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Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights

Report¹

Committee on Migration, Refugees and Population

Rapporteur: Mr David DARCHIASHVILI, Georgia, Group of the European People's Party

Summary

Rule 39 of the Rules of the European Court of Human Rights enables the Court to indicate at any stage of the proceedings, interim (including urgent) measures to be taken by member states which are in the interests of the parties or the proper conduct of proceedings.

These have been used predominantly to prevent harm to refugees, asylum seekers and irregular migrants under threat of being sent back to their countries of origin. In these cases, the interim measures often call upon the states concerned to halt a removal pending a decision of the Court on the issue at stake.

Rule 39 is a procedural rule of the Court which is legally binding. Notwithstanding that most of the requests are made against surprisingly few countries, their numbers have increased rapidly in recent years. This is attributable to increased numbers of removals and corresponding decreases in the number of persons granted international protection. However, the number of requests for Rule 39 is likely to increase further as access to the procedure becomes better known and available in other member states of the Council of Europe.

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. States cannot act with impunity.

The challenges faced by the Court and by governments in dealing with requests for interim measures should not be underestimated. The report recommends that member states implement their Convention obligations and ensure that they provide real access to the Court, including the possibility to request interim measures, to all persons within their jurisdiction. The report also recommends that the Court, the Committee of Ministers and other Council of Europe bodies work together to respond to the changing practice of Rule 39 measures and cases of non-compliance. Important steps must be taken to prevent vulnerable individuals from being harmed and to maintain the integrity of the Convention system.

1. Reference to committee: [Doc. 11978](#), Reference 3601 of 2 October 2009.



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A. Draft resolution²

1. The Parliamentary Assembly recalls that the centrepiece of the protection of human rights in Europe is the European Convention on Human Rights ("the Convention"). Application of the Convention is supervised by the European Court of Human Rights ("the Court"), which plays a unique and central role in upholding human rights in Europe.
2. The Assembly has stated in its Resolution 1571 (2007) on Council of Europe member states' duty to co-operate with the European Court of Human Rights, that "[t]he right of individuals to apply to the Court is a central element of the human rights protection mechanism in Europe and must be protected from interference at all levels".
3. To ensure the effectiveness of this right of individual application, Rule 39 of the Rules of Court provides that the Court may indicate to the parties in a case before it that interim measures be adopted in the interests of the parties or the proper conduct of proceedings. Interim measures are thus ordered pending a decision on the admissibility and merits of the case.
4. The Court can, for example, order interim measures to member states to prevent, until a specified date or further notice, the imminent expulsion or extradition of refugees, failed asylum seekers or irregular migrants at risk of harm of a serious, irreparable nature in their country of origin or other third country. These interim measures are binding and failure to comply with them results in a breach of the state's international obligations, as determined by the Court's case law
5. Recently, there has been an increase in the number of applications for interim measures, with the Court having to deal with 2 400 such requests in 2009. It is appreciated that the increase in numbers puts further pressure on the Court and on the governments and their agents (representatives of the Government before the Court) that have to abide by the interim measures. However, pressures linked to numbers of applications and workload should not lead to a dilution of standards and protection offered to the individual.
6. Of great concern to the Assembly, however, is not just the increase in numbers, but also a growing number of cases where states have ignored the interim measures ordered by the Court. This has resulted, for example, in persons being deported to countries where they are at risk of torture or ill-treatment, despite clear decisions by the Court under Rule 39 not to deport them.
7. Whilst still relatively rare, the growing number of breaches is of grave concern given the harm to the individuals concerned and the impact on the integrity of the Convention system as a whole. The Assembly condemns any disrespect of legally binding measures ordered by the Court as a blatant disregard for this unique system of protection of human rights.
8. The Assembly underlines that the burden is on states to demonstrate that they have complied with the interim measures in question or, in an exceptional case, that there was an objective impediment which prevented compliance and that they took all reasonable steps to remove the impediment and keep the Court informed about the situation.
9. Notwithstanding the rise in the number of requests for Rule 39 measures addressed to the Court, the majority of these requests are directed against a handful of the 47 member states. This shows that in most member states there still exists a lack of awareness amongst individuals, practitioners or even the authorities of these measures and how they are applied.
10. The number of Rule 39 requests could rise substantially in the future if access to the procedure becomes better known and available in all member states of the Council of Europe. It is currently impossible for many of those seeking international protection to request interim measures from the Court as they often lack access to lawyers and free legal aid, they are not informed of their rights or the procedures available or applicable to them, in a language which they understand, and they do not have access to a telephone or to the outside world. Furthermore, some of those in need of international protection are effectively denied the time and/or opportunity to request Rule 39 measures. Particular problems in this respect occur when persons are detained or due to the rapidity of their expulsion.
11. The Assembly therefore urges the member states of the Council of Europe to:
 - 11.1. guarantee the right of individual petition to the Court under Article 34 and not hinder or interfere with the exercise of that right in any way whatsoever;

2. . Draft resolution adopted unanimously by the committee on 21 September 2010.

- 11.2. guarantee the principle of *non-refoulement* in domestic law as a matter of their obligations under the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol;
 - 11.3. fully comply with the letter and spirit of the binding measures indicated under Rule 39;
 - 11.4. ensure that other member states are not permitted to act in breach of Rule 39 with impunity;
 - 11.5. co-operate with the Court and Convention organs by providing full, frank and fair disclosure in response to requests for further information under Rule 39(3) and facilitate to the highest degree any fact-finding requests made by the Court;
 - 11.6. exercise good faith and record keeping in demonstrating that there was, in exceptional cases of non-compliance, an “objective impediment preventing compliance” and that all reasonable steps were taken to remove the impediment and to keep the Court informed about the situation;
 - 11.7. uphold legal representation, assistance and, where appropriate, provide legal aid, as well as access to the Court and to the United Nations High Commissioner for Refugees;
 - 11.8. take steps at national level to reduce the need for interim measures by:
 - 11.8.1. guaranteeing access to a full, fair and efficient asylum determination procedure and implementing minimum standards to ensure quality and consistency in asylum decision making;
 - 11.8.2. implementing and guaranteeing basic human rights protections (including in reception and detention centres, access to legal aid, exceptional use of detention) and procedural safeguards against arbitrary detention and *refoulement* (including a fair and effective asylum determination procedure for asylum seekers and refugees);
 - 11.8.3. guaranteeing access to appeal and effective remedies against removal, including remedies with automatic suspensive effect, and removing strict and automatic time frames (including in accelerated procedures);
 - 11.9. providing training to judges, domestic authorities and lawyers, using, *inter alia*, the good offices of the United Nations High Commissioner for Refugees as well as the Practice Direction provided by the Court;
 - 11.10. publish up-to-date information and statistics on Rule 39 and asylum determination procedures and practice;
 - 11.11. co-operate fully with the Committee of Ministers in the execution of judgments, by ensuring *restitutio in integrum* in those cases where individual measures are ordered and by complying fully with general measures, and working towards speedy final resolution of cases.
12. The Assembly recognises the primary role of the Court in finding solutions for dealing with interim measures under Rule 39 and in this context invites the Court to:
- 12.1. continue its work to ensure a consistent implementation of interim measures and improve the flow of information between its sections;
 - 12.2. organise, with the intergovernmental sector of the Council of Europe, an exchange of views on the challenges faced by the Court and governments in dealing with interim measures, taking into account the fact that the number of requests could increase greatly in the future;
 - 12.3. examine whether it is appropriate and possible to provide reasoning as to positive and negative decisions in Rule 39 requests, at least in cases where the Court sees a systemic problem;
 - 12.4. publish regular statistics on Rule 39 requests – granted or rejected – and their status, as well as the number of persons deported in cases where a Rule 39 has been granted (including those where it has been subsequently lifted) and the number of cases in which a substantive violation is subsequently found;
 - 12.5. be sensitive to the needs of vulnerable persons, including survivors of torture, victims of trafficking, lesbian, gay, bisexual and transgender persons, children, women, and elderly and disabled persons;
 - 12.6. wherever possible or appropriate, deal with cases in which Rule 39 has been indicated by way of an expedited procedure;
 - 12.7. require, in more cases, the adoption of specific measures by states to remedy harm caused, in order that the Committee of Ministers may more effectively monitor the execution of judgments.

13. The Assembly invites the United Nations High Commissioner for Refugees and the Council of Europe to strengthen their mandate of co-operation in the context of improving the effectiveness of Rule 39 in protecting the rights of refugees and asylum seekers, in accordance with United Nations General Assembly Resolution (A/63/L12) and their memorandum of understanding.

14. The Assembly invites the United Nations High Commissioner for Refugees and NGOs to continue to monitor the situation, including the statistics, and to raise awareness about the use of interim measures and provide useful workable tools for practitioners and applicants.

