



Ivane Javakhishvili Tbilisi State University  
Faculty of Law

# Journal of Law

№1, 2018



უნივერსიტეტის  
ბანოშტელოზა

UDC(ყოფილი) 34(051.2)

ბ-216

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ISSN 2233-3746

**Guliko Kazhashvili\***

## **Provisional Measures in the Practice of European Court of Justice and European Court of Human Rights**

*Due to the Association Agreement between Georgia and the European Union and the diversification of trade relations, it is important to actively harmonize Georgian civil procedural legislation with the EU Civil Procedure Law. For this purpose, it is interesting to review the definitions of the European Court of Justice on the issues related to the recognition and enforcement of the provisional measures.*

*The role of the institute of provisional measure is great because the enforcement is an integral part of the fair trial. There are cases of adoption of provisional measures, cancellation of provisional measures and the denial of the provisional measures in the practice of the European Court of Human Rights. It is important to review the precedential decisions and the special definitions related to the provisional measures. In case the state submits a unilateral guarantee, the European Court of Human Rights shall cancel the provisional measure.*

**Keywords:** *Provisional Measure, Interim Measure, Regulation, the Right to Fair Trial, European Court of Justice, European Court of Human Rights.*

### **1. Introduction**

When approached from a national point of view, the notion of ‘civil procedure’ does not pose major difficulties. In principle, civil procedure governs the adjudication of civil cases before a court of law, but ‘civil procedure’ may have broader or narrower definition in different countries.<sup>1</sup> Georgia has taken a number of steps for the integration of the European jurisdiction.<sup>2</sup> Special attention should be paid to the Association Agreement signed between Georgia and the European Union on 27 June 2014, on which Georgia has been able to achieve gradual economic integration with the EU internal market through the creation of a deep and comprehensive free trade area. In turn, the prerequisite for such admission is the sustainable and all-round regulatory approximation with European legal mechanisms.<sup>3</sup>

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<sup>1</sup> *van Rhee C.H., Smits J.M. (ed.)*, Civil Procedure, Elgar Encyclopedia of Comparative Law, Cheltenham etc., 2006, 120. <<http://tcpbckup1.yolasite.com/resources/Elgar%20Encyclopedia%20of%20Comparative%20Law%20By%20Jan%20M%20Smits.pdf>> [22.03.2018].

<sup>2</sup> It is notable, that the approximation of the Georgian legislative system to the European standards was declared as a priority in 1997, which was reflected in the resolution №828, adopted by the parliament of Georgia on the September 2, 1997. According to that resolution every law and the normative act adopted from September 1, 1998, should be in accordance with the European Union standards and norms. See *Lakerbaia T.*, The Right of Withdrawal: Comparative Analyze of the Georgian and the European Contract Law, the dissertation work is presented for the academic degree of doctor, 2016, 9, <[http://press.tsu.ge/data/image\\_db\\_innova/disertaciebi\\_samartali/tamar\\_lakerbaia.pdf](http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/tamar_lakerbaia.pdf)>, [21.03.2018] (In Georgian).

<sup>3</sup> *Lakerbaia T.*, The Right of Withdrawal: Comparative Analyze of the Georgian and the European Contract Law, Dissertation Thesis, Tbilisi, 2016, 9. <[http://press.tsu.ge/data/image\\_db\\_innova/disertaciebi\\_samartali/tamar\\_lakerbaia.pdf](http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/tamar_lakerbaia.pdf)>, [21.03.2018] (In Georgian).

All human rights bodies surveyed, issue precautionary measures to protect the range of rights recognized in their constitutive documents.<sup>4</sup> Interim measures are urgent measures which, according to the Court's well-established practice, apply only where is an imminent risk of irreparable harm.<sup>5</sup> The procedures of use of precautionary measures is detailed explained in the Rule 39<sup>th</sup> of Rules of Court.<sup>6</sup>

The European Court of Human Rights and International Court of Justice in some cases grant possibility for a state to provide diplomatic assurances as an alternative to receiving a court order for provisional measures against it. At the same time, orders for provisional measures are now understood to also be legally binding; yet international courts will sometimes permit a state to substitute an assurance in place of an order for provisional measures. This emerging practice has brought the nature of a state as a sovereign capable of creating legal obligations that escape inquiry into reliability of outcome.<sup>7</sup>

