, especially when this jurisdiction clearly comes away from the requirements of Article 34, as it does to the absence of natural justice and failure to adhere to rule of law standards that characterises the Court's practice. In discussions with the Strasbourg Court, which are reportedly ongoing,[84] and with the Committee of Ministers, the Government should not be content to accept procedural changes that succeed only in making the Court's Rule 39 practice less unfair. The Government should firmly maintain the UK's principled objections, which concern the lack of legal foundation for the practice, as well as its incongruence with the Convention itself.

In future, the Government must be much more vigilant to object promptly to decisions of the Strasbourg Court that subvert the Court's jurisdictional limits and a proper understanding of the ECHR. Relatedly,

83. See further European Court President attends Reykjavik Summit, Press Release no 127 issued by the Registrar of the Court on 17 May 2023.

84. Matt Dathan and Oliver Wright, "Sunak seeks European court reform to fight migrant crisis" The Times, 16 May 2023

the Government should intervene more often in litigation that may transform the relevant case law and subvert the terms agreed by member states.

The Government should also be much more careful in participating in declarations and resolutions that may inadvertently suggest acquiescence to Strasbourg decisions that flout the Convention. This will require civil servants to be vigilant in defence of UK interests, including the UK's treaty rights, and for Ministers to exercise close control over officials who represent the UK in this context. Other parliamentarians should hold the Government to account for its actions in this regard.

Future public deliberation about the role and record of the Strasbourg Court should recognise that the Court is capable of making very bad decisions and acting in excess of its jurisdiction and that the Court is often not well placed to recognise or reverse its errors. Respect for the rule of law is not a reason to excuse and overlook the Court's failures. On the contrary, the rule of law provides good reason for member states, including the UK, to challenge the Court's abuse of its adjudicative authority and to (work together to) restore the limits on its jurisdiction.

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