15. The Assembly invites the Council of Europe's Commissioner for Human Rights to continue to monitor the situation in member states as regards cases of non-compliance with interim measures under Rule 39 and use fully the right of intervention before the Court in appropriate circumstances.

B. Draft recommendation³

1. Referring to its Resolution ... on preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights, the Parliamentary Assembly emphasises that the power to invoke interim measures under Rule 39 of the Rules of the European Court of Human Rights (“the Court”) plays an important role in ensuring the effectiveness of the right of individual petition.
2. The Assembly is not only concerned about a certain increase in the number of requests for interim measures filed with the Court, but also that their number could rise dramatically as and when applications come from across Europe and not just from a few member states. The Assembly is also concerned that the increase in the number of requests and of workload may lead to a dilution of standards and protection offered to the individual.
3. A further major concern of the Assembly is the growing number of member states that have recently ignored interim measures ordered by the Court under Rule 39. This emphasises the need for the Committee of Ministers to reinforce its role in the execution of the Court’s judgments.
4. The Assembly therefore invites the Committee of Ministers to:
 - 4.1. monitor compliance with the letter and spirit of Rule 39 measures of which notice has been given under Rule 39(2) of the Rules of Court;
 - 4.2. co-operate with the Court pursuant to Article 46 of the Convention in resolving cases of non-compliance in a way which fully and effectively upholds the Convention and ensure, in collaboration with the Court, that a mechanism or working method is established for follow-up in cases of non-compliance;
 - 4.3. investigate cases of non-compliance and/or publish statements in this connection;
 - 4.4. impose more frequently individual measures to erase the consequences of a violation suffered by an applicant removed in breach of Rule 39 in order to ensure as far as possible *restitution in integrum* (in accordance with Recommendation R(2000)2 of the Committee of Ministers), as well as general measures;
 - 4.5. seek to find an interim or final resolution, by way of individual or general measures, in those cases where an individual has been expelled to a state which has no wish to return him or her;
 - 4.6. co-operate with the Court and other relevant actors in order to make available up-to-date Rule 39 statistics and publish information on the extent of compliance by contracting parties;
 - 4.7. assess current practice at national level and by the Court in view of the increase in the number of Rule 39 applications against some states and examine solutions to improve the efficiency and consistency of national practice and the Court’s practice and procedure in dealing with these applications;
 - 4.8. organise, with the intergovernmental sector of the Council of Europe and the Court, an exchange of views on the challenges faced by the Court and governments in dealing with interim measures, taking into account the fact that the number of requests could increase greatly in the future.
 - 4.9. create a working group to identify best practice in relation to access to the Court and compliance with the “letter and spirit” of Rule 39, taking into account, *inter alia*, issues such as the circumstances in which “objective impediments” may validly be raised and the steps that need to be taken to rectify actions taken following any failure to follow interim measures.

3. . Draft recommendation unanimously adopted by the committee on 21 September 2010.

C. Explanatory memorandum by Mr Darchiashvili, rapporteur

1. Introduction

1. On 9 December 2009, the rapporteur was appointed by the Committee on Migration, Refugees and Population to prepare a report on Rule 39 of the Rules of the European Court of Human Rights (hereinafter “the Court”) (See Doc. 11978). Rule 39 reads as follows:

“Rule 39

(Interim measures)

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.”

This Rule enables the Court to indicate necessary measures to be taken which are in the interests of the parties or the proper conduct of proceedings. Such measures are ordered to avoid irreparable harm to the applicant(s) pending a decision on the admissibility and merits of the case.

2. In the preparation of this report, the Sub-Committee on Refugees held a hearing on the issue in Strasbourg on 28 April 2010 with the participation of Ms Liselot Egmond, Deputy Government Agent (Netherlands), Ms Elisabet Fura, Judge of the European Court of Human Rights (Sweden), Ms Catherine Meredith, Barrister (United Kingdom), AIRE Centre, and Mr Stan Naismith, Deputy Section Registrar at the European Court of Human Rights. The rapporteur would like to thank them and convey his special thanks to Ms Catherine Meredith who acted as a consultant in the drafting process of the report.

3. Some might ask themselves why the Parliamentary Assembly has decided to prepare a report on a procedural rule of the Court. At the outset, the rapporteur underlines the fact that Rule 39 is much more than a simple procedural matter. It allows, for example, the Court to avoid people being extradited to a place where they risk imminent and irreparable harm, such as inhuman or degrading treatment, torture or even death. The Council of Europe’s Commissioner for Human Rights recently, and rightly, underlined that “Rule 39 is vital for individual applicants. For those who might face a risk of violation of their human right, the [European Court of Human Rights] is often their ultimate hope to stop a forced return to a country where they could be exposed to a treatment in violation with the European Convention on Human Rights.”⁴

4. Furthermore, this report has not only been drawn up to stress the importance of Rule 39 and to explain how it works, but also, more importantly, to ensure that applicants enjoy effective access to interim measures and that member states are not allowed to show disregard for measures ordered by the Court. Both the Chair of the Committee on Migration, Refugees and Population and the Chair of the Committee on Legal Affairs and Human Rights⁵ have expressed their shock and concern at instances of non-compliance, insisting on the fact that such action directly undermines the authority of the Court.⁶ Furthermore, in his recent human rights comment, the Commissioner for Human Rights highlights the cases of Italy, which has failed on at least four occasions to comply with interim measures ordered by the Court by expelling applicants to Tunisia, as well as the expulsion from the Slovak Republic of an Algerian national.⁷

5. This report is divided into five sections. The first section examines the Rule 39 mechanism – how it works, what it is used for, and in what circumstances it may be used. The second section focuses on the potential beneficiaries of the Rule 39 mechanism – vulnerable asylum seekers and migrants – the problems they face and possible reasons for this. The third section deals with state acts and omissions in situations of non-compliance and the question of whether a state has taken all reasonable steps to remove any objective impediment to compliance. The fourth section is concerned with the institutional responses to cases of non-

4. . Council of Europe Commissioner for Human Rights’ comment, 25 June 2010, <http://commissioner.cws.coe.int>.

5. . The Committee on Legal Affairs and Human Rights is seized for opinion on this report.

6. . See the press releases: http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=5505 and http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4849.

7. . See footnote 4.

compliance, the role of the Court, the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights and the United Nations High Commissioner for Refugees (UNHCR). The conclusions are contained in a final section.

2. The Rule 39 mechanism and its use in extradition and expulsion cases

6. Rule 39 of the Rules of the European Court of Human Rights⁸ enables a Chamber of the Court or its President to indicate⁹ any interim measures to be taken which are in the interests of the parties or the proper conduct of proceedings.¹⁰ Rule 39 is a procedural rule of the Court which, according to the Court's case law, is binding for the member states, in addition to their obligations under the European Convention on Human Rights (hereinafter "the Convention" or "the ECHR").

7. The Court may grant interim measures under Rule 39 to prevent imminent, irreparable harm occurring in serious and urgent cases – the majority concerning the suspension of the extradition or expulsion of an individual facing a real risk of ill-treatment on return.¹¹ The measure has been applied in other contexts, for example to prevent harm by reason of the refusal of urgent medical treatment or to tackle deplorable prison conditions.¹²

8. There is no particular domain of the Convention in which Rule 39 is applied. However, until recently, Rule 39 has been applied in limited fields: under Article 2 of the ECHR (the right to life and prohibition of the death penalty) or Article 3 of the ECHR (the prohibition of torture and inhuman or degrading treatment or punishment).¹³ Rule 39 indications are exceptional in non-Article 3 matters.

9. The purpose of a Rule 39 indication is to preserve the substance of the rights of the parties pending a final judgment on the issue in question which would otherwise be rendered useless but for the grant of Rule 39.¹⁴ In this respect, interim measures maintain the status quo – a typical example being that removal is suspended until a specified date or until further notice. Interim measures in international law pursue the same purpose and the domestic equivalent is interim or injunctive relief (an injunction).

10. Rule 39 measures are legally binding, as are interim measures in international law generally. Failure to comply with interim measures gives rise to a breach of Article 34 of the ECHR (the right to individual petition),¹⁵ which may or may not be accompanied by a breach of Article 3. However where the government demonstrates an "objective impediment" to compliance, Article 34 of the Convention will not be violated.¹⁶

8. . Rules of Court, 1 June 2010. The most recent version of the Rules incorporates changes accompanying the entry into force on 1 June 2010 of Protocol No. 14. However, the substance of Rule 39 remains unchanged.

9. . In terms of nomenclature, Rule 39 interim measures or interim relief under Rule 39 are also sometimes referred to as "Rule 39 indications". When Rule 39 is granted, the Court gives an "indication" to the respondent government to stop the act complained of (until a given date or further notice). Otherwise "interim relief" refers to the fact that when the Rule 39 is granted the state must confirm that they will not carry out the impugned measure (for example the expulsion or extradition).