## **2. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters**

The EU directives are mandatory for the Member States. They have the obligation to implement the regulations in the national legislation.<sup>8</sup> 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters has been very important document. The Convention originally only applied to the then six<sup>9</sup> member states of the European Community, but became more influential when the Community/Union expanded. The Brussels Convention has recently been converted in a European Regulation. This Regulation is applicable to all member states except Denmark.<sup>10</sup> In 1988, the parallel Lugano Convention was implemented. This Convention deal with international cases involving the member states of the European Union and the members of the European Free Trade Association.<sup>11</sup>

EU law makes day-to-day unification of the rules of international civil procedure law. EU adopted the directives on: Jurisdiction and the recognition and enforcement of judgments in civil and commercial

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<sup>4</sup> Comparative Analysis of the Practice and Precautionary Measures Among International Human Rights Bodies, Submitted to Special Meeting of the Permanent Council of the Organization of American States by the Center for Justice and International Law (CEJIL) and International Human Rights Law Clinic, University of California, Berkeley, School of Law, Berkeley, California, United States of America, December 2012, 2. <[https://www.law.berkeley.edu/files/IHRLC/Precautionary\\_Measures\\_Research\\_Paper\\_\(FINAL\)\\_121210.pdf](https://www.law.berkeley.edu/files/IHRLC/Precautionary_Measures_Research_Paper_(FINAL)_121210.pdf)>, [12.02.2018].

<sup>5</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 1, [12.02.1018].

<sup>6</sup> <[http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)>, [12.02.2018].

<sup>7</sup> *Worster W. Th.*, Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015), *Law and Practice of International Courts and Tribunals*, Vol. 15, No. 3, 2016, 1, <<https://ssrn-com/abstract=2632159>>.

<sup>8</sup> *Lakerbaia T.*, The Right of Withdrawal: Comparative Analyze of the Georgian and the European Contract Law, Dissertation Thesis, Tbilisi, 2016, 9. <[http://press.tsu.ge/data/image\\_db\\_innova/disertaciebi\\_samartali/tamar\\_lakerbaia.pdf](http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/tamar_lakerbaia.pdf)>, [21.03.2018] (In Georgian).

<sup>9</sup> Belgium, France, Italy, Luxemburg, Netherlands and Western Germany.

<sup>10</sup> *van Rhee C.H., Smits J.M. (ed.)*, Civil Procedure, Elgar Encyclopedia of Comparative Law, Cheltenham etc., 2006, 121. <<http://tcpbackup1.yolasite.com/resources/Elgar%20Encyclopedia%20of%20Comparative%20Law%20By%20Jan%20M%20Smits.pdf>>, [22.03.2018].

<sup>11</sup> Ibid.

matters;<sup>12</sup> on Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility;<sup>13</sup> on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents);<sup>14</sup> on cooperation between the courts of the Member States in the taking of evidences in civil and commercial matters;<sup>15</sup> on insolvency proceedings.<sup>16</sup>

The legal framework under EU law of the recognition and the enforcement of protective measures is not particularly detailed. As in other fields of EU law the jurisprudence of the ECJ<sup>17</sup> has developed further the legal framework and has provided some guidance as its interpretation. Some aspects are still not particularly clear.<sup>18</sup> Regulation (EU) No 1215/2012 entered into force on January 9<sup>th</sup>, 2013,<sup>19</sup> and Council Regulation (EC) No. 44/2001 was replaced. The procedure of the recognition and the enforcement of foreign judgments were simplified by the amendments of January 10<sup>th</sup>, 2015. According to the article 35 of the Regulation application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.<sup>20</sup>

## **2.1 The Review of Problematic Issues Related to the Enforcement of Court Decisions on Interim Measures to State to State in the European Union**

### **2.1.1 Which Court Has Jurisdiction to Issue Interim Measure?**

Discuss the ECJ cases on the recognition and the enforcement of the provisional measures.

Contractual relationship dispute between two parties, where contract contained arbitration clause excluding court jurisdiction. One party did not carry out their duties and arbitration was initiated while court in Nederland was tasked to issue protective measure. Other party opposed the courts in Nederland

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<sup>12</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

<sup>13</sup> Council Regulation (EC) No 2201/2003 of 27 December 2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility.

<sup>14</sup> Council Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Service of Documents).

<sup>15</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidences in Civil and Commercial Matters.

<sup>16</sup> Regulation (EC) No 1346/2000 on Insolvency Proceedings.

<sup>17</sup> ECJ – European Court of Justice.

<sup>18</sup> *Rozalinova E., Angelov A., Georgiev I.*, Jurisdiction, Recognition and Enforcement of Provisional and Protective Measures (International Cooperation in Civil Matters) (2012), Revista Forumul Judecatorilor, No. 4, 2012, 84. <<https://ssrn.com/abstract=2224223>>, [12.03.2018].