10. . The Court may grant interim measures following a request by a party or any other person concerned, or of its own motion.

11. . *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, judgment of 4 February 2005 (Grand Chamber), paragraph 104.

12. . *Shtukaturov v. Russia*, Application No. 44009/05, judgment of 27 March 2008; See further Harby, C., "The changing nature of interim measures before the European Court of Human Rights", E.H.R.L.R. 2010, 1, pp. 73-84; and Mole, N., and Meredith, C., *Asylum and the European Convention on Human Rights*, Human rights files No. 9, Council of Europe Publishing, 2010, pp. 217-225 ("Asylum and the ECHR").

13. . Where it is alleged that an individual will face the death penalty in breach of Article 1 of Protocol No. 6 (no one shall be condemned to the death penalty or executed) or Article 1 of Protocol No. 13 (no one shall be condemned to the death penalty or executed even in times of war), the Court prefers to examine the issue under Article 3. The premeditated destruction of a human being by the state authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death has been declared inhuman and degrading treatment and is contrary to Article 3: *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, judgment 2 March 2010. All but two member states have signed Protocol No. 13 and all but three states who have signed the Protocol have ratified it. See *Asylum and the ECHR*, pp. 90-92.

14. . *Mamatkulov and Askarov v. Turkey*, op. cit.

15. . *Ibid.*

16. . *Paladi v. Moldova*, Application No. 39806/05, judgment of 10 March 2009 (Grand Chamber).

11. Non-compliance with Rule 39 measures in the context of removal may also breach the principle of *non-refoulement* under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol¹⁷ and for those 27 member states which are also members of the European Union, their obligations under European Union law.

12. It was not until 2006-2007 that the Court began to publish statistics on the number of Rule 39 requests made or measures granted. The 2007 report included a section on Rule 39 for the first time,¹⁸ which stated that 1 000 requests for Rule 39 had been received. However, the Annual Report for 2006 did not publish any figures suggesting that they could have been much lower that year. In 2008, the Court stated that it dealt with an “unprecedented” number of requests for Rule 39 – over 3 000 in total.¹⁹ In 2009, it received 2 400 requests for interim measures; an average of almost 50 a week.

13. Of those requests made in 2009, a considerable proportion related to matters falling outside the scope of Rule 39 (about 340), in respect of which no formal decision was taken by the Chamber or its President, but the number of requests on which a formal decision was taken was well over 2 000 (2 060), slightly higher than in 2008 (1 908). The number of cases in which Rule 39 was applied dropped slightly from 747 to 654, or rather less than one third of the requests falling within the scope of the provision. The vast majority of requests never actually come to the attention of the governments concerned. Furthermore, there are some member states to which the Court has never been asked to indicate, nor has ever indicated measures under Rule 39.

14. From the outset, the rapporteur notes that in the absence of information and explanations, further studies and analysis are required to, *inter alia*, establish the reasons why indications against some states are plentiful and against others there are none. Similarly, there are few requests from individuals in Greece (and Spain) but, conversely, there are indications against states sending individuals to Greece (including under the Dublin II Regulation²⁰). The rapporteur therefore encourages the publication of as much information as possible in this fast-developing area of law and practice in order to identify trends and respond appropriately to protect the needs of refugees, vulnerable asylum seekers and migrants and ensure that they have full access to appropriate legal protection against *refoulement* and breaches of their Convention rights.

3. Rule 39 and the individual

3.1. Recent practice

15. As the statistics above indicate, the Court now receives an unprecedented number of Rule 39 requests for interim measures, but not all are granted. Interim measures are usually requested by individuals²¹ who claim that they are facing imminent and irreparable harm to their Convention rights. Whilst the focus of this report is the application of Rule 39 in suspending extradition and expulsion cases of refugees and asylum seekers, the scope of application of the measure is much wider.²²

16. Requests for Rule 39 have sometimes been in waves, where large numbers of individuals have complained to the Court that they are at risk on return to their country of origin, for example in countries wracked by armed conflict such as Somalia or Sri Lanka. The Court, faced with hundreds of requests for Rule 39 from Tamils fearing a risk of death or torture in Sri Lanka, wrote to the United Kingdom stating that Rule 39 would be applied in such cases pending the adoption of a lead judgment. The lead judgment in *NA v. the United Kingdom*²³ and the steps taken by the Court to deal with the 342 cases in which Rule 39 had been

17. . See Written Question No. 510 to the Committee of Ministers by Mrs Vermot-Mangold: “Extradition of refugees and the obligation of non-refoulement of member states of the Council of Europe” and reply by the Committee of Ministers, Doc. 11095.

18. . Prior to that, such relevant cases were included under the section dealing with Article 34 of the ECHR, the right to individual petition.

19. . European Court of Human Rights Annual Report 2008, Registry of the Court, 2009.

20. . Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union 50/1, 25 February 2003, (“the Dublin II Regulation”).

21. . Although there is nothing to stop states applying for interim measures, which is what Georgia did to request that hostilities be stopped (see *Georgia v. Russia*). Furthermore, the Court has not excluded that interim measures may be indicated against individuals or corporations. Indeed, the Court has in the past applied Rule 39 in respect of individuals, in particular to request them to stop hunger strikes.

22. . The Court retains the flexibility to make Rule 39 indications against individuals or private parties as well as the contracting parties. Furthermore, in August 2008, the Court for the first time made an interstate Rule 39, indicating interim measures to Russia and Georgia to prevent human rights violations several days after the war broke out.

23. . *NA v. the United Kingdom*, Application No. 25904/07, judgment of 17 July 2008.

applied may provide an indication of what to expect in the future in other contexts.²⁴ Lawyers in the Netherlands were successful in obtaining Rule 39 indications for a group of Somali clients, culminating in the lead judgment of *Salah Sheekh v. the Netherlands*.²⁵ Since then, large numbers of interim measures have been indicated to states preventing return to Somalia. In light of the deteriorating situation in Somalia, the lead judgment concerning the risk on return is awaited.²⁶

17. Whilst not on the same scale, there have been a large number of requests for Rule 39 from asylum seekers from Iran whose asylum claims have been ignored in Turkey (due to the geographical reservation on Turkey's protection obligations under the 1951 Convention relating to the Status of Refugees, which are restricted to persons originating from Europe). In *Abdolkhani and Karimnia v. Turkey*, the Court found a violation of Article 3 as the authorities remained "totally passive" to the applicants' asylum requests. The Court has seen no reason to depart from its reasoning in *Abdolkhani* in a line of cases which follow it.²⁷

18. In another context, large numbers of individuals have requested Rule 39 measures to prevent their transfer between European Union member states under the Dublin II Regulation. Statistics show that within a seven-month period in 2008, there were 141 requests made by individuals in five out of 47 member states alone. Some 94 out of 141 requests were granted. Some 83 of the 94 Rule 39 indications were made to the United Kingdom Government between May and September 2008. In the first five months of 2009, there were 103 requests for Rule 39, 58 of which were granted, 46 in May 2009 alone. Again the statistics refer to only five Council of Europe states (the United Kingdom, Finland, Belgium, Italy and Austria). The bulk of these requests and of those granted was against the United Kingdom.²⁸

19. Rule 39 requests have been made in respect of Dublin II transfers complaining that reception conditions in the receiving European Union member state breach the Convention (*inter alia* Articles 2, 3, 5, 8 and 13) and/or because of the lack of access to an effective asylum determination procedure following which is the risk of onward return. The Court previously stated in *K.R.S. v. the United Kingdom* that reception conditions are a matter for the receiving state and does not engage the responsibility under the Convention of the sending state (and in any event noting that the European Commission can institute infringement proceedings at European Union level).²⁹ However, this question together with that of onward return from Greece to another country (for example Somalia and Afghanistan) goes to the assessment of real risk under Article 3 – the Court previously having found that it did not exist. However, these issues are expected to be resolved in *M.S.S. v. Belgium and Greece*.³⁰

24. . On 17 July 2008, a lead judgment was handed down in *NA v. the United Kingdom*, Application No. 25904/07, judgment of 17 July 2008, which held that the applicant's proposed deportation to Sri Lanka would be in violation of Article 3. A specific Rule 39 indication had been made and the government had complied with it. Following the judgment in *NA*, the United Kingdom Government proposed that the domestic authorities reconsider those applications before the Court where Rule 39 was applied and where the applications were based on more than simply the applicants' Tamil ethnicity. Following an undertaking by the government not to remove the applicants in question pending the conclusion of the domestic re-examination of their cases, the Court decided to lift the Rule 39 measures applied. Many of the applicants in these cases are now involved in proceedings in the English courts. Little is known of the procedure concerning similar cases in other jurisdictions – another reason why information sharing could be of use.

25. . *Salah Sheekh v. the Netherlands*, Application No. 1948/04, judgment of 11 January 2007.

26. . *Sufi v. the United Kingdom*, *Elmi v. the United Kingdom*, *Husain v. the United Kingdom*.

27. . *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, judgment of 22 September 2009; *Z.N.S. v. Turkey*, Application No. 21896/08, judgment of 19 January 2010, and another 12 or so cases at the time of writing, with other cases having been communicated.

28. . European Council on Refugees and Exiles (ECRE) on the number of Rule 39 requests concerning transfers to Greece (under the Dublin II Regulation).

29. . *K.R.S. v. the United Kingdom*, Application No. 32733/08, decision of 2 December 2008.

30. . *M.S.S. v. Belgium and Greece*, Application No. 30696/09, and see also for example, *Ahmed Ali v. the Netherlands and Greece*, Application No. 26494/09, *Djelani Sufi and Hassan Guduud v. the Netherlands and Greece*, Application No. 28631/09, *Saied Ahmed v. the Netherlands and Greece*, Application No. 29936/09, *Mohammed Jele v. the Netherlands and Greece*, Application No. 29940/09, *Abwali v. the Netherlands and Greece*, Application No. 30416/09, *Aweys Ahmed v. the Netherlands and Greece*, Application No. 31930/09, *Mohamed Ilmi v. the Netherlands and Greece*, Application No. 32212/09, *Yahia Yasir v. the Netherlands and Greece*, Application No. 32256/09, *Moosa Mahamoud v. the Netherlands and Greece*, Application No. 32729/09, *Alem Abraha v. the Netherlands and Greece*, Application No. 32758/09, *Ali Elmi v. the Netherlands and Greece*, Application No. 33212/09, *Nuur Haji v. the Netherlands and Greece*, Application No. 34565/09, *Abshir Samatar v. the Netherlands and Greece*, Application No. 36092/09, *Malaaq Showri v. the Netherlands and Greece*, Application No. 37728/09, *N.I. v. Belgium*, Application No. 51599/08, *M.E.G. v. France*, Application No. 42101/09.

3.2. Scope

20. The majority of expulsion or extradition cases in which Rule 39 is applied fall within the scope of Articles 2 or 3 of the Convention (death, inhuman and degrading treatment or torture). The individual must show that he or she faces imminent, irreparable harm, including that he or she is personally at risk from the harm feared or that he or she is a member of a group systematically exposed to a practice of ill-treatment. In this context, the Court will consider the question of risk where necessary on the basis of human rights reports of the European Committee for the Prevention of Torture or the Commissioner for Human Rights and other well-respected bodies³¹ or guidelines from the UNCHR (which the Court has stated should be given “due weight”).³²

21. However, the possibility is not excluded of a Rule 39 indication being made to prevent harm within the scope of Articles 5, 6 and 8 to 11 of the ECHR. However, the application of Rule 39 in such cases would be exceptional and require a “flagrant” violation of the right in question.³³ More recently, indications have been made to suspend removal where the individual fears being subjected to forced labour, sexual exploitation or trafficking under Article 4 of the ECHR.³⁴

22. The rapporteur remains concerned about the high refusal rate of asylum and trafficking claims generally. In addition, the rapporteur urges member states and the Court to be aware of the gender perspective of Rule 39. In this context, the rapporteur emphasises his concerns about a protection gap for victims of trafficking.³⁵

23. Furthermore, in cases of gender- and identity-related violence and forms of persecution including rape, female genital mutilation and violence from family members, under- (or non-)reporting of acts of persecution have a bearing on the applicable standard of proof and make it difficult for women and lesbian, gay, bisexual and transgender (“LGBT”) persons to succeed. These difficulties are often compounded in that negative domestic findings are carried forward to the point when the Court is called upon to examine the prima facie risk on return in the context of requests for Rule 39. There is a disproportionately high refusal rate for LGBT cases,³⁶ although there has been a selection of successful Rule 39 requests.³⁷

24. In asylum and immigration cases, the right to family and private life under Article 8 is often invoked as a barrier to removal but Rule 39 indications in this context have been rare, essentially because the situation in family cases is rarely irreparable in the same way as exposure to ill-treatment or death. In the non-immigration context, a Rule 39 indication was made to prevent destruction of frozen embryos with which the applicant argued she had private life within the scope of Article 8.³⁸

25. In the immigration context, the rapporteur is aware of only one Rule 39 granted in respect of Article 8 in a case yet to be communicated. The Court indicated that the United Kingdom Government stay the removal of an applicant involved in care proceedings and seeking contact rights with his child. The applicant argued that irreparable harm would be caused to him and his children if he was deported to Jamaica prior to the conclusion of the care proceedings and that his significant mental health difficulties would impede his ability to

31. . Muminov v. Russia, Application No. 42502/06, judgment of 11 December 2008, paragraph 95; Saadi v. Italy, Application No. 37201/06, judgment of 28 February 2008; Salah Sheekh v. the Netherlands, op. cit., paragraph 148.

32. . Abdolkhani and Karimnia v. Turkey, op. cit., N.A. v. the United Kingdom, op. cit., paragraphs 120-122.

33. . Mamatkulov and Askarov v. Turkey, op. cit., paragraph 14 of the joint partly dissenting opinion of Judges Sir Nicolas Bratza, Bonello and Hedigan. This was a dissent on the facts.

34. . See M. v. the United Kingdom, Application No. 16081/08, decision of 1 December 2009 (struck out of the list).

35. . The Refugee Council Briefing on Trafficking in Persons, May 2006 states that “100% of the cases covered in the report were rejected at first instance (provisional figures for 2005 show an overall refusal rate of 83%) and 80% were successful at appeal (overall rate is 18%). Given the fact that these women all had the support of the Poppy Project, and so few trafficking victims are able to access any kind of support, this gives rise to serious concerns about access to protection for this group”.

36. . The United Kingdom-based NGO Stonewall, in its report [No going back: Lesbian and gay people and the asylum system \(2010\)](#), stated that “Some lesbian, gay and bisexual people are granted asylum but the vast majority are refused. In claims brought to the attention of the UK Lesbian and Gay Immigration Group (UKLGIG), between 2005 and 2009 over 98% were refused at this initial stage. Between 2005 and 2008 the percentage of all asylum applicants refused at this initial stage was 76.5% (ICAR, December 2009)”.

37. . See F. v. the United Kingdom, Application No. 36812/02, decision of 31 August 2004; See in the context of the United Kingdom, Stonewall, “No going back: Lesbian and gay people and the asylum system” (2010), www.stonewall.org.uk/what_we_do/2583.asp#Asylum.

38. . Evans v. the United Kingdom, Application No. 6339/05, judgment of 10 April 2007 (Grand Chamber).

regain contact rights from abroad. In another exceptional case, the Court indicated interim measures to stay the transfer of individuals under the Dublin II Regulation, forcing them into a situation of destitution due to the unlawful action of the Greek authorities – contrary to Articles 3 or 8 of the Convention.

26. The number of expulsion or extradition cases in which Rule 39 is granted in a non-Article 3 context, such as Article 8, is exceptional and should not be an open invitation to applicants to file Rule 39 requests in cases where imminent and irreparable harm is not threatened. Nevertheless, it is encouraging to note that the Court is taking such cases very seriously and has recognised the need to preserve the applicant's position pending the full application being lodged with the Court.

27. In situations not concerning removal, the Court may order release or specific measures to allow access to a lawyer or family members, receive medical treatment or be transferred to or kept in hospital.³⁹ Some asylum seekers have requested one Rule 39 to stay removal and another to secure their release from appalling conditions in detention.⁴⁰

28. Procedurally, in many cases, the application of Rule 39 is accompanied by the application of Rule 40 (urgent notification of an application to the respondent government) or Rule 41 (prioritising cases). These Rules can be applied simultaneously or at different stages of the procedure.

3.3. Access

29. The published figures on Rule 39 requests represent the tip of the iceberg in terms of the number of requests which could be made. In many member states persons in need of international protection are denied access to the asylum procedure. The prospect of applying for Rule 39 is illusory even when an asylum request has been ignored or refused. Individuals intercepted at sea being sent back without being granted access to the asylum procedure stand little chance.⁴¹

30. The first point is that the growing demand for Rule 39 requests is undoubtedly an indication of the problems faced by many of those in need of international protection and in securing respect for their rights and their safety at national level.⁴²

31. The shrinking of the asylum space in Europe undoubtedly propels some individuals who are refused international or humanitarian protection at national level to seek the subsidiary protection of the Court.