<sup>19</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. <<http://www.wipo.int/wipolex/en/details.jsp?id=15134>>, [26.02.2018].

<sup>20</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 35.

have no jurisdiction since the contractual arbitration clause was agreed upon by both parties. ECJ established the distinction between the substance of the matter and issuance of protective measure. While jurisdiction of matter substance decision must be established by the Regulation articles, protective measure decision can also be guided by the jurisdiction of the national law. In this case no court has jurisdiction to decide the case while both parties agreed to exclude the court proceeding and entrusted dispute resolution via arbitration. According to Regulation no court would have jurisdiction to issue protective measure, however according to national legislation courts in Nederland have jurisdiction to issue protective measure while not assessing the matter substance.<sup>21</sup>

European patent dispute where one party filed both lawsuit and protective measure proposal to Dutch court. Opposing party opposed the claim validity but not the court Jurisdiction. ECJ ruled, protective measure decision does not affect the substance matter decision. Exclusive jurisdiction does not exclude the possibility to issue protective measure since it is not the decision in substance matter and does not affect the final outcome.<sup>22</sup>

Dispute between seller and buyer where seller is a company and buyer is natural person. Since buyer did not meet his obligation regarding payment, court in Nederland ruled about his payment obligation and asked court in Germany to execute the ruling. Objection was based on fact the buyer is a consumer and treaty was mostly arranged in Germany and only signed in Nederland, thus only German courts have jurisdiction. ECJ stated in its reasoning, protective measure can be issued by the court not having the jurisdiction over substance matter.<sup>23</sup>

### 2.1.2. What Conditions Must Be Met in Order to Issue Protective Measure?

Every procedural activity, including provisional measures has its precondition.

Dispute between two Belgian parties. One party suggested witness interrogation by the Dutch court. ECJ defined that the requested activity did not fulfill the requirements set for protective measures.<sup>24</sup>

ECJ defined payment can be regarded as protective measure only under the condition guarantee is made to return the payment in case of unfavourable court decision on substance matter. Court also stated in order to apply art. 35 of the Regulation (EU) No 1215/2012 a bond between protective measure substance and local court jurisdiction must be present.<sup>25</sup>

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<sup>21</sup> ECJ, Judgment of the 17 November 1998, **Van Uden Maritime BV, Trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another**, Case C-391/95. ECLI identifier: ECLI:EU: C: 1998:543.

<sup>22</sup> ECJ, Judgment of 12 July 2012, **Solvay SA v Honeywell Flourine Products Europe BV, Honeywell Belgium NV, Honeywell Europe NV**, c-616/10.

<sup>23</sup> ECJ, **Judgment of the Court of 27 April 1999, Hans-Hermann Mietz v Intership Yachting Sneek BV**, Case C-99/96, ECLI identifier: ECLI:EU:C:1999:202.

<sup>24</sup> ECJ **Judgment of 28 April 2005** St. Paul Dairy Industries NV vs. Unibel Exser BVBA, **Case C-104/03**, ECLI identifier: ECLI:EU:C:2005:255.

*JUDr. Kolban P., Mgr. Babickova K., Mgr. Potucky J.*, Selected Problems Related to Provisional Measures within Brussels I bis Regulation and European Court on Human Rights, THEMIS competition – 2017, 8. <<http://www.ejtn.eu/Documents/Team%20CZ%20semi%20final%20C.pdf>>, [24.03.2018].

Divorce proceeding where husband proposed execution of French court decision by German Court. Bank accounts and furniture manipulation should have been prohibited. Proposal was denied due to lack of proper documents and appeal was denied. ECJ ruled it is impossible to issue protective measure based on the Council Regulation (EC) No 44/2001 on matter substance falling outside of this Regulation scope.<sup>26</sup>

### **2.1.3. Which Procedural Stage Allows Issuing Interim Measure?**

The procedural stage of the case is of little importance and protective measures can be issued whenever the need arise and the request meet the conditions of the protective measures.<sup>27</sup>

## **2.2. The Recognition and Enforcement of Court Decision by the Regulation (EU) No. 1215/2012**

A judgment given in a Member State which is enforceable in that Member state shall be enforceable in the other Member States without any declaration of enforceability being required.<sup>28</sup> Before the enforcement procedure, the decision should be recognized by a Member, where the decision should be enforced.<sup>29</sup> A part who wishes to invoke in a member State a judgment given in another Member State shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.<sup>30</sup> Decisions do have in other Member States no effect if they suffer from any of the defects listed in Article 45. The Brussels Ibis Regulation contains the following reasons for refusing recognition, or enforcement: apparent disagreement with the public order of the state of recognition, serious procedural defects;<sup>31</sup> if the judgment is irreconcilable with a judgment given between the same parties in the Member State Addressed;<sup>32</sup> the judgment conflicts with the rules established by the regulations.

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<sup>26</sup> ECJ, **Judgment of 27 March 1979** Jacques de Cavel vs. Luise de Cavel, **Case 143/78**, ECLI identifier: ECLI:EU:C:1979:83.

<sup>27</sup> *JUDr. Kolban P., Mgr. Babickova K., Mgr. Potucky J.*, Selected Problems Related to Provisional Measures within Brussels I bis Regulation and European Court on Human Rights, THEMIS competition – 2017, 8. <<http://www.ejtn.eu/Documents/Team%20CZ%20semi%20final%20C.pdf>>, [21.03.2018].

<sup>28</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 39.

<sup>29</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 36.

<sup>30</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, article 37.

<sup>31</sup> *JUDr. Kolban P., Mgr. Babickova K., Mgr. Potucky J.*, Selected Problems Related to Provisional Measures within Brussels I bis Regulation and European Court on Human Rights, THEMIS competition – 2017, 15, <<http://www.ejtn.eu/Documents/Team%20CZ%20semi%20final%20C.pdf>>, [21.02.2018].

<sup>32</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, article 45.1.c.

### 3. The Cases of the European Court of Human Rights on Interim Measures

#### 3.1. The Procedure of Granting Interim Measures by the Rules of Court<sup>33</sup> of the European Court of Human Rights

European Court of Human Rights issues interim measures in order to protect the rights declared in the article 2<sup>34</sup>, 5<sup>35</sup>, 6<sup>36</sup>, 8<sup>37</sup> and 11<sup>38</sup> of the Convention for the Protection of Human Rights and the Fundamental Freedoms during the proceedings.<sup>39</sup> Article 39 of the Rules of Court regulates the procedures of using interim measures. According to the first paragraph of the article 39 - The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4<sup>40</sup> 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.<sup>41</sup> The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm.<sup>42</sup> Types of interim measures are not listed in the Rules of Court and on some stage it creates problems to granting the interim measures.

The court shall grant interim measure in the case where the applicant is exposed to the expulsion or extradition. In the case of *Mamatkulov and Askarov v. Turkey*,<sup>43</sup> the court made an important definition on the interim measure. The case was the following: Mamatkulov and Askarov were citizens of Uzbekistan and at the same time members of the opposition party. They were arrested in turkey on suspicion of murder and an attempted attack, and extradited to Uzbekistan in spite of an interim measure indicated by the Court under Rule of the Rules of Court. Thus Turkey was recognized as a violator of the European Convention.<sup>44</sup> In this judgment, the Court for the first time concluded that, by failing to comply with interim measures indicated under Rule 39 of the Rules of Court, a State Party<sup>45</sup> had failed to comply with its obligations under Article 34<sup>46</sup> of the Convention.<sup>47</sup> Any State to whom the interim

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<sup>33</sup> Rules of Court.

<sup>34</sup> Right to Life.

<sup>35</sup> Right to Liberty and Security.

<sup>36</sup> Right to a Fair Trial.

<sup>37</sup> Right to Respect for Private and Family Life.

<sup>38</sup> Freedom of Assembly and Association.

<sup>39</sup> <[https://www.ecre.org/wp-content/uploads/2016/05/RULE-39-RESEARCH\\_FINAL.pdf](https://www.ecre.org/wp-content/uploads/2016/05/RULE-39-RESEARCH_FINAL.pdf)>, [12.02.2018].

<sup>40</sup> The chairman of the court may appoint the deputy chairman to decide adoption of interim measure. See <[http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)>, [25.02.2018].

<sup>41</sup> <[http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)>, [25.02.2018].

<sup>42</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 1, [25.02.2018].

<sup>43</sup> *Mamatkulov and Askarov v. Turkey*, <[https://hudoc.echr.coe.int/eng#{"itemid":\["001-68183"\]}](https://hudoc.echr.coe.int/eng#{)>, [25.02.2018].

<sup>44</sup> *Naldi G. J.*, Interim Measures in the UN Human Rights Committee, 2004, *International and Comparative Law Quarterly*, 53(2), 445-454, 452.

<sup>45</sup> The Convention for the Protection of Human Rights and the Fundamental Freedoms. <<http://www.supremecourt.ge/files/upload-file/pdf/aqtebi5.pdf>>, [25.02.2018] (In Georgian).