32. The rapporteur is concerned that many individuals are not able to file a request for Rule 39 measures because they are in detention and are denied access to the outside world, including the European Court of Human Rights or UNHCR, NGOs and legal representatives. They may not have access to a telephone. The position for individuals at liberty may only be marginally better in terms of access or opportunity to access Rule 39 measures – due in part to general levels of ignorance amongst all concerned, including lawyers.

33. Free legal aid provision is critical in ensuring access to the Rule 39 mechanism as well as safeguards, including interpretation to make basic information understood. The rapporteur is concerned that even in countries with legal aid in place, funding dries up once domestic proceedings come to an end and there is a glass ceiling of representation. Countless individuals are either unrepresented throughout or at the most crucial stage, when their appeal rights have been exhausted and they are facing expulsion.

34. Furthermore whilst in some states there are many requests (for example the United Kingdom, Sweden, the Netherlands), in others, such as Greece or Spain, there appear to be few. One would expect there to be equal or similar numbers of requests for Rule 39 from individuals in those states which are popular destination countries (and receive large numbers of asylum applications), but this does not appear to be the case.

35. Rule 39 practice is nevertheless an emerging one; therefore the rapporteur does not attempt an exhaustive explanation here, but recommends instead further awareness raising and greater publication of information and statistics, as well as training of lawyers, judges and immigration officials at national level.

39. . See *Shtukaturov v. Russia*, op. cit.

40. . *Abdolkhani and Karimnia v. Turkey*, op. cit.

41. . *Sharifi and Others v. Italy and Greece*, Application No. 16643/07 (communicated 13 July 2009); *Hirsi v. Italy*.

42. . It should be made clear that not all irregular migrants are seeking international protection and some are just trying to migrate, while others might need protection (treatment, documents from their embassy) upon arrival, but not international protection.

3.4. Nature and timing of enforcement action

36. The rapporteur is concerned about examples of removals which show that detention is often considered a precursor to *refoulement* or that the rapidity with which enforcement action is taken denies individuals the opportunity to contact a lawyer, let alone request the Court's intervention.⁴³

37. The rapporteur considers that the root of the problem here is the lack of procedural safeguards in the domestic asylum system, the use of automatic timescales⁴⁴ (in particular in accelerated or fast-track asylum procedures) and the lack of remedies without automatic suspensive effect, all of which have been found to be contrary to Article 3, or Article 3 in conjunction with Article 13 (the right to an effective remedy).⁴⁵

38. Further examples of the problems faced by individuals are considered below in the context of non-compliance by states.

4. Rule 39 measures and states parties

4.1. Recent practice

39. The emerging trends show that the number of requests in general has been most significant in respect of a relatively small number of countries (for example Sweden or the United Kingdom). Since 2005,⁴⁶ when dealing with situations of non-compliance with Rule 39 in extradition/expulsion cases, some have led to a finding of a violation of Article 34 (but no violation of Article 3, for example because of a lack of information), and recently to a violation of both Articles 3 and 34 (*Ben Khemais v. Italy*,⁴⁷ see below). The incidences of non-compliance have risen during this time.

40. Of the decided cases since 2005, the majority concern the expulsion or extradition of alleged or convicted terrorists. In the context of Rule 39 examination, as with any judgment of the Court, the Court has repeated the maxim that given that the absolute nature of Article 3, no individual should be sent back to face torture, irrespective of the heinousness of their conduct.⁴⁸ The majority of the applicants claimed asylum in the sending state, claims which were either ignored or failed and the others of course claimed that their return would violate their human rights.

41. Some countries, including Italy and Russia, have repeatedly failed to comply with interim measures; however, the United Kingdom does not have a clean record either and nor does the Slovak Republic.⁴⁹ Further cases pending before the Court have been publicised by Council of Europe bodies, including the Parliamentary Assembly, the Committee of Ministers and the Commissioner for Human Rights.

42. Following the judgment in *Ben Khemais*, Italy has expelled more Tunisians in breach of Rule 39 (see *Hamidovic v. Italy*, *Trabelsi v. Italy* and *Toumi v. Italy*).⁵⁰ In other cases, the rapidity of the expulsion order precluded the applicant from applying for Rule 39 beforehand. This has also been criticised by the Commissioner for Human Rights and the Parliamentary Assembly.

43. There are further cases where Rule 39 has been granted and the Court, when communicating the case to the government concerned, has been forced to ask whether or not the applicant had actually been deported and for his whereabouts.⁵¹ This is also of grave concern; not only can states not ignore their obligations under the ECHR and the 1951 Refugee Convention, they cannot simply allow individuals to fall under the radar. The

43. . Commissioner's report on Italy, Italian cases on rapid enforcement, accelerated asylum procedures guidelines, the Lampedusa cases, *Hussun v. Italy*, *Sharifi v. Italy* and *Greece*, *Hirsi v. Italy*.

44. . *Jabari v. Turkey*, Application No. 40035/98, decision of 28 October 1999.

45. . *Abdolkhani and Karimnia*, op. cit.

46. . *Mamatkulov and Askarov v. Turkey*, op. cit., and subsequent to the Court publishing communicated cases on its website.

47. . *Ben Khemais v. Italy*, Application No. 246/07, judgment 24 February 2009.

48. . *Saadi v. Italy*, op. cit.

49. . *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit. See also *Labsi v. Slovakia*, Application No. 33809/08 (communicated on 28 June 2010).

50. . See, inter alia, *Hamidovic v. Italy*, Application No. 31956/05; *Trabelsi v. Italy*, Application No. 50163/08 and *Toumi v. Italy*, Application No. 25719/09; *Shamayev and Others v. Georgia and Russia*, Application No. 36378/02, judgment of 12 April 2005. These cases are set out in the annex attached to this report.

51. . *M.B. and Others v. Turkey*, Application No. 36009/08, communicated on 1 December 2008; *Moghaddas v. Turkey*, Application No. 46134/08, communicated on 15 July 2009.

Grand Chamber in *Mamatkulov and Askarov v. Turkey* stated that Article 34 not only prevents states from applying pressure to individuals but also from conducting themselves in a way which prevents the Court from considering the application. The letter and spirit of compliance is considered in the section below.

4.2. Compliance – letter and spirit

44. Interim measures are binding on the state to which they are indicated.⁵² In *Mamatkulov and Askarov v. Turkey*,⁵³ the Court held that failure to comply with interim measures would result in a substantive breach of the Convention under Article 34 (the right of individual petition). The point of departure for verifying whether or not the respondent state has complied with the measure is the formulation of the interim measure itself. The Court will therefore examine whether the respondent state complied with the “letter and the spirit” of the interim measure indicated to it.

45. The Court will specify that a Rule 39 indication made to a respondent government must continue in force until a specified date, until further notice, or in practical terms until such time that the Court examines the case in full.⁵⁴ During this time, the Court may request that the state provide the Chamber with information on any matter connected with the implementation of any interim measure it has indicated (under Rule 39(3)). This might include, *inter alia*, further information relating to the individual’s personal circumstances, location or conditions of detention, or whether or not the authorities have permitted access by the individual’s representatives or family, and the country to which removal is proposed.

46. The provision of more information to the Court, following a request, has in some cases resulted in a Rule 39 indication being lifted. However, attempts to challenge or make submissions on the granting of Rule 39 have not been welcomed.⁵⁵ Similarly, any request to have the Rule 39 lifted, either by the applicant or the respondent state is treated very seriously and the final say ultimately rests with the Court.⁵⁶

47. Attempts by states to try to coerce individuals into withdrawing their cases,⁵⁷ in particular where persons are in detention or other situations of increased vulnerability, have been found to violate the effective exercise of the right to petition the Court and have one’s case heard.⁵⁸ The rapporteur is concerned that this may infringe the principle that Rule 39 indications are binding both in letter and in spirit.

48. Governments, and sometimes individuals, have been critical of the lack of reasons for applying Rule 39, but the Court remains reluctant to provide reasons. Not only would the giving of reasons delay these urgent matters, but it would inappropriately enlarge the Rule 39 assessment stage beyond the question of whether or not there is a *prima facie* risk to an examination of the merits of the case. However, in some cases the Court imports a degree of specificity into the wording of an indication to ensure that the purpose of the measure indicated is practically realised – and the specific needs of an applicant (for example as a minor, a pregnant woman or a detained person) are met.

49. The rapporteur is concerned about violations of the Convention in letter and in spirit. The most obvious cases are those of clear non-compliance, where the state has ignored measures ordered by the Court. The Court has clearly ordered that expulsion or extradition be suspended and the state concerned has gone on and done it regardless of the Rule 39 in force. These grave cases have been found to violate Article 34 of the Convention and some have also violated Article 3. However, there are other cases which are not so obvious but which may also be found to violate the Convention. For example, where there may have been an “objective impediment” to compliance – situations which the Court has to scrutinise to discover whether or not there has been a violation of the Convention. For example, this may be where the state argues that it was

52. . *Mamatkulov and Askarov v. Turkey*, op. cit., paragraph 100; also *Olaechea Cahuas v. Spain*, Application No. 24668/03, judgment of 10 August 2006.