<sup>46</sup> The Court may receive applications from any person, nongovernmental organization 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



measure has been used shall permanently protect this measure and abstain from any action or inactivity which undermines the authority and effect of the court decision.<sup>48</sup>

The Court noted in particular that, under the Convention system, interim measures, as they had consistently been applied in practice, played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted.<sup>49</sup> This precedent changed 10 year practice established by the case of *Cruz Varas v. Sweden*<sup>50</sup>, where the Court held that in the absence of a provision in the Convention for interim measures, an indication given under Rule 36 (39) cannot be considered as to give rise to a binding obligation on member States.<sup>51</sup>

In the majority of cases, the applicant requests the suspension of an expulsion or an extradition. The Court grants such requests for an interim measure only on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm.<sup>52</sup> The court does not justify the use of the interim measure, only briefly indicates the use of the measure. For example: to stop the enforcement of the decision of the National Court,<sup>53</sup> to stop eviction until such time as

the authorities assured the Court of the measures they had taken to secure housing for the children, elderly, disabled or otherwise vulnerable people.<sup>54</sup>

### **3.2. Analysis of the Court Practice in Case of Refusal to Grant the Interim Measure and Cancel of Granted Interim Measure**

The Rules of court of the European Court of Human Rights does not include a list of type of interim measures. Also, it does not take into account the obligation of the court to prove the necessity of the use of the interim measure. On the basis of the application submitted by the applicant, the Court grants the interim measure. However, the court may also not comply with the applicant's motion and refuse to grant the interim measure. Refusals of the Court cannot be appealed.<sup>55</sup>

Human rights bodies generally prioritize efficiency over transparency when issuing precautionary measures. They do not publish their decisions on precautionary measures. Instead, these bodies usually

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Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right, article 34, see <<http://www.supremecourt.ge/files/upload-file/pdf/aqtebi5.pdf>>, [25.02.2018].

<sup>47</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 10, [25.02.2018].

<sup>48</sup> *Naldi G. J.*, Interim Measures in the UN Human Rights Committee, *International and Comparative Law Quarterly*, 2004, 53(2), 445-454, 452.

<sup>49</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 10, [25.02.2018].

<sup>50</sup> <<http://www.refworld.org/cases,ECHR,3ae6b6fe14.html>>, [25.02.2018].

<sup>51</sup> <[http://www.pict-pecti.org/matrix/discussion/echr/echr\\_interim.htm](http://www.pict-pecti.org/matrix/discussion/echr/echr_interim.htm)>, [25.02.2018].

<sup>52</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 1, [25.02.2018].

<sup>53</sup> *Rustavi 2 Broadcasting Company Ltd v. Georgia*, Application no. 16812/17.

<sup>54</sup> *Remiche A., Yordanova and Others v. Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home* (December 22, 2012). *Human Rights Law Review*, 2012, Vol. 12 (4), 792, <<https://ssrn.com/abstract=2705714>>, [25.02.2018].

<sup>55</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 1, [25.02.2018].

request that the State implement precautionary measures via a letter or a Note Verbal<sup>56</sup> (a diplomatic communication that is less formal than a note, is drafted in the third person, and is never signed). Human rights bodies do not publish the contents of these communications; however these decisions may become public if a party decides to publish the communication.<sup>57</sup>

There is an established practice, when the court cancels the granted interim measure, if the state presents assurances. There are different opinions on assurances. Experts of Human Rights are against it, because it may cause the violation of norms on prohibition of torture.<sup>58</sup> Part of the international organizations consider that assurances have legal force, as the assurances are „formal”,<sup>59</sup> „irrevocable”,<sup>60</sup> and „legally binding”,<sup>61</sup> the others think that assurances has no legal force.<sup>62</sup> As a fact assurances is not a mere piece of paper which some ordinary official could sign and then leave other to ignore<sup>63</sup>, but its legal nature stays untypical. The European Court of Human Rights for the first time in the Yordanova case allowed the state to grant an assurance to cancel the interim measure<sup>64</sup> and in a few weeks after the implementation of the measure, Bulgaria's assurance was sufficiently considered to cancel the measure.<sup>65</sup>

Diplomatic assurances issued between states or to individuals are usually considered to not be legally binding and are essentially questions of fact, but unilateral assurances issued directly to an international court are questions of law, and usually legally binding.<sup>66</sup>

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<sup>56</sup> Note Verbale.

<sup>57</sup> Comparative Analysis of the Practice and Precautionary Measures Among International Human Rights Bodies, Submitted to Special Meeting of the Permanent Council of the Organization of American States by the Center for Justice and International Law (CEJIL) and Intranational Human Rights Law Clinic, University of California, Berkeley, School of Law, Berkeley, California, United States of America, December 2012, 10. <[https://www.law.berkeley.edu/files/IHRLC/Precautionary\\_Measures\\_Research\\_Paper\\_\(FINAL\)\\_121210.pdf](https://www.law.berkeley.edu/files/IHRLC/Precautionary_Measures_Research_Paper_(FINAL)_121210.pdf)>, [25.02.2018].

<sup>58</sup> *Burduli N.*, Are Diplomatic Assurances Effective Guarantees against Torture, *Journal of Law, №2*, 2014, 333.

<sup>59</sup> Othman (2007) S.I.A.C. No. SC/15/2005 para. 283. <[http://siac.decisions.tribunals.gov.uk/Documents/-QATADA\\_FINAL\\_7FEB2007.pdf](http://siac.decisions.tribunals.gov.uk/Documents/-QATADA_FINAL_7FEB2007.pdf)>, [25.02.2018].

<sup>60</sup> *Alzery v. Sweden*, Comm. No. 1416/2005, para. 3.12, UN Doc.CCPR/C/88/D/1416/2005 available at <<http://hrlibrary.umn.edu/undocs/1416-2005.html>>, [25.02.2018].

<sup>61</sup> *Worster W. Th.*, Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015). *Law and Practice of International Courts and Tribunals*, II B, Vol. 15, No. 3, 2016. <<https://ssrn.com/abstract=2632159> or <http://dx.doi.org/10.2139/ssrn.2632159>>, [25.02.2018].

<sup>62</sup> *Alzery v. Sweden*, Comm. No. 1416/2005, para. 4.11, UN Doc.CCPR/C/88/D/1416/2005 available at <http://hrlibrary.umn.edu/undocs/1416-2005.html>, [25.02.2018].

<sup>63</sup> Othman (2007) S.I.A.C. No. SC/15/2005 para. 501. <[http://siac.decisions.tribunals.gov.uk/Documents/QATADA\\_FINAL\\_7FEB2007.pdf](http://siac.decisions.tribunals.gov.uk/Documents/QATADA_FINAL_7FEB2007.pdf)>, [25.02.2018].

<sup>64</sup> *Worster W. Th.*, Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015). *Law and Practice of International Courts and Tribunals*, IV , Vol. 15, No. 3, 2016. <<https://ssrn.com/abstract=2632159> or <http://dx.doi.org/10.2139/ssrn.2632159>>, [25.02.2018].

<sup>65</sup> *Yordanova v Bulgaria* appl. no. 25446/06, judgment, para 4, <[https://hudoc.echr.coe.int/eng#-{"itemid":\["002-2155"\]}](https://hudoc.echr.coe.int/eng#-{)>, [25.02.2018].

<sup>66</sup> *Worster W. Th.*, Unilateral Diplomatic Assurances as an Alternative to Provisional Measures (July 17, 2015). *Law and Practice of International Courts and Tribunals*, Vol. 15, No. 3, 2016. <<https://ssrn.com/abstract=2632159> or <http://dx.doi.org/10.2139/ssrn.2632159>>.

In the Court's case-law as it currently stands, Rule 39 of the Rules of Court is not applied, for example, the following cases: to prevent the imminent demolition of property, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court's decision as to the fairness of the proceedings; to ensure the holding of a referendum or to prevent the dissolution of a political party.<sup>67</sup> On 21 December 2007 the European Court of Human Rights issued a special statement and explained that the court grants interim measure only when there is the applicant's inevitable and irreparable harm.<sup>68</sup> The Court has never granted the interim measure of an event which implies the obligation to hold a referendum for the Government. According to the Court, access to the same content at the court is part of a managed campaign that does not have the possibility of positively solving and leads to the expenditure of court resources which could be distributed on more important issues.<sup>69</sup>

### **3.3. Provisional Measures as the Part of Right to a Fair Trial**

The recognition of a violated right does not have any point if it is not enforced.<sup>70</sup> According to the article 2.1 of CPCG, everyone shall be guaranteed judicial protection of their rights. This statement of the law itself implies the legal consequence (in case of adequate prerequisites), which the plaintiff requires. The right to submit a claim to the court is not a theoretical right and does not only guarantee the right to acknowledge the right through final decision, but also includes a legitimate expectation that the final judgment will be enforced.<sup>71</sup> Any other interpretation of the law otherwise jeopardize the rights of the plaintiff, which in spite of the administration of justice, could not reach a decision and the execution of its lawful rights and interests of the restoration, which in turn, undermines the fundamental right to a fair trial guaranteed by the Constitution and the European Convention on Human Rights.<sup>72</sup>