53. . *Mamatkulov and Askarov v. Turkey*, op. cit. The Court also took note of the approach to interim measures by other international bodies, including the Human Rights Committee of the United Nations, the Inter-American Court of Human Rights and the International Court of Justice. It also considered interventions from the International Commission of Jurists, Human Rights Watch and the AIRE Centre.

54. . Extensions of time are possible. If a Rule 39 indication is limited in time, the Court may extend the duration of the measure to a given date or “until further notice”.

55. . *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit.

56. . *Sufi v. the United Kingdom*, *Kaboulov v. Ukraine*, Application No. 41015/04, judgment 19 November 2005, is not an expulsion case but concerns the question of interference with correspondence and applicant’s withdrawal of his or her case as the result of interference or coercion.

57. . Op. cit., paragraph 127.

58. . *Shamayev and Others v. Georgia and Russia*, Application No. 36378/02, judgment of 12 April 2005.

informed too late about a measure. These two categories are considered in the following sub-sections. However, there is also a third category which the rapporteur is concerned about – where states have sought to circumvent a measure entirely by rapid expulsion or other questionable tactics displaying bad faith.

50. An example of this third category of case is *Sivanathan v. the United Kingdom*.⁵⁹ The rapporteur is concerned about this decision by the Court to retrospectively exonerate the United Kingdom for removal of an individual from its jurisdiction despite a Rule 39 measure being in force. On 3 February 2009, the Court decided to strike out the case of *Sivanathan v. United Kingdom* on the basis of Article 37(1), holding that the applicant no longer wished to pursue his application and that respect for human rights did not require further examination. When removal directions were issued, Mr Sivanathan wrote to the Court stating that he feared ill-treatment contrary to Article 3 if deported to Sri Lanka and that he would suffer great distress if separated from his family in the United Kingdom. He also asked for an interim measure, which was granted on 5 September. On the way to the airport, removal directions were cancelled. However, the United Kingdom authorities claimed that, on being told, Mr Sivanathan changed his mind and asked for the removal to go ahead. There were no records of this due to an “administrative oversight”, a reason which the Court accepted. Given that the Court clarified the test in the later Grand Chamber case of *Paladi v. Moldova* and given the remarkable nature of the Sivanathan case, even though the case had been struck out of the list, steps are being taken to request the Court to restore the case to the list under Article 37(2) for a full examination.

51. *Sivanathan* is illustrative of the rapporteur’s concern about the closed nature of the system of removals and detention in which the individual is in a situation of heightened vulnerability. He therefore recommends open and transparent procedures and record keeping and once again urges the wider publication of statistics.

4.3. Non-compliance

52. Non-compliance with a Rule 39 indication can result in a violation of Article 34 of the Convention because the individual can no longer pursue his or her application before the Court. The first case in which interim measures were considered legally binding within the Convention system was *Mamatkulov and Askarov v. Turkey*,⁶⁰ which concerned the extradition of two Uzbek nationals to Uzbekistan under a bilateral treaty. The Court indicated that the applicants not be extradited to Uzbekistan before the Court heard the case. However, the very next day, the Turkish Government ordered the applicants’ extradition under an expedited procedure.

53. Taking into account the binding nature of interim measures in international law, the Court held that under the Convention system, interim measures, as they have consistently been applied in practice, play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing for the applicant the practical and effective benefit of the Convention rights asserted.

54. Accordingly, in these conditions a failure by a respondent state to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the state’s formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.⁶¹

55. This has been followed in subsequent cases, so the principle is beyond doubt. The “letter and spirit” formulation is applied generously, including in *Aoulmiv. France*⁶² and *Shamayev and Others*,⁶³ where difficulties faced by the applicants following their extradition or removal were of such a nature that the effective exercise of their right under Article 34 of the Convention was “seriously obstructed”. The right of individual petition lies at the heart of the Convention system and any incidences of non-compliance undermine its integrity.

56. The case showed clearly that even the single fact of non-compliance with interim measures per se entails a violation of Article 34 of the Convention. Furthermore, violation of this provision may be found irrespective of whether the harm feared actually occurs. Where the harm is found to occur, the violation of Article 34 may be accompanied by a breach of one of the other Articles, such as Article 3.⁶⁴

59. . *Sivanathan v. the United Kingdom*, Application No. 38108/07, decision of 3 February 2009.

60. . *Mamatkulov and Askarov v. Turkey*, op. cit.

61. . *Ibid.*, paragraph 125.

62. . *Aoulmi v. France*, Application No. 50278/99, judgment of 17 April 2006, paragraph 110.

63. . *Shamayev and Others v. Georgia and Russia*, op. cit., paragraph 478.

64. . *Muminov v. Russia*, op. cit., and *Ben Khemais v. Italy*, op. cit.

57. The rapporteur considers that the *Ben Khemais v. Italy* case and those Italian cases which followed it provide a focal point in terms of unacceptable state practice. The case concerned the expulsion of an individual to Tunisia by the Italian Government because of his role in terrorist activities and using diplomatic assurances. The Court indicated to the Italian Government that the applicant not be expelled to Tunisia, but the Italians enforced removal in breach of Rule 39. The Court held that this conduct violated Articles 34 and 3 given that the applicant was detained on return to Tunisia. It was not possible to verify whether or not he was being ill-treated, but ill-treatment in detention and human rights abuse in Tunisia is well documented in international reports.⁶⁵

58. The rapporteur considers important the fact that *Ben Khemais* confirmed the now often repeated principles in *Saadi v. Italy* and *Soldatenko v. Ukraine*⁶⁶ that diplomatic assurances cannot be relied upon to reduce or negate the risk of torture when returning an individual to a country where international sources reliably report that torture is carried out by the authorities.

59. Therefore, the *Mamatkulov* and *Ben Khemais* cases demonstrate further that continued attempts to expel or extradite individuals suspected or convicted of terrorism offences, with or without diplomatic assurances, is also directly in contravention with the absolute prohibition on torture. Not only does this principle feature in the Court's judgment, but also at the Rule 39 stage on prima facie risk.⁶⁷

4.4. Objective impediments

60. The rapporteur first acknowledges those cases considered by the Court where there have been objective impediments to compliance or lack of notice given before removal. On the other hand, the rapporteur is concerned that states have sought to circumvent condemnation by the Court where the breach of Rule 39 is alleged by claiming ignorance of the indication, lack of time to comply, difficulties en route to the airport, lack of staff, or on the basis that relevant officials on the ground never received the information.⁶⁸ States should put in place procedures to deal with these eventualities. More worrying however, are attempts by states to exonerate themselves before the Court by reference to the fact that there was an "objective impediment" to compliance. These tactics clearly demonstrate the same lack of respect for the Convention system as clear non-compliance cases, as well as a creeping element of bad faith.

61. When examining a complaint under Article 34 concerning the alleged failure of a contracting state to comply with an interim measure, it is for the respondent government to demonstrate to the Court that the interim measure was complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the government took all reasonable steps to remove the impediment and to keep the Court informed about the situation. The intentions or reasons underlying the state's acts or omissions in question are of little relevance when assessing whether Article 34 was complied with; what matters is whether the situation created as a result of the authorities' act or omission conforms to that provision.⁶⁹

62. A non-expulsion case, *Groni v. Albania*, demonstrated that where there appears to be no acceptable explanation for the domestic authorities' failure and a delay in complying with an interim measure, without an objective justification for it, a violation of Article 34 will result.⁷⁰ This principle has been applied in the context of expulsion. The Court has also rejected arguments that the absence of a domestic legal mechanism to comply with Rule 39 absolves it from its responsibilities under Article 34.⁷¹

63. A practical example of the way in which the objective impediment test may be applied is in *Al-Saadoon v. the United Kingdom*,⁷² concerning the transfer of prisoners from British custody in Iraq to the Iraqi Higher Tribunal to stand trial for war crimes punishable by death (an analogous situation to returns cases). The

65. . *Ben Khemais v. Italy*, paragraphs 64-65.

66. . *Saadi v. Italy*, op. cit. *Soldatenko v. Ukraine*, Application No. 2440/07, judgment of 23 October 2008.

67. . See, for example, *Othman v. the United Kingdom*, Application No. 8139/09, communicated on 8 June 2009.

68. . *Al-Moayad v. Germany*, Application No. 35865/03, (Inadmissibility) decision, 20 February 2007; *Muminov v. Russia*, op. cit.; *Sivanathan v. the United Kingdom*, Application No. 38108/07, decision to strike the application out of the list, 3 February 2009.

69. . *Paladi v. Moldova*, op. cit., paragraphs 87 and 92.