Provisional measure is a very important part of civil procedure and is to create a guarantee so that the imminent judgment can be enforced successfully when it is time for the enforcement. Essentially, the need for security measures—such as seizure and injunction—in civil litigation is connected to two factors: the slowness of the ordinary civil trial and the tendency of some defendants to take so-called sabotage measures. As a matter of experience, it may take considerable time from the point when a dispute arises to the point when the dispute is resolved through a final judgment. There is thus a time-gap that provides ample room for a defendant to obstruct the plaintiff's rights. On the side of the defendant, one could hide or sell the property in question, carry out competing commercial activities in breach of contract, take advantage of the inventions of the plaintiff, shirk one's responsibility for a

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<sup>67</sup> <[http://www.echr.coe.int/Documents/FS\\_Interim\\_measures\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf)>, 2, [25.02.2018].

<sup>68</sup> <[https://hudoc.echr.coe.int/eng-press#{"itemid":\["003-2226998-2371975"\]}](https://hudoc.echr.coe.int/eng-press#{)>, [25.02.2018].

<sup>69</sup> Ibid.

<sup>70</sup> JSC „Sakgazi” and „Anajgupi” v. Parliament of Georgia, Judgment №1/14/184,228, July 28, 2005, Constitutional Court of Georgia, II-4 (In Georgian).

<sup>71</sup> Judgment, case N2/B-209-16, March 30, 2016, Kutaisi Court of Appeal (In Georgian).

<sup>72</sup> Judgment, case N1272780-19, March 9, 2016, Tbilisi Court of Appeal (In Georgian).

debt by emptying a company of its assets, etc.<sup>73</sup> Provisional measures serve to prevent these threats. Effective implementation in Civil Justice has a very important public interest, at the same time, the efficiency of justice is largely depended on the enforcement of the court's decision, therefore, legal mechanisms, which support enforceable decisions, has the most important legitimate purpose - to ensure the effective implementation of justice.<sup>74</sup>

The European Court of Human Rights emphasizes the importance of enforcing a final decision in its numerous cases. The Right to a fair trial includes the right to enforce the take decisions.<sup>75</sup> A person having a judgment in his/her favor and against the state, which is subject to compulsory enforcement, may not be the subject to enforced demands or other similar actions to enforce the judgment. Effective protection of the complaint and restoration of lawfulness implies the obligation of the administrative authorities to enforce the final decision of the domestic court.<sup>76</sup> It can be said that the European Court of Human Rights stress the State in the enforcement of a legally enforceable judgment when the judgment itself is taken against the state. The State is responsible for the enforcement of the final decision when the factors that hinder their full and timely enforcement are under the control of the relevant authorities.<sup>77</sup> At the same time, the winning party may be required to adopt certain procedural measures to ensure the enforcement of the decision, provided that the required formalities do not necessarily restrict or decrease the availability of the party to the enforcement procedure.<sup>78</sup> In any case, the above mentioned requirements should not be exempt the state from the obligations under the convention to take, on time and on their own initiative, special measures on the available information to implement the judgments against the State.<sup>79</sup> The obligation of ensuring the enforcement of a judgment against the State, first of all, is the responsibility of the state structures from the moment when the judgment is mandatory and enforceable.<sup>80</sup> Consequently, if the administrative authorities refuse, they are unable or delay the implementation of these obligations; the guarantee given by Article 6 in the proceedings of the Claimant Party loses sense.<sup>81</sup>

Article 6 of the European Convention on Human Rights provides the right to a fair trial to all persons. This right would be illusory if the domestic legislation of the Contracting State was to facilitate

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<sup>73</sup> *Westberg P.*, Interim Measures and Civil Litigation, *Scandinavian Studies in Law*, 538. <<http://www.scandinavianlaw.se/pdf/51-25.pdf>>, [21.03.2018].

<sup>74</sup> „Broadcasting Company Rustavi 2,, Ltd and „TV Company Georgia” Ltd v. The Parliament of Georgia, N1/5/675.681, Sept. 30, 2016, The Constitutional Court of Georgia, II-52 (In Georgian).

<sup>75</sup> “Iza” Ltd and Makrakhidze v. Georgia, №28537/02, Sept. 27, 2005, European Court of Human Rights Judgments v. Georgia, The Supreme Court of Georgia Human Rights Centre, 2010, 57. <<http://www.supremecourt.ge/files/upload-file/pdf/krebuli-saqartvelos-saqmeebze.pdf>>, [21.03.2018] (In Georgian).