70. . *Groni v. Albania*, Application No. 2536/04, judgment of 7 July 2009, paragraphs 191, 194 and 195.

71. . *Shtukaturov v. Russia*, op. cit., paragraph 148.

72. . *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit., paragraphs 160-166. See Mole and Meredith, p. 225, "The applicants' representatives also asked the Court to order measures under Article 46 (concerning the execution of judgments) which might assist in mitigating the damage caused by the transfer. Given the failure to comply with the interim

United Kingdom sought to justify the breach of Rule 39 by reference to their lack of sovereignty at the end of the period of the United Nations mandate. The Court found a violation of Article 34 given that the state did not demonstrate that it took all reasonable steps to remove the impediment.

64. The finding in *Al-Saadoon* was accompanied by a breach of Article 3 because the men feared execution by the Iraqi courts. A violation of Article 13 was also found because the transfer of the applicants out of the United Kingdom's jurisdiction exposed them to a serious risk of grave and irreparable harm at the hands of the Iraqi authorities and had unjustifiably nullified the effectiveness of any appeal to the United Kingdom courts.

5. Institutional support for the Rule 39 mechanism

5.1. Recent practice and the role of the Court

65. The increased number of requests for Rule 39 received by the Court has placed an extra burden on its case load and the government agents who have to deal with the requests. This has also forced new and changing trends in the law and practice regarding Rule 39, not only in terms of the application of Rule 39 as seen in cases but also internally in terms of the Court's internal workings. It is still too early to map all of these trends properly.

66. The statistics cited earlier in the report in relation to Dublin II transfers show that the distribution of Rule 39 cases is not spread equally between different sections of the Court. Some sections receive a substantial number of requests and others receive none or few. Asylum seekers and irregular migrants in the member states of the Council of Europe should have an equal opportunity to request interim relief under Rule 39, but for reasons beyond the scope of this report, they do not. Furthermore, the Court must ensure consistency in its practice as regards Rule 39 in order to ensure the continuing and effective operation of the Convention system.

67. A grave misunderstanding is that a violation of Article 34 carries less of a stigma than a violation of Article 3, with the resulting lack of incentive to comply with interim measures. However the more robust approach seen in recent cases includes a violation of Article 34 accompanied by a violation of Article 3. The rapporteur emphasises that the state's failure to comply with an indication under Rule 39 should not necessarily prevent the Court from examining the merits of a complaint under Article 3 or other Articles of the Convention. Otherwise it would be less burdensome for a respondent state to remove an applicant from its territory in cases in which Rule 39 was applied and to be held in violation of Article 34 of the Convention than to comply with Rule 39 and to be found to have breached Article 3.⁷³

68. The rapporteur recognises the important and difficult work of the Court in examining so many urgent requests for Rule 39 measures. The rapporteur also recognises the concerns that within the Court this may shift the focus away from substantive applications, reduce overall productivity and on a human level can be stressful for the judges, lawyers, government agents and Court staff involved.

69. Of course there are practical difficulties involved in the smooth operation of the Rule 39 mechanism. It depends on all parties playing fairly, meeting deadlines on time, and co-operating fully and providing the Court with as much information as possible in order that it has time and opportunity to make a proper assessment of requests for Rule 39 measures. To this end, the Court has provided a Practice Direction which should be followed by individuals making requests. The UNHCR has also produced a toolkit to assist its staff in responding to requests from lawyers and refugees by providing an understanding of the workings of this important system.

70. The biggest problem faced by the Court in relation to Dublin cases is that the domestic authorities transferring an individual are relying on the Dublin Regulation as a means of allocating responsibility for examination of the asylum claim on another state. Inherent in the process of removing a person back to the state deemed responsible for examining an asylum application is the fact that the Court has little to go on by way of findings of the domestic authorities in the removing state when examining risk on return. However when assessing whether or not there is a prima facie risk for the purpose of granting Rule 39, the Court will

measure and the finding that the applicants had been subjected to mental suffering caused by the fear of execution amounting to treatment prohibited by Article 3, the Court required the Government to take 'all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty'.

73. . Argued by the applicants in *Muminov v. Russia*, op. cit., paragraph 81.

consider independent reports about the lack of a fair and effective asylum determination procedure in the receiving state and will give more weight than usual to the general situation in the country of origin were an individual to face onward return.

71. Requests are currently dealt with by several different sections of the Court and usually without much time for proper consultation and verification of facts. This heightens the risk of inconsistency between the sections. However, the Court has sought to tackle this by improving the available internal resources. A new working party including the section presidents and the deputy section registrars has been established precisely with a view to securing greater co-ordination and agreement on a common approach where possible. The deputy section registrars also maintain regular contact with each other to ensure a flow of information and to exchange ideas and suggestions.

72. The rapporteur encourages the Court to strive further for a coherent approach, including improving the flow of information between the sections. Where serious divergences of opinion persist, the matter will be referred to the sections and eventually to the Grand Chamber, which is exactly what has happened with the issue of Dublin Regulation expulsions – the case of *M.S.S. v. Belgium and Greece*.

73. The rapporteur encourages the Court to co-operate closely with the Committee of Ministers in cases of non-compliance. Cases of non-compliance are rare and of course it is a matter for the Committee of Ministers to take action on a collective level following a finding of the Court of a violation of Article 34. However, it would be disappointing if the Court were to wash its hands of the matter or resign itself to taking no action.

74. It is the possibility of repairing the damage caused in cases of non-compliance that is important here. The approach preferred by the rapporteur is that seen in *Al-Saadoon*, where in its judgments the Court required the United Kingdom authorities to take practical steps (namely getting assurances from the Iraqi authorities) to put an end to the applicant's already existing suffering under Article 3.⁷⁴

5.2. Recent practice and the role of the Committee of Ministers

75. Rule 39(2) states that notice of the measures shall be given to the Committee of Ministers, who play a role in supervising compliance with interim measures.

76. Furthermore, under Article 46 of the European Convention on Human Rights, states have made an undertaking to abide by the judgments of the European Court of Human Rights in cases to which they are parties. Compliance with this obligation is supervised by the Committee of Ministers.

77. In the past two years the Committee of Ministers has been called upon to supervise interim measures, albeit at the point of non-compliance when seeking to repair damage caused. Despite the judgment in *Ben Khemais v. Italy* and the action taken by the Committee of Ministers in supervising the execution of this judgment (namely an action plan to prevent further breaches) there have been several more cases of non-compliance (as stated above).⁷⁵

78. The Committee of Ministers has responded by issuing an interim resolution.⁷⁶ The Committee of Ministers deplored that on 1 May 2010 the Italian authorities had disregarded another such measure indicated by the Court and expelled another applicant to Tunisia. It noted with concern that the same had already happened in at least two other cases in 2008 and 2009. The Committee urged the Italian authorities to take all necessary measures to prevent new similar violations.

79. The rapporteur encourages both the Court and the Committee of Ministers to capitalise on this relationship in order that Rule 39 remains a strong and effective mechanism of preventing harm to refugees, asylum seekers and irregular migrants facing removal.

74. . In the present case, the Court has found that through the actions and inaction of the United Kingdom authorities the applicants have been subjected to mental suffering caused by the fear of execution amounting to inhuman treatment within the meaning of Article 3. While the outcome of the proceedings before the Iraq High Tribunal remains uncertain, the applicants' suffering continues. For the Court, compliance with their obligations under Article 3 of the Convention requires the government to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty.

75. . The possibility of attaching financial penalties to any violation of the Convention, including Article 34, to incentivise compliance would require a treaty amendment. However this would be a step towards ending impunity.

76. . Interim Resolution CM/ResDH(2010)83, execution of the judgments of the European Court of Human Rights, *Ben Khemais v. Italy*, op. cit. (Adopted by the Committee of Ministers on 3 June 2010 at the 1086th meeting of the Ministers' Deputies).

5.3. Role of the Parliamentary Assembly

80. The rapporteur has been encouraged by the extent to which members of the Parliamentary Assembly have shown interest in the serious issue of Rule 39 measures in the context of extradition and expulsion. He hopes that parliamentarians will implement change at national level – acknowledging the dual task of improving asylum determination procedures on the one hand and co-operating with the Court in respect of any indications made on the other.

81. Whilst non-compliance applies only to a very few states, the rapporteur urges the Parliamentary Assembly to monitor cases of non-compliance and seek to find appropriate remedies. The Assembly has an important political and awareness-raising function. Its reports and public statements need to be heard by state officials and actioned when necessary.

5.4. Role of the Commissioner for Human Rights

82. The rapporteur welcomes the new role played by the Commissioner for Human Rights in third party interventions before the Court and invites the Commissioner to use this important new power. The rapporteur welcomes the third party intervention in the *M.S.S. v. Belgium and Greece* case and others because the Commissioner's views carry particular weight in the interpretation of the Convention. This will clearly have an impact on Rule 39 practice in respect of Dublin II transfers and the interface of ECHR and European Union law.

83. Furthermore, the rapporteur welcomes the Commissioner's country reports, as well as his recent human rights comment,⁷⁷ which have highlighted cases of non-compliance and made recommendations to the authorities in relation to these.

5.5. Role of the UNHCR

84. The rapporteur encourages further co-operation between the UNHCR and the Strasbourg organs in strengthening the Rule 39 mechanism. The rapporteur invites the Strasbourg organs to give "due weight" to the views of the UNHCR when considering issues of *refoulement* of asylum seekers and refugees, which clearly go to the heart of the mandate of both organisations in protecting human rights. The rapporteur also welcomes the steps taken by the UNHCR to raise awareness about interim measures and their application and encourages them to continue their work in this area.

85. Relevant training has taken place within the framework of the Council of Europe's Joint Programmes. The rapporteur encourages this to continue and calls for further projects aimed at training civil servants, the judiciary, national asylum authorities, ministries, local lawyers and NGOs. The rapporteur encourages further co-operation between the Council of Europe and the UNHCR in this context.⁷⁸

6. Conclusion and way forward

86. The rapporteur deems it appropriate to stress by way of conclusion that non-compliance with Rule 39 measures is unacceptable. The repetitive breach of the Convention by any state in any manner is unacceptable. Similarly, the attempts made by states (including the United Kingdom) to evade the Rule 39 mechanism or exonerate themselves when those attempts fail by resorting to the "objective impediment" line of argument, are also unacceptable.

87. However, the rapporteur is also concerned about:

- the lack of access by individuals to the Rule 39 mechanism where persons are detained, have no means of support, are destitute, have no access to a lawyer either practically speaking (for example access to a telephone) or financially (for example because they are excluded by the lack of legal aid), or because of language barriers and flaws in the asylum procedure in addressing this;
- the lack of compliance by states (which is on the increase), failure to co-operate, failure to act in good faith, and the increasing albeit rare trend towards seeking to justify situations of non-compliance;
- the lack of consistency in the approach to Rule 39 by the Court;

77. . See the Council of Europe Commissioner for Human Rights' comment dated 25 June 2010 under http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=52.

78. . For several years, this has included seminars on Protection of Refugees and Asylum Seekers under Asylum Law, Refugee Law and the European Convention on Human Rights.

- the prospects that there will be even greater use of interim measures in the future.

The rapporteur also emphasises the need for the Court and the Committee of Ministers to work together more closely on this issue, even if their relationship is strengthening steadily from recent initiatives in this area.

88. The rapporteur considers that the Committee of Ministers and member states should:

- ensure that all individuals should have real access and opportunity to use interim measures;
- take measures to ease the burden on the Court, and government agents, in particular if there continues to be a rise in the number of such cases;
- respond robustly to cases of non-compliance in a way which will mitigate individuals' suffering caused by the breach of their rights;
- act collectively to prevent further cases of non-compliance.

Appendix – The response of the European Court of Human Rights in cases in which Rule 39 has been breached or allegedly breached

Case name	Reference	Ruling/Date	Expelled whilst Rule 39 in place	Terrorism related	Violation of Article 34	Violation of Article 3
* <i>Cruz Varas v. Sweden</i>	15576/89	Judgment 20.03.1991	Yes	Yes	No. Interim measures had not been declared binding in law, only in practice.	No
<i>Mamatkulov and Askarov v. Turkey</i>	46827/99 and 46951/99	Judgment [GC] 04.02.2005	Yes	Yes	Yes. Interim measures declared legally binding in line with interim measures generally in international law.	No
** <i>Aoulimi v. France</i>	50278/99	Judgment 17.01.2006	Yes	No (burglary)	Yes	No
<i>Shamayev and Others v. Georgia and Russia</i>	36378/02	Judgment 12.04.2005	Yes	Yes	Yes	No
<i>Olaechea Cahuas v. Spain</i>	24668/03	Judgment 10.08.2006	Yes	Yes	Yes See paragraphs 75-83	No
<i>Al-Moayad v. Germany</i>	35865/03	Decision (Inadm.) 20.02.2007	Timeframe contested.	Yes	No	No
<i>Murginov v. Russia</i> 1	42502/06	Judgment 11.12.2008	Timeframe contested.	Yes	No	Yes
<i>Sivanathan v. the United Kingdom</i>	38108/07	Decision (struck out of the list) 03.02.2009	Yes	No	No	No
<i>Ben Khemais v. Italy</i>	246/07	Judgment 24.02.2009	Yes	Yes	Yes	Yes
<i>Paladi v. Moldova</i>	39806/05	Judgment [GC] 10.03.2009	Not an expulsion case Rule 39 granted to ensure the applicant's continued treatment in a neurological centre.	No (Criminal aspects – corruption)	Yes paragraphs 91 and 92. Important because "letter and spirit" and "objective impediment" to compliance tests set out.	
<i>Cherif and Others v. Italy</i>	1860/07	Judgment (struck out of the list) 07.04.2009	Yes	Yes		

<i>Al-Saadoon and Mufdhi v. the United Kingdom</i>	61498/08	Judgment 02.03.2010	Yes. Transferred. Not an expulsion case Transfer of prisoners from custody of British forces (in detention facilities in Basra) to the Iraqi authorities.	No (war crimes)	Yes	Yes
<i>Groni v. Albania</i>	25336/04	Decision (Adm.) 07.07.2009	Not an expulsion case Rule 39 indication to transfer applicant from prison to hospital for treatment.	No. (murder and illegal possession of firearms)	Yes See paragraphs 191, 194 and 195.	
<i>Trabelsi v. Italy</i>	50163/08	Judgment 13.04.2010	Yes	Yes	Yes	Yes
<i>M.B. and Others v. Turkey</i>	36009/08	Judgment 15.06.2010	Alleged. Timeframe contested.	No	No	Yes
<i>D.B. v. Turkey</i>	33526/08	Judgment 13.07.2010	Yes	No	Yes	No
<i>Mustapha Labsi v. Slovak Republic</i>	33809/08	Pending				

Notes:

(1) “Expelled whilst Rule 39 in place” relates to the fact of expulsion in those circumstances (rather than to the Court’s finding – as to which, refer to the final column – “Violation of Art 34”).

(2) “Terrorism related” includes those cases where the applicant is a suspected terrorist (but note the wide definition of terrorism used by some states which may incorporate otherwise ordinary criminal offences – see some of the applicants in *Mamatkulov and Askarov v. Turkey*) – or – that the person was a convicted terrorist (for example *Ben Khemais v. Italy* even though legitimacy concerns remain because of the operation of the judicial system in Tunisia and convictions *in absentia*). Nevertheless in the view of the respondent state concerned there were terrorist /security concerns.

(3) Cases which the Court has not yet examined, include those which have been communicated (including where not publicised) and those publicised by the Commissioner for Human Rights or the Parliamentary Assembly, including: *Moghaddas v. Turkey*, Application No. 46134/08, Communicated 15.06.2009, Question: whether he is at risk of or has already been removed to Iran; *Toumi v. Italy*, Application No. 25719/09, Communicated on 31 August 2009; *Hamidovic v. Italy* Application No. 31956/05, *Labsi v. Slovakia*; Application No. 33809/08, Communicated on 28 June 2010, *Habib v. Italy*, deported August 2006, rapidity of expulsion order did not allow for Rule 39, does not mention Rule 39, reportedly tortured in Tunisia, see Commissioner for Human Rights in his report on Italy Strasbourg, 16 April 2009, CommDH (2009)16.

* *Cruz Varas* pre-dated the finding in *Mamatkulov and Askarov v. Turkey* that a breach of Rule 39 could result in a violation of Article 34 of the ECHR.

** In *Aoulmi v. France* the actual deportation in breach of Rule 39 took place before the Court had adopted its judgment in *Mamatkulov*. However, this did not absolve the state from complying with Article 34 in *Aoulmi v. France*. Explained in paragraph 74 of *Olauchea v. Spain*; *Aoulmi v. France*, the Court examined the government’s submission “that the applicant’s expulsion had taken place before the delivery of the *Mamatkulov and Askarov* judgment and ... that the Court was required to reach its findings with reference to the applicable legal context at the time of the impugned measure”. The Court’s conclusion in that judgment is clear and leaves no room for doubt: “[The Court] stresses that ... even though the binding nature of measures adopted under Rule 39 had not yet been expressly asserted at the time of the applicant’s expulsion, Contracting States were nevertheless already required to comply with Article 34 and fulfil their ensuing obligations” (paragraph 111). That was the first time the Court used the adjective “binding” in reference to interim measures.

(as at 2 September 2010)