<sup>76</sup> Dadiani and Machabeli v. Georgia, N8252/08, Sept 12, 2012, §44, <<http://www.supremecourt.ge/files/upload-file/pdf/dadiani,machabeli.pdf>>, [21.03.2018] (In Georgian).

<sup>77</sup> Sokur v. Ukraine, no. 29439/02, 26 April 2005, and Kryshchuk v. Ukraine no. 1811/06, 19 February 2009.

<sup>78</sup> Kosmidis and Kosmidou v. Greece, no. 32141/04, §24, 8 November 2007; Rompoti and Rompotis v. Greece, no. 14263/04, §26, 25 January 2007; Apostol v. Georgia, no 40765/02 § 64.

<sup>79</sup> Akashev v. Russia, no 30616/05, §22, 1 June 2008.

<sup>80</sup> Ibid §45.

<sup>81</sup> Antonetto v. Italy, no. 15918/89, §28, 20 July 2000.

the final and compulsory decision of the Court to be ineffective to one party.<sup>82</sup> The European Court of Human Rights granted provisional measure and prohibited the United Kingdom government to deport the applicant.<sup>83</sup> In the case of Abu Qatada,<sup>84</sup> the court for the first time explained that the expulsion of the applicant, until the Court's judgment would be a violation of Article 6 of the Convention.

#### 4. Conclusion

The proceedings for granting interim measures of protection are one of the important parts of civil procedure.<sup>85</sup> Interim measures are meant to serve as a support to civil litigation and not a replacement.<sup>86</sup>

It is recommended that, the court be guided by international doctrine, when granting the interim measures in transnational relations disputes, according to which during the implementation of interim measures, decisive thing is considered in relation with the state legal system, where the enforceable thing is situated. It means that considering the purpose and aim of the institute of interim measures, the measures should be enforced in the legal system, where the property is, this gives opportunity to exclude all legal conflicts, between the granting and enforcing legal systems of interim measures.<sup>87</sup>

The right to a fair trial shall include not only the right to submit a claim, but the right to a public and fair hearing and also the right to enforce the decision. The non-enforcement of the court decision is equal to the absence of the right to a fair trial, as it makes deprives the person's ability to enjoy this right. The right to enforce a court decision as an element of the above-mentioned / fair trial / rights is protected and recognized by the Constitution of Georgia, according to which "the acts of the Court are obligatory for all state bodies and persons in the whole territory of the country",<sup>88</sup> the constitution's rule is imposed in the Georgian organic law on the "General Courts" and the Civil Procedure Code of Georgia.<sup>89</sup>

Domestic Courts of Georgia are actively using the judgments of the European Courts of Human Rights to adjudicate their judgments, which underlines the high qualification of court system.<sup>90</sup>

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<sup>82</sup> Hornsby v Greece, no. 18357/91, §40, 19 March 1997.

<sup>83</sup> The applicant was a citizen of Jordan Abu Qatada, who was suspected of having connection with al-Qaeda. According to Abu Qatada, his deportation would cause the violation of right to a fair trial <[https://hudoc.echr.coe.int/fre#{"itemid":\["003-3808707-4365533"\]}](https://hudoc.echr.coe.int/fre#{)>, [25.02.2018].

<sup>84</sup> Othman (Abu Qatada) v. The United Kingdom, §287, no. 8139/09, 09 May 2012.

<sup>85</sup> *Rozalinova E., Angelov A. and Georgiev I.*, Jurisdiction, Recognition and Enforcement of Provisional and Protective Measures (International Cooperation in Civil Matters) (2012). *Revista Forumul Judecatorilor*, №4, 2012, 82. <<https://ssrn.com/abstract=2224223>> ,[25.02.2018].

<sup>86</sup> *Westberg P.*, Interim Measures and Civil Litigation, *Scandinavian Studies in Law*, 539. <<http://www.scandinavianlaw.se/pdf/51-25.pdf>>, [25.02.2018].

<sup>87</sup> Judgment, case N2/B-352-2013, May 8, 2013, Kutaisi Court of Appeal (In Georgian).

<sup>88</sup> Article 82 of the Constitution of Georgia.

<sup>89</sup> Judgment, case N2/761-2015, §2.5, March 26, 2015, Batumi City Court.

<sup>90</sup> The court repeats, that the right to a fair trial includes the right to enforce the decision. This right would be unrealistic if the national legal system of the High Contracting Party would have made it possible that the final decision would not remain in force for one party. For the purposes of Article 6 of the Convention, the enforcement of any decision made by any court shall be deemed as an integral part of the "trial". See case N1272780-16, March 9, 2016, Tbilisi City Court.